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Part III

Environmental Protection Agency

40 CFR Part 1, et al.

**Changes to Regulations to Reflect the Role
of the New Environmental Appeals Board in
Agency Adjudications; Final Rule**

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 1, 3, 17, 22, 27, 57, 60, 66, 85, 86, 114, 123, 124, 164, 209, 222, 223, 233 and 403

[FRL-4086-7]

Changes to Regulations to Reflect the Role of the New Environmental Appeals Board in Agency Adjudications

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Under the environmental statutes administered by the Environmental Protection Agency, the Administrator has authority to decide appeals of permit decisions made by the Agency's Regional Administrators and administrative penalty decisions made by the Agency's Administrative Law Judges. Because it is unnecessary and impractical for the Administrator to make all such decisions, the Administrator has in the past either delegated authority to decide appeals in such cases to the Agency's Judicial Officers or decided such appeals himself primarily on the basis of recommendations from the Judicial Officers. As part of the response to an increasing level of administrative adjudications, the Administrator is creating a new entity called the Environmental Appeals Board to hear and decide the kinds of appeals that the Administrator formerly delegated to the Agency's Judicial Officers or decided on the basis of the Judicial Officers' recommendations. The rule promulgated herein makes technical changes to the rules of practice governing Agency permit and penalty decisions to bring such rules into conformity with the Administrator's action. The final rule delegates to the new Environmental Appeals Board the Administrator's authority to hear appeals of permit and penalty decisions. The rule also replaces references to the Judicial Officers and those references to the Administrator relating to appellate functions with references to the Environmental Appeals Board.

EFFECTIVE DATE: March 1, 1992.

FOR FURTHER INFORMATION CONTACT: James W. Black, Administrator's Office (A-101), 401 M Street, SW., Washington, DC, 20460, (202) 260-4076.

SUPPLEMENTARY INFORMATION:

The Environmental Appeals Board

The Administrator has authority to decide appeals of permitting decisions

made by Regional Administrators and appeals of administrative penalty decisions made by Administrative Law Judges. In implementing this authority, the Administrator has delegated authority to decide most kinds of appeals to the Agency's Judicial Officers (two EPA attorneys, one denominated the Chief Judicial Officer and the other denominated the Judicial Officer). The Administrator has retained authority to decide a few types of appeals, but has decided such appeals primarily on the basis of recommendations from the Agency's Judicial Officers.

The Agency is now creating a new entity called the Environmental Appeals Board, the purpose of which is to hear and decide appeals in cases that were formerly either delegated to the Judicial Officers or decided on the basis of the Judicial Officers' recommendations. The Judicial Officer positions at EPA Headquarters are being abolished. The establishment of the Board is being accomplished by the Administrator through internal Agency action. The purpose of the rule promulgated herein is only to make technical changes to the rules of practice governing Agency permit and penalty decisions to bring such rules into conformity with the Administrator's action.

The Board will be a permanent body with continuing functions. It will be composed of three Environmental Appeals Judges designated by the Administrator. The Board will decide each matter before it by majority vote in accordance with applicable statutes and regulations. Two Board members constitute a quorum, and if the absence or recusal of a Board member so requires, the Board may sit as a Board of two members. In the case of a tie vote, the matter shall be referred to the Administrator to break the tie.

The rule promulgated herein defines the Board and sets qualifications for Board members. It also includes express delegations of authority from the Administrator to the Board to hear and decide appeals of various types of cases. Under the old scheme, the rules of practice governing Agency adjudications did not actually delegate authority to the Judicial Officers (with the exception of the Equal Access to Justice Act regulations in part 17). Instead, the rules merely recognized the possibility of such a delegation, while the actual delegations were accomplished through an internal Agency document called the delegations manual. By contrast, under the rule promulgated herein, the rules of practice actually effect the delegation of the Administrator's authority. In addition, the rule replaces references to the Judicial Officer and those references

to the Administrator related to appellate functions with references to the Environmental Appeals Board.

The approach adopted in this rule, while having the same practical effect as the previous approach, is designed to provide greater clarity. Under the old approach, in which delegations of authority were effected in a separate internal delegations manual, there was considerable confusion in the regulated community over the role of the Judicial Officers in Agency adjudications. The approach adopted in this rule reflects more clearly and directly the role of the Board as the final decisionmaker in Agency adjudications. Also, effecting the delegation directly in the regulation confers on the Board the dignity and stature that is appropriate for the Agency's highest adjudicative body. The old approach, in which the rules of practice merely recognized the possibility of a delegation, was rejected because it might have fostered the perception that the Board is an ad hoc, provisional body.

As a result of the rule promulgated today, the Board now holds delegated authority from the Administrator to hear and decide the following types of cases:

- Appeals of cases arising under the Equal Access to Justice Act (EAJA) (5 U.S.C. 504), which are governed by the procedures set out in part 17;
- Appeals of civil penalty cases arising under sections 3005(e), 3008, 9006, 11005 of the Solid Waste Disposal Act (RCRA), as amended (42 U.S.C. 6925, 6928, 6991(e), and 6992(d)), which are governed by the procedures set out in part 22;
- Appeals of civil penalty cases arising under section 211 of the Clean Air Act (CAA), as amended (42 U.S.C. 7545), which are governed by the procedures set out in part 22;
- Appeals of Class II penalty cases arising under section 309(g) of the Clean Water Act (CWA) (33 U.S.C. 1319(g)), which are governed by the procedures set out in part 22;
- Appeals of civil penalty cases arising under section 16(a) of the Toxic Substances Control Act (TSCA) (15 U.S.C. 2615(a)), which are governed by the procedures set out in part 22;
- Appeals of civil penalty cases arising under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (7 U.S.C. 1361(a)), which are governed by the procedures set out in part 22;
- Appeals of administrative penalty cases arising under section 325 of the Emergency Planning and Community Right to Know Act (EPCRA) (42 U.S.C.

- 11045), which are governed by the procedures set out in part 22;
- Appeals of civil penalties cases arising under sections 105 (a) and (f) of the Marine Protection, Research, Sanctuaries Act of 1972 (MPRSA) (33 U.S.C. 1415(a)), which are governed by the procedures set out in part 22;
 - Appeals of administrative penalty cases arising under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA) (42 U.S.C. 9609), which are governed by the procedures set out in part 22.
 - Appeals of civil penalty cases arising under section 1414(g)(3)(B) of the Safe Drinking Water Act as amended (42 U.S.C. 300g-3(g)(3)(B)), which are governed by the procedures set out in part 22.
 - Appeals of cases arising under the Program Fraud Civil Remedies Act (31 U.S.C. 3801), which are governed by the procedures set out in part 27;
 - Appeals of determinations under § 60.539, which deals with standards of performance for new residential wood heaters promulgated under the Clean Air Act.
 - Appeals of Clean Air Act section 120 noncompliance penalty cases, which are governed by the procedures set out in part 66;
 - Appeals of cases arising under the Clean Air Act involving control of air pollution from motor vehicles and motor vehicle engines, which are governed by the procedures set out in part 85;
 - Appeals of cases arising under the Clean Air Act involving control of air pollution from new motor vehicles and new motor vehicle engines and certification and test procedures, which are governed by the procedures set out in part 86;
 - Appeals of Spill Prevention, Containment and Control (SPCC) penalty cases arising under the Clean Water Act, which are governed by the oil pollution prevention regulations set out in part 114;
 - Appeals from permit decisions made by Regional Administrators and Administrative Law Judges under the Clean Water Act (NPDES), which are governed by the procedures set out in part 124;
 - Appeals from permit decisions made by Regional Administrators under RCRA, which are governed by the procedures set out in part 124;
 - Appeals from permit decisions made by Regional Administrators and delegated States under the Clean Air Act (PSD permits), which are governed by the procedures set out in part 124;

- Appeals from permit decisions made by Regional Administrators under the Safe Drinking Water Act (UIC permits), which are governed by the procedures set out in part 124;
- Appeals of FIFRA cancellation, suspension and compensation cases, which are governed by the procedures set out in part 164;
- Appeals of cases under the Noise Control Act, which are governed by the procedures set out in part 209;
- Appeals from permit decisions made by Regional Administrators under the Marine Protection, Research, and Sanctuaries Act (MPRSA), which are governed by the procedures set out in part 222.
- Appeals of determinations under § 403.13, which deals with "fundamentally different factors" variances from Clean Water Act categorical pretreatment standards for publicly owned treatment works.

The Board will also have authority to decide appeals in cases arising under section 113(d) of the Clean Air Act, as soon as final action is taken on a proposed rule to make such cases subject to part 22. In addition, it is expected that the Administrator will, on occasion, ask the Board for advice and consultation on decisions that the Administrator has not delegated to the Board through these rule changes. In such cases, the Administrator may ask the Board to make findings of fact or conclusions of law, to prepare a recommended decision for the Administrator's consideration, or to serve as the final decisionmaker for the Agency, as is appropriate to a particular case.

The provisions promulgated herein to effect the delegation of the Administrator's authority to the Board provide that the delegation of authority does not preclude the Board from referring a particular case or motion to the Administrator for decision when the Board deems it appropriate to do so. The language of the provisions makes clear, however, that an appeal or motion for reconsideration of a Board decision must be directed to the Board. An appeal or motion for reconsideration directed to the Administrator will not be considered. One of the goals of the Board is to relieve the Administrator of the responsibility for responding to appeals. Allowing parties to petition the Administrator directly to hear an appeal or to overturn a Board decision would defeat this goal. It is expected that the Board will exercise its discretion to refer cases or motions to the Administrator directly to hear an appeal or to overturn a Board decision would defeat this goal.

It is expected that the Board will exercise its discretion to refer cases or motions to the Administrator only in exceptional circumstances.

The rule promulgated herein also amends parts of Title 40 under which the Board will not have authority to hear appeals, but which contain incidental references to the Judicial Officer that need to be removed to reflect the abolition of that position. The following provisions have been amended for that purpose:

- (1) Sections 57.103, 57.806, 57.809, relating to primary nonferrous smelter orders;
- (2) Section 123.64, governing withdrawal of State NPDES programs;
- (3) Section 223.4, relating to the revision, revocation, or limitation of ocean dumping permits under the Marine Protection, Research, and Sanctuaries Act;
- (4) Section 233.53, relating to withdrawal of section 404 State program approval.

The Environmental Appeals Board will decide any appeals or related matters covered in this rule that are pending before a Judicial Officer or the Administrator at the time this rule becomes effective.

Reasons for the Change

The Environmental Appeals Board is being established to adapt the Agency's administrative appeals process to new realities facing the Agency. In recent years, the Agency has stepped up enforcement of the environmental statutes it is charged with administering. In addition, statutory amendments (most recently the Clean Air Act Amendments of 1990) have greatly increased the Agency's administrative penalty authority. This increase in administrative enforcement activity will continue to generate an increasing number of appeals to the Administrator. The Agency has also received a greater number of permit applications, resulting in more appeals from the permit decisions of Regional Administrators. As a result, the Agency needs to direct more resources to its administrative appeals process, so that it may keep pace with the growing case docket. The establishment of the Environmental Appeals Board will allow the Agency to do this. Another advantage of the Board is that it will allow for a broader range of input and perspective in administrative decisionmaking. It will do this in two ways. First, three individuals, rather than just one, will review each case, lending greater authority to the Agency's decisions. Second, the Board anticipates that, in

appropriate cases, it will exercise its discretionary authority to grant or require oral argument, an authority that the Judicial Officers held under the rules but did not exercise. Another virtue of the Board is that it will make clear that the Administrator's enforcement authority (delegated to various Regional and Headquarters enforcement officers) and the Administrator's adjudicative authority are delegated to, and exercised by, separate and distinct components of the Agency, thus inspiring confidence in the fairness of Agency adjudications. Finally, the creation of the Board confers on Agency appellate proceedings the stature and dignity that are commensurate with the growing importance of such proceedings.

Issuance of Rule on Final Basis

The rule promulgated herein is being issued on a final basis pursuant to the Administrative Procedure Act, which allows the issuance of rules without prior notice and comment where the rules concern agency practice or procedure. 5 U.S.C. 553(b)(1)(A). All of the changes made in this notice affect only Agency practice and procedure. None of the changes are substantive in nature. Accordingly, the Agency may take final action approving these rule changes without first providing for notice and comment.

Effective Date of Rule

The rule promulgated herein will become effective on March 1, 1992. This effective date was chosen to coincide with the internal Agency actions creating the Environmental Appeals Board and abolishing the positions of the Judicial Officers.

Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601-612, whenever an agency is required to publish a general notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis which describes the impact of the rule on small entities (i.e., small businesses, small organizations, and small governmental jurisdictions). The Administrator may certify, however, that the rule will not have a significant economic impact on a substantial number of small entities. In such circumstances, a regulatory flexibility analysis is not required. The rule promulgated herein is not expected to have any impact on small entities. The rule does not impose additional regulatory requirements on small entities. Accordingly, the Administrator certifies that these regulations will not

have a significant impact on a substantial number of small entities. These regulations, therefore, do not require a regulatory flexibility analysis.

Executive Order No. 12291

The rule promulgated herein has been reviewed under Executive Order 12291. The rule does not constitute a "major" regulation within the meaning of Executive Order 12291, because it will not result in: (1) An annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or U.S. enterprises operating in foreign or domestic markets. Because the rule promulgated herein is not a "major" regulation, the Agency is not required to conduct a Regulatory Impact Analysis.

Paper Work Reduction Act

This rule does not contain any information collection requirements subject to OMB review under the Paperwork Reduction Act of 1980.

List of Subjects

40 CFR Part 1

Organization and functions (Government agencies).

40 CFR Part 3

Conflicts of interest.

40 CFR Part 17

Claims, Equal access to justice, Lawyers.

40 CFR Part 22

Administrative practice and procedure, Air pollution control, Hazardous substances, Hazardous waste, Penalties, Pesticides and pests, Poison prevention, Water pollution control.

40 CFR Part 27

Administrative practice and procedure, Claims, Fraud, Penalties.

40 CFR Part 57

Administrative practice and procedure, Air pollution control, Intergovernmental relations.

40 CFR Part 60

Administrative practice and procedure, Air pollution control, Penalties.

40 CFR Part 85

Confidential business information, Imports, Labeling, Motor vehicle

pollution, Reporting and recordkeeping requirements, Research, Warranties.

40 CFR Part 86

Administrative practice and procedure, Confidential business information, Labeling, Motor vehicle pollution, Reporting and recordkeeping requirements.

40 CFR Part 114

Administrative practice and procedure, Oil pollution, Penalties.

40 CFR Part 123

Administrative practice and procedure, Confidential business information, Hazardous substances, Indians-lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Water pollution control.

40 CFR Part 124

Administrative practice and procedure, Air pollution control, Hazardous waste, Indians-lands, Reporting and recordkeeping requirements, Water pollution control, Water supply.

40 CFR Part 164

Administrative practice and procedure, Pesticides and pests.

40 CFR Part 209

Administrative practice and procedure, Noise control.

40 CFR Part 222

Administrative practice and procedure, water pollution control.

40 CFR Part 223

Administrative practice and procedure, Water pollution control.

40 CFR Part 233

Administrative practice and procedure, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Water pollution control.

40 CFR Part 403

Confidential business information, Reporting and recordkeeping requirement, Waste treatment and disposal, Water pollution.

Dated: January 27, 1992.

William K. Reilly,
Administrator.

For the reasons set out in the preamble, title 40 is amended, effective March 1, 1992, as follows:

PART 1—STATEMENT OF ORGANIZATION AND GENERAL INFORMATION

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

Authority: 5 U.S.C. 552.

2. Section 1.25 is amended by adding paragraph (e) to read as follows:

§ 1.25 Staff Offices.

(e)(1) *Environmental Appeals Board.* The Environmental Appeals Board is a permanent body with continuing functions composed of three Board Members designated by the Administrator. The Environmental Appeals Board shall decide each matter before it in accordance with applicable statutes and regulations. The Environmental Appeals Board shall decide each matter by majority vote. Two Board Members constitute a quorum, and if the absence or recusal of a Board Member so requires, the Board shall sit as a Board of two Members. In the case of a tie vote, the matter shall be referred to the Administrator to break the tie.

(2) *Functions.* The Environmental Appeals Board shall exercise any authority expressly delegated to it in this title. With respect to any matter for which authority has not been expressly delegated to the Environmental Appeals Board, the Environmental Appeals Board shall, at the Administrator's request, provide advice and consultation, make findings of fact and conclusions of law, prepare a recommended decision, or serve as the final decisionmaker, as the Administrator deems appropriate. In performing its functions, the Environmental Appeals Board may consult with any EPA employee concerning any matter governed by the rules set forth in this title, provided such consultation does not violate applicable *ex parte* rules in this title.

(3) *Qualifications.* Each member of the Environmental Appeals Board shall be a graduate of an accredited law school and a member in good standing of a recognized bar association of any state or the District of Columbia. Board Members shall not be employed by the Office of Enforcement, the Office of the General Counsel, a Regional Office, or any other office directly associated with matters that could come before the Environmental Appeals Board. A Board Member shall recuse himself or herself from deciding a particular case if that Board Member in previous employment performed prosecutorial or investigative functions with respect to the case.

participated in the preparation or presentation of evidence in the case, or was otherwise personally involved in the case.

PART 3—EMPLOYEE RESPONSIBILITIES AND CONDUCT

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

Authority: E.O. 11222, 30 FR 6460; 3 CFR 1964-65 Comp., p. 306; 5 CFR parts 734, 735 and 737.

2. Appendix C of subpart A is amended by revising 2(a), the first paragraph of 9(a), and the last sentence of the second paragraph of 9(a) to read as follows:

Appendix C to Subpart A—Procedures for Administrative Enforcement of Post-Employment Restrictions

* * * * *

2. * * * * *

(a) A member of the Environmental Appeals Board or its designee is the Presiding Official as provided by paragraph 9(a) of this appendix:

* * * * *

9. * * * * *

(a) *The Presiding Official.* A member of the Environmental Appeals Board or its designee presides at the hearing. The Presiding Official, if not a member of the Environmental Appeals Board, must be an attorney and an employee of the Environmental Protection Agency. If the Environmental Appeals Board designates a Presiding Official other than one of its members, it must promptly notify the former employee and the Inspector General of the Presiding Official's name, address and telephone number.

* * * The Environmental Appeals Board may remove a Presiding Official for cause.

PART 17—IMPLEMENTATION OF THE EQUAL ACCESS TO JUSTICE ACT IN EPA ADMINISTRATIVE PROCEEDINGS

1. The authority citation for part 17 continues to read as follows:

Authority: Section 504, Title 5 U.S.C., as amended by sec. 203(a)(1), Equal Access to Justice Act (Title 2 of Pub. L. 96-481, 94 Stat. 2323).

2. Section 17.8 is revised to read as follows:

§ 17.8 Delegation of authority.

The Administrator delegates to the Environmental Appeals Board authority to take final action relating to the Equal Access to Justice Act. The Environmental Appeals Board is described at 40 CFR 1.25(e). This delegation does not preclude the

Environmental Appeals Board from referring any matter related to the Equal Access to Justice Act to the Administrator when the Environmental Appeals Board 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 the rules in this part referring to the Environmental Appeals Board shall be interpreted as referring to the Administrator.

3. Section 17.14 is amended by revising paragraph (b) to read as follows:

§ 17.14 Time for submission of application.

* * * * *

(b) Final disposition means the later of: (1) The date on which the Agency decision becomes final, either through disposition by the Environmental Appeals Board of a pending appeal or through an initial decision becoming final due to lack of an appeal or (2) the date of final resolution of the proceeding, such as settlement or voluntary dismissal, which is not subject to a petition for rehearing or reconsideration.

* * * * *

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

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

Authority: Sec. 16 of the Toxic Substances Control Act, 15 U.S.C. 2615; secs. 211 and 301 of the Clean Air Act, 42 U.S.C. 7545 and 7601; secs. 14 and 15 of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136i and 136m; secs. 105 and 108 of the Marine Protection, Research and Sanctuaries Act, 33 U.S.C. 1415 and 1418; secs. 2002 and 3008 of the Solid Waste Disposal Act, 42 U.S.C. 6912 and 6928; sec. 501 of the Clean Water Act, 33 U.S.C. 1361; and sec. 1414 of the Safe Drinking Water Act, 42 U.S.C. 300g-3.

2. Section 22.03 is amended by revising the definition of "Complainant," removing the definition of "Judicial Officer" and adding the definition of "Environmental Appeals Board" in alphabetical order to read as follows:

§ 22.03 Definitions.

* * * * *

Complainant means any person authorized to issue a complaint 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 decision.

Environmental Appeals Board means the Board within the Agency described in § 1.25 of this title, located at U.S. Environmental Protection Agency, A-110, 401 M St. SW., Washington, DC 20460.

3. Section 22.04 is amended by revising paragraphs (a) and (b), the first, third, and fourth sentences of paragraph (d)(1), and paragraph (d)(2) to read as follows:

§ 22.04 Powers and duties of the Environmental Appeals Board, the Regional Administrator, the Regional Judicial Officer and the Presiding Officer; disqualification.

(a) *Environmental Appeals Board.* The Administrator delegates authority under the Act to the Environmental Appeals Board to perform the functions assigned to it in these rules of practice. An appeal or motion under this part directed to the Administrator, rather than to the Environmental Appeals Board, will not be considered. This delegation of authority to the Environmental Appeals Board does not preclude the Environmental Appeals Board from referring any case or motion governed by this part to the Administrator when the Environmental Appeals Board, in its direction, deems it appropriate to do so. When an appeal or motion is referred to the Administrator, all parties shall be so notified and the rules in this part referring to the Environmental Appeals Board shall be interpreted as referring to the Administrator. If a case or motion is referred to the Administrator by the Environmental Appeals Board, the Administrator may consult with any EPA employee concerning the matter, provided such consultation does not violate the ex parte rules set forth in § 22.08.

(b) *Regional Administrator.* The Regional Administrator shall exercise all powers and duties as prescribed or delegated under the Act and these rules of practice.

(1) *Delegation to Regional Judicial Officer.* One or more Regional Judicial Officers may be designated by the Regional Administrator to perform, within the region of their designation, the functions described below. The Regional Administrator may delegate his or her authority to a Regional Judicial Officer to act in a given proceeding. This delegation will not prevent the Regional Judicial Officer from referring any motion or case to the

Regional Administrator. The Regional Judicial Officer shall exercise all powers and duties prescribed or delegated under the Act or these rules of practice.

(2) *Qualifications of Regional Judicial Officer.* A Regional Judicial Officer shall be an attorney who is a permanent or temporary employee of the Agency or some other Federal agency and who may perform other duties within the Agency. A Regional Judicial Officer shall not be employed by the Region's Enforcement Division or by the Regional Division directly associated with the type of violation at issue in the proceeding. A Regional Judicial Officer shall not have performed prosecutorial or investigative functions in connection with any hearing in which he serves as a Regional Judicial Officer or with any factually related hearing.

(d) * * * (1) The Administrator, the Regional Administrator, the members of the Environmental Appeals Board, the Regional Judicial Officer, or the Presiding Officer may not perform functions provided for in these rules of practice regarding any matter in which they (i) have a financial interest or (ii) 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 request that the Regional Administrator, a member of the Environmental Appeals Board, or the Presiding Officer be disqualified or request that the Administrator disqualify himself or herself from the proceeding. The Administrator, the Regional Administrator, a member of the Environmental Appeals Board, the Regional Judicial Officer, or the Presiding Officer may at any time withdraw from any proceeding in which they deem themselves disqualified or unable to act for any reason.

(2) If the Administrator, the Regional Administrator, the Regional Judicial Officer, or the Presiding Officer 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 to replace him. Assignment of a replacement for Regional Administrator or for the Regional Judicial Officer shall be made by the Administrator or the Regional Administrator, respectively. The Administrator, should he or she withdraw or disqualify himself or herself, shall assign the Regional Administrator from the Region where the case originated to replace him or her. 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 Presiding Officer if the original Presiding Officer was not an Administrative Law Judge. The Chief Administrative Law Judge shall assign a new Presiding Officer from among available Administrative Law Judges if the original Presiding Officer was an Administrative Law Judge.

4. Section 22.05 is amended by revising paragraph (c)(1) and the first and third sentences of paragraph (c)(5) to read as follows.

§ 22.05 Filings, service, and form of pleadings and documents.

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

(5) The Environmental Appeals Board, the Regional Administrator, the Presiding Officer, or the Regional Hearing Clerk may refuse to file any document which does not comply with this paragraph. * * * Such person may amend and resubmit any document refused for filing upon motion granted by the Environmental Appeals Board, the Regional Administrator, or the Presiding Officer, as appropriate.

5. Section 22.06 is amended by revising the second and third sentences to read as follows:

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

* * * All such documents issued by the Environmental Appeals Board shall be filed with the Clerk of the Environmental Appeals Board. Copies of such rulings, orders, decisions, or other documents shall be served personally, or by certified mail, return receipt requested, upon all parties by the Environmental Appeals Board, the Regional Administrator, the Regional Judicial Officer, or the Presiding Officer, as appropriate.

6. Section 22.07 is amended by revising the first sentence of paragraph (b) to read as follows:

§ 22.07 Computation and extension of time.

(b) * * * The Environmental Appeals Board, the Regional Administrator, or the Presiding Officer, as appropriate, may grant an extension of time for the

filing of any pleading, document, or motion (1) upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties, or (2) upon its or his own motion. * * *

7. Section 22.08 is amended by revising the first and second sentences to read as follows:

§ 22.08 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 Regional Judicial Officer, the Presiding Officer, or any other person who is likely to advise these officials in the decision on the case, 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, the Regional Judicial Officer, 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. * * *

8. Section 22.09(a) is amended by revising the second sentence to read as follows:

§ 22.09 Examination of documents filed.

(a) * * * Such documents shall be made available by the Regional Hearing Clerk, the Hearing Clerk, or the Environmental Appeals Board, as appropriate. * * *

9. Section 22.11 is amended by revising the third sentence of paragraph (d) to read as follows:

§ 22.11 Intervention.

(d) * * * If the motion is granted, the Presiding Officer or the Environmental Appeals Board shall issue an order setting the time for filing such brief. * * *

10. Section 22.16 is amended by revising the first sentence of paragraph (b) and the second and fourth sentences of paragraph (c) to read as follows:

§ 22.16 Motions.

(b) * * * The Presiding Officer, the Regional Administrator, or the Environmental Appeals Board, as appropriate, may set a shorter time for response, or make such other orders concerning the disposition of motions as they deem appropriate.

(c) * * * The Environmental Appeals Board shall rule on all motions filed or made after service of the initial decision upon the parties. * * * Oral argument on motions will be permitted where the Presiding Officer, the Regional Administrator, or the Environmental Appeals Board considers it necessary or desirable.

11. Section 22.23 is amended by revising the last sentence of paragraph (b) to read as follows:

§ 22.23 Objections and offers of proof.

(b) * * * Where the Environmental Appeals Board decides that the ruling of the Presiding Officer in excluding the evidence was both erroneous and prejudicial, the hearing may be reopened to permit the taking of such evidence.

12. Section 22.27 is amended by revising the last sentence of paragraph (a) and paragraph (c) to read as follows:

§ 22.27 Initial decision.

(a) * * * The Hearing Clerk shall forward a copy of the initial decision to the Environmental Appeals Board.

(c) *Effect of initial decision.* The initial decision of the Presiding Officer shall become the final order of the Environmental Appeals Board within forty-five (45) days after its service upon the parties and without further proceedings unless (1) an appeal to the Environmental Appeals Board is taken from it by a party to the proceedings, or (2) the Environmental Appeals Board elects, sua sponte, to review the initial decision.

13. Section 22.29 is amended by revising the first and second sentences of paragraph (a), paragraph (b), the first, second, third and fifth sentences of paragraph (c), and the first and third sentences of paragraph (d) to read as follows:

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

(a) * * * Except as provided in this section, appeals to the Environmental Appeals Board shall obtain as a matter of right only from a default order, an accelerated decision or decision to dismiss issued under § 22.20(b)(1), or an initial decision rendered after an evidentiary hearing. Appeals from other orders or rulings shall lie only if the

Presiding Officer or Regional Administrator, as appropriate, upon motion of a party, certifies such orders or rulings to the Environmental Appeals Board on appeal. * * *

(b) *Availability of interlocutory appeal.* The Presiding Officer may certify any ruling for appeal to 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 (i) an immediate appeal from the order or ruling will materially advance the ultimate termination of the proceeding, or (ii) review after the final order is issued will be inadequate or ineffective.

(c) * * * If the Environmental Appeals Board determines that certification was improvidently granted, or if the Environmental Appeals Board takes no action within thirty (30) days of the certification, the appeal is dismissed. When the Presiding Officer declines to certify an order or ruling to the Environmental Appeals Board on interlocutory appeal, 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 made within six (6) days of service of an order of the Presiding Officer refusing to certify a ruling for interlocutory appeal to the Environmental Appeals Board. * * * The Environmental Appeals Board may, however, allow further briefs and oral argument.

(d) * * * The Presiding Officer may stay the proceedings pending a decision by the Environmental Appeals Board upon an order or ruling certified by the Presiding Officer for an interlocutory appeal. * * * Where the Presiding Officer grants a stay of more than thirty (30) days, such stay must be separately approved by the Environmental Appeals Board.

14. Section 22.30 is amended by revising the first sentence of paragraph (a)(1), the first and third sentences of paragraph (a)(2), the paragraph heading and the first sentence of paragraph (b), paragraph (c) and paragraph (d) to read as follows:

§ 22.30 Appeal from or review of initial decision.

(a) * * * (1) Any party may appeal an adverse ruling or order of the Presiding Officer by filing a notice of appeal and an accompanying appellate brief with the Environmental Appeals

Board and upon all other parties and amicus curiae within twenty (20) days after the initial decision is served upon the parties. * * *

(2) Within fifteen (15) days of the service of notices of appeal and briefs under paragraph (a)(1) of this section, any other party or amicus curiae may file and serve with the Environmental Appeals Board a reply brief responding to argument raised by the appellant, together with references to the relevant portions of the record, initial decision, or opposing brief. * * * Further briefs shall be filed only with the permission of the Environmental Appeals Board.

(b) *Sua sponte review by the Environmental Appeals Board.* Whenever the Environmental Appeals Board determines sua sponte to review an initial decision, the Environmental Appeals Board shall serve notice of such intention on the parties within forty-five (45) days after the initial decision is served upon the parties. * * *

(c) *Scope of appeal or review.* If the Environmental Appeals Board determines that issues raised, but not appealed by the parties, should be argued, it shall give counsel for the parties reasonable written notice of such determination to permit preparation of adequate argument. Nothing herein shall prohibit the Environmental Appeals Board from remanding the case to the Presiding Officer for further proceedings.

(d) *Argument before the Environmental Appeals Board.* The Environmental Appeals Board may, upon request of a party or sua sponte, assign a time and place for oral argument after giving consideration to the convenience of the parties.

15. Section 22.31 is amended by revising paragraph (a) to read as follows:

§ 22.31 Final order on appeal.

(a) *Contents of the final order.* When an appeal has been taken or the Environmental Appeals Board issues a notice of intent to conduct a review sua sponte, the Environmental Appeals Board shall issue a final order as soon as practicable after the filing of all appellate briefs or oral argument, whichever is later. The Environmental Appeals Board shall adopt, modify, or set aside the findings and conclusions 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, in its discretion, increase or decrease the assessed penalty from the amount recommended to be assessed in the decision or order being reviewed, except that if the order being reviewed is a

default order, the Environmental Appeals Board may not increase the amount of the penalty.
* * *

16. Section 22.32 is revised to read as follows:

§ 22.32 Motion to reconsider a final order.

Motions to reconsider a final order shall be filed within ten (10) days after service of the final order. Every such motion 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 § 22.04(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 specifically so ordered by the Environmental Appeals Board.

PART 27—PROGRAM FRAUD CIVIL REMEDIES

1. The authority citation for part 27 continues to read as follows:

Authority: 31 U.S.C. 3809.

2. Section 27.2 is amended by removing the definitions of "Authority Head" and "Judicial Officer" and adding the definition of "Environmental Appeals Board" in alphabetical order to read as follows:

§ 27.2 Definitions.

Environmental Appeals Board means the Board within the Agency described in § 1.25 of this title.
* * *

3. Section 27.10 is amended by revising paragraphs (h), (i), (j), (k), and (l) to read as follows:

§ 27.10 Default upon failure to file an answer.

(h) The defendant may appeal to the Environmental Appeals Board the decision denying a motion to reopen by filing a notice of appeal within 15 days after the presiding officer denies the section. The timely filing of a notice of appeal shall stay the initial decision the Environmental Appeals Board decides the issue.

(i) If the defendant files a timely notice of appeal, the presiding officer shall forward the record of the

proceeding to the Environmental Appeals Board:

(j) The Environmental Appeals Board shall decide expeditiously whether extraordinary circumstances excuse the defendant's failure to file a timely answer based solely on the record before the presiding officer.

(k) If the Environmental Appeals Board decides that extraordinary circumstances excused the defendant's failure to file a timely answer, the Environmental Appeals Board shall remand the case to the presiding officer with instructions to grant the defendant an opportunity to answer.

(l) If the Environmental Appeals Board decides that the defendant's failure to file a timely answer is not excused, the Environmental Appeals Board shall reinstate the initial decision of the presiding officer, which shall become final and binding upon the parties 30 days after the Environmental Appeals Board issues such decision.

4. Section 27.14 is amended by revising paragraphs (a)(2) and (b) to read as follows:

§ 27.14 Separation of functions.

(a) * * *

(2) Participate or advise in the initial decision or the review of the initial decision by the Environmental Appeals Board, except as a witness or representative in public proceedings; or
* * *

(b) Neither the presiding officer nor the members of the Environmental Appeals Board shall be responsible to, or subject to, the supervision or direction of the investigating official or the reviewing official.
* * *

5. Section 27.16 is amended by revising paragraph (f)(3) to read as follows:

§ 27.16 Disqualification of the reviewing official or presiding officer.

(f) * * *

(3) If the presiding officer denies a motion to disqualify, the Environmental Appeals Board may determine the matter only as part of its review of the initial decision upon appeal, if any.

6. Section 27.31 is amended by revising the first sentence of paragraph (a), the introductory text of paragraph (b) and paragraph (c) to read as follows:

§ 27.31 Determining the amount of penalties and assessments.

(a) In determining an appropriate amount of civil penalties and assessments, the presiding officer and the Environmental Appeals Board, upon

appeal, should evaluate any circumstances that mitigate or aggravate the violation and should articulate in their opinions the reasons that support the penalties and assessments they impose. * * *

(b) Although not exhaustive, the following factors are among those that may influence the presiding officer and the Environmental Appeals Board in determining the amount of penalties and assessments to impose with respect to the misconduct (*i.e.*, the false, fictitious, or fraudulent claims or statements) charged in the complaint:
* * *

(c) Nothing in this section shall be construed to limit the presiding officer or the Environmental Appeals Board from considering any other factors that in any given case may mitigate or aggravate the offense for which penalties and assessments are imposed.

7. Section 27.35 is amended by revising paragraph (b) to read as follows:

§ 27.35 The record.
* * *

(b) The transcript of testimony, exhibits and other evidence admitted at the hearing, and all papers and requests filed in the proceeding constitute the record for the decision by the presiding officer and the Environmental Appeals Board.
* * *

8. Section 27.37 is amended by revising paragraph (d) to read as follows:

§ 27.37 Initial decision.
* * *

(d) Unless the initial decision of the presiding officer is timely appealed to the Environmental Appeals Board, or a motion for reconsideration of the initial decision is timely filed, the initial decision shall constitute the final decision of the Environmental Appeals Board and shall be final and binding on the parties 30 days after it is issued by the presiding officer.

9. Section 27.38 is amended by revising paragraphs (f) and (g) to read as follows:

§ 27.38 Reconsideration of initial decision.
* * *

(f) If the presiding officer denies a motion for reconsideration, the initial decision shall constitute the final decision of the Environmental Appeals Board and shall be final and binding on the parties 30 days after the presiding officer denies the motion, unless the initial decision is timely appealed to the Environmental Appeals Board in accordance with § 27.39.

(g) If the presiding officer issued a revised initial decision, that decision shall constitute the final decision of the Environmental Appeals Board and shall be final and binding on the parties 30 days after it is issued, unless it is timely appealed to the Environmental Appeals Board in accordance with § 27.39.

10. Section 27.39 is amended by revising paragraphs (a), (b)(3), (c), (f), (h), (i), (j), (k), and (l) to read as follows:

§ 27.39 Appeal to Environmental Appeals Board.

(a) Any defendant who has filed a timely answer and who is determined in an initial decision to be liable for a civil penalty or assessment may appeal such decision to the Environmental Appeals Board by filing a notice of appeal with the hearing clerk in accordance with this section.

(b) * * *

(3) The Environmental Appeals Board may extend the initial 30 day period for an additional 30 days if the defendant files a request for an extension within the initial 30 day period and shows good cause.

(c) If the defendant filed a timely notice of appeal, and the time for filing motions for reconsideration under § 27.38 has expired, the presiding officer shall forward the record of the proceeding to the Environmental Appeals Board.
* * *

(f) There is no right to appear personally before the Environmental Appeals Board.
* * *

(h) In reviewing the initial decision, the Environmental Appeals Board shall not consider any objection that was not raised before the presiding officer unless a demonstration is made of extraordinary circumstances causing the failure to raise the objection.

(i) If any party demonstrates to the satisfaction of the Environmental Appeals Board that additional evidence not presented at such hearing is material and that there were reasonable grounds for the failure to present such evidence at such hearing, the Environmental Appeals Board shall remand the matter to the presiding officer for consideration of such additional evidence.

(j) The Environmental Appeals Board may affirm, reduce, reverse, compromise, remand, or settle any penalty or assessment, determined by the presiding officer in any initial decision.

(k) The Environmental Appeals Board shall promptly serve each party to the appeal with a copy of the decision of the Environmental Appeals Board and a statement describing the right of any

person determined to be liable for a civil penalty or assessment to seek judicial review.

(l) Unless a petition for review is filed as provided in 31 U.S.C. 3805 after a defendant has exhausted all administrative remedies under this part and within 60 days after the date on which the Environmental Appeals Board serves the defendant with a copy of the Environmental Appeals Board's decision, a determination that a defendant is liable under § 27.3 is final and is not subject to judicial review.

11. Section 27.40 is revised to read as follows:

§ 27.40 Stay ordered by the Department of Justice.

If at any time the Attorney General or an Assistant Attorney General designated by the Attorney General transmits to the Environmental Appeals Board a written finding that continuation of the administrative process described in this part with respect to a claim or statement may adversely affect any pending or potential criminal or civil action related to such claim or statement, the Environmental Appeals Board shall stay the process immediately. The Environmental Appeals Board may order the process resumed only upon receipt of the written authorization of the Attorney General.

12. Section 27.41 is revised to read as follows:

§ 27.41 Stay pending appeal.

(a) An initial decision is stayed automatically pending disposition of a motion for reconsideration or of an appeal to the Environmental Appeals Board.

(b) No administrative stay is available following a final decision of the Environmental Appeals Board.

13. Section 27.42 is revised to read as follows:

§ 27.42 Judicial Review.

Section 3805 of title 31, United States Code, authorizes judicial review by an appropriate United States District Court of a final decision of the Environmental Appeals Board imposing penalties or assessments under this part and specifies the procedures for such review.

14. Section 27.46 is amended by revising paragraphs (c) and (e) to read as follows:

§ 27.46 Compromise or settlement.
* * *

(c) The Environmental Appeals Board has exclusive authority to compromise or settle a case under this part at any time after the date on which the

presiding officer issues an initial decision, except during the pendency of any review under § 27.42 or during the pendency of any action to collect penalties and assessments under § 27.43.

(e) The investigating official may recommend settlement terms to the reviewing official, the Environmental Appeals Board, or the Attorney General, as appropriate. The reviewing official may recommend settlement terms to the Environmental Appeals Board or the Attorney General, as appropriate.

15. Section 27.48 is revised to read as follows:

§ 27.48 Delegated functions.

The Administrator delegates authority to the Environmental Appeals Board to issue final decisions in appeals filed under this part. An appeal directed to the Administrator, rather than the Environmental Appeals Board, will not be considered. This delegation of authority to the Environmental Appeals Board does not preclude the Environmental Appeals Board from referring an appeal or motion filed under this part to the Administrator for decision when the Environmental Appeals Board, in its discretion, deems it appropriate to do so. When an appeal or motion is referred to the Administrator, all parties shall be so notified and the rules in this part referring to the Environmental Appeals Board shall be interpreted as referring to the Administrator. If a case or motion is referred to the Administrator by the Environmental Appeals Board, the Administrator may consult with any EPA employee concerning the matter, provided such consultation does not violate the ex parte contacts restrictions set forth in §§ 27.14 and 27.15 of this part.

PART 57—PRIMARY NONFERROUS SMELTER ORDERS

1. The authority citation for part 57 continues to read as follows:

Authority: 31 U.S.C. 3809.

§ 57.103 [Amended]

2. Section 57.103 is amended by removing paragraph (p) and redesignating paragraphs (q) through (x) as new paragraphs (p) through (w).

3. Section 57.806 is amended by revising paragraph (a)(2) to read as follows:

§ 57.806 Presiding Officer.

(a) * * *

(2) If the parties to the hearing waive their right to have the Agency or an Administrative Law Judge preside at the hearing, the Administrator shall appoint an EPA employee who is an attorney to serve as presiding officer.

4. Section 57.809 is amended by revising the first sentence of paragraph (c)(2) to read as follows:

§ 57.809 Ex parte communications.

(2) *Decisional body* means any Agency employee who is or may be reasonably expected to be involved in the decisional process of the proceeding including the Administrator, Presiding Officer, the Regional Administrator (if he does not designate himself as a member of the Agency trial staff), and any of their staff participating in the decisional process. * * *

PART 60—STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES

1. The authority citation for part 60 continues to read as follows:

Authority: 42 U.S.C. 7401, 7411, 7414, 7416, and 7601.

2. Section 60.539 is amended by revising the third sentence of paragraph (h)(1); paragraph (h)(2); and the last sentence of paragraph (h)(3) to read as follows:

§ 60.539 Hearing and appeal procedures.

(h)(1) * * * The initial decision shall become the decision of the Environmental Appeals Board without further proceedings unless there is an appeal to the Environmental Appeals Board or motion for review by the Environmental Appeals Board. * * *

(2) The Administrator delegates authority to the Environmental Appeals Board to issue final decisions in appeals filed under this section. An appeal directed to the Administrator, rather than to the Environmental Appeals Board, will not be considered. This delegation of authority to the Environmental Appeals Board does not preclude the Environmental Appeals Board from referring an appeal or a motion filed under this part to the Administrator for decision when the Environmental Appeals Board, in its discretion, deems it appropriate to do so. When an appeal or motion is referred to the Administrator, all parties shall be so notified and the rules in this section referring to the Environmental Appeals Board shall be interpreted as

referring to the Administrator. On appeal from or review of the initial decision, the Environmental Appeals Board shall have all the powers that it would have in making the initial decision including the discretion to require or allow briefs, oral argument, the taking of additional evidence or the remanding to the Presiding Officer for additional proceedings. The decision by the Environmental Appeals Board shall include written findings and conclusions and the reasons or basis therefor on all the material issues of fact, law, or discretion presented on the appeal or considered in the review.

(3) * * * Any appeal to the Environmental Appeals Board shall be taken within 10 days of the initial decision, and the Environmental Appeals Board shall render its decision in the appeal within 30 days of the filing of the appeal.

PART 66—ASSESSMENT AND COLLECTION OF NONCOMPLIANCE PENALTIES BY EPA

1. The authority citation for part 66 continues to read as follows:

Authority: Sec. 120, Clean Air Act, as amended, 42 U.S.C. 7420.

2. Section 66.3 is amended by redesignating paragraphs (g) through (l) as paragraphs (h) through (m) and adding a new paragraph (g) to read as follows:

§ 66.3 Definitions.

(g) "Environmental Appeals Board" shall mean the Board within the Agency described in § 1.25 of this title. The Administrator delegates authority to the Environmental Appeals Board to issue final decisions in appeals filed under this part. Appeals directed to the Administrator, rather than to the Environmental Appeals Board, will not be considered. This delegation of authority to the Environmental Appeals Board does not preclude the Environmental Appeals Board from referring an appeal or a motion filed under this part to the Administrator for decision when the Environmental Appeals Board, in its discretion, deems it appropriate to do so. When an appeal or motion is referred to the Administrator, all parties shall be so notified and the rules in this part referring to the Environmental Appeals Board shall be interpreted as referring to the Administrator.

3. Section 66.6 is amended by revising paragraph (b) to read as follows:

§ 66.6 Effect of litigation; time limits.

(b) Failure of the Environmental Appeals Board or the Presiding Officer at a hearing to meet any of the time limits contained in this part 66 and part 67 of this chapter shall not affect the validity of any proceeding under these regulations.

4. Section 66.72 is amended by revising the first sentence of paragraph (a) to read as follows:

§ 66.72 Additional payment or reimbursement.

(a) Within 120 days after the source owner or operator receives notification pursuant to § 66.71(b) that it has achieved and is maintaining compliance with applicable legal requirements, or within 120 days after receipt of a decision to that effect upon petition and hearing, or within 120 days after receipt of a decision to that effect upon an appeal to the Environmental Appeals Board, the source owner or operator shall submit to the Administrator a revised penalty calculation as provided in the Technical Support Document and the Manual, together with data necessary for verification.

5. Section 66.81 is amended by revising the second and third sentences of paragraph (b) and paragraph (c) to read as follows:

§ 66.81 Final action.

(b) To exhaust administrative remedies, a source owner or operator must first petition for reconsideration of the decision in question and, if unsuccessful after hearing or after denial of hearing, appeal the decision in question to the Environmental Appeals Board. The action becomes final upon the completion of review by the Environmental Appeals Board and notice thereof to the owner or operator of the source.

(c) Where a petition seeks reconsideration both of the finding of noncompliance and of the finding of liability on the ground that the source owner or operator is entitled to an exemption, both questions must be decided before any review by the Environmental Appeals Board is sought, except on agreement of the parties.

6. Section 66.95 is amended by revising the first and second sentences of paragraph (c) to read as follows:

§ 66.95 Decision of the Presiding Officer, Appeal to the Environmental Appeals Board.

(c) An appeal to the Environmental Appeals Board from a decision of the Presiding Officer shall be made by petition filed within twenty (20) days from receipt by a party of the Presiding Officer's decision. The Environmental Appeals Board shall rule on the appeal within 30 days of receipt of a petition.

PART 85—CONTROL OF AIR POLLUTION FROM MOTOR VEHICLES AND MOTOR VEHICLE ENGINES

1. The authority citation for subpart S of part 85 continues to read as follows:

Authority: Sec. 301(a), Clean Air Act, 81 Stat. 504, as amended by sec. 15(c), 84 Stat. 1713 (42 U.S.C. 1857g(a)). The regulations implement sec. 207(c)(1)–(2), Clean Air Act, 84 Stat. 1697 (42 U.S.C. 1847f–5a(c)(1)–(2)); sec. 208(a), Clean Air Act, 81 Stat. 501, as renumbered by sec. 8(a), 84 Stat. 1694 (42 U.S.C. 1857f–6(a)).

2. Section 85.1807 is amended by revising paragraphs (a)(6) and (o)(2), the second and third sentences of paragraph (o)(3), paragraphs (q)(1), (q)(4), (q)(5), (t)(1), (t)(2), (u)(1), (u)(3)(iv), (u)(4), (u)(5), (v)(1), (v)(2), (w)(1), (w)(2), and (w)(3), the first, second, and fourth sentences of paragraph (x), paragraphs (z)(1) and (z)(2), and the second sentence of paragraph (aa)(1) to read as follows:

§ 85.1807 Public hearings.

(a) "Environmental Appeals Board" shall mean the Board within the Agency described in § 1.25 of this title. The Administrator delegates authority to the Environmental Appeals Board to issue final decisions in appeals filed under this subpart. Appeals directed to the Administrator, rather than to the Environmental Appeals Board, will not be considered. This delegation of authority to the Environmental Appeals Board does not preclude the Environmental Appeals Board from referring an appeal or a motion filed under this subpart to the Administrator for decision when the Environmental Appeals Board, in its discretion, deems it appropriate to do so. When an appeal or motion is referred to the Administrator, all parties shall be so notified and the rules in this part referring to the Environmental Appeals Board shall be interpreted as referring to the Administrator.

(o) (2) Within ten days after service of any motion filed pursuant to this section, or within such other time as may be fixed by the Environmental Appeals Board or the Presiding Officer, as appropriate, any party may serve and file an answer to the motion. The

movant shall, if requested by the Environmental Appeals Board or the Presiding Officer, as appropriate, serve and file reply papers within the time set by the request.

(3) The Environmental Appeals Board shall rule upon all motions filed prior to the appointment of a Presiding Officer and all motions filed after the filing of the decision of the Presiding Officer or accelerated decision. Oral argument of motions will be permitted only if the Presiding Officer or the Environmental Appeals Board, as appropriate, deems it necessary.

(q) *Interlocutory appeal.* (1) An interlocutory appeal may be taken to the Environmental Appeals Board either (i) with the consent of the Presiding Officer and where he certifies on the record or in writing that the allowance of an interlocutory appeal is clearly necessary to prevent exceptional delay, expense or prejudice to any party or substantial detriment to the public interest, or (ii) absent the consent of the Presiding Officer, by permission of the Environmental Appeals Board.

(4) Applications to file such appeals absent consent of the Presiding Officer shall be filed with the Environmental Appeals Board within 5 days of the denial of any appeal by the Presiding Officer.

(5) The Environmental Appeals Board will consider the merits of the appeal on the application and any answers thereto. No oral argument will be heard nor other briefs filed unless the Environmental Appeals Board directs otherwise.

(1) Unless extended by the Environmental Appeals Board, the Presiding Officer shall issue and file with the Hearing Clerk his decision within 30 days after the period for filing proposed findings as provided for in paragraph (s) of this section has expired.

(2) The Presiding Officer's decision shall become the opinion of the Environmental Appeals Board (i) when no notice of intention to appeal as described in paragraph (u) of this section is filed, 30 days after the issuance thereof, unless in the interim the Environmental Appeals Board shall have taken action to review or stay the effective date of the decision; or (ii) when a notice of intention to appeal is filed but the appeal is not perfected as required by paragraph (u) of this section, 5 days after the period allowed for perfection of an appeal has expired unless within that 5 day period, the

Environmental Appeals Board shall have taken action to review or stay the effective date of the decision.

(u) * * * (1) Any party to a proceeding may appeal the Presiding Officer's decision to the Environmental Appeals Board, *Provided*, That within 10 days after issuance of the Presiding Officer's decision such party files a notice of intention to appeal and an appeal brief within 30 days of such decision.

(3) * * * Any brief filed pursuant to this paragraph shall contain in the order indicated, the following:

(iv) A proposed form of rule or order for the Environmental Appeals Board's consideration if different from the rule or order contained in the Presiding Officer's decision.

(4) No brief in excess of 40 pages shall be filed without leave of the Environmental Appeals Board.

(5) Oral argument will be allowed in the discretion of the Environmental Appeals Board.

(v) * * * (1) If, after the expiration of the period for taking an appeal as provided for by paragraph (u) of this section, no notice of intention to appeal the decision of the Presiding Officer has been filed, or if filed, not perfected, the Hearing Clerk shall so notify the Environmental Appeals Board.

(2) The Environmental Appeals Board, upon receipt of notice from the Hearing Clerk that no notice of intention to appeal has been filed, or if filed, not perfected pursuant to paragraph (u) of this section, may, on its own motion, within the time limits specified in paragraph (t)(2) of this section, review the decision of the Presiding Officer. Notice of the intention of the Environmental Appeals Board to review the decision of the Presiding Officer shall be given to all parties and shall set forth the scope of such review and the issue which shall be considered and shall make provision for filing of briefs.

(w) * * * (1) Upon appeal from or review of the Presiding Officer's decision, the Environmental Appeals Board shall consider such parts of the record as are cited or as may be necessary to resolve the issues presented and, in addition shall to the extent necessary or desirable exercise all the powers which it could have exercised if it had presided at the hearing.

(2) In rendering its decision, the Environmental Appeals Board shall adopt, modify, or set aside the findings, conclusions, and rule or order contained

in the decision of the Presiding Officer and shall set forth in its decision a statement of the reasons or bases for its action.

(3) In those cases where the Environmental Appeals Board determines that it should have further information or additional views of the parties as to the form and content of the rule or order to be issued, the Environmental Appeals Board, in its discretion, may withhold final action pending the receipt of such additional information or views, or may remand the case to the Presiding Officer.

(x) * * * Within twenty (20) days after issuance of the Environmental Appeals Board's decision, any party may file with the Environmental Appeals Board a petition for reconsideration of such decision, setting forth the relief desired and the grounds in support thereof. Any petition filed under this subsection must be confined to new questions raised by the decision or the final order and upon which the petitioner had no opportunity to argue before the Presiding Officer or the Environmental Appeals Board. * * * The filing of a petition for reconsideration shall not operate to stay the effective date of the decision or order or to toll the running of any statutory time period affecting such decision or order unless specifically so ordered by the Environmental Appeals Board.

(z) * * * (1) If, after the expiration of the period for taking an appeal as provided for by paragraph (u) of this section, no appeal has been taken from the Presiding Officer's decision, and, after the expiration of the period for review by the Environmental Appeals Board on its own motion as provided for by paragraph (v) of this section, the Environmental Appeals Board does not move to review such decision, the hearing will be deemed to have ended at the expiration of all periods allowed for such appeal and review.

(2) If an appeal of the Presiding Officer's decision is taken pursuant to paragraph (u) of this section, or if, in the absence of such appeal, the Environmental Appeals Board moves to review the decision of the Presiding Officer pursuant to paragraph (v) of this section, the hearing will be deemed to have ended upon the rendering of a final decision by the Environmental Appeals Board.

(aa) * * * (1) * * * Such officer shall be responsible for filing in the court the record on which the order of the Environmental Appeals Board is based.

2. Section 85.1808 is amended by revising paragraph (d) to read as follows:

§ 85.1808 Treatment of confidential information.

(d) If a claim is made that some or all of the information submitted pursuant to this subpart is entitled to confidential treatment, the information covered by that confidentiality claim will be disclosed by the Environmental Appeals Board only to the extent and by means of the procedures set forth in part 2, subpart B, of this chapter.

PART 86—CONTROL OF AIR POLLUTION FROM NEW MOTOR VEHICLES AND NEW MOTOR VEHICLE ENGINES; CERTIFICATION AND TEST PROCEDURES

1. The authority citation for part 86 continues to read as follows:

Authority: Secs. 202, 203, 206, 207, 208, 215, 301(a), of the Clean Air Act as amended; (42 U.S.C. 7521, 7522, 7524, 7525, 7541, 7542, 7549, 7550 and 7601(a)).

2. Section 86.614-84 is amended by revising paragraphs (b)(5) and (o)(2), the second and third sentences of paragraph (o)(3), paragraphs (s)(1), (s)(2), (t)(1), (t)(3)(iv), (t)(4), (t)(5), (u)(2), (u)(5), (v)(1), (v)(2), (w)(1), (w)(2), (w)(3), (w)(4), the first, second, and fourth sentences of paragraph (x), paragraphs (z)(1) and (z)(2), and the second sentence of paragraph (aa)(1) to read as follows:

§ 86.614-84 Hearings on suspensions, revocation, and voiding of certificates of conformity.

(b) * * *

(5) "Environmental Appeals Board" shall mean the Board within the Agency described in section 1.25 of this title. The Administrator delegates to the Environmental Appeals Board authority to issue final decisions in appeals filed under this subpart. Appeals directed by the Administrator, rather than to the Environmental Appeals Board, will not be considered. This delegation of authority to the Environmental Appeals Board does not preclude the Environmental Appeals Board from referring an appeal or a motion filed under this subpart to the Administrator for decision when the Environmental Appeals Board, in its discretion, deems it appropriate to do so. When an appeal or motion is referred to the Administrator, all parties shall be so notified and the rules in this part referring to the Environmental Appeals

Board shall be interpreted as referring to the Administrator.

(o) * * *

(2) Within such time as may be fixed by the Environmental Appeals Board or the Presiding Officer, as appropriate, any party may serve and file an answer to the motion. The movant shall, if requested by the Environmental Appeals Board or the Presiding Officer, as appropriate, serve and file reply papers within the time set by the request.

(3) * * * The Environmental Appeals Board shall rule upon all motions filed prior to the appointment of a Presiding Officer and all motions filed after the filing of the decision of the Presiding Officer or accelerated decision. Oral argument of motions will be permitted only if the Presiding Officer or the Environmental Appeals Board, as appropriate, deems it necessary.

(s) * * * (1) Unless extended by the Environmental Appeals Board, the Presiding Officer shall issue and file with the Hearing Clerk his decision within 14 days (or within 7 days in the case of a hearing requested under § 86.612(i)) after the period for filing proposed findings as provided for in paragraph (r) of this section has expired.

(2) The Presiding Officer's decision shall become the decision of the Environmental Appeals Board (i) when no notice of intention to appeal as described in paragraphs (t) and (u) of this section is filed, 10 days after issuance thereof, unless in the interim the Environmental Appeals Board shall have taken action to review or stay the effective date of the decision; or (ii), when a notice of intention to appeal is filed but the appeal is not perfected as required by paragraphs (t) or (u) of this section, 5 days after the period allowed for perfection of an appeal has expired unless within that 5 day period, the Environmental Appeals Board shall have taken action to review or stay the effective date of the decision.

(t) * * * (1) Any party to a proceeding may appeal the Presiding Officer's decision to the Environmental Appeals Board. *Provided*, That within 10 days after issuance of the Presiding Officer's decision such party files a notice of intention to appeal and an appeal brief within 20 days of such decision.

(3) * * *

(iv) A proposed order for the Environmental Appeals Board's consideration if different from the order contained in the Presiding Officer's decision.

(4) No brief in excess of 40 pages shall be filed without leave of the Environmental Appeals Board.

(5) Oral argument shall be allowed only in the discretion of the Environmental Appeals Board.

(u) * * *

(2) Any party to the proceeding may appeal the Presiding Officer's decision to the Environmental Appeals Board by filing a notice of appeal within 10 days.

(5) No brief in excess of 15 pages shall be filed without leave of the Environmental Appeals Board.

(v) * * * (1) If after the expiration of the period for taking an appeal as provided for by paragraph (t) or (u) of this section no notice of intention to appeal the decision of the Presiding Officer has been filed, or if filed, not perfected, the Hearing Clerk shall so notify the Environmental Appeals Board.

(2) The Environmental Appeals Board, upon receipt of notice from the Hearing Clerk that no notice of intention to appeal the decision of the Presiding Officer has been filed, or if filed, not perfected pursuant to paragraph (t) or (u) of this section, may, on its own motion, within the time limits specified in paragraph (s)(2) of this section, review the decision of the Presiding Officer. Notice of the intention of the Environmental Appeals Board to review the decision of the Presiding Officer shall be given to all parties and shall set forth the scope of such review and the issues which shall be considered and shall make provision for filing of briefs.

(w) * * * (1) Upon appeal from or review of the Presiding Officer's decision, the Environmental Appeals Board shall consider such parts of the record as are cited or as may be necessary to resolve the issues presented and in addition shall, to the extent necessary or desirable, exercise all the powers which it could have exercised if it had presided at the hearing.

(2) In rendering its decision, the Environmental Appeals Board shall adopt, modify or set aside the findings, conclusions, and order contained in the decision of the Presiding Officer and shall set forth in its decision a statement of the reasons or bases for its action.

(3) In those cases where the Environmental Appeals Board determines that it should further information or additional views of the parties as to the form and content of the rule or order to be issued, the Environmental Appeals Board, in its discretion, may withhold final action pending the receipt of such additional

information or views, or may remand the case to the Presiding Officer.

(4) Any decision rendered under this paragraph which completes disposition of a case shall be a final decision of the Environmental Appeals Board.

(x) * * * Within twenty (20) days after issuance of the Environmental Appeals Board's decision, any party may file with the Environmental Appeals Board a petition for reconsideration of such decision, setting forth the relief desired and the grounds in support thereof. Any petition filed under this subsection must be confined to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Presiding Officer or the Environmental Appeals Board; *Provided, however*, That in the case of a hearing requested under § 86.612(i) such new questions shall be limited to the issues specified in paragraph (c)(2)(ii) of this section. * * * The filing of a petition for reconsideration shall not operate to stay the effective date of the decision or order or to toll the running of any statutory time period affecting such decision or order unless specifically so ordered by the Environmental Appeals Board.

(z) * * * (1) If, after the expiration of the period for taking an appeal as provided for by paragraph (t) and (u) of this section, no appeal has been taken from the Presiding Officer's decision, and after the expiration of the period for review by the Environmental Appeals Board on its own motion as provided for by paragraph (v) of this section, the Environmental Appeals Board does not move to review such decision, the hearing will be deemed to have ended at the expiration of all periods allowed for such appeal and review.

(2) If an appeal of the Presiding Officer's decision is taken pursuant to paragraphs (t) and (u) of this section, or if, in the absence of such appeal, the Environmental Appeals Board moves to review the decision of the Presiding Officer pursuant to paragraph (v) of this section, the hearing will be deemed to have ended upon rendering of a final decision by the Environmental Appeals Board.

(aa) * * * (1) * * * Such officer shall be responsible for filing in the court the record on which the order of the Environmental Appeals Board is based.

3. Section 86.615-84 is amended by revising paragraph (d) to read as follows:

§ 86.615-84 Treatment of confidential information.

(d) If a claim is made that some or all of the information submitted pursuant to this subpart is entitled to confidential treatment, the information covered by that confidentiality claim will be disclosed by the Environmental Appeals Board only to the extent and by means of the procedures set forth in part 2, subpart B, of this chapter.

4. Section 86.1014-84 is amended by revising paragraphs (b)(5) and (o)(2), the second and third sentences of paragraph (o)(3), paragraphs (s)(1), (s)(2), (s)(2)(i), (s)(2)(ii), (t)(1), (t)(3)(iv), (t)(4), (t)(5), (u)(2), (u)(5), (v)(1), (v)(2), (w)(1), (w)(2), (w)(3), (w)(4), and (x)(1), the second sentence of paragraph (x)(2), paragraphs (z)(1) and (z)(2), and the second sentence of (aa)(1) to read as follows:

§ 86.1014-84 Hearings on suspension, revocation and voiding of certificate of conformity.

(b) * * *
 (5) *Environmental Appeals Board* shall mean the Board within the Agency described in § 1.25 of this title. The Administrator delegates authority to the Environmental Appeals Board to issue final decisions in appeals filed under this subpart. Appeals directed to the Administrator, rather than to the Environmental Appeals Board, will not be considered. This delegation of authority to the Environmental Appeals Board does not preclude the Environmental Appeals Board from referring an appeal or a motion filed under this subpart to the Administrator for decision when the Environmental Appeals Board, in its discretion, deems it appropriate to do so. When an appeal or motion is referred to the Administrator, all parties shall be so notified and the rules in this part referring to the Environmental Appeals Board shall be interpreted as referring to the Administrator.

(o) * * *
 (2) Within the time fixed by the Environmental Appeals Board or the Presiding Officer, as appropriate, any party may serve and file an answer to the motion. The movant shall, if requested by the Environmental Appeals Board or the Presiding Officer, as appropriate, serve and file reply papers within the time set by the request.

(3) * * * The Environmental Appeals Board shall rule upon all motions filed prior to the appointment of a Presiding Officer and all motions filed after the

filing of the decision of the Presiding Officer or accelerated decision. Oral argument of motions will be permitted only if the Presiding Officer or the Environmental Appeals Board, as appropriate, considers it necessary.

(s) * * * (1) Unless extended by the Environmental Appeals Board, the Presiding Officer shall issue and file with the Hearing Clerk his decision within fourteen (14) days (or within seven (7) days in the case of a hearing requested under § 86.1012-84(1)) after the period for filing proposed findings as provided for in paragraph (r) of this section has expired.

(2) The Presiding Officer's decision shall become the decision of the Environmental Appeals Board:

(i) When no notice of intention to appeal as described in paragraphs (t) and (u) of this section is filed, ten (10) days after issuance thereof, unless in the interim the Environmental Appeals Board shall have acted to review or stay the effective date of the decision; or

(ii) When a notice of intention to appeal is filed but the appeal is not perfected as required by paragraphs (t) or (u) of this section, five (5) days after the period allowed for perfection of an appeal has expired unless within that five (5) day period, the Environmental Appeals Board shall have acted to review or stay the effective date of the decision.

(t) * * * (1) Any party to a proceeding may appeal the Presiding Officer's decision to the Environmental Appeals Board; *Provided*, That within ten (10) days after issuance of the Presiding Officer's decision the party files a notice of intention to appeal and an appeal brief within twenty (20) days of the decision.

(3) * * *
 (iv) A proposed order for the Environmental Appeals Board's consideration if different from the order contained in the Presiding Officer's decision.

(4) No brief in excess of 40 pages will be filed without leave of the Environmental Appeals Board.

(5) The Environmental Appeals Board may allow oral argument.

(u) * * *
 (2) Any party to the proceeding may appeal the Presiding Officer's decision to the Environmental Appeals Board by filing a notice of appeal within ten (10) days.

(5) No brief in excess of fifteen (15) pages will be filed without leave of the Environmental Appeals Board.

(v) * * * (1) If after the expiration of the period for taking an appeal as provided for by paragraph (t) or (u) of this section, no notice of intention to appeal the decision of the Presiding Officer has been filed, or if filed, not perfected, the Hearing Clerk shall so notify the Environmental Appeals Board.

(2) The Environmental Appeals Board, upon receipt of notice from the Hearing Clerk that no notice of intention to appeal the decision of the Presiding Officer has been filed, or if filed, not perfected pursuant to paragraph (t) or (u) of this section, may, on its own motion, within the time limits specified in paragraph (s)(2) of this section, review the decision of the Presiding Officer. Notice of the intention of the Environmental Appeals Board to review the decision of the Presiding Officer shall be given to all parties and shall set forth the scope of such review and the issues to be considered and shall make provision for filing of briefs.

(w) * * * (1) Upon appeal from or review of the Presiding Officer's decision, the Environmental Appeals Board shall consider such parts of the record as are cited or as may be necessary to resolve the issues presented and in addition shall, to the extent necessary or desirable, exercise all the powers which it could have exercised if it had presided at the hearing.

(2) In rendering its decision, the Environmental Appeals Board shall adopt, modify or set aside the findings, conclusions, and order contained in the decision of the Presiding Officer and shall set forth in its decision a statement of the reasons or basis for its action.

(3) In those cases where the Environmental Appeals Board determines that it should have further information or additional views of the parties as to the form and content of the rule or order to be issued, the Environmental Appeals Board, in its discretion, may withhold final action pending the receipt of such additional information or views, or may remand the case to the Presiding Officer.

(4) Any decision rendered under this paragraph which completes disposition of a case constitutes a final decision of the Environmental Appeals Board.

(x) * * * (1) Within twenty (20) days after issuance of the Environmental Appeals Board's decision, any party may file with the Environmental Appeals Board a petition for reconsideration of such decision, setting

forth the relief desired and the grounds in support thereof. Any petition filed under this subsection must be confined to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Presiding Officer or the Environmental Appeals Board; *Provided, however,* That in the case of a hearing requested under § 86.1012-84(1) such new questions shall be limited to the issues specified in paragraph (c)(2)(ii) of this section.

(2) * * * The filing of a petition for reconsideration shall not operate to stay the effective date of the decision or order or to toll the running of any statutory time period affecting such decision or order unless specifically so ordered by the Environmental Appeals Board.

(z) * * * (1) If, after the expiration of the period for taking an appeal as provided for by paragraphs (t) and (u) of this section, no appeal has been taken from the Presiding Officer's decision, and after the expiration of the period for review by the Environmental Appeals Board on its own motion as provided for by paragraph (v) of this section, the Environmental Appeals Board does not move to review such decision, the hearing is considered ended at the expiration of all periods allowed for the appeal and review.

(2) If an appeal of the Presiding Officer's decision is taken pursuant to paragraphs (t) and (u) of this section, or if, in the absence of this appeal, the Environmental Appeals Board moves to review the decision of the Presiding Officer pursuant to paragraph (v) of this section, the hearing is considered ended upon rendering of a final decision by the Environmental Appeals Board.

(aa) * * * (1) * * * This officer shall be responsible for filing in the court the record of which the order of the Environmental Appeals Board is based.

(5) Section 86.1015-84 is amended by revising paragraph (d) to read as follows:

§ 86.1015-84 Treatment of confidential information.

(d) If a claim is made that some or all of the information submitted pursuant to this subpart is entitled to confidential treatment, the information covered by that confidentiality claim will be disclosed by the Environmental Appeals Board only to the extent and by means

of the procedures set forth in part 2, subpart B, of this chapter.

6. Section 86.1115-87 is amended by revising paragraphs (b)(5) and (o)(2), the second sentence of (o)(3), paragraphs (s)(1), (s)(2), (t)(1), (t)(3)(iv), (t)(4), (t)(5), (u)(1), (u)(2), (v)(1), (v)(2), (v)(3), and (v)(4), the first, second, third, and fifth sentences of paragraph (w), paragraphs (y)(1) and (y)(2), and the second sentence of paragraph (z)(1) to read as follows:

§ 86.1115-87 Hearing procedures for nonconformance determinations and penalties.

(b) * * * (5) *Environmental Appeals Board* shall mean the Board within the Agency described in § 1.25 of this title. The Administrator delegates authority to the Environmental Appeals Board to issue final decisions in appeals filed under this subpart. Appeals directed to the Administrator, rather than to the Environmental Appeals Board, will not be considered. This delegation of authority to the Environmental Appeals Board does not preclude the Environmental Appeals Board from referring an appeal or a motion filed under this subpart to the Administrator for decision when the Environmental Appeals Board, in its discretion, deems it appropriate to do so. When an appeal or motion is referred to the Administrator, all parties shall be so notified and the rules in this part referring to the Environmental Appeals Board shall be interpreted as referring to the Administrator.

(o) * * * (2) Within such time as may be fixed by the Environmental Appeals Board or the Presiding Officer, as appropriate, any party may serve and file an answer to the motion. The movant shall, if requested by the Environmental Appeals Board or the Presiding Officer, as appropriate, serve and file reply papers, within the time set by the request.

(3) * * * The Environmental Appeals Board shall rule upon all motions filed prior to the appointment of a Presiding Officer and all motions filed after the filing of the decision of the Presiding Officer or accelerated decision. Oral argument of motions will be permitted only if the Presiding Officer or the Environmental Appeals Board, as appropriate, deems it necessary.

(s) * * * (1) Unless extended by the Environmental Appeals Board, the

Presiding Officer shall issue and file with the Hearing Clerk his decision within 30 days after the period for filing proposed findings has expired, as provided for in paragraph (c) of this section.

(2) The Presiding Officer's decision shall become the decision of the Environmental Appeals Board (i) 10 days after issuance thereof, if no notice of intention to appeal as described in paragraph (t) of this section is filed, unless in the interim the Environmental Appeals Board shall have taken action to review or stay the effective date of the decision; or (ii) 5 days after expiration of the period allowed by paragraph (t)(1) of this section for perfection of an appeal, if a notice of intention to appeal is filed but the appeal is not perfected, unless within that 5 day period the Environmental Appeals Board shall have taken action to review or stay the effective date of the decision;

(t) * * * (1) Any party to a proceeding may appeal the Presiding Officer's decision to the Environmental Appeals Board, *Provided,* That within 10 days after issuance of the Presiding Officer's decision such party files a notice of intention to appeal and an appeal brief within 20 days of such decision.

(3) * * * (iv) A proposed order for the Environmental Appeals Board's consideration if different from the order contained in the Presiding Officer's decision.

(4) No brief in excess of 15 pages shall be filed without leave of the Environmental Appeals Board.

(5) Oral argument will be allowed only in the discretion of the Environmental Appeals Board.

(u) * * * (1) If, after the expiration of the period for taking an appeal as provided for by paragraph (t) of this section, no notice of intention to appeal the decision of the Presiding Officer has been filed, or if filed, not perfected, the Hearing Clerk shall so notify the Environmental Appeals Board.

(2) The Environmental Appeals Board, upon receipt of notice from the Hearing Clerk that no notice of intention to appeal has been filed, or if filed, not perfected pursuant to paragraph (t)(1) of this section, may, on its own motion, within 14 days after notice from the Hearing Clerk, review the decision of the Presiding Officer. Notice of the intention of the Environmental Appeals Board to review the decision of the

Presiding Officer shall be given to all parties and shall set forth the scope of such review and the issues which shall be considered and shall make provisions for filing of briefs.

(v) * * * (1) Upon appeal from or review of the Presiding Officer's the Environmental Appeals Board shall consider such parts of the record as are cited or as may be necessary to resolve the issues presented and in addition shall, to the extent necessary or desirable, exercise all the powers which it could have exercised if it had presided at the hearing.

(2) In rendering its decision, the Environmental Appeals Board shall adopt, modify, or set aside the findings, conclusions, and order contained in the decision of the Presiding Officer and shall set forth in its decision a statement of the reasons or bases for this action.

(3) In those cases where the Environmental Appeals Board determines that it should have further information or additional views of the parties as to the form and content of the rule or order to be issued, the Environmental Appeals Board, in its discretion, may without final action pending the receipt of such additional information or views, or may remand the case to the Presiding Officer.

(4) Any decision rendered under this paragraph which completed disposition of a case shall be a final decision of the Environmental Appeals Board.

(w) * * * Any party may file with the Environmental Appeals Board a petition for reconsideration of such decision setting forth the relief desired and the grounds in support thereof. This petition must be filed within 20 days of the issuance of the Environmental Appeals Board's decision, and must be confined to new questions raised by the decision or final order and which the petitioner had no opportunity to argue before the Presiding Officer or the Environmental Appeals Board, unless otherwise specified by the Environmental Appeals Board. Subsequent to the expiration of the period for petitioning for reconsideration, the Environmental Appeals Board may, in its discretion and for good cause shown, grant the manufacturer a hearing to contest the compliance level or the penalty calculation even though such issues may have been raised in the previous proceeding. * * * The filing of a petition for reconsideration shall not operate to stay the effective date of the decision or order or to toll the running of any statutory time period affecting such decision or order unless specifically so

ordered by the Environmental Appeals Board.

(y) * * * (1) If, after the expiration of the period for taking an appeal as provided by paragraph (t) of this section, no appeal has been taken from the Presiding Officer's decision, and after the expiration of the period for review by the Environmental Appeals Board on its own motion as provided for by paragraph (u) of this section, the Environmental Appeals Board does not move to review such decision, the hearing will be deemed to have ended at the expiration of all periods allowed for such appeal and review.

(2) If an appeal of the Presiding Officer's decision is taken pursuant to paragraph (t) of this section, or if, in the absence of such appeal the Environmental Appeals Board moves to review the decision of the Presiding Officer pursuant to paragraph (u) of this section, the hearing will be deemed to have ended upon issuance of a final decision by the Environmental Appeals Board.

(z) * * * (1) * * * Such officer shall be responsible for filing in the court the record on which the order of the Environmental Appeals Board is based.

7. Section 86.1116-87 is amended by revising paragraph (d) to read as follows:

§ 86.1116-87 Treatment of confidential information.

(d) If a claim is made that some or all of the information submitted pursuant to this subpart is entitled to confidential treatment, the information covered by that confidentiality claim will be disclosed by the Environmental Appeals Board only to the extent and by means of the procedures set forth in part 2, subpart B, of this chapter.

PART 114—CIVIL PENALTIES FOR VIOLATION OF OIL POLLUTION PREVENTION REGULATIONS

1. The authority citation for part 114 continues to read as follows:

Authority: Secs. 311(j), 501(a), Pub. L. 92-500, 86 Stat. 868, 885 (33 U.S.C. 1321(j), 1361(a)).

2. Section 114.10 is amended by revising the last sentence to read as follows:

§ 114.10 Decision.

* * * The decision of the Presiding Officer shall become the final decision of the Environmental Protection Agency unless within fifteen (15) days from the

date of receipt of such decision, the person assessed the penalty appeals the decision to the Environmental Appeals Board, or unless the Environmental Appeals Board shall have stayed the effectiveness of the decision pending review.

3. Section 114.11 is amended by removing paragraph (c), redesignating paragraph (b) as new paragraph (c), redesignating paragraph (a) as new paragraph (b), adding a new paragraph (a), revising newly redesignated paragraphs (b) and (c)(4) and paragraph (d) to read as follows:

§ 114.11 Appeal to the Environmental Appeals Board.

(a) The Administrator delegates authority to the Environmental Appeals Board (which is described in § 1.25 of this title) to issue final decisions in appeals filed under this part. An appeal directed to the Administrator, rather than to the Environmental Appeals Board, will not be considered. This delegation does not preclude the Environmental Appeals Board from referring an appeal or a motion filed under this part 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, all parties shall be so notified and the rules in this part referring to the Environmental Appeals Board shall be interpreted as referring to the Administrator.

(b) The person assessed a penalty in the Presiding Officer's determination shall have the right to appeal an adverse decision to the Environmental Appeals Board upon filing a written Notice of Appeal in the form required by paragraph (c) of this section within fifteen (15) days of the date of the receipt of the Presiding Officer's decision.

(c) * * * (4) Contain a concise statement setting forth the action which the person proposes that the Environmental Appeals Board take.

(d) The Environmental Appeals Board, after a Notice of Appeal in proper form has been filed, shall render a decision with respect to the appeal promptly. In rendering its decision, the Environmental Appeals Board may adopt, modify, or set aside the decision of the Presiding Officer in any respect and shall include in its decision a concise statement of the basis therefor. The decision of the Environmental Appeals Board on appeal shall be effective when rendered.

PART 123—STATE PROGRAM REQUIREMENTS

1. The authority citation for part 123 continues to read as follows:

Authority: Clean Water Act, 33 U.S.C. 1251 *et seq.*

2. Section 123.64 is amended by revising paragraph (b)(3)(ii)(B) to read as follows:

§ 123.64 Procedures for withdrawal of State programs.

(b) * * *

(3)(ii) * * *

(B) *Ex parte discussion of proceedings.* At no time after the issuance of the order commencing proceedings shall the Administrator, the Regional Administrator, the Regional Judicial Officer, the Presiding Officer, or any other person who is likely to advise these officials in the decision on the case, 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 Regional Judicial Officer, 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.

PART 124—PROCEDURES FOR DECISIONMAKING

1. The authority citation for part 124 continues to read as follows:

Authority: Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.*; Safe Drinking Water Act, 42 U.S.C. 300(f) *et seq.*; Clean Water Act, 33 U.S.C. 1251 *et seq.*; and Clean Air Act, 42 U.S.C. 1857 *et seq.*

2. Section 124.2 is amended by adding a definition of "Environmental Appeals Board" in alphabetical order to read as follows:

§ 124.2 Definitions.

Environmental Appeals Board shall mean the Board within the Agency described in § 1.25(e) of this title. The Administrator delegates authority to the Environmental Appeals Board to issue final decisions in RCRA, PSD, or UIC

permit appeals filed under this subpart. An appeal directed to the Administrator, rather than to the Environmental Appeals Board, will not be considered. This delegation does not preclude the Environmental Appeals Board from referring an appeal or a motion under this subpart 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 the rules in this subpart referring to the Environmental Appeals Board shall be interpreted as referring to the Administrator.

3. Section 124.19 is amended by revising the first sentence of the paragraph (a) introductory text, paragraphs (a)(2) and (b), the first and third sentences of paragraph (c), the paragraph (d) introductory text, paragraphs (e) and (f)(1) (i), (ii) and (iii) and by adding paragraph (g) to read as follows:

§ 124.19 Appeal of RCRA, UIC, and PSD permits.

(a) Within 30 days after a RCRA, UIC, or PSD final permit decision (or a decision under § 270.29 to deny a permit for the active life of a RCRA hazardous waste management facility or unit) has been issued under § 124.15, any person who filed comments on that draft permit or participated in the public hearing may petition the Environmental Appeals Board to review any condition of the permit decision. * * *

(2) An exercise of discretion or an important policy consideration which the Environmental Appeals Board should, in its discretion, review.

(b) The Environmental Appeals Board may also decide on its initiative to review any condition of any RCRA, UIC, or PSD permit issued under this part. The Environmental Appeals Board must act under this paragraph within 30 days of the service date of notice of the Regional Administrator's action.

(c) Within a reasonable time following the filing of the petition for review, the Environmental Appeals Board shall issue an order granting or denying the petition for review. * * * Public notice of any grant of review by the Environmental Appeals Board under paragraph (a) or (b) of this section shall be given as provided in § 124.10. * * *

(d) The Environmental Appeals Board may defer consideration of an appeal of a RCRA or UIC permit under this section until the completion of formal proceedings under subpart E or F

relating to an NPDES permit issued to the same facility or activity upon concluding that:

(e) A petition to the Environmental Appeals Board under paragraph (a) of this section is, under 5 U.S.C. 704, a prerequisite to the seeking of judicial review of the final agency action.

(f)(1) * * *

(i) When the Environmental Appeals Board issues notice to the parties that review has been denied;

(ii) When the Environmental Appeals Board issues a decision on the merits of the appeal and the decision does not include a remand of the proceedings; or

(iii) Upon the completion of remand proceedings if the proceedings are remanded, unless the Environmental Appeals Board's remand order specifically provides that appeal of the remand decision will be required to exhaust administrative remedies.

(g) Motions to reconsider a final order shall be filed within ten (10) days after service of the final order. Every such motion 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 § 124.2 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 specifically so ordered by the Environmental Appeals Board.

4. Section 124.72 is amended by removing the definition of "Judicial Officer" and by adding the definition of "Environmental Appeals Board" in alphabetical order to read as follows:

§ 124.72 Definitions.

Environmental Appeals Board shall mean the Board within the Agency described in § 1.25 of this title. The Administrator delegates authority to the Environmental Appeals Board to issue final decisions in NPDES appeals filed under this subpart. An appeal directed to the Administrator, rather than to the Environmental Appeals Board, will not be considered. This delegation does not preclude the Environmental Appeals Board from referring an appeal or a 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 the rules in this subpart referring to the Environmental Appeals Board shall be interpreted as referring to the Administrator.

5. Section 124.74 is amended by revising the third and fourth sentences of the explanatory note at the end of paragraph (b)(1) to read as follows:

§ 124.74 Request for evidentiary hearing.
* * * * *

(b)(1) * * *

Note: * * * However, on review of the denial the Environmental Appeals Board is authorized by § 124.91(a)(1) to review policy or legal conclusions of the Regional Administrator. EPA is requiring an appeal to the Environmental Appeals Board even of purely legal issues involved in a permit decision to ensure that the Environmental Appeals Board will have an opportunity to review any permit before it will be final and subject to judicial review.
* * * * *

6. Section 124.75 is amended by revising the second sentence of paragraph (b) to read as follows:

§ 124.75 Decision on request for a hearing.
* * * * *

(b) * * * That denial is subject to review by the Environmental Appeals Board under § 124.91.

7. Section 124.78 is amended by revising the first sentence of paragraph (a)(2) to read as follows:

§ 124.78 Ex parte communications.

(a) * * *

(2) *Decisional body* means any Agency employee who is or may reasonably be expected to be involved in the decisional process of the proceeding including the Administrator, the members of the Environmental Appeals Board, the Presiding Officer, the Regional Administrator (if he or she does not designate himself or herself as a member of the Agency trial staff), and any of their staff participating in the decisional process. * * *

8. Section 124.89 is amended by revising paragraphs (b)(1) and (b)(2) to read as follows:

§ 124.89 Decisions.
* * * * *

(b) * * *

(1) A party files a petition for review by the Environmental Appeals Board pursuant to § 124.91; or

(2) The Environmental Appeals Board *sua sponte* files a notice that it will review the decision pursuant to § 124.91.

9. Section 124.90 is amended by revising the first and second sentences of paragraph (a), the paragraph (b) introductory text, all but the next to the last sentence of paragraph (c), and paragraph (d) to read as follows:

§ 124.90 Interlocutory appeal.

(a) Except as provided in this section, appeals to the Environmental Appeals Board may be taken only under § 124.91. Appeals from orders or rulings may be taken under this section only if the Presiding Officer, upon motion of a party, certifies those orders or rulings to the Environmental Appeals Board for appeal on the record. * * *

(b) The Presiding Officer may certify an order or ruling for appeal to the Environmental Appeals Board if:
* * * * *

(c) If the Environmental Appeals Board decides that certification was improperly granted, it shall decline to hear the appeal. The Environmental Appeals Board shall accept or decline all interlocutory appeals within 30 days of their submission; if the Environmental Appeals Board takes no action within that time, the appeal shall be automatically dismissed. When the Presiding Officer declines to certify an order or ruling to the Environmental Appeals Board for an interlocutory appeal, it may be reviewed by the Environmental Appeals Board only upon appeal from the initial decision of the Presiding Officer, except when the Environmental Appeals Board determines, upon motion of a party and in exceptional circumstances, that to delay review would not be in the public interest. Such motion shall be made within 5 days after receipt of notification that the Presiding Officer has refused to certify an order or ruling for interlocutory appeal to the Environmental Appeals Board. * * * The Environmental Appeals Board may, however, allow briefs and oral argument.

(d) In exceptional circumstances, the Presiding Officer may stay the proceeding pending a decision by the Environmental Appeals Board upon an order or ruling certified by the Presiding Officer for an interlocutory appeal, or upon the denial of such certification by the Presiding Officer.
* * * * *

10. Section 124.91 is amended by revising the first sentence of the paragraph (a)(1) introductory text, paragraphs (a)(1)(ii), (a)(3), (b), (c)(1), (c)(2), (d), (e), (f), the first, fourth, and

fifth sentences of paragraph (g), paragraph (h), and by adding a new paragraph (i) to read as follows:

§ 124.91 Appeal to the Environmental Appeals Board.

(a)(1) Within 30 days after service of an initial decision, or a denial in whole or in part of a request for an evidentiary hearing, any party or requester, as the case may be, may appeal any matter set forth in the initial decision or denial, or any adverse order or ruling to which the party objected during the hearing, by filing with the Environmental Appeals Board notice of appeal and petition for review. * * * * *

(ii) An exercise of discretion or policy which is important and which the Environmental Appeals Board should review.
* * * * *

(3) Policy decisions made or legal conclusions drawn in the course of denying a request for an evidentiary hearing may be reviewed and changed by the Environmental Appeals Board in an appeal under this section.

(b) Within 30 days of an initial decision or denial of a request for an evidentiary hearing, the Environmental Appeals Board may, *sua sponte*, review such decision. Within 7 days after the Environmental Appeals Board has decided under this section to review an initial decision or the denial of a request for an evidentiary hearing, notice of that decision shall be served by mail upon all affected parties and the Regional Administrator.

(c)(1) Within a reasonable time following the filing of the petition for review, the Environmental Appeals Board shall issue an order either granting or denying the petition for review. When the Environmental Appeals Board grants a petition for review or determines under paragraph (b) of this section to review a decision, the Environmental Appeals Board may notify the parties that only certain issues shall be briefed.

(2) Upon granting a petition for review, the Regional Hearing Clerk shall promptly forward a copy of the record to the Environmental Appeals Board and shall retain a complete duplicate copy of the record in the Regional Office.

(d) Notwithstanding the grant of a petition for review or a determination under paragraph (b) of this section to review a decision, the Environmental Appeals Board may summarily affirm without opinion an initial decision or the denial of a request for an evidentiary hearing.

(e) A petition to the Environmental Appeals Board under paragraph (a) of this section for review of any initial decision or the denial of an evidentiary hearing is, under 5 U.S.C. 704, a prerequisite to the seeking of judicial review of the final decision of the Agency.

(f) If a party timely files a petition for review or if the Environmental Appeals Board *sua sponte* orders review, then, for purposes of judicial review, final Agency action on an issue occurs as follows:

(1) If the Environmental Appeals Board denies review or summarily affirms without opinion as provided in § 124.91(d), then the initial decision or denial becomes the final Agency action and occurs upon the service of notice of the Environmental Appeals Board's action.

(2) If the Environmental Appeals Board issues a decision without remanding the proceeding then the final permit, redrafted as required by the Environmental Appeals Board's original decision, shall be reissued and served upon all parties to the appeal.

(3) If the Environmental Appeals Board issues a decision remanding the proceeding, then final Agency action occurs upon completion of the remanded proceeding, including any appeals to the Environmental Appeals Board from the results of the remanded proceeding.

(g) The petitioner may file a brief in support of the petition within 21 days after the Environmental Appeals Board has granted a petition for review. * * * Any person may file an *amicus brief* for the consideration of the Environmental Appeals Board within the same time periods that govern reply briefs. If the Environmental Appeals Board determines, *sua sponte*, to review an initial Regional Administrator's decision or the denial of a request for an evidentiary hearing, the Environmental Appeals Board shall notify the parties of the schedule for filing briefs.

(h) Review by the Environmental Appeals Board of an initial decision or the denial of an evidentiary hearing shall be limited to the issues specified under paragraph (a) of this section, except that after notice to all the parties, the Environmental Appeals Board may raise and decide other matters which it considers material on the basis of the record.

(i) Motions to reconsider a final order shall be filed within ten (10) days after service of the final order. Every such motion 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 § 124.72 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 specifically so ordered by the Environmental Appeals Board.

11. Section 124.115 is amended by revising the second sentence to read as follows:

§ 124.115 Effect of denial of or absence of request for hearing.

* * * Any person whose hearing request has been denied may then appeal that recommended decision to the Environmental Appeals Board as provided in § 124.91.

12. Section 124.124 is amended by revising the last sentence to read as follows:

§ 124.124 Recommended decision.

* * * After the recommended decision has been filed, the Regional Hearing Clerk shall serve a copy of that decision on each party and upon the Environmental Appeals Board.

13. Section 124.125 is revised to read as follows:

§ 124.125 Appeal from or review of recommended decision.

Within 30 days after service of the recommended decision, any party may take exception to any matter set forth in that decision or to any adverse order or ruling of the Presiding Officer to which that party objected, and may appeal those exceptions to the Environmental Appeals Board as provided in § 124.91, except that references to the "initial decision" will mean recommended decision under § 124.124.

14. Section 124.126 is revised to read as follows:

§ 124.126 Final decision.

As soon as practicable after all appeal proceedings have been completed, the Environmental Appeals Board shall issue a final decision. The Environmental Appeals Board may consult with the Presiding Officer, members of the hearing panel, or any other EPA employee other than members of the Agency Trial Staff under § 124.78 in preparing the final decision. The Hearing Clerk shall file a copy of the decision on all parties.

15. Section 124.127 is revised to read as follows:

§ 124.127 Final decision if there is no review.

If no party appeals a recommended decision to the Environmental Appeals Board, and if the Environmental Appeals Board does not elect to review it, the recommended decision becomes the final decision of the Agency upon the expiration of the time for filing any appeals.

16. Section 124.128 is revised to read as follows:

§ 124.128 Delegation of authority; time limitations.

(a) The Administrator delegates authority to the Environmental Appeals Board (which is described in § 1.25 of this title) to issue final decisions in appeals filed under this subpart. An appeal directed to the Administrator, rather than to the Environmental Appeals Board, will not be considered. This delegation does not preclude the Environmental Appeals Board from referring an appeal or a motion filed under this subpart 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 the rules in this subpart referring to the Environmental Appeals Board shall be interpreted as referring to the Administrator.

(b) The failure of the Environmental Appeals Board, the Regional Administrator, or the Presiding Officer to do any act within the time periods specified under this part shall not waive or diminish any right, power, or authority of the United States Environmental Protection Agency.

(c) Upon a showing by any party that it has been prejudiced by a failure of the Environmental Appeals Board, the Regional Administrator, or the Presiding Officer to do any act within the time periods specified under this part, the Environmental Appeals Board, the Regional Administrator, and the Presiding Officer, as the case may be, may grant that party such relief of a procedural nature (including extension of any time for compliance or other action) as may be appropriate.

17. In appendix A to part 124 figure 1 is amended by revising 1.c.ii, 6.a, and the second sentence of 7, and by revising the second sentence of the second paragraph of 4 in Figure 2 to read as follows:

Appendix A to Part 124—Guide to Decisionmaking Under Part 124

* * * * *

Figure 1—Conventional EPA Permitting Procedures

* * * * *

1. * * *

c. * * *

ii. If the request is denied, an informal appeal to the Environmental Appeals Board is available.

* * * * *

6. * * *

a. RCRA, UIC, or PSD permits standing alone will be appealed directly to the Environmental Appeals Board under § 124.9.

* * * * *

7. * * * Procedures for appeal to the Environmental Appeals Board under § 124.19 are self-explanatory; subpart F procedures are diagrammed in Figure 2; and subpart E procedures are basically the same that would apply in any evidentiary hearing.

Figure 2—Non-Adversary Panel Procedures

* * * * *

4. * * *

* * * The recommended decision may then be appealed to the Environmental Appeals Board. See § 124.115.

* * * * *

18. The flow chart at the end of appendix A under the heading "Figure 2-Non-Adversary Panel Procedures" is revised to read as follows:

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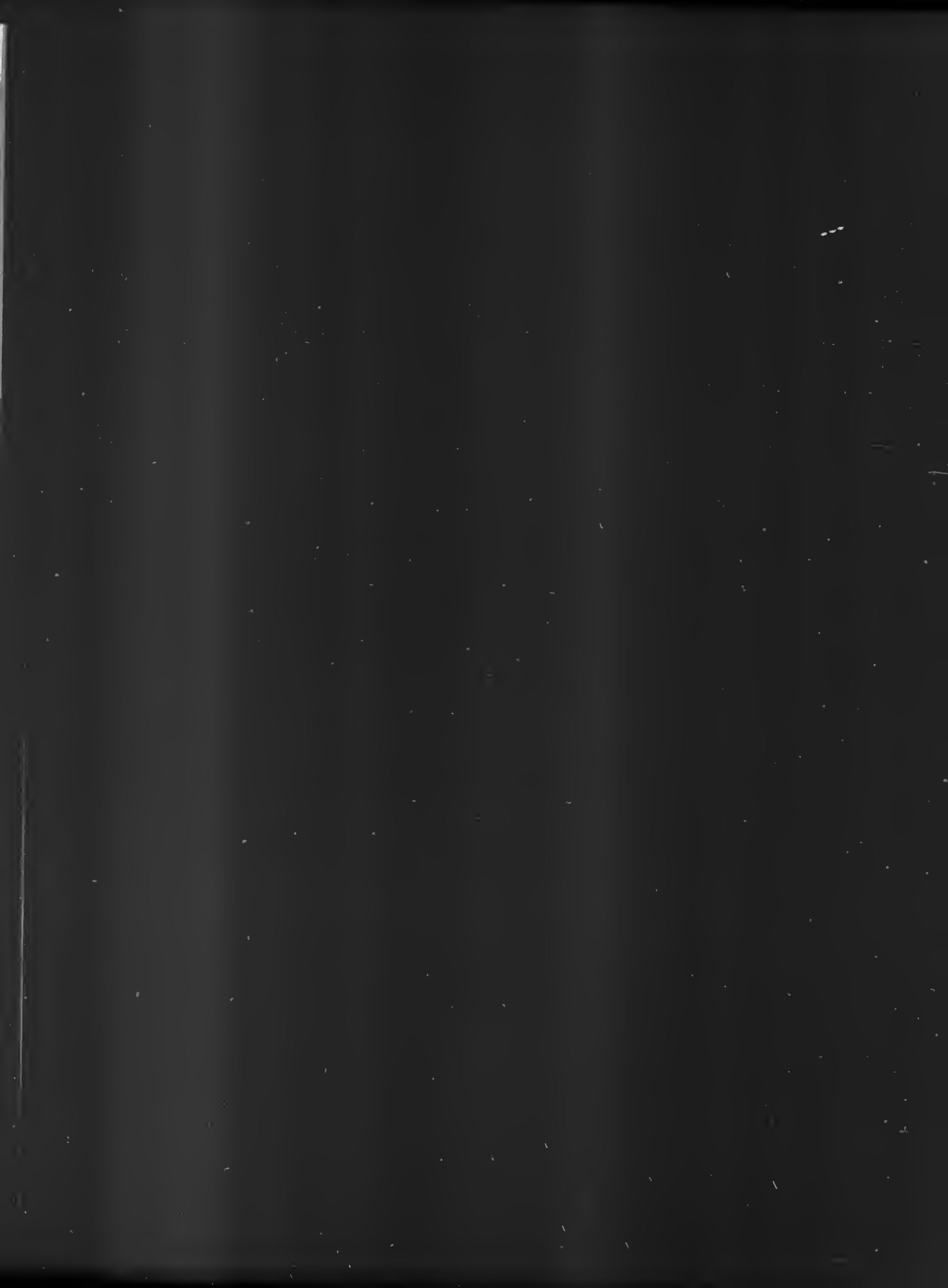
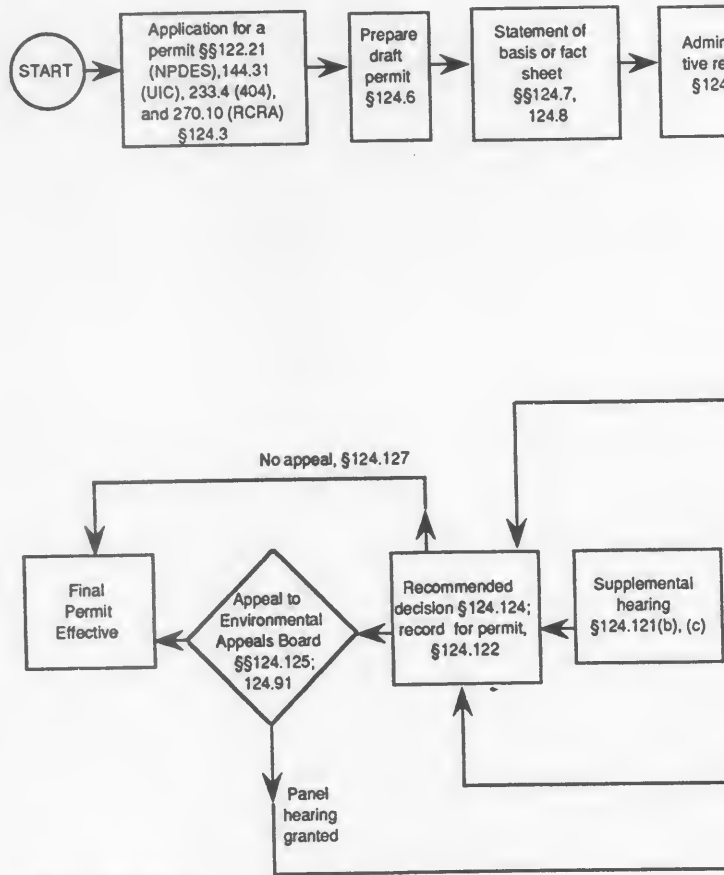
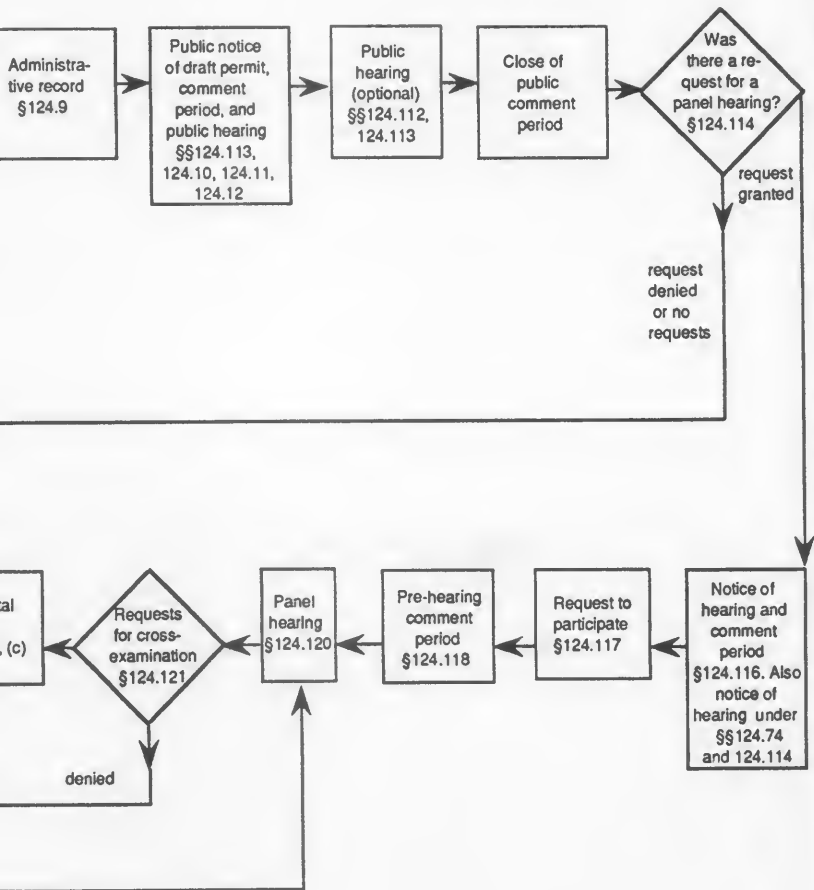


Figure 2-Non-Adversary Panel Procedures



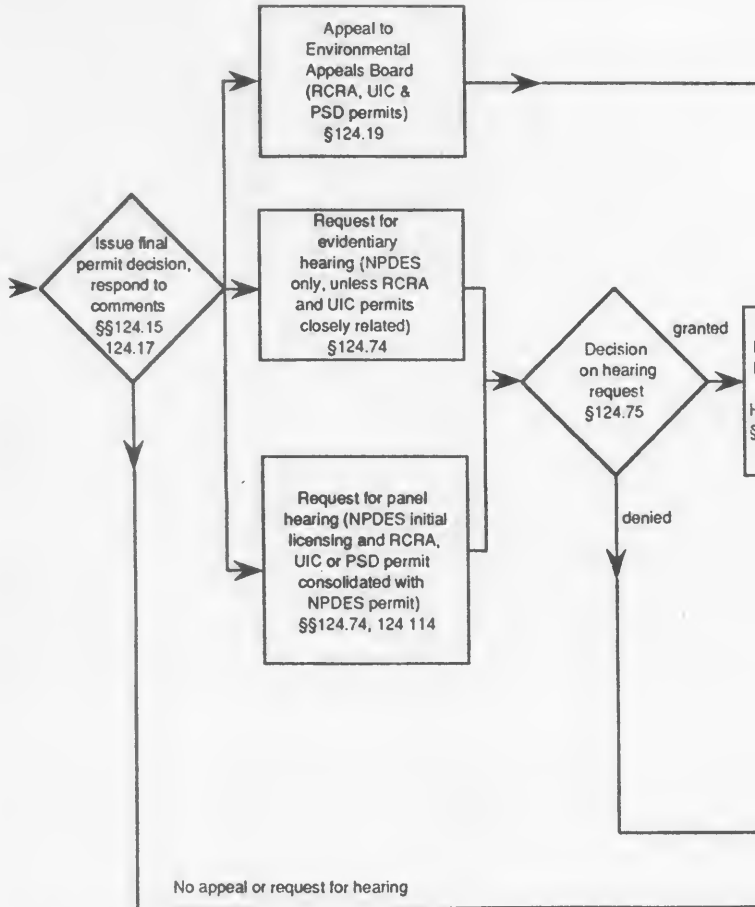
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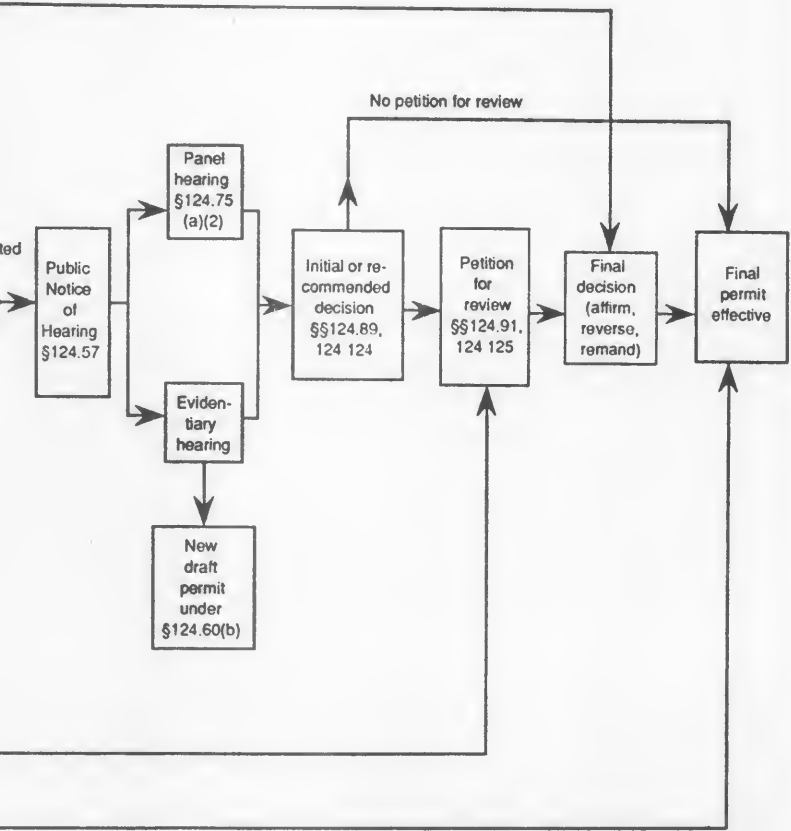


19. The flow chart at the end of appendix A under the heading "EPA Appeal Procedures" is revised to read as follows:

BILLING CODE 6560-50-M

EPA Appeal Procedures





PART 164—RULES OF PRACTICE GOVERNING HEARINGS, UNDER THE FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT, ARISING FROM REFUSALS TO REGISTER, CANCELLATIONS OF REGISTRATIONS, CHANGES OF CLASSIFICATIONS, SUSPENSIONS OF REGISTRATIONS AND OTHER HEARINGS CALLED PURSUANT TO SECTION 6 OF THE ACT

1. The authority citation for part 164 continues to read as follows:

Authority: 7 U.S.C. 136d.

2. Section 164.2 is amended by revising paragraph (c), redesignating paragraphs (g) through (j) as paragraphs (h) through (k) and by adding a new paragraph (g) to read as follows:

§ 164.2 Definitions

(c) The term *Administrator* means the Administrator of the United States Environmental Protection Agency.

(g) *Environmental Appeals Board* shall mean the Board within the Agency described in § 1.25 of this title. The Administrator delegates authority to the Environmental Appeals Board to issue final decisions in appeals filed under subparts B and C of this part. An appeal directed to the Administrator, rather than to the Environmental Appeals Board, will not be considered. This delegation does not preclude the Environmental Appeals Board from referring an appeal or a motion under subparts B and C 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, all of the parties shall be so notified and the rules in subparts B and C referring to the Environmental Appeals Board shall be interpreted as referring to the Administrator.

3. Section 164.4 is amended by revising paragraphs (a), (c), and (d) to read as follows:

§ 164.4 Arrangements for examining Agency records, transcripts, orders, and decisions.

(a) Reporting of orders, decisions, and other signed documents. All orders, decisions, or other signed documents required by the rules in this part, whether issued by the Environmental Appeals Board or the Presiding Officer shall be made available to the public.

(c) Whenever any information or data is required to be produced or examined

and any party to the proceeding claims that such information is a trade secret or commercial or financial information, other than information relating to the formulas of a pesticide, the Administrative Law Judge, the Presiding Officer, or the Environmental Appeals Board may require production or testimony *in camera* and sealed to all but the parties.

(d) All orders, decisions, or other documents made or signed by the Administrative Law Judge, the Presiding Officer, or the Environmental Appeals Board shall be filed with the hearing clerk. The hearing clerk shall immediately serve all parties with a copy of such order, decision, or other document.

4. Section 164.6 is amended by revising the first sentence after the hearing of paragraph (b) to read as follows:

§ 164.6 Time.

(b) * * * When by these rules or by order of the Administrative Law Judge, the Presiding Officer, or the Environmental Appeals Board, an act is required or allowed to be done at or within a specified time, the Administrative Law Judge (before his initial decision is filed), or the Presiding Officer (before his recommended decision is filed), or the Environmental Appeals Board (after the Administrative Law Judge's initial decision or the presiding officer's recommended decision is filed), for cause shown may at any time in their discretion: with or without motion or notice, order the period enlarged if request therefor, which may be made *ex parte*, is made before the expiration of the period originally prescribed or as extended by a previous order; or on motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect. * * *

5. Section 164.7 is revised to read as follows:

§ 164.7 Ex parte discussion of proceeding.

At no stage of a proceeding shall the Administrator, the members of the Environmental Appeals Board, the Presiding Officer, or the Administrative Law Judge discuss *ex parte* the merits of the proceeding with any party or with any person who has been connected with the preparation or presentation of the proceeding as an advocate, or in an investigative or expert capacity, or with any representative of such person, *Provided*, That the Environmental Appeals Board, the Presiding Officer, or the Administrative Law Judge may

discuss the merits of the case with any such person if all parties to the proceeding, or their representatives, have been given reasonable notice and opportunity to be present. Any memorandum or other communication addressed to the Administrator, the Environmental Appeals Board, the Presiding Officer, or the Administrative Law Judge during the pendency of the proceeding, and relating to the merits thereof, by or on behalf of any party, shall be regarded as an argument made in the proceeding. The Administrator, the Environmental Appeals Board, the Presiding Officer, or the Administrative Law Judge shall cause any such communication to be filed with the hearing clerk and served upon all other parties to the proceeding who will be given the opportunity to file an answer thereto.

6. Section 164.20 is amended by revising the last sentence of paragraph (c) to read as follows:

§ 164.20 Commencement of proceeding.

(c) * * * The Chief Administrative Law Judge shall refer the proceeding to himself or another Administrative Law Judge who shall thereafter be in charge of all further matters concerning the proceedings, except as otherwise provided for by order of the Chief Administrative Law Judge, the Administrator, or the Environmental Appeals Board.

7. Section 164.31 is amended by revising the last sentence of paragraph (c) to read as follows:

§ 164.31 Intervention.

(c) * * * If leave is denied, the movant may request that the ruling be certified to the Environmental Appeals Board, pursuant to § 164.100 for a speedy appeal.

8. Section 164.40 is amended by revising paragraph (e) to read as follows:

§ 164.40 Qualifications and duties of Administrative Law Judge.

(e) *Absence or change of the Administrative Law Judge.* In the case of the absence or unavailability of the Administrative Law Judge, or his inability to act, or his removal by disqualification or withdrawal, the powers and duties to be performed by him under this part in connection with a hearing assigned to him may, unless otherwise directed by the Administrator, be assigned to another Administrative

Law Judge so designated to act by the Chief Administrative Law Judge, the Administrator or the Environmental Appeals Board.

9. Section 164.60 is amended by revising the third and fourth sentences of paragraph (c) to read as follows:

§ 164.60 Motions.

* * * * *

(c) * * * The Environmental Appeals Board shall rule upon all motions filed after the filing of the initial or accelerated decision. Oral argument of motions will be permitted only if the Administrative Law Judge or the Environmental Appeals Board deems it necessary.

10. Section 164.81 is amended by revising the last sentence of paragraph (f) to read as follows:

§ 164.81 Evidence.

* * * * *

(f) * * * In the event the Environmental Appeals Board decides that the Administrative Law Judge's ruling in excluding the evidence was erroneous and prejudicial, the hearings may be reopened to permit the taking of such evidence, or where appropriate, the Environmental Appeals Board may evaluate the evidence and proceed to a final decision.

11. Section 164.90 is amended by revising the second and the third sentences of paragraph (b) to read as follows:

§ 164.90 Initial Decision.

* * * * *

(b) * * * A copy of the initial decision shall be served upon each of the parties, and the hearing clerk shall immediately transmit a copy to the Environmental Appeals Board. The initial decision shall become the decision of the Environmental Appeals Board without further proceedings unless an appeal is taken from it or the Environmental Appeals Board orders review of it, pursuant to § 164.101.

12. Section 164.100 is revised to read as follows:

§ 164.100 Appeals from or review of interlocutory orders or rulings.

Except as provided herein, appeals as a matter of right shall lie to the Environmental Appeals Board only from an initial or accelerated decision of the Administrative Law Judge. Appeals from other orders or rulings shall, except as provided in this section, lie only if the Administrative Law Judge certifies such orders or rulings for appeal, or otherwise as provided. The Administrative Law Judge may certify an order or ruling for appeal to the

Environmental Appeals Board when: (a) The order or ruling involves an important question of law or policy about which there is substantial ground for difference of opinion; and (b) either (1) an immediate appeal from the order and ruling will materially advance the ultimate termination of the proceeding or (2) review after the final judgment is issued will be inadequate or ineffective. The Administrative Law Judge shall certify orders or rulings for appeal only upon the request of a party. If the Environmental Appeals Board determines that certification was improvidently granted, or takes no action within thirty (30) days of the certification, the appeal shall be deemed dismissed. When an order or ruling is not certified by the Administrative Law Judge, it shall be reviewed by the Environmental Appeals Board only upon appeal from the initial or accelerated decision except when the Environmental Appeals Board determines, upon request of a party and in exceptional circumstances, that delaying review would be deleterious to vital public or private interests. Except in extraordinary circumstances proceedings will not be stayed pending an interlocutory appeal; where a stay is granted, a stay of more than 30 days must be approved by the Environmental Appeals Board. Ordinarily, the interlocutory appeal will be decided on the basis of the submission made to the Administrative Law Judge, but the Environmental Appeals Board may allow further briefs and oral argument.

13. Section 164.101 is amended by revising the first sentence of paragraph (a)(1), the second and third sentences of paragraph (b), and paragraph (c) to read as follows:

§ 164.101 Appeals from or review of initial decisions.

(a) * * * (1) Within 20 days after the filing of the Administrative Law Judge's initial decision, each party may take exception to any matter set forth in such decision or to any adverse order or ruling to which he objected during the hearing and may appeal such exceptions to the Environmental Appeals Board for decision by filing them in writing with the hearing clerk, including a section containing proposed findings of fact, conclusions, orders, or rulings. * * *

(b) * * * Within 10 days after said notification, the Environmental Appeals Board shall issue an order either declining review of the initial decision or expressing its intent to review said initial decision. Such order may include a statement of issues to be briefed by the parties and a time schedule

concerning service and filing of briefs adequate to allow the Environmental Appeals Board to issue a final order within 90 days from the close of the hearing.

(c) *Argument before the Environmental Appeals Board.* (1) A party, if he files exceptions and a brief, shall state in writing whether he desires to make an oral argument thereon before the Environmental Appeals Board; otherwise, he shall be deemed to have waived such oral argument. The Environmental Appeals Board shall, however, on its own initiative, have the right to set an appeal for oral argument.

(2) If the Environmental Appeals Board determines that additional exceptions should be argued, counsel for the parties shall be given reasonable written notice of such determination so as to permit preparation of adequate argument on all of the exceptions to be argued.

14. Section 164.102 is amended by revising paragraph (c) to read as follows:

§ 164.102 Appeals from accelerated decisions.

* * * * *

(c) Ordinarily, the appeal from an accelerated decision will be decided on the basis of the submission of briefs, but the Environmental Appeals Board may allow additional briefs and oral argument.

15. Section 164.103 is revised to read as follows:

§ 164.103 Final decision or order on appeal or review.

Within 90 days after the close of the hearing or within 90 days from the filing of an accelerated decision, unless otherwise stipulated by the parties, the Environmental Appeals Board shall, on appeal or review from an initial or accelerated order of the Administrative Law Judge, issue its final decision and order, including its rulings on any exceptions filed by the parties; such final order may accept or reject all or part of the initial or accelerated decision of the Administrative Law Judge even if acceptable to the parties.

16. Section 164.110 is amended by revising the first sentence of paragraph (a) and paragraph (c) to read as follows:

§ 164.110 Motion for reopening hearings; for rehearing; for reargument of any proceeding; or for reconsideration of order.

(a) * * * A motion for reopening the hearing to take further evidence, or for rehearing or reargument of any proceeding or for reconsideration of the order, must be made by motion to the

Environmental Appeals Board filed with the hearing clerk. * * *

(c) *Motions to rehear or reargue proceedings, or to reconsider final orders.* A motion to rehear or reargue the proceeding or to reconsider the final order shall be filed within 10 days after the date of service of the final order. Every such motion must state specifically the matters claimed to have been erroneously decided, and alleged errors must be briefly stated. Motions to rehear or reargue proceedings or to reconsider final orders shall be directed to, and heard by, the Environmental Appeals Board. Motions under this section directed to the Administrator will not be considered, except in cases that the Environmental Appeals Board has referred to the Administrator pursuant to § 164.2(g) 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 specifically so ordered by the Environmental Appeals Board.

17. Section 164.111 is amended by revising all but the first sentence to read as follows:

§ 164.111 Procedure for disposition of motions.

* * * As soon as practicable thereafter, the Environmental Appeals Board shall announce its decision whether to grant or to deny the motion. Unless the Environmental Appeals Board shall determine otherwise, operation of the order shall not be stayed pending the decision to grant or to deny the motion. In the event that any such motion is granted by the Environmental Appeals Board, the applicable rules of practice, as set out elsewhere herein, shall be followed.

18. Section 164.121 is amended by revising paragraphs (j)(3) and (j)(4) to read as follows:

§ 164.121 Expedited hearing.

(j) * * * (3) Within 10 days of the conclusion of the presentation of evidence the Presiding Officer shall submit to the Environmental Appeals Board his recommended findings and conclusions, together with the record.

(4) Within 12 days of the conclusion of the presentation of evidence the parties shall submit to the Environmental Appeals Board their objections to the Presiding Officer's recommended findings and conclusions and written briefs in support thereof.

19. Section 164.122 is amended by revising the first sentence of paragraph

(a) and the first sentence of paragraph (b) to read as follows:

§ 164.122 Final order and order of suspension.

(a) * * * Within 7 days of receipt of the record and of the Presiding Officer's recommended findings and conclusions, the Environmental Appeals Board shall issue a final decision and order. * * *

(b) * * * No final order of suspension shall be issued unless the Environmental Appeals Board has issued or at the same time issues a notice of its intention to cancel the registration or change the classification of the pesticide. * * *

20. Section 164.123 is amended by revising paragraph (a) and the first sentence of paragraph (b) to read as follows:

164.123 Emergency order.

(a) Whenever the Environmental Appeals Board determines that an emergency exists that does not permit him to hold a hearing before suspension, the Environmental Appeals Board may issue a suspension order in advance of notification to the registrant.

(b) The Environmental Appeals Board shall immediately notify the registrant of the suspension order. * * *

PART 209—RULES OF PRACTICE GOVERNING PROCEEDINGS UNDER THE NOISE CONTROL ACT OF 1972

1. The authority citation for part 209 continues to read as follows:

Authority: Sec. 11, Noise Control Act of 1972 (42 U.S.C. 4910) and additional authority as specified.

2. Section 209.3 is amended by revising paragraph (k) to read as follows:

§ 209.3 Definitions.

(k) "Environmental Appeals Board" means the Board within the Agency described in § 1.25 of this title. The Administrator delegates authority to the Environmental Appeals Board to issue final decisions in appeals filed under this part. An appeal directed to the Administrator, rather than to the Environmental Appeals Board, will not be considered. This delegation of authority to the Environmental Appeals Board does not preclude the Environmental Appeals Board from referring an appeal or a motion filed under this part to the Administrator for decision when the Environmental Appeals Board, in its discretion, deems it appropriate to do so. When an appeal or motion is referred to the Administrator, all parties shall be so notified and the rules in this part

referring to the Environmental Appeals Board shall be interpreted as referring to the Administrator.

3. Section 209.14 is amended by revising paragraph (b) and the second and third sentences of paragraph (c) to read as follows:

§ 209.14 Motions.

(b) Within 10 days after service of any motion filed under this section or within such other time as may be fixed by the Environmental Appeals Board or the administrative law judge, as appropriate, any party may serve and file an answer to the motion. The movant shall, by leave of the Environmental Appeals Board or the administrative law judge, as appropriate, serve and file reply papers within the time set by the request.

(c) * * * The Environmental Appeals Board shall rule upon all motions filed before the appointment of the administrative law judge and all motions filed after the filing of the decision of the administrative law judge or accelerated decision. Oral argument of motions will be permitted only if the administrative law judge or the Environmental Appeals Board, as appropriate, deems it necessary.

4. Section 209.17 is amended by revising the first sentence to read as follows:

§ 209.17 Amicus curiae.

Persons not parties to the proceedings who wish to file briefs may do so by leave of the Environmental Appeals Board or the administrative law judge, as appropriate, granted on motion. * * *

5. Section 209.19 is amended by revising paragraph (b) and the first and second sentences of paragraph (c) to read as follows:

§ 209.19 Informal settlement and consent agreement.

(b) *Consent agreement.* A written consent agreement signed by the complainant and respondent shall be prepared by the complainant and forwarded to the Environmental Appeals Board whenever settlement or compromise is proposed. A copy shall be served on all other parties to the proceeding, no later than the date the consent agreement is forwarded to the Environmental Appeals Board. The consent agreement shall state that, for the purpose of this proceeding, respondent (1) admits the jurisdictional allegations of the complaint; (2) admits the facts as stipulated in the consent

agreement or neither admits nor denies specific factual allegations contained in the complaint; and (3) consents to the issuance of a given remedial order. The consent agreement shall include (i) the terms of the agreement; (ii) any appropriate conclusions regarding material issues of law, fact and/or discretion as well as reasons therefor; and (iii) the Environmental Appeals Board's proposed final order. The administrative law judge does not have jurisdiction over a consent agreement.

(c) * * * No settlement or consent agreement shall be dispositive of any action pending under section 11(d) of the act without a final order of the Environmental Appeals Board. In preparing a final order, the Environmental Appeals Board may require that any or all of the parties to the settlement or other parties appear before it to answer inquiries relating to the proposed consent agreement. * * *

6. Section 209.24 is amended by revising the last sentence of paragraph (a) and the last sentence of paragraph (c) to read as follows:

§ 209.24 Default order.

(a) * * * The remedial order proposed is binding on respondent without further proceedings upon the issuance by the Environmental Appeals Board of a final order issued upon default.

(c) * * * An order issued by the Environmental Appeals Board upon default of respondent shall constitute a final order in accordance with the terms of § 209.33.

7. Section 209.27 is amended by revising paragraphs (a), (c), and (d) to read as follows:

§ 209.27 Interlocutory appeal.

(a) An interlocutory appeal may be taken to the Environmental Appeals Board either (1) with the consent of the administrative law judge where he or she certifies on the record or in writing that the allowance of an interlocutory appeal is clearly necessary to prevent exceptional delay, expense or prejudice to any party or substantial detriment to the public interest, or (2) absent the consent of the administrative law judge, by permission of the Environmental Appeals Board.

(c) Applications to file such appeals absent consent of the administrative law judge shall be filed with the Environmental Appeals Board within 5 days of the denial of any appeal by the administrative law judge.

(d) The Environmental Appeals Board will consider the merits of the appeal on the application and answers. No oral argument will be heard nor other briefs filed unless the Environmental Appeals Board directs otherwise.

8. Section 209.30 is amended by revising paragraph (b) to read as follows:

§ 209.30 Decision of the administrative law judge.

(b) The administrative law judge's decision shall become the decision of the Environmental Appeals Board (1) when no notice of intention to appeal as described in § 209.31 is filed, 30 days after its issuance, unless in the interim the Environmental Appeals Board shall have taken action to review or stay the effective date of the decision; or (2) when a notice of intention to appeal is filed but the appeal is not perfected as required by § 209.31, 5 days after the period allowed for perfection of an appeal has expired unless within that 5 day period, the Environmental Appeals Board has taken action to review or stay the effective date of the decision.

9. Section 209.31 is amended by revising paragraphs (a), (c)(4), (d), and (e) to read as follows:

§ 209.31 Appeal from the decision of the administrative law judge.

(a) Any party to a proceeding may appeal the administrative law judge's decision to the Environmental Appeals Board: Provided, That within 10 days after the administrative law judge's decision is issued, the party files a notice of intention to appeal, and within 30 days of the decision the party files an appeal brief.

(c) * * *
(4) A proposed form of rule or order for the Environmental Appeals Board's consideration if different from the rule or order contained in the administrative law judge's decision.

(d) Briefs shall not exceed 40 pages without leave of the Environmental Appeals Board.

(e) The Environmental Appeals Board may allow oral argument in its discretion:

10. Section 209.32 is revised to read as follows:

§ 209.32 Review of the administrative law judge's decision in absence of appeal.

(a) If, after the expiration of the period for taking an appeal under § 209.31, no notice of intention to appeal the decision of the administrative law judge

has been filed, or if filed, not perfected, the hearing clerk shall so notify the Environmental Appeals Board.

(b) The Environmental Appeals Board, upon receipt of notice from the hearing clerk that no notice of intention to appeal has been filed, or if filed, not perfected pursuant to § 209.31, may, on its own motion, within the time limits specified in § 209.30(b), review the decision of the administrative law judge. Notice of the Environmental Appeals Board's intention to review the decision of the administrative law judge shall be given to all parties and shall set forth the scope of such review and the issues which shall be considered and shall make provision for filing of briefs.

11. Section 209.33 is revised to read as follows:

§ 209.33 Decision on appeal or review.

(a) Upon appeal from or review of the administrative law judge's decision, the Environmental Appeals Board shall consider such parts of the record as are cited or as may be necessary to resolve the issues presented and, in addition shall to the extent necessary or desirable exercise all the powers which the Environmental Appeals Board could have exercised if it had presided at the hearing.

(b) The Environmental Appeals Board shall render a decision as expeditiously as possible. The Environmental Appeals Board shall adopt, modify, or set aside the findings, conclusions, and rule or order contained in the decision of the administrative law judge and shall set forth in its decision a statement of the reasons or bases for its action. The Environmental Appeals Board's decision shall be the final order in the proceeding.

(c) In those cases where the Environmental Appeals Board determines that it should have further information or additional views of the parties as to the form and content of the rule or order to be issued, the Environmental Appeals Board, in its discretion, may withhold final action pending the receipt of such additional information or views, or may remand the case to the administrative law judge.

12. Section 209.34 is revised to read as follows:

§ 209.34 Reconsideration.

Within five (5) days after service of the Environmental Appeals Board's decision, any party may file a petition for reconsideration of such decision, setting forth the relief desired and the grounds in support thereof. Petitions for reconsideration under this provision shall be directed to, and decided by, the

Environmental Appeals Board. Petitions 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's pursuant to § 209.3(k) and in which the Administrator has issued the final order. Any petition filed under this subsection must be confined to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the administrative law judge or the Environmental Appeals Board. Any party desiring to oppose a petition shall file an answer thereto within five (5) days after service of the petition. The filing of a petition for reconsideration shall not operate to stay the effective date of the decision or order.

13. Section 209.35 is revised to read as follows:

§ 209.35 Conclusion of hearing.

(a) If no appeal has been taken from the administrative law judge's decision before the period for taking an appeal under § 209.31 has expired, and the period for review by the Environmental Appeals Board on its own motion under § 209.30 has expired, and the Environmental Appeals Board does not move to review such decision, the hearing will be deemed to have ended at the expiration of all periods allowed for such appeal and review.

(b) If an appeal of the administrative law judge's decision is taken under § 209.31, or if, in the absence of such appeal, the Environmental Appeals Board moves to review the decision of the administrative law judge under § 209.32, the hearing will be deemed to have ended upon the rendering of a final decision by the Environmental Appeals Board.

14. Section 209.36 is amended by revising the second sentence of paragraph (a) to read as follows:

§ 209.36 Judicial review.

(a) * * * That officer shall be responsible for filing in the court the record on which the order of the Environmental Appeals Board is based.

PART 222—ACTION ON OCEAN DUMPING PERMIT APPLICATIONS UNDER SECTION 102 OF THE ACT

1. The authority citation for part 222 continues to read as follows:

Authority: 33 U.S.C. 1412 and 1418.

2. Section 222.12 is amended by revising paragraphs (a), (b)(4), (c), (e), and (f) to read as follows:

§ 222.12 Appeal to the Environmental Appeals Board.

(a)(1) The Administrator delegates to the Environmental Appeals Board authority to issue final decisions in appeals filed under this part. An appeal directed to the Administrator, rather than to the Environmental Appeals Board, will not be considered. This delegation of authority to the Environmental Appeals Board does not preclude the Environmental Appeals Board from referring an appeal or a motion filed under this part to the Administrator for decision when the Environmental Appeals Board, in its discretion, deems it appropriate to do so. When an appeal or motion to referred to the Administrator, all parties shall be so notified and the rules in this section referring to the Environmental Appeals Board shall be interpreted as referring to the Administrator.

(2) Within 10 days following receipt of the determination of the Regional Administrator pursuant to paragraph (f)(2) of § 222.11, any party to an adjudicatory hearing held in accordance with § 222.11 may appeal such determination to the Environmental Appeals Board by filing a written notice of appeal, or the Environmental Appeals Board may, on its own initiative, review any prior determination.

(b) * * *
(4) A concise statement setting forth the action which the person proposes that the Environmental Appeals Board take; and

(c) The effective date of any determination made pursuant to paragraph (f)(2) of § 222.11 may be stayed by the Environmental Appeals Board pending final determination by it pursuant to this section upon the filing of a notice of appeal which satisfies the requirements of paragraph (b) of this section or upon initiation by the Environmental Appeals Board of review of any determination in the absence of such notice of appeal.

(e) Within 45 days following the filing of a notice of appeal in accordance with this section, the Environmental Appeals Board shall render its final determination with respect to all issues raised in the appeal to the Environmental Appeals Board and shall affirm, reverse, or modify the previous determination and briefly state the basis for its determination.

(f) In accordance with 5 U.S.C. section 704, the filing of an appeal to the Environmental Appeals Board pursuant to this section shall be a prerequisite to judicial review of any determination to issue or impose conditions upon any permit, or to modify, revoke or suspend any permit, or to take any other enforcement action, under this subchapter H.

PART 223—CONTENTS OF PERMITS; REVISION, REVOCATION OR LIMITATION OF OCEAN DUMPING PERMITS UNDER SECTION 104(d) OF THE ACT

1. The authority citation for part 223 continues to read as follows:

Authority: Secs. 102, 104, 107, 108, Marine Protection Research, and Sanctuaries Act of 1972, as amended (33 U.S.C. 1412, 1414, 1417, 1418).

2. Section 223.4 is amended by revising the first sentence of paragraph (d) to read as follows:

§ 223.4 Request for, scheduling and conduct of public hearing; determination.

(d) * * * Any hearing convened pursuant to this part shall be conducted by a Presiding Officer, who shall be either a Regional Judicial Officer or a person having the qualifications of the members of the Environmental Appeals Board (described in 40 CFR 1.25(e)) if assigned by the Administrator or the qualifications of a Regional Judicial Officer if assigned by the Regional Administrator, as appropriate. * * *

PART 233—404 STATE PROGRAM REGULATIONS

1. The authority citation for part 233 continues to read as follows:

Authority: Clean Water Act, 33 U.S.C. 1251 et seq.

2. Section 233.53 is amended by revising the first and second sentences after the heading of paragraph (c)(3)(ii)(B) to read as follows:

§ 233.53 Withdrawal of program approval.

(c) * * *
(3) * * *
(ii) * * *
(B) * * * At no time after the issuance of the order commencing proceedings shall the Administrator, the Regional Administrator, the Regional Judicial Officer, the Presiding Officer, or any other person who is likely to advise these officials in the decisions on the case, 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 Regional Judicial Officer, 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. * * *

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**PART 403—GENERAL
PRETREATMENT REGULATIONS FOR
EXISTING AND NEW SOURCES OF
POLLUTION**

1. The authority citation for part 403 continues to read as follows:

Authority: Sec. 54(c)(2) of the Clean Water Act of 1977, (Pub. L. 95-217) sections 204(b)(1)(C), 208(b)(2)(C)(iii), 301(b)(1)(A)(ii), 301(b)(2)(A)(ii), 301(b)(2)(C), 301(h)(5), 301(i)(2), 304(e), 304(g), 307, 308, 309, 402(b), 405 and 501(a) of the Federal Water Pollution Control Act (Pub. L. 92-500) as amended by the Clean Water Act of 1977 and the Water Quality Act of 1987 (Pub. L. 100-4).

2. Section 403.13 is amended by revising paragraph (m)(2) to read as follows:

§ 403.13 Variances from categorical pretreatment standards for fundamentally different factors.

* * * * *

(m) * * *

(2) If the Regional Administrator declines to hold a hearing and the Regional Administrator affirms the findings of the Administrator's delegate the requester may submit a petition for a hearing to the Environmental Appeals Board (which is described in § 1.25 of this title) within 30 days of the Regional Administrator's decision.

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