
EPA Administrative Enforcement Actions: An Introduction to the Consolidated Rules of Practice

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On December 2, 1970, the United States Environmental Protection Agency (“EPA” or the “Agency”) was established and charged with the implementation and enforcement of the nation’s federal environmental laws.¹ Administrative actions, one of the numerous enforcement authorities that Congress has provided to the EPA to help it accomplish its mission, historically have played an important role in the Agency’s enforcement strategy. The EPA’s most recent enforcement data reveals that the Agency is substantially more likely to address violations by the regulated community through an administrative proceeding than a civil action or criminal prosecution in federal court.² For example, during Fiscal Year (FY) 2004, the EPA issued 2,122 Administrative Penalty Complaints and 2,248 Final Administrative Penalty Orders which resulted in the collection of approximately \$28,000,000 in civil penalties.³ During the same time period, the EPA made only 265 civil judicial

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¹ President Nixon proposed the creation of the EPA in Reorganization Plan No. 3, July 9, 1970. USEPA, Reorganization Plan No. 3 of 1970, www.epa.gov/history/org/origins/reorg.htm. Further information concerning the history of the creation of the EPA is available at www.epa.gov/history.

² OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, EPA FY 2004 END OF YEAR ENFORCEMENT & COMPLIANCE ASSURANCE RESULTS (2004), *available at* www.epa.gov/compliance/data/results/annual/fy2004.html.

³ *See, id.* at 10-12.

referrals to the U.S. Department of Justice⁴ and charged only 293 defendants with environmental crimes in federal court.⁵ The data also shows that administrative actions have been playing an ever-increasing role in the EPA's enforcement activities.⁶ From FY 2002 through FY 2004, the Agency's use of administrative actions to address non-compliance by the regulated community increased by approximately fifty percent,⁷ while the number of EPA civil and criminal enforcement actions in the federal courts remained relatively constant.⁸

Given the EPA's increasing reliance on administrative enforcement and the significant monetary penalties that can be assessed in these actions,⁹ it is imperative that a legal practitioner be familiar not only with the underlying substantive environmental law, but also with the relatively complex procedural rules that govern such actions. The purpose of this article is to provide an introduction to and overview of administrative enforcement practice before the EPA. The focus of this article is on those EPA administrative enforcement actions that:

- Seek the assessment of civil monetary penalties and/or issuance of Corrective Action/Compliance Orders;¹⁰
- are subject to the requirements of Section 554 of the Administrative Procedure Act ("APA");¹¹ and
- are governed procedurally by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the

⁴ *See, id.* at 8.

⁵ *See, id.* at 14.

⁶ *See, id.* at 8, 10-11, 14.

⁷ *Id.* at 10 and 11.

<u>Administrative Penalty Complaints</u>		<u>Final Administrative Penalty Orders</u>	
Fiscal Year 2002	1533	Fiscal Year 2002	1417
Fiscal Year 2003	1888	Fiscal Year 2003	1706
Fiscal Year 2004	2122	Fiscal Year 2004	2248

⁸ *Id.* at 8 and 14.

<u>Civil Judicial Referrals to DOJ</u>		<u>Defendants Criminally Charged</u>	
Fiscal Year 2002	252	Fiscal Year 2002	325
Fiscal Year 2003	268	Fiscal Year 2003	247
Fiscal Year 2004	265	Fiscal Year 2004	293

⁹ *See, e.g., In re Strong Steel Products, LLC*, (Nos. RCRA-5-2001-0016, CAA-5-2001-0020, and MM-5-2001-0006, 2005 EPA ALJ LEXIS 26, at *5 (ALJ Apr. 7, 2005) (assessing a \$269,527 civil administrative penalty); *In re Hunt* (No. TSCA-03-2003-0285, 2005 EPA ALJ LEXIS 9, at 1 (ALJ Mar. 8, 2005) (assessing \$84,224.80 in civil penalties); *In re Fed. Cartridge Co.* (No. RCRA-05-2002-0003, 2004 EPA ALJ LEXIS 135, at 2 (ALJ Sept. 3, 2004) (assessing a \$225,000 civil penalty).

¹⁰ This article does not address Permit Actions under the Consolidated Rules of Practice.

¹¹ 5 U.S.C. § 554 (2000) (sets forth requirements a federal agency must implement for certain adjudications that are "required by statute to be determined on the record after opportunity for an agency hearing").

Revocation or Suspension of Permits (“Consolidated Rules of Practice”, “CROP” or “Part 22 Rules”).¹²

These actions are commonly referred to as “Part 22 actions.”

I. GENERAL OVERVIEW OF PART 22 PRACTICE

A. Consolidated Rules of Practice

In 1980, the EPA promulgated the Consolidated Rules of Practice (“CROP” or “Part 22 Rules”)¹³ to establish a uniform set of procedural rules to govern administrative actions by the Agency that are subject to the requirements of APA Section 554, 5 U.S.C. § 554.¹⁴ On many levels, the Consolidated Rules of Practice were modeled on the Federal Rules of Civil Procedure (“FRCP”) and function as the administrative equivalent of the FRCP. For example, given the similarities between the two sets of procedural rules, the FRCP and federal court decisions interpreting the FRCP, although not binding on the Agency in Part 22 actions, are frequently cited as being “instructive” and providing “useful guidance” for interpreting the requirements of the CROP.¹⁵ The CROP apply to the following types of actions by the EPA:

- *Federal Insecticide, Fungicide, and Rodenticide Act* (“FIFRA”) - assessment of any administrative civil penalty under FIFRA Section 14(a).¹⁶
- *Clean Air Act* (“CAA”) - assessment of any administrative civil penalty under CAA Sections (Rule 12.9) 113(d), 205(c), 211(d) and 213(d).¹⁷
- *Marine Protection, Research and Sanctuaries Act* (“MPRSA”) - assessment of any administrative civil penalty or revocation/suspension of any permit under MPRSA Sections 105(a) and (f).¹⁸
- *Resource Conservation and Recovery Act* (“RCRA”) - issuance of a compliance order, corrective action order or permit termination under RCRA Section 3008(a)(3), suspension or revocation of authority to operate under Section 3005(e), or assessment of any civil penalty under

¹² 40 C.F.R. Part 22 (2004).

¹³ *Id.*

¹⁴ Consolidated Rules of Practice, 45 Fed. Reg. 24,360 (Apr. 9, 1980) (codified at 40 C.F.R. pt. 22 (2004)).

¹⁵ *See, e.g., In re B&L Plating*, No. CAA-5-2000-012, 2003 EPA App. LEXIS 8, at *13 n. 10 (E.A.B. Oct. 20, 2003) (“While the Board may, in its discretion, refer to the FRCP for guidance when the Consolidated Rules of Practice do not clearly resolve a procedural issue, it is well settled that the Agency is entitled to set its own procedural rules...”)(citations omitted); *In re Chempace Corp.*, 9 E.A.D. 119, 135 n. 22 (E.A.B. 2000); *In re Zaclon, Inc.*, 7 E.A.D. 482, 490 n.7 (EAB 1998); *In re Lazarus*, 7 E.A.D. 318, 330 n.25 (EAB 1997).

¹⁶ 7 U.S.C. § 136l(a) (West 2005).

¹⁷ 42 U.S.C. §§ 7413(d), 7524(c), 7545(d) (2004).

¹⁸ 33 U.S.C. § 1415(a), (f) (2004).

Sections 3008, 9006 and 11005,¹⁹ except as provided in 40 C.F.R. Parts 24;

- *Toxic Substances Control Act* (“TSCA”) - assessment of any administrative civil penalty under TSCA Sections 16(a) and 207,²⁰
- *Clean Water Act* (“CWA”) - assessment of any Class II penalty under CWA Sections 309(g) and 311(b)(6),²¹
- *Comprehensive Environmental Response, Compensation and Liability Act* (“CERCLA”)- assessment of any administrative civil penalty under CERCLA Section 109,²²
- *Emergency Planning and Community Right-to-Know Act of 1986* (“EPCRA”) - assessment of any administrative civil penalty under EPCRA Section 325,²³
- *Safe Drinking Water Act* (“SDWA”)- assessment of any administrative civil penalty under SDWA Sections 1414(g)(3)(B), 1423(c) and 1447(b),²⁴ or issuance of any order for compliance and the assessment of an administrative civil penalty under SDWA Section 1423(c),²⁵ and
- *Mercury-Containing and Rechargeable Battery Management Act* (“MCRBMA”) - assessment of any administrative civil penalty or issuance of any compliance order under Section 5 of the MCRBMA.²⁶

The 1980 version of the Consolidated Rules of Practice was utilized by the Agency for almost twenty years without amendment until 1999 when the EPA revised the Rules with the primary goal of updating and modernizing their procedures to make them more “user-friendly” and to “streamline” administrative practice.”²⁷ The 1999 revisions became effective on August 23, 1999, and became applicable to all Part 22 proceedings initiated on or after that date.²⁸

B. Participants in Part 22 Actions

1. Parties

Generally, there are three types of parties involved in a Part 22 action: the complainant,²⁹ the respondent,³⁰ and intervener/amicus curiae.³¹

¹⁹ 42 U.S.C. §§ 6928, 6991e, 6992d.

²⁰ 15 U.S.C. §§ 2615(a), 2647 (2004).

²¹ 33 U.S.C. §§ 1319(g), 1321(b)(6) (2004), 33 U.S.C. § 1342(a) (2004) (termination of any permit issued under Section 402(a)).

²² 42 U.S.C. § 9609 (2004).

²³ 42 U.S.C. § 11045 (2004).

²⁴ 42 U.S.C. §§ 300g-3(g)(3)(B), 300h-2(c) and 300j-6(b) (2004).

²⁵ 42 U.S.C. § 300h-2 (2004).

²⁶ 40 C.F.R. § 22.1(a) (2004), 42 U.S.C. § 14304. (2004)

²⁷ Consolidated Rules of Practice, 63 Fed. Reg. 9,464, (Feb. 25, 1998) (Proposed rule); 64 Fed. Reg. 40,138 (July 23, 1999) (Final rule).

²⁸ Consolidated Rules of Practice, 64 Fed. Reg. 40,138 (July 23, 1999).

²⁹ 40 C.F.R. § 22.3 (2004).

³⁰ *Id.*

a) Complainant

A Part 22 action is initiated by a complainant.³² Logically, it may be assumed that the complainant in a Part 22 action will be the EPA or, more specifically, EPA Headquarters or the EPA Region which files the complaint. However, under the Part 22 Rules, the “complainant” is neither the Agency nor a particular EPA Region, but rather the “person authorized to issue a complaint” on behalf of the Agency.³³ This is an important distinction. Federal environmental statutes generally vest the legal authority to initiate enforcement actions with the EPA Administrator.³⁴ However, as a practical matter, the Administrator cannot participate in every Part 22 action. To address this situation, the legal authority of the Administrator to initiate actions under the CROP has been delegated through a series of written delegations, recorded in the EPA Delegations Manual, to other EPA employees who can serve as complainants in Part 22 actions.³⁵

b) Respondent

The “respondent” is the person against whom a Part 22 Complaint is issued and may be viewed as the Part 22 equivalent of a defendant.³⁶ A respondent in a Part 22 action can be an “individual, partnership, association, corporation and any trustee, assignee, receiver or legal successor thereof, any organized group of persons whether incorporated or not, and any officer, employee, agent, department, agency or instrumentality of the Federal Government, of any State or local unit of government, or of any foreign government.”³⁷

c) Intervener/Amicus Curiae

A person who has not been named as a party to a Part 22 action may seek to intervene in the matter by filing a Motion for Leave to Intervene.³⁸ Similar to federal court practice, the non-party movant must establish that it has an interest relating to the matters being contested in the action, a final order may as a practical

³¹ 40 C.F.R. § 22.11 (2004).

³² 40 C.F.R. §§ 22.3 and 22.13(a) (2004).

³³ *Id.* at § 22.3 (2004).

³⁴ *See, e.g.*, Resource Conservation and Recovery Act, 42 U.S.C. § 6928(a)(1) (2000).

³⁵ *See In re Julie’s Limousine & Coachworks, Inc.*, No. CAA-04-2002-1508, 2004 EPA App. LEXIS 23, at 54, n.41 (EAB July 23, 2004). (“The EPA Delegations Manual addresses both delegations from the Administrator to senior EPA management and redelegations from senior management to lower level EPA officials. . . . In light of the procedurally rigorous nature of the EPA Delegations Manual and the express recognition of the Manual as a legal record of EPA delegations, it also strikes us as reasonable for EPA to rely on the Manual, in the context of such administrative proceedings, as authoritative proof that a delegation exists.”). *See also In re Lyon County Landfill*, 8 E.A.D. 559, 567-567 (E.A.B. 1999), *appeal dismissed for lack of jurisdiction*, No. 99-CV-1460 (D.Minn. Feb. 11, 2000); *In re Woodcrest Mfg, Inc.*, 7 E.A.D. 757, 765-766 (E.A.B. 1998), *aff’d*, 114 F.Supp.2d 775 (N.D. Ind. 1999); *In re Rohm and Haas Co.*, 2 E.A.D. 358, 369 nn. 20, 21 (C.J.O. 1987).

³⁶ 40 C.F.R. § 22.3 (2004).

³⁷ *Id.*

³⁸ 40 C.F.R. § 22.11(a) (2004).

matter impair the movant's ability to protect that interest, and the movant's interest is not adequately represented by the existing parties to the action.³⁹ Generally, motions to intervene filed after the Pre-Hearing Information Exchange phase of a Part 22 proceeding are denied unless the non-party can establish good cause for its failure to file earlier in the proceeding.⁴⁰ A non-party who desires to submit a written brief (i.e., similar to an amicus curiae in federal court), as opposed to intervening in a matter, may file a Motion for Leave to File a Non-Party Brief in accordance with Part 22 Rule 22.11(b).⁴¹

d) Impleader/Third Party Practice

Impleader and third party practice are not permitted in Part 22 actions. Because the authority to issue a complaint arises not from the Consolidated Rules of Practice, but rather from the federal environmental statutes being enforced in an action, only the complainant possesses the authority to name a person as a respondent to a Part 22 action. Therefore, a respondent does not possess the authority under either the Part 22 Rules or federal environmental statutes to implead a third party that the respondent believes may be to some degree responsible for the violations alleged in the complaint or legally required to indemnify the respondent for any civil penalty assessed in the action.⁴²

2. Legal Counsel/Representatives of the Parties

Part 22 Rules provide that any party to an action may appear in person or through a representative.⁴³ The representative may, but does not necessarily have to be, an attorney.⁴⁴

a) Legal Counsel

Complainants in Part 22 actions are represented by EPA attorneys. If an administrative action is initiated by an EPA Regional Office, an Assistant Regional Counsel usually is assigned to serve as legal counsel in the matter. If an administrative action is initiated by EPA Headquarters in Washington, D.C., an attorney with EPA Headquarters usually is assigned to represent the interests of the complainant. In many instances, although not required by the CROP to retain an attorney's services, a respondent will elect to have an attorney represent its interests in a Part 22 action. The CROP does not require that an attorney representing a respondent be licensed to practice law in any particular state or jurisdiction. However, legal counsel for both the complainant and respondent are required to "conform to the standards of conduct and ethics required of practitioners before the

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ 40 C.F.R. § 22.11(b).

⁴² *See, e.g., In re Hous. Auth. of Moundville*, No. CAA-03-2003-0211, 2004 EPA ALJ LEXIS 1 at 4 -9 (ALJ, Jan. 5, 2004).

⁴³ 40 C.F.R. § 22.10 (2004).

⁴⁴ *Id.*

courts of the United States.”⁴⁵ Additionally, counsel is required to exercise a level of competence and are “charged with knowledge” of the Consolidated Rules of Practice.⁴⁶ Furthermore, a party to a Part 22 action is deemed to be bound by the actions or omissions of its representative and will suffer the consequences of the failure of its representative to comply with the requirements of the Part 22 Rules or a Presiding Officer’s Order.⁴⁷

b) “Pro Se” Respondents

A respondent may elect to represent him or herself in a Part 22 action.⁴⁸ The Agency’s Environmental Appeals Board has specifically held that *pro se* respondents are required to comply with all rules and orders issued in conjunction with a Part 22 proceeding, including, but not limited to, the CROP.⁴⁹ As a matter of practice, however, *pro se* respondents sometimes have been held to a “more lenient standard” and provided with a degree of latitude or flexibility with regard to their compliance with the CROP.⁵⁰ However, the actual scope and extent of such latitude and flexibility have never been specifically defined, and, in practice, varies among Presiding Officers.

3. Agency Decision-makers

“It is axiomatic that due process requires an impartial decision maker.”⁵¹ However, with regard to administrative adjudications by a Federal agency, “the decision maker need not be independent from the agency to serve as an impartial decision maker.”⁵² In proceedings under the CROP, various Agency decision-makers are usually involved.

a) Administrator of the EPA

As previously noted, the majority of the federal statutes enforced by the Agency

⁴⁵ 40 C.F.R. § 22.10 (2004).

⁴⁶ See, e.g. *In re* Tri-County Builders Supply, No. CWA-9-2000-0008, 2004 EPA App. LEXIS 14, at 8-9 (EAB May 24, 2004); *In re* Tate, No. FIFRA-09-99-0005, 2000 EPA ALJ LEXIS 44 at 7-9 (ALJ, July 3, 2000)(“The fact that counsel is inexperienced does not render her negligence excusable...”).

⁴⁷ See, *In re* Pyramid Chem. Co., No. RCRA-HQ-2003-0001, 2004 EPA App. LEXIS 32, at 28-29 (EAB Sept. 16, 2004) (“[U]nder Board precedent an attorney stands in the shoes of his or her client, and ultimately, the client takes responsibility for the attorney’s failings.”); *In re* Mr. C.W. Smith, No. CWA-04-2001-1501, 2004 EPA ALJ LEXIS 128, at 161-172 (A.L.J., July 15, 2004)(“[C]lients must be held accountable for the acts and omissions of their attorneys.”).

⁴⁸ 40 C.F.R. § 22.10 (2004).

⁴⁹ See, e.g., *In re* Jiffy Builders, Inc., 8 E.A.D. 315, 321 (EAB 1999)(observing that *pro se* parties are not excused from compliance with the CROP); *In re* Rybond, Inc., 6 E.A.D. 614, 627. (EAB, 1996)(quoting, *In re* House Analysis & Assoc., 4 E.A.D. 501, 505 (EAB, 1993)(noting that *pro se* litigants who do not comply with procedural rules may suffer adverse consequences).

⁵⁰ See, e.g., *In re* Jiffy Builders, 8 E.A.D. at 321(finding that *pro se* parties are held to a more lenient standard than parties represented by members of the bar); *In re* AE Associates, Inc. No. 10-99-0262, 2001 EPA ALJ LEXIS 170 at 8 n.6 (ALJ, Nov. 30, 2001); Four Start Feed and Chem., 2004 EPA ALJ LEXIS 130 at *11-12.

⁵¹ *In re* Gen. Elec. Co., 4 E.A.D. 615, 634 (E.A.B. 1993)(citing *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970)).

⁵² *Id.*

vest decision-making authority in the Administrator. As a practical matter, however, given the number of administrative actions filed by the Agency during the course of a fiscal year, it is impossible for the Administrator to preside over every action. Therefore, the Administrator has delegated decision-making authority over Part 22 actions to a number of other decision-makers within the EPA.⁵³

b) Regional Judicial Officers

The Regional Judicial Officer (“RJO”) is frequently the first level of Agency decision-maker with which a party to a Part 22 action will have contact. A Regional Judicial Officer ‘wears many hats.’ First, an RJO serves as a Presiding Officer in a Part 22 proceeding until an answer is filed by a respondent and the case is forwarded to the Agency’s Office of Administrative Law Judges.⁵⁴ As the Presiding Officer, the RJO will, among other things, rule on certain motions filed before an answer is received by the appropriate Hearing Clerk (e.g., respondent’s Motion for Extension of Time to File an Answer or complainant’s Motion for Default for Failure of Respondent to File an Answer).⁵⁵ Secondly, a Regional Judicial Officer serves as the Presiding Officer for administrative actions initiated under 40 C.F.R. Parts 22 (Subpart I); actions that are not subject to the requirements of APA Section 554, 5 U.S.C. § 554.⁵⁶ Finally, an RJO is responsible in most Regions for approving settlements of Part 22 actions.⁵⁷

c) Administrative Law Judges—Office of Administrative Law Judges

The second tier of Agency decision-makers involved in Part 22 actions consists of the Administrative Law Judges (“ALJs”) in the Agency’s Office of Administrative Law Judges (“OALJ”).⁵⁸ These ALJs can be viewed as trial level judges for proceedings initiated under the CROP.⁵⁹ The Administrative Law Judges of the OALJ are certified by the Office of Personnel Management and appointed in accordance with the requirements of 5 U.S.C. § 3105. The ALJs serve as Presiding Officers in Part 22 proceedings, exercising authority that has been delegated to them by the Administrator.⁶⁰ As a Presiding Officer, an ALJ possesses broad authority

⁵³ “The Administrative Procedure Act was enacted in recognition of the fact that agency heads, unable personally to conduct hearings, would be forced to delegate that duty. One of the primary purposes of the Act was to establish qualified, impartial Hearing Examiners who would not be mere ‘rubber stamps’ for the agency’s prosecuting arm.” *Borg-Johnson Elect, Inc. v. Christenberry*, 169 F. Supp. 746, 754 (S.D.N.Y. 1959)(citing *Ramspeck v. Fed. Trial Exam’rs. Conference* 345 U.S. 128 (1953)).

⁵⁴ Regional Administrators are required to designate one or more employees to serve as Regional Judicial Officers. 40 C.F.R. § 22.4(b)(2004). An RJO is neither certified by the Office of Personnel Management as an administrative law judge, nor appointed in accordance with the requirements of 5 U.S.C. § 3105 (2000).

⁵⁵ 40 C.F.R. § 22.16(c) (2004).

⁵⁶ 40 C.F.R. § 22.4 (2004).

⁵⁷ 40 C.F.R. §§ 22.18(b)(3), 22.4(b).

⁵⁸ Contact information, biographical sketches of ALJs, and electronic copies of decisions/orders issued by the ALJs of the OALJ are available at the Office’s website. U.S. Env’tl. Prot. Agency, Office of Administrative Law Judges, <http://www.epa.gov/aljhomep/index.htm> (last visited Sept. 12, 2005).

⁵⁹ *In re Haw’n Indep. Refinery*, 1992 EPA ALJ LEXIS 311, at *7 (ALJ, July 14, 1992) (noting that “The work of an ALJ is ‘functionally comparable’ to that of a trial judge.”).

⁶⁰ See United States Environmental Protection Agency, *Delegations Manual*, at 1-37.

under the Part 22 Rules to oversee the adjudication of a case.⁶¹ The ALJs of the OALJ obtain jurisdiction over a Part 22 action after a respondent files its answer with the appropriate Hearing Clerk.⁶²

d) Environmental Appeals Board

The third level of decision-maker with jurisdiction over Part 22 actions is the Environmental Appeals Board (“EAB” or the “Board”). On March 1, 1992, the Administrator created the EAB to serve as the final Agency decision-maker for administrative actions under the CROP.⁶³ The EAB has a number of responsibilities such as serving as an administrative “Court of Appeals” for appeals of Initial Decisions, Rulings and Orders, acting as the Presiding Officer until an answer is filed in a Part 22 action initiated by EPA Headquarters, and approving settlements of Part 22 actions that are initiated by EPA Headquarters.⁶⁴ The EAB is a “permanent” and “impartial” body which, for organizational purposes, is part of the Office of the EPA Administrator, but exercises independent decision-making authority.⁶⁵ Members of the EAB are Senior Executive Service-level Agency attorneys who have been designated by the Administrator.⁶⁶ The Board typically sits in three-member panels and decides appeals based upon a majority vote.⁶⁷

e) Impartiality of Agency Decision-Makers

The EPA has instituted strict rules governing the conduct of Agency decision-makers in order to ensure their neutrality and decisional independence. Ex parte communications between an Agency decision-maker and EPA staff involved in the investigation or prosecution of an enforcement action are strictly prohibited.⁶⁸ Additionally, Agency decision-makers are required to recuse themselves from participating in any action in which they may have previously performed prosecutorial or investigative functions.⁶⁹

⁶¹ 40 C.F.R. §§ 22.4(c)(1)-(10) (2004).

⁶² 40 C.F.R. §§ 22.16(c), 22.21(2004).

⁶³ Environmental Protection Agency, 57 Fed Reg. 5320 (Feb. 13, 1992)(codified Mar. 1, 1992). See generally, Nancy A. Firestone, *The Environmental Protection Agency’s Environmental Appeals Board*, 1 ENVTL. LAW. 1 (Sept. 1994); William A. Tilleman, *Environmental Appeal Boards: A Comparative Look at the United States, Canada, and England*, 21 COLUM. J. ENVTL. L. 1 (1996); and 40 C.F.R. § 1.25(e)(2)(2004).

⁶⁴ 40 C.F.R. § 22.4(a)(1)(2004).

⁶⁵ The Environmental Appeals Board, Practice Manual, 1103B E.A.B. 1 (2004), available at <http://epa.gov/eab/pmanual.pdf>.

⁶⁶ A Member of the Board must be a graduate of an accredited law school and in good standing with a recognized bar association of any State or the District of Columbia. 40 C.F.R. § 1.25(e)(3)(2004). Members of the EAB are not Administrative Law Judges and are not certified by the Office of Personnel Management. More information concerning the EAB is available at the Board’s website. U.S. Environmental Protection Agency, Environmental Appeals Board, <http://www.epa.gov/boarddec/> (last visited Sept. 12, 2005).

⁶⁷ 40 C.F.R. § 1.25(e)(1)(2004).

⁶⁸ 40 C.F.R. § 22.8(2004).

⁶⁹ 40 C.F.R. §§ 1.25(e)(3), 22.4(b), 22.4(d)(1) (2004).

4. Hearing Clerks

The Regional Hearing Clerk (“RHC”) or EPA Headquarters Hearing Clerk is an “individual duly authorized to serve as hearing clerk” for a Part 22 action.⁷⁰ Their primary responsibility is to organize all documents filed in a Part 22 action into an administrative record for the proceeding.⁷¹ These clerks are required to be “neutral in every proceeding.”⁷²

C. Administrative Case Law

EPA’s decision-makers issue written decisions in connection with their adjudication of Part 22 matters.⁷³ There are a number of official and unofficial sources of these decisions.

1. EAB Decisions

The EAB’s official website has a library of EAB published decisions and orders issued dating from 1992.⁷⁴ Official copies of decisions and orders issued by the EAB are available in a publication entitled the Environmental Administrative Decisions (E.A.D.) Reporter published by the U.S. Government Printing Office.⁷⁵ The EAB has adopted an official form of citation for the reporting of its decisions.⁷⁶

2. OALJ Decisions

The OALJ’s official website has a library of OALJ decisions and orders dating from October 31, 1996.⁷⁷ Currently, there is no official reporter or U.S. Government Printing Office publication of OALJ decisions. Copies of individual decisions or orders may, however, be obtained by contacting the OALJ or the appropriate Hearing Clerk for a specific proceeding. Unlike the EAB, the OALJ has not adopted

⁷⁰ 40 C.F.R. § 22.3(2004).

⁷¹ 40 C.F.R. § 22.5(a)(1) (2004).

⁷² *Id.*

⁷³ Section 552(a)(2)(A), requires, in pertinent part, that, “[e]ach Agency, in accordance with published rules, shall make available for public inspection and copying, (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases.” 5 U.S.C. § 552(a)(2)(2000).

⁷⁴ The Environmental Appeals Board’s official website contains published orders and unpublished final orders issued by the Board from November, 1996 to the present. Individual copies of EAB decisions/final orders may also be obtained by contacting the EAB’s Clerk of the Board. <http://www.eps.gov/eab>.

⁷⁵ Copies of volumes 1-7 of the E.A.D. can be ordered online through the U.S. Government Printing Office. GPO Access, <http://bookstore.gpo.gov/sb/sb-088.html> (last visited Sept. 12, 2005). Vol. 1 of the E.A.D. covers decisions and orders issued from Mar. 1972 – Mar. 1985; Vol. 2, Apr. 1985 – Oct. 1989; Vol. 3, Oct. 1989 – Feb. 1992; Vol. 4, Mar. 1992 – Dec. 1993; Vol. 5, Jan. 1994 – Apr. 1995; Vol. 6, May 1995 – Mar. 1997; Vol. 7, Mar. 1997 – July 1998; Vol. 8, Sept. 1998 – Feb. 2000; Vol. 9, Mar. 2000 – Apr. 2001; Vol. 10, May, 2001 – Dec., 2002; Vol. 11, begins at Jan. 2003. Vol. 12 covers the current term.

⁷⁶ The Environmental Appeals Board, Practice Manual, 1103B E.A.B. 1, 7 (EPA June 2004), available at <http://www.eps.gov/eab/pmanual.pdf>.

⁷⁷ U.S. E.P.A., Office of Administrative Law Judges, Decisions and Orders, <http://www.epa.gov/oalj> (last visited Sept. 7, 2005).

an official form of citation for the reporting of its decisions.⁷⁸

3. *RJO Decisions*

Copies of decisions and orders issued by the Agency's RJOs are available on the Agency's website.⁷⁹ Currently, there is no official reporter or U.S. Government Printing Office publication of RJO decisions and orders. The Agency's Regional Judicial Officers have not adopted an official form of citation for the reporting of their decisions.

4. *Precedential Value of Decisions*

A decision issued by the Environmental Appeals Board is considered to be binding on all of the Agency's ALJs and RJOs, unless overturned on judicial appeal or contravened by a subsequent statute or regulation. Additionally, the EAB has generally adopted a philosophy of *stare decisis* concerning the holdings of Board decisions. A decision issued by an ALJ, however, is not binding upon other Administrative Law Judges of the OALJ or upon the EAB.⁸⁰

II. OVERVIEW OF A PART 22 PROCEEDING

The following discussion provides an overview of a Part 22 administrative enforcement action from the initiation of the action through the appeal of the Final Order of the Agency concerning the matter to the federal courts. Naturally, each administrative action will follow its own course and not all of the matters discussed herein will necessarily be applicable to every Part 22 proceeding.

A. Initiation of a Part 22 Action—Filing of Administrative Complaint

Generally, a Part 22 action is initiated by the filing of a written complaint, which⁸¹ serves as the vehicle by which the Agency places a respondent on notice of its alleged violations, sets forth the factual and legal basis for such violations, requests the imposition of some form of relief to address the violations (e.g., assessment of a monetary penalty), and advises a respondent of its right to request a hearing on the matter. The decision whether to issue a complaint rests within the enforcement discretion of the Agency.⁸²

⁷⁸ As a matter of practice, decisions by the ALJs of the OALJs are usually captioned as "*In the Matter of*," as opposed to decisions issued by the Environmental Appeals Board which are usually captioned as "*In re*." Additionally, citations to OALJ and RJO decisions usually will contain the docket number of the case and full date of issuance. E.g., *In re Barden Corp.*, No. CAA-1-2000-0070, 2002 EPA ALJ LEXIS 64, at 6-10 (ALJ Oct. 1, 2002).

⁷⁹ U.S. E.P.A., Regional Judicial Officers, <http://cfpub.epa.gov/compliance/resources/rjo/index.cfm> (last visited Sept. 7, 2005) (follow "Case List By Date" or "Alphabetical Case List" hyperlinks).

⁸⁰ See *In re* U.S. Army Training Ctr. and Fort Jackson, No. CAA-04-2001-1502, 2003 EPA ALJ LEXIS 187, at 20 n. 9 (Sept. 12, 2003) (noting that the decision of one ALJ is not binding on another ALJ).

⁸¹ 40 C.F.R. § 22.13(a)(2004). If the complainant and respondent agree to the terms of a settlement prior to the filing of a complaint, a Part 22 actions can also be initiated through an expedited settlement procedure, in which the action may be simultaneously initiated and concluded through the issuance of a modified consent agreement and final order. See *infra*, Part II.F.6.

⁸² See, e.g., *In re* Arapahoe County Weed Dist., 8 E.A.D. 381, 392 (EAB 1999) (holding that "the Agency retains discretion as to when a warning may be issued instead of a penalty) (citing *In re* Green

1. *Format and Content of Complaint*

The CROP do not mandate a particular format for Part 22 complaints.⁸³ As a result, the format of complaints generally varies among the EPA's Regions and, in some instances, may vary among the different divisions of a particular Region. With regard to content, however, the CROP require that all Part 22 complaints must include, *inter alia*: a statement of the legal authority pursuant to which the complaint is issued⁸⁴; specific reference to and a concise statement of the factual basis of each alleged violation by the respondent⁸⁵; a description of the relief requested by the complainant to be imposed on the respondent⁸⁶; notice of the respondent's right to request a hearing⁸⁷; a caption identifying the respondent and the docket number assigned to the matter⁸⁸; and the signature of the EPA employee authorized to issue a complaint on behalf of the Agency (i.e., the complainant).⁸⁹

2. *Pleading Standard*

The EAB has held that the CROP provide for a "notice pleading" standard with regard to Part 22 complaints.⁹⁰ However, at a minimum, a Part 22 complaint must "set forth factual allegations that if proven establish a prima facie case."⁹¹ Furthermore, the allegations contained in a complaint must include "enough detail to fairly inform" a respondent of the claim or claims it must defend against.⁹² A Part 22 complaint, however, does not need to set forth the "evidentiary support" for the

Thumb Nursery, Inc., 6 E.A.D., 782, 799-800 (EAB 1997); *see also*, *In re* B&R Oil Co., 8 E.A.D. 39, 51 (EAB 1998) (noting that "courts have traditionally accorded governments a wide berth of prosecutorial discretion in deciding whether, and against whom, to undertake enforcement action."); *In re* GMC Delco Remy, 7 E.A.D. 136, 151 n.35 (EAB 1997) (noting that "the rule in American law is that investigation and prosecution by federal agencies are discretionary functions.").

⁸³ 40 C.F.R. § 22.5(c)(1).

⁸⁴ 40 C.F.R. § 22.14(a)(1).

⁸⁵ 40 C.F.R. § 22.14(a)(2)-(3).

⁸⁶ 40 C.F.R. § 22.14(a)(4).

⁸⁷ 40 C.F.R. § 22.14(a)(5).

⁸⁸ 40 C.F.R. § 22.5(c)(2). The docket number is used to track a case and its administrative record. All documents filed in an action must include the docket number of the case. *Id.* The OALJ standardized the format for docket numbers for cases filed under the Part 22 Rules. The current practice is that the first part of the docket number will identify the statute pursuant to which the complaint was issued (e.g., CAA for Clean Air Act). The next part will identify the Region from which the complaint was issued. The third part will identify the fiscal year during which the complaint was issued. The final part will identify the specific, four-digit tracking number assigned to the case. For example, the docket number "CWA-03-2002-0034" indicates that the complaint was filed pursuant to the Clean Water Act by EPA Region III during fiscal year 2002 and assigned the tracking number 0034.

⁸⁹ 40 C.F.R. § 22.5(c)(3). This section provides, in pertinent part, that the signature on a document "constitutes a representation by the signer that he has read the document [i.e., complaint], that to the best of his knowledge, information and belief, the statements made therein are true, and that it is not interposed for delay."

⁹⁰ *In re* Richner, 10 E.A.D. 617, 627 (EAB 2002) ("An administrative complaint need only reasonably inform an individual of the matters to be dealt with at the hearing." (*citing*, *In re* Sporicidin Int'l, 3 E.A.D. 589, 596-98 (CJO, 1991))).

⁹¹ *In re* Puerto Rico Aqueduct & Sewer Auth., No. EPCRA-02-99-4003, 1999 EPA ALJ LEXIS 72 at 10 (October 4, 1999) (*quoting* *In re* Commercial Cartage Co., 5 E.A.D. 112, 117 (EAB 1994)).

⁹² *In re* Antkiewicz, 8 E.A.D. 218, 232 (EAB 1999).

allegations contained therein.⁹³ Overall, the EAB has noted that the pleading standard under the CROP is “no more onerous on its face” than that for complaints issued under the Federal Rules of Civil Procedure.⁹⁴

3. Proposed Relief

40 C.F.R. § 22.14(a)(4) requires that a complaint include a description and brief explanation of the relief that the complainant is proposing that the Presiding Officer assess against a respondent for its alleged violations. The type of relief that can be requested in a Part 22 action depends upon the authority provided in the federal environmental statute being enforced in the action. Usually, in a Part 22 proceeding the complainant may seek the assessment of a civil monetary penalty. Additionally, depending upon the specific statute being enforced in the matter, a complainant may be able to seek the issuance of a Compliance or Corrective Action Order or implementation of a Permit Action.⁹⁵

a) Assessment of Civil Monetary Penalty

Most of the statutes the EPA enforces provide legal authority for the assessment of civil monetary penalties.⁹⁶ Generally, these statutes specify a maximum penalty that can be assessed for violations of federal environmental law.⁹⁷ Additionally, the statutes set forth certain factors (referred to as the “Statutory Factors”) that the EPA must consider in calculating a civil penalty to ensure that it is fair and appropriate in light of a respondent’s violations.⁹⁸ In a Part 22 complaint, the complainant must either: propose a specific civil penalty amount to be assessed against a respondent⁹⁹; or make a general penalty demand by pleading the maximum penalty amount available under the federal statute pursuant to which the action was initiated.¹⁰⁰ When the complainant elects to make a specific penalty demand, it has been the practice of the Agency to calculate such civil penalties based upon the previously mentioned statutory factors and in accordance with civil penalty policies created by

⁹³ *In re* DMB North Carolina 2, LLC, No. CWA-04-2002-5005, 2003 EPA ALJ LEXIS 48, at 4 (July 10, 2003).

⁹⁴ *In re* Antkiewicz, 8 E.A.D. at 218, 232 (EAB 1999).

⁹⁵ 40 C.F.R. §§ 22.1, 22.14(a)(4)(i)-(iv) (2004).

⁹⁶ *See, e.g.*, Resource Conservation and Recovery Act of 1976 § 3008(a)(1), 42 U.S.C. § 6928(a)(1) (2000).

⁹⁷ The Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by the Debt Collection Improvement Act of 1996 (DCIA), 31 U.S.C. § 3701 (2000), required federal agencies, like EPA, to periodically adjust for inflation the maximum civil penalties available under the statutes the agencies are charge with implementing. On December 31, 1996, EPA promulgated the Civil Monetary Penalty Inflation Adjustment Rules (CMPIAR), which provided for an initial ten percent increase to civil penalties assessed by the Agency on or after January 30, 1997. 40 C.F.R. § 19.4. On February 13, 2004, EPA implemented a second penalty adjustment implement an increase applicable to all civil penalties assessed on or after March 15, 2004. CMPIAR, 69 Fed. Reg. 7121 (Feb. 13, 2004).

⁹⁸ *See, e.g.*, Resource Conservation & Recovery Act § 3008(a)(3), 42 U.S.C. § 6928(a)(3) (provides, in pertinent part, that in assessing a penalty under the Act, “the Administrator shall take into account the seriousness of the violation and any good faith efforts [by a respondent] to comply with the applicable requirements.”).

⁹⁹ 40 C.F.R. § 22.14(a)(4)(i).

¹⁰⁰ 40 C.F.R. § 22.14(a)(4)(ii).

the EPA.¹⁰¹ The EAB has upheld the use of such penalty policies for the purpose of calculating civil penalty amounts in Part 22 actions.¹⁰² In situations where the complainant elects to plead the statutory maximum, the Part 22 Rules require that the complaint must: specify the number of violations by a respondent and, where applicable, the number of days of violation; provide a brief explanation of the severity of each violation alleged; and provide a recitation of the statutory penalty authority applicable for each violation alleged in the complaint.¹⁰³ During the subsequent Pre-hearing Information Exchange stage of the proceeding, the complainant is required to propose a specific penalty and the basis for its calculation.¹⁰⁴

b) Issuance of Corrective Action/Compliance Orders

In addition to seeking the assessment of a civil penalty, the CROP allow the complainant to request the Presiding Officer to issue a form of injunctive relief called a Corrective Action or Compliance Order.¹⁰⁵ The authority for issuing such an Order derives from the federal environmental law being enforced in the action.¹⁰⁶ The Corrective Action or Compliance Order portion of a complaint usually will set forth discrete tasks that a respondent must undertake within a set time frame in order to rectify its violations.¹⁰⁷

4. Filing and Service of Complaint

Pursuant to 40 C.F.R. §§ 22.5(a)(1) and 22.13(a), the complainant is required to file the original and one copy of a Part 22 complaint with either the Regional Hearing Clerk or EPA Headquarters' Clerk, as appropriate.¹⁰⁸ A complaint is deemed to be filed when it is received by the appropriate Clerk.¹⁰⁹ After the complaint is filed, the complainant is required to serve a copy of the complaint on

¹⁰¹ U.S. E.P.A., Civil Enforcement, <http://www.epa.gov/compliance/resources/policies/civil/index.html> (last visited Sept. 12, 2005).

¹⁰² See, e.g., *In re M.A. Bruder & Sons, Inc.*, 10 E.A.D. 598, 613 (EAB 2002) (holding that "there are good reasons to apply a penalty policy whenever possible" even though there is no legal obligation); see also *In re Catalina Yachts, Inc.*, 8 E.A.D. 199, 207 (EAB 1999) ("On many occasions, the Board has affirmed the proposition that penalty policies serve to facilitate the application of statutory penalty criteria, and that Presiding Officers and the Board may utilize applicable penalty policies in determining civil penalty amounts."); *aff'd*, *Catalina Yachts, Inc. v. EPA*, 112 F.Supp.2d 965 (C.D.Cal. 2000); *In re DIC Americas, Inc.*, 6 E.A.D. 184, 189 (EAB 1995) (holding that presiding officers "must consider" civil penalty guidelines but have discretion to either adopt or deviate from them as circumstances warrant) (citing *In re Great Lakes Div. of Nat'l Steel Corp.*, 5 E.A.D. 355, 374 (EAB 1994)).

¹⁰³ 40 C.F.R. § 22.14(a)(4)(ii).

¹⁰⁴ 40 C.F.R. § 22.19(a)(4).

¹⁰⁵ 40 C.F.R. §§ 22.1, 22.14(a)(4)(iv).

¹⁰⁶ E.g., the Resource Conservation & Recovery Act of 1976 § 3008(a)(1), 42 U.S.C. § 6928(a)(1), provides, in pertinent part, that "whenever . . . the Administrator determines that any person has violated or is in violation of any requirement of this subchapter, the Administrator may issue an order . . . requiring compliance immediately or within a specified time period."

¹⁰⁷ 40 C.F.R. § 22.14(a)(4)(iv) (2004).

¹⁰⁸ 40 C.F.R. § 22.5(a)(3) requires that a certificate of service shall accompany each document (including a Complaint) filed or served in a proceeding under the CROP.

¹⁰⁹ 40 C.F.R. § 22.5(a)(1).

each party to the action.¹¹⁰ Service may be made by one of three methods: personal service, certified mail with return receipt requested, or any reliable commercial delivery service that provides written verification of delivery.¹¹¹ Service of a complaint by regular, first class mail and facsimile are not permitted.¹¹² Service of a complaint, when made by certified mail or commercial delivery service, is deemed to be complete when the return receipt card or written verification of delivery has been “signed” by the respondent.¹¹³ The Part 22 Rules contain specific service requirements for an individual,¹¹⁴ corporation or business entity,¹¹⁵ federal government¹¹⁶ and local/state government.¹¹⁷

5. Filing of Proof of Service

40 C.F.R. § 22.5(b)(1)(iii), requires the complainant to file a Proof of Service with the appropriate Hearing clerk immediately upon the completion of service of the complaint. The Part 22 Rules do not define the term “immediately.” Additionally, the Rules do not specify what, if any, repercussions will occur if a Proof of Service is not filed. At a minimum, such a failure would most likely have an impact upon the success or failure of a Motion by a complainant seeking the issuance of a Default Order against a respondent for failing to file an answer.

6. Amendment of the Complaint

The Part 22 Rules provide that a complaint may be amended once as a matter of right at any time before an answer is filed or, thereafter, by motion to and leave from the Presiding Officer.¹¹⁸ The Rules, however, do not address when amendment is appropriate and what factors a Presiding Officer should consider in ruling upon a Motion to Amend a complaint.¹¹⁹ Generally, Agency decision-makers have adopted the policy that Part 22 complaints should be “liberally construed” and “easily

¹¹⁰ 40 C.F.R. § 22.5(b)(1).

¹¹¹ Service is governed by 40 C.F.R. § 22.5(b)(1) (2004); *In re C.W. Smith*, No. CWA-04-2001-1501, 2002 EPA ALJ LEXIS 7, at 19-20 (Feb. 6, 2002) (“Agencies are free to fashion their own rules of procedure, so long as these rules satisfy the fundamental requirements of fairness and notice.”) (*quoting*, *Katzon Bros., Inc. v. US EPA*, 839 F.2d 1396, 1399 (10th Cir. 1988)).

¹¹² See 40 C.F.R. § 22.5(b)(1) (providing that service “shall” be made only by one of the three prescribed methods).

¹¹³ 40 C.F.R. § 22.7(c).

¹¹⁴ 40 C.F.R. § 22.5(b)(1)(i) (requiring service on the respondent or respondent’s representative the signed original of the complaint and a copy of the Consolidated Rules of Practice by personal service, by a reliable delivery service that provides written verification of delivery).

¹¹⁵ 40 C.F.R. § 22.5(b)(1)(ii)(A) (requiring service on an officer, partner, a managing or general agent, or any other person authorized by appointment or by Federal or State law to receive of process).

¹¹⁶ 40 C.F.R. § 22.5(b)(1)(ii)(B) (requiring service according to that agency’s regulations, or in the absence of controlling regulations as permitted by law and also service to the senior executive official having responsibility for the overall operations of the geographical unit where the alleged violation arose, unless the agency is a corporation).

¹¹⁷ 40 C.F.R. § 22.5(b)(1)(ii)(C) (requiring service on the chief executive officer thereof, or as otherwise permitted by law).

¹¹⁸ 40 C.F.R. § 22.14(c).

¹¹⁹ *In re JDN InterMountain Holdings, Inc.*, No. CWA-08-2003-0073, 2004 EPA ALJ LEXIS 119, at *4 (ALJ, June 10, 2004).

amended.”¹²⁰ Additionally, the EAB and OALJ have looked to FRCP 15(a) and federal courts decisions, like *Foman v. Davis*,¹²¹ for guidance on ruling on motions to amend pleadings.¹²² More specifically, Presiding Officers have considered the following factors: undue prejudice to the respondent;¹²³ bad faith or dilatory motive by complainant;¹²⁴ repeated failures by complainant to cure deficiencies in previous versions of complaint;¹²⁵ futility of amendment,¹²⁶ and undue delay to proceedings by amendment.¹²⁷ If a Motion to Amend is granted, the practice has been for the Presiding Officer to set a deadline by which the complainant is required to file the amended complaint with the appropriate Hearing Clerk and serve the amended complaint on all respondents to the action.¹²⁸ Pursuant to 40 C.F.R. § 22.14(c), the respondent then has twenty (20) days from the date of service of the amended complaint to file an answer.

7. *Withdrawal of Complaint*

In addition to amending a complaint, the CROP also permit a complainant to withdrawal a complaint or any part thereof “without prejudice” one time as a matter of right before an answer has been filed.¹²⁹ If an answer has been filed, the complainant may withdrawal the complaint “without prejudice” only upon motion to and leave from the Presiding Officer.¹³⁰ If a complaint is withdrawn, a respondent

¹²⁰ See, e.g., *In re Carroll Oil Co.*, 10 E.A.D. 635, 649 (EAB 2002); *In re Wego Chemical & Mineral Corp.*, 4 E.A.D. 513, 525 n.11 (EAB 1993); *In re Strong Steel Products, LLC* Nos. RCRA-5-2001-0016, CAA-5-2001-0020 & MM-5-2001-0006, 2003 EPA ALJ LEXIS 191, at *4 (ALJ, Oct. 27, 2003); (noting that the general rule is that administrative pleadings are “liberally construed and easily amended”).

¹²¹ 371 U.S. 178, 181-82 (1962).

¹²² See also, *Carroll Oil Co.*, 10 E.A.D. at 649; *In re Asbestos Specialists, Inc.*, 4 E.A.D. 819, 828-29 (EAB 1993); and *In re Wayne Vaughn.*, No. CWA-9-2001-0002) 2002 EPA ALJ LEXIS 43 at *4 and n.5 and 6 (July 25, 2002).

¹²³ See e.g., *Carroll Oil Co.*, 10 E.A.D. at 650 (stating that the most significant of the Foman factors is whether an amendment would “unduly prejudice” the opposing party).

¹²⁴ See, e.g., *In re Everwood Treatment Co.*, No. RCRA-IV-92-R, 1993 EPA ALJ LEXIS 273 at *13 (ALJ, July 28, 1993), *rev. 'd on other grounds*, 6 E.A.D. 589 (EAB 1996) (stating a denial of a motion would be justified if “some ulterior purpose...to gain some tactical advantage or to abuse or harass” was found); *In re Nassau County Dept. of Public Works*, No. MPRSA-II-92-02, 1992 EPA ALJ LEXIS 715 at *15-17 (ALJ, Sept. 11, 1992) (discussing a possible denial of a motion if “bad faith” was found).

¹²⁵ See, e.g., *Carroll Oil Co.*, 10 E.A.D. at 650 (quoting Fed. R. Civ. P. 15(a)).

¹²⁶ See, e.g., *In re Hardin County, Ohio*, 5 E.A.D. 189 (EAB 1994); and *In re AZS Corp.*, No. TSCA-90-H-23 1993 EPA ALJ LEXIS 147, at *28-29 (ALJ, March 18, 1993).

¹²⁷ See, e.g., *Carroll Oil Co.*, 10 E.A.D. at 650; *AZS Corp.*, 1994 EPA ALJ LEXIS 147 at *32; *Everwood Treatment Co.*, 1993 EPA ALJ LEXIS 273 at *13-16 (denying the motion, in part, because of the unreasonable delays).

¹²⁸ See, e.g., *Strong Steel Products*, 2003 EPA ALJ LEXIS 191 at *23 (finding that a complainant will serve and file an amended complaint on a specific date and finding that the respondent will file and answer on or before a specific date). Pursuant to 40 C.F.R. § 22.14(c), the respondent then has twenty (20) days from the date of service of the Amended Complaint to file an Answer.

¹²⁹ 40 C.F.R. § 22.14(d).

¹³⁰ See, e.g., *In re Hillyard Industries, Inc.*, No. FIFRA-07-2004-0124, 2004 EPA ALJ LEXIS 14 at *1-2 (ALJ, May 11, 2004) (discussion of withdrawal versus dismissal of a Complaint); *In re Laclede Steel Co.*, No. RCRA-5-99-003, 2001 EPA ALJ LEXIS 178, at 1 (ALJ, Nov. 19, 2001) (withdrawal of complaint based upon respondent’s filing of a bankruptcy petition); see *In re B & L Builders, Inc.*, No. CWA-5-2000-006, 2001 EPA ALJ LEXIS 26 at *2-3 (ALJ, March 1, 2001) (noting that a presiding officer may dismiss a complaint upon the respondent’s filing of the motion); *In re City of Cambridge, Water Pollution Control Center*, No. 5-CWA-97-021, 1998 EPA ALJ LEXIS 14 at *1-2 (ALJ, April 29,

generally is not entitled to reimbursement of attorney's fees, consultant fees, and other costs incurred in defending the action prior to the withdrawal.¹³¹

B. Respondent's Answer

Once a complaint has been filed and served, the respondent must decide whether to challenge the Agency's action and submit a responsive filing. The CROP require a respondent to file a written answer whenever the respondent: contests any material fact upon which the complaint is based, contends that the proposed penalty, Compliance Order, Corrective Action Order, or Permit Action is inappropriate, or contends that it is entitled to judgment as a matter of law.¹³²

1. Format and Content

The CROP do not mandate that an answer be in a particular format.¹³³ As a matter of practice, answers filed in Part 22 proceedings tend to mirror the format of complaints.¹³⁴ With regard to content, the CROP require that in an answer a respondent must, *inter alia*:

- Admit, Deny or Explain Factual Allegations – If a respondent lacks knowledge concerning a particular factual allegation and so states in the answer, the allegation is deemed denied.¹³⁵ If a respondent fails to admit, deny or explain any material factual allegation, then the allegation is deemed to have been admitted by the respondent;¹³⁶
- Assert Defenses – Respondent must set forth any circumstances or arguments which will constitute the grounds of any defense it intends to make in the proceeding, including any affirmative defense, and any fact which respondent disputes;¹³⁷
- Explain Opposition to Proposed Relief – Respondent must set forth the bases for its opposition to the relief proposed in the complaint, including penalty-mitigation factors (e.g., inability-to-pay),¹³⁸ and
- Request a Hearing – If a respondent fails in the answer to request a hearing, the respondent may be deemed to have waived its opportunity.¹³⁹

1998).

¹³¹ *In re* Richmond American Homes of Colorado, Inc., No. CWA-08-2003-0080, 2004 EPA ALJ LEXIS 4 at *3-4 (ALJ, Feb. 9, 2004).

¹³² 40 C.F.R. § 22.15(a).

¹³³ 40 C.F.R. § 22.5(c)(1).

¹³⁴ *See In re* Mr. Marcelino Alvarez (Terrazas de Borinquen, S.E.), No. CWA-02-2004-3400, 2004 EPA ALJ LEXIS 8 at *1-2 (ALJ, April 12, 2004) (Respondent cannot unilaterally change caption of case).

¹³⁵ 40 C.F.R. § 22.15(b).

¹³⁶ 40 C.F.R. § 22.15(d).

¹³⁷ 40 C.F.R. § 22.15(b).

¹³⁸ *Id.*

¹³⁹ *Id.*

2. *Filing and Service of Answer*

40 C.F.R. § 22.15(a)(1) requires that the original and one copy of an answer must be filed with the appropriate Hearing Clerk. Generally, an answer must be filed within thirty (30) days of service of the complaint.¹⁴⁰ However, a respondent is provided an additional five days to file if the complaint was served by either certified mail or some method other than overnight or same day delivery service.¹⁴¹ An answer is deemed to be filed when it has been received by the appropriate Hearing Clerk.¹⁴² With regard to service, 40 C.F.R. § 22.15(a) requires that the respondent serve a copy of its answer on all other parties to the action. Pursuant to 40 C.F.R. § 22.5(b)(2), an answer may be served by either: in-person delivery, by first class mail (including certified mail, return receipt requested, Overnight Express and Priority Mail); or by any reliable commercial delivery service. Service of an answer is deemed to be “complete” upon mailing or when placed in the custody of a reliable commercial delivery service.¹⁴³

3. *Assertion of Defenses*

40 C.F.R. § 22.15(b) requires that a respondent assert in its answer any defense to liability that the respondent intends to raise at hearing. A respondent is not required to include the “specific facts in support of [its] defense, but merely the ‘circumstances or arguments which are alleged to constitute the grounds’ for the defense.”¹⁴⁴ However, the assertion must be sufficient to “apprise the opposing party of the nature of the defense.”¹⁴⁵ Merely asserting a defense by name (e.g., “complainant is estopped”) without providing more information has been held to be insufficient.¹⁴⁶ A number of EAB decisions have held that a respondent may be deemed to have waived a defense if it is not asserted in its answer.¹⁴⁷ In determining whether a defense has been waived, the EAB and OALJ have looked for guidance to FRCP 15(a) and federal court decisions.¹⁴⁸

4. *Affirmative Defenses*

The EAB has described an affirmative defense as a defense which is “avoiding in

¹⁴⁰ 40 C.F.R. § 22.15(a); 40 C.F.R. § 22.7(a). (time periods under the CROP are computed by the “day of the event from which the designated period begins to run shall not be included. Saturdays, Sundays and Federal holidays shall be included. When a stated time expires on a Saturday, Sunday or Federal holiday, the stated time period shall be extended to include the next business day.”)

¹⁴¹ 40 C.F.R. § 22.7(c).

¹⁴² 40 C.F.R. § 22.5(a)(1).

¹⁴³ Respondents frequently will file a Motion for an Extension of Time to File an Answer in order to research facts and questions of law, and to explore settlement options for the action. 40 C.F.R. § 22.7(b)

¹⁴⁴ Strong Steel Products, LLC, 2003 EPA ALJ LEXIS 191, at *25.

¹⁴⁵ *Id.*

¹⁴⁶ *See, e.g., In re Dearborn Refining Co.*, No. RCRA-05-2001-0019, 2003 EPA ALJ LEXIS 10, at *4 (ALJ, Jan. 3, 2003) (finding that the respondent’s “quick and dirty” response was not a sufficient of those defenses); Strong Steel Products, 2003 EPA ALJ LEXIS 191, at *25-26 (pleading the words ‘estoppel’ and ‘unclean hands’ without more, is not sufficient statement of those defenses).

¹⁴⁷ *In re Lazarus, Inc.*, 7 E.A.D. 318, 330-333 (EAB 1997); *In re Landfill, Inc.*, 3 E.A.D. 461, 466-67 (CJO, 1990).

¹⁴⁸ *Foman v. Davis*, 371 U.S. 178, 181-82 (1962); *Lazarus*, 7 E.A.D. at 331-2.

nature” and which raises matters outside the scope of the complainant’s prima facie case.”¹⁴⁹ The CROP do not specifically list the types of affirmative defenses that may be asserted in a Part 22 proceeding. However, when an affirmative defense is asserted, the respondent bears the burdens of proof and persuasion with regard to that defense.¹⁵⁰ The following is a discussion of some of the more frequently utilized affirmative defenses in Part 22 actions.

a) Statute of Limitations

Most of the federal statutes that the EPA enforces do not contain statute of limitations provisions.¹⁵¹ Rather, the five-year statute of limitations set forth in 28 U.S.C. § 2462¹⁵² has been held to be applicable to Part 22 actions.¹⁵³ Under 28 U.S.C. § 2462, the EPA is barred from initiating an enforcement action seeking the assessment of a civil penalty, unless the action is commenced within five years of the date on which the claims raised first accrued.¹⁵⁴ A claim is deemed to have accrued “when the factual and legal prerequisites for filing suit are in place.”¹⁵⁵ However, some violations may be of a continuing nature and subject to the “continuing violations” rule which provides that a claim “may be maintained at any time beginning when the illegal course of conduct first occurs and ending five years after it is completed.”¹⁵⁶ In effect, the “continuing violations” rule tolls the statute of limitations.¹⁵⁷ In determining whether violations of federal environmental laws are of a “continuing nature” and, therefore, subject to the “continuing violations”, the EAB has focused its review on the precise language of the regulation at issue and whether it connotes an on-going obligation.¹⁵⁸

¹⁴⁹ *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 540 (EAB 1994); *In re City of Salisbury*, 10 E.A.D. 263, 289 n.38 (EAB, 2002).

¹⁵⁰ 40 C.F.R. § 22.24(a); *See, also, In re Harpoon P’ship*, No. TSCA-05-2002-0004, 2003 EPA ALJ LEXIS 52 at *2 n.1 (ALJ, Aug. 4, 2003) (*citing* *Rogers Corp. v. EPA*, 352 F.3d 1096, 1103 (D.C. Cir. 2002.)).

¹⁵¹ *See In re Britton Constr. Co.*, 8 E.A.D. 261, 277 (EAB 1999) (*citing In re BJ Carney Industries, Inc.*, 7 E.A.D. 171, 223 n.69 (EAB 1997) (“the statute of limitations is an affirmative defense”).

¹⁵² 28 U.S.C. § 2462 (2000) provides that, “[e]xcept as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.”

¹⁵³ *In re Newell Recycling Co.*, 8 E.A.D. 598, 614 (EAB 1999), *aff’d*, *Newell Recycling Co. v. EPA*, 231 F.3d 204 (5th Cir. 2000); *In re Lazarus, Inc.*, 7 E.A.D. 318, 364 (EAB 1997).

¹⁵⁴ *In re Harmon Elec., Inc.*, 7 E.A.D. at 19.

¹⁵⁵ *Id.* *See also In re Ray and Jeanette Veldhuis*, No. CWA-9-99-0008, 2002 EPA ALJ LEXIS 39, at 238 n.443 (ALJ, June 24, 2002) (“A claim normally accrues when the factual and legal prerequisites for filing suit are in place” e.g. when the violation takes place).

¹⁵⁶ *Newell Recycling Co.*, 8 E.A.D. at 614; *Lazarus*, 7 E.A.D. at 364.

¹⁵⁷ *Lazarus Inc.*, 7 E.A.D. at 364 (*citing* *Toussie v. United States*, 397 U.S. 112, 115 (1970)). *See also* *3M Co. v. Browner*, 17 F.3d 1483, 1462-63 (D.C. Cir. 1994) (holding that, with regard to the general federal statute of limitations, the discovery of violation rule does not apply). *See also In re E.I DuPont de Nemours*, Nos. TSCA-2004-0016, RCRA-HQ-2004-0016 and TSCA-HQ-2005-0001, 2005 EPA ALJ LEXIS 20 at 143-144 (ALJ March 29, 2005).

¹⁵⁸ *See Harmon Elec.*, 7 E.A.D. at 16-40; *Lazarus Inc.*, 7 E.A.D. at 366.

b) Selective Enforcement

A respondent may assert as an affirmative defense that it was subject to selective enforcement on the part of the Agency and that the Agency's action should be barred. In order to successfully assert this defense, a respondent must establish that: the respondent was "singled out while other similarly situated violators" were not prosecuted by the Agency; and the Agency selected the respondent for an enforcement action "invidiously or in bad faith, i.e., based upon such impermissible considerations as race [or] religion".¹⁵⁹ When raising this defense, a respondent must do more than merely assert the defense, but must be fairly specific in identifying other violators who were not prosecuted by the Agency and who were "similarly situated" with the respondent.¹⁶⁰ Overall, the burden a respondent faces with regard to proving selective enforcement has been described as "demanding" and "daunting."¹⁶¹

c) Constitutional Challenge to Statutes and Regulations—Generally

Almost universally, the EAB and OALJ have refused to entertain constitutional challenges to statutes or regulations during the course of a Part 22 proceeding. The EAB has held that it is clearly beyond its "purview" to rule on the constitutionality of a statute during a CROP proceeding.¹⁶² However, in situations "where the constitutionality of the statute is not at issue, but instead where the issue is whether the statute is being applied in a manner that satisfies constitutional requirements", such challenges have been entertained.¹⁶³ With regard to Agency regulations, the Board has held there is a presumption against challenges in a Part 22 proceeding and that a regulatory challenge should not be entertained "absent the most compelling circumstances."¹⁶⁴

d) Equitable Estoppel

A Respondent asserting an affirmative defense of equitable estoppel against the Agency bears a "high burden".¹⁶⁵ More specifically, a respondent must establish that: the complainant participated in some type of affirmative misconduct,¹⁶⁶ the

¹⁵⁹ *In re B&R Oil Co.*, 8 E.A.D. 39, 51 (EAB 1998); *In re Newell Recycling Co.*, 8 E.A.D. 598, 634-35 (EAB 1999), *aff'd*, 231 F.3d 204 (5th Cir. 2000).

¹⁶⁰ See *In re Goodman Oil Co.*, No. RCRA-10-2000-0113, 2001 EPA ALJ LEXIS 152 at 26-29 (ALJ, Aug. 22, 2001); *In re United States Dep't of the Navy*, No. RCRA-III-9006-062, 2000 EPA ALJ LEXIS 76, at 48-50 (ALJ, Nov. 15, 2000).

¹⁶¹ See *B&R Oil Co.*, 8 E.A.D. at 50-1; *Newell Recycling Co.*, 8 E.A.D. at 634; *In re Aakash Chem. & Dyestuffs, Inc.*, No. 5-TSCA-96-006, 1997 EPA ALJ LEXIS 44, at 4-6 (ALJ, Nov. 4, 1997).

¹⁶² See *In re Echevarria*, 5 E.A.D. 626, 637 (EAB 1994) (citing *Mathews v. Diaz*, 426 U.S. 67, 76 (1976) (constitutionality of a statute is beyond an agency's competence.); *In re City of Irving*, 10 E.A.D. 111, 124 (EAB 2001); *City of Abilene v. U.S.*, 325 F.3d 657 (5th Cir. 2003); *In re Colleen Tillion*, No. CWA-10-2004-0067, 2005 EPA ALJ LEXIS 28, at 29 n.16 (ALJ May 26, 2005).

¹⁶³ *Colleen Tillion*, 2005 EPA ALJ LEXIS, at 29 n.16. See also, *In re Mayes*, No. 04-2002-0001, 2005 EPA App. LEXIS 5, at 28 n.16 (EAB Mar. 3, 2005); *In re Ocean State Asbestos Removal*, 7 E.A.D. 522, 558 (EAB 1998); *In re General Elec. Co.*, 4 E.A.D. 615, 632-33, 639 (EAB 1993).

¹⁶⁴ See also *Echevarria*, 5 E.A.D. at 634; *B.J. Carney Indus, Inc.*, 7 E.A.D. at 194.

¹⁶⁵ *In re BWX Tech., Inc.*, 9 E.A.D. 61, 80 (EAB 2000); *Newell Recycling Co.*, 8 E.A.D. at 631; *In re Wego Chemical & Mineral Corp.*, 4 E.A.D. 513, 521-22 (EAB 1993).

¹⁶⁶ "Affirmative misconduct" has been defined as "an affirmative misrepresentation or affirmative

complainant was aware of its affirmative misconduct, the complainant intended its affirmative misconduct to be acted upon, the respondent (i.e., party asserting estoppel) did not have knowledge of the facts of the complainant's affirmative misconduct; and the respondent reasonably relied¹⁶⁷ upon the conduct of the complainant to its detriment or substantial injury.¹⁶⁸ When the conduct of the Agency may not rise to the level of "affirmative misconduct," yet may have prejudiced a respondent, a Presiding Officer may consider such conduct a "mitigating factor in penalty calculations" but not as a defense to liability for the violation.¹⁶⁹

e) Laches

In general, the affirmative defense of laches (i.e., that unreasonable delay in undertaking an action results in prejudice to another party) has been held to be inapplicable to actions of the federal government, including actions by EPA under the CROP.¹⁷⁰ However, in situations where a respondent is unable to produce evidence sufficient to establish laches, such information may be used as a penalty mitigation factor by a Presiding Officer in calculating an appropriate penalty to be assessed against the respondent for its violations.

f) Paperwork Reduction Act—Public Protection Provision

The Paperwork Reduction Act of 1980¹⁷¹ (PRA) was enacted to "minimize the paperwork burden for individuals, small businesses, educational and nonprofit institutions, Federal contractors, State, local and tribal governments, and other persons resulting from the collection of information by or for the Federal Government."¹⁷² The PRA requires an agency to submit the proposed collection of information to the Office of Management and Budget (OMB), obtain OMB approval and a control number and display the control number, before conducting or

concealment of a material fact by the government." *Newell Recycling Co.*, 8 E.A.D. at 631 n. 24; *In re V-1 Oil Co.*, 8 E.A.D. 729, 749 (EAB 2000). Generally, "[m]ere negligence, delay, inaction, or failure to follow agency guidelines does not constitute affirmative misconduct sufficient to estop the government." *BWX*, 9 E.A.D. at 80; *B.J. Carney Indus.*, 7 E.A.D. at 199 (an "extended period of no enforcement or under-enforcement" usually will not warrant a finding of affirmative misconduct).

¹⁶⁷ *B.J. Carney Indus.*, 7 E.A.D. at 202. (A respondent must also prove that it "reasonably relied" on the Agency's misconduct in such a manner as to have changed its "position for the worse.").

¹⁶⁸ *Newell Recycling Co.*, 8 E.A.D. at 631 n. 24. See also *In re B.J. Carney Indus.*, 7 E.A.D. at 196; *Wego Chem.*, 4 E.A.D. at 522 ("A party asserting equitable estoppel against the United States must demonstrate that there was affirmative misconduct upon which the party reasonably relied to its detriment").

¹⁶⁹ *B.J. Carney Indus.*, 7 E.A.D. at 204.

¹⁷⁰ *In re Tenn. Valley Auth.*, 9 E.A.D. 357, 415 n. 56 (EAB 2000) ("The government is not in the position of a private litigant or a private party.") (citing *Nevada v. United States*, 463 U.S. 110, 141 (1983)). See also *In re Dept. of Def., Davis Monthan Air Force Base*, No. CAA-09-98-17, 1999 EPA ALJ LEXIS 99, at 14 (ALJ Nov. 19, 1999); *In re Century Aluminum of W. Va, Inc.*, No. CAA-III-116, 1999 EPA ALJ LEXIS 26, at 5-6 (ALJ June 25, 1999). ("The affirmative defense of laches generally does not apply to the federal government when the government is acting in its sovereign capacity to protect the public welfare or to enforce a public right, and therefore is rarely granted.").

¹⁷¹ 44 U.S.C. §§ 3501-3520 (2001).

¹⁷² 44 U.S.C. § 3501-1. Additional information concerning the PRA can be located at <http://www.epa.gov/icr>, or <http://www.whitehouse.gov/OMB/infoereg/prareprt.html>.

sponsoring a collection of information.¹⁷³ Congress enacted the Public Protection Provision within the PRA to protect against “bootleg” collection requests undertaken in violation of the Act.¹⁷⁴ The Public Protection Provision has been recognized as an affirmative defense.¹⁷⁵ Indeed, the provision specifically provides that it “may be raised in the form of a complete defense, bar, or otherwise at any time” during an agency administrative or judicial action to which it applies.¹⁷⁶ However, it is important to note that the PRA and the Public Protection Provision are applicable only to information requests by the Agency issued pursuant to authority set forth in regulations and not statutes.¹⁷⁷

5. *Penalty Mitigation Arguments*

In addition to asserting affirmative defenses to liability, a respondent can also raise in its answer equitable arguments addressed at mitigating the amount of any penalty that might be assessed by a Presiding Officer concerning the violations alleged in the complaint.¹⁷⁸ One of the more frequently cited penalty mitigation arguments concerns the financial impact that a proposed penalty may have on the ability of a respondent to stay in business. Such arguments are commonly referred to as “ability-to-pay” claims.¹⁷⁹ The Agency has taken the position that, in certain circumstances, it “will not assess penalties that are clearly beyond the means of the violator.”¹⁸⁰ However, the EPA has reserved the right “to seek penalties that might put a company out of business” in certain situations, including, but not limited to, when a “facility refuses to correct a serious violation,” has a “long history of previous violations” or has “violations of the law [that] are particularly egregious.”¹⁸¹ In order to evaluate ability-to-pay claims raised by respondents, the EPA may utilize a computer model called “ABEL” and may seek the opinions of financial/accounting experts.¹⁸²

6. *Amendment of Answer*

Pursuant to 40 C.F.R. § 22.15(e), the presiding officer may grant a respondent’s motion to amend its answer. Because 40 C.F.R. § 22.15(e) does not address the

¹⁷³ 44 U.S.C. § 3507. *E.g.*, *In re Billy Yee*, 10 E.A.D. 1, 12 (EAB 2001); *In re EK Assoc., L.P.*, 8 E.A.D. 458, 462 (EAB 1999).

¹⁷⁴ 44 U.S.C. § 3512(b) (The Public Protection Provision provides that “[n]otwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information that is subject to this subchapter if (1) the collection of information does not display a valid control number assigned by the Director [of OMB] in accordance with this subchapter; or (2) the agency fails to inform the person who is to respond to the collection of information that such person is not required to respond to the collection of information unless it displays a valid control number.”).

¹⁷⁵ *In re Lazarus, Inc.*, 7 E.A.D. at 330 (EAB 1997).

¹⁷⁶ 44 U.S.C. § 3512(b).

¹⁷⁷ *Lazarus, Inc.*, 7 E.A.D. 328-29 n.22; *EK Associates*, 8 E.A.D. at 463 n.8.

¹⁷⁸ 40 C.F.R. § 22.15(b).

¹⁷⁹ *See In re New Waterbury, Ltd.*, 5 E.A.D. 529, 540 (EAB 1994) (the EAB “rejected” the contention that an ability-to-pay claim is an affirmative defense.).

¹⁸⁰ RCRA Civil Penalty Policy, at 38 (June 2003).

¹⁸¹ *Id.*

¹⁸² ABEL model available at www.epa.gov/compliance/civil/programs/econmodels/index.html#models. The ABEL model is limited to providing analysis of for-profit entities.

standards that a Presiding Officer is to use in ruling upon a Motion to Amend an Answer, the EAB and the OALJ have both looked to Federal Rule of Civil Procedure 8(c) as well as the “Foman Factors”, for guidance.¹⁸³ Additionally, the EAB and OALJ have adopted the policy that administrative pleadings, like answers, should be “liberally construed” and “easily amended.”¹⁸⁴

C. Case Assigned by OALJ

When an answer is filed in a Part 22 action, jurisdiction of the action transfers to the EPA’s Office of Administrative Law Judges.¹⁸⁵ An Administrative Law Judge will be designated to serve as the Presiding Officer for the matter.¹⁸⁶ Shortly after being designated, the Presiding Officer will issue a Pre-hearing Order that, *inter alia*, sets a schedule for the filing of Pre-Hearing Information Exchanges by the parties.¹⁸⁷ The presiding officer may also call the parties into a conference to discuss proposed locations and dates for a hearing.¹⁸⁸

D. Pre-Hearing Information Exchange and Other Discovery

Probably the biggest difference between Part 22 and federal court practice lies in the area of discovery. Discovery under the CROP is relatively limited.¹⁸⁹ The Pre-hearing Information Exchange is the primary “mechanism for discovery” in Part 22 actions.¹⁹⁰ Additional discovery is permitted only upon motion to and leave from the Presiding Officer.¹⁹¹

1. Contents of Pre-hearing Exchange

Under the CROP, a party’s Pre-Hearing Information Exchange must contain the following information:

¹⁸³ *Foman v. Davis*, 371 U.S. 178, 182 (1962). See *Lazarus, Inc.*, 7 E.A.D. at 331-332 (EAB 1997); *In re Palm Harbor Homes, Inc.*, No. EPCRA-4-99-54, 2000 EPA ALJ LEXIS 66, at 7 (ALJ Oct. 3, 2000); *In re Wozniak Industries, Inc.*, No. 5-EPCRA-97-051, 1998 EPA ALJ LEXIS 17, at 3 (ALJ Feb. 4, 1998) (When applying Federal Rule of Civil Procedure 15(a) if “undue delay, bad faith, dilatory movements on the part of the movant, undue prejudice to the opposing party and futility of amendment” are not present then the court should permit the respondent to amend his pleading).

¹⁸⁴ *In re Overcash Gravel and Grading Co.*, No. CWA-04-2004-4530, 2005 EPA ALJ LEXIS 40, at 1 (ALJ July 29, 2005); *Lazarus*, 7 E.A.D. at 333; *In re Port of Oakland and Great Lakes Dredge and Dock Co.*, 4 E.A.D. 170, 205 (EAB 1992).

¹⁸⁵ 40 C.F.R. § 22.21(a) (2004).

¹⁸⁶ 40 C.F.R. § 22.4(d)(1) (At any time during the course of an administrative proceeding, a party may file a motion requesting that a Presiding Officer disqualify/recuse himself or herself. The judge may also withdraw from a part 22 proceeding at any time for any reason).

¹⁸⁷ 40 C.F.R. § 22.19(a).

¹⁸⁸ *Id.* at § 22.19(b)(6).

¹⁸⁹ See *In re Advanced Elec., Inc.*, 10 E.A.D. 385, 393 n. 19 (EAB 2002) (court explained that there is no basic right to discovery in federal administrative proceedings, rather the agency’s procedural rules govern the amount of discovery available).

¹⁹⁰ 40 C.F.R. § 22.19(a); *In re H. Kramer & Company*, No. RCRA-5-2000-014, Slip op. at 2 (ALJ Feb. 27, 2001).

¹⁹¹ 40 C.F.R. § 22.19(e) (By limiting the use of additional discovery tools, “EPA foregoes in its administrative proceedings the opportunities afforded by extensive discovery in exchange for the benefits of more expeditious case resolution.”). 64 Fed. Reg. 40138, 40160 (July 23, 1999).

a) Witness Information

A Pre-hearing Information Exchange must identify “the names of any expert or other witnesses” that a party intends to call at a hearing and include a “brief narrative summary” of the witnesses’ expected testimony.¹⁹² Generally, a party will be precluded from calling a witness at a Part 22 hearing if that witness’ name and testimony summary have not been included in its Pre-hearing Information Exchange.¹⁹³ With regard to expert witnesses, the Part 22 Rules do not define the term nor do they set forth what qualifications a witness must have in order to be qualified an expert witness.¹⁹⁴ Rather, the EAB and OALJ have looked to Rule 702 of the Federal Rules of Evidence and respective federal court decisions, particularly *Daubert v. Merrell Dow Pharmaceuticals*,¹⁹⁵ and its progeny, as providing “useful guidance” in determining the reliability and weight of evidence presented in administrative proceedings.¹⁹⁶

b) Documents and Exhibits

Pursuant to 40 C.F.R. § 22.19(a)(2)(ii), a party’s Pre-Hearing Information Exchange must contain “copies of all documents and exhibits which it intends to introduce into evidence at the hearing.” A party will be precluded from introducing at hearing a document or exhibit that was not included in its Pre-Hearing Information Exchange.¹⁹⁷ With regard to documents or exhibits that are included in a Pre-Hearing Information Exchange, a “party is not required to explain the relevancy” of the documents or exhibits or “to authenticate them, prior to hearing.”¹⁹⁸

c) Penalty Information

In those cases in which a specific penalty was proposed in the complaint, the Part 22 Rules require the complainant to set forth and explain in detail in its Pre-Hearing Information Exchange how the penalty was calculated in accordance with the applicable statutory factors.¹⁹⁹ In those cases in which the complainant elected to the

¹⁹² 40 C.F.R. § 22.19(a)(2)(i); *See In re Strong Steel Prod., LLC*, Nos. RCRA-5-2001-0016, CAA-5-2001-0020 & MM-5-2001-0006, 2003 EPA ALJ LEXIS 191, at 41 (ALJ, Oct. 27, 2003) (“There is no standard for the degree of specificity required of a summary of testimony, so there is no authority for precluding testimony at hearing on the basis of failure to provide a sufficiently specific summary of testimony in prehearing exchange.”).

¹⁹³ 40 C.F.R. §§ 22.19(a)(1), 22.22(a)(1).

¹⁹⁴ *See, In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 540 n.20 (EAB 1998); *Strong Steel Prod.*, 2003 EPA ALJ LEXIS 191, at 53-54 (The EAB and OALJ have held that EPA witnesses testifying concerning penalty calculations are “expert witnesses”); *See In re Hous. Auth. of Moundsville*, No. CAA-03-2003-2011, 2004 EPA ALJ LEXIS 116, at 4 (ALJ, June 7, 2004).

¹⁹⁵ 509 U.S. 570 (1993).

¹⁹⁶ *See, e.g., In re City of Salisbury, Maryland*, No. CWA-III-219, 2000 EPA ALJ LEXIS, at 35-36 (ALJ, Feb. 8, 2000); *But see C.W. Smith*, 2004 EPA ALJ LEXIS 128, at 164 (EBA July 15, 2004); *In re Solutia, Inc.*, 10 E.A.D. 193, 211 n. 22 (EAB 2001); *In re Solutia, Inc.*, 10 E.A.D. 193, 211 n. 22 (EAB 2001) (Federal Rules of Evidence 702 and decisions, like *Daubert*, are “not controlling principles in agency hearings” rather a Presiding Officer has considerable determining the reliability of expert testimony).

¹⁹⁷ 40 C.F.R. §§ 22.19(a)(1), 22.22(a)(1).

¹⁹⁸ *See Strong Steel Prod.*, 2003 EPA ALJ LEXIS 191, at 43.

¹⁹⁹ 40 C.F.R. § 22.19(a)(3).

plead statutory maximum, the Part 22 Rules require that the complainant's Pre-Hearing Information Exchange must set forth all of the facts that it believes are relevant to the calculation of a penalty for Respondent's alleged violations.²⁰⁰ Then, within fifteen (15) days after the respondent has filed its Pre-Hearing Information Exchange, the Complainant must propose a specific penalty and explain how this penalty was calculated in accordance with all applicable statutory factors.²⁰¹ The respondent is required to explain in its Pre-Hearing Information Exchange any argument it may have as to "why the proposed penalty should be reduced or eliminated."²⁰²

d) Case Specific Disclosures

In addition to the aforementioned information, a Presiding Officer may require parties to include as part of their Pre-Hearing Information Exchange other case specific information the Presiding Officer deems to be relevant to the matter.²⁰³ However, parties are not required to disclose information relating to settlement that would be protected under Rule 408 of the Federal Rules of Evidence.²⁰⁴

e) Supplementing/Updating Pre-hearing Information Exchange

A party must "promptly supplement or correct" its Pre-Hearing Information Exchange when that party "learns that the information exchanged or response provided is incomplete, inaccurate or outdated, and the additional or corrective information has not otherwise been disclosed" to the other parties in the matter.²⁰⁵

f) Sanctions for Failure to Comply with Pre-Hearing Exchange

If a party fails to include in its Pre-Hearing Information Exchange information within its control which it is required to disclose in accordance with 40 C.F.R. § 22.19, that party is potentially subject to sanctions. More specifically, a Presiding Officer may: (1) infer that the information at issue would be adverse to the party that failed to provide it, (2) exclude the information from evidence, or (3) issue a default against the party that failed to disclose the information.²⁰⁶ Additionally, if a party fails disclose to its adversary and the Presiding Officer a "document, exhibit, witness name or summary of expected testimony" at least fifteen days prior to the date set for hearing in the matter, the CROP require that the Presiding Officer not admit the document, exhibit or testimony into evidence, unless the non-exchanging party can

²⁰⁰ 40 C.F.R. § 22.19(a)(4).

²⁰¹ *Id.*

²⁰² 40 C.F.R. § 22.19(a)(3).

²⁰³ 64 FR 40138, 40159 (July 23, 1999). *See also In re Virgin Petroleum-Princess, Inc.*, No. RCRA-02-2002-7501, 2003 EPA ALJ LEXIS 9, at 4-5 (ALJ, Mar. 24, 2003).

²⁰⁴ 40 C.F.R. § 22.19(a)(1).

²⁰⁵ 40 C.F.R. § 22.19(f). *See In re City of New Bedford, Mass.*, No. CWA-01-2002-0059, 2003 EPA ALJ LEXIS 43, at 7 (ALJ July 2, 2003); *In re Belmont Plating Works*, No. RCRA-5-2001-0013, 2002 EPA ALJ LEXIS 65 (ALJ Sept. 11, 2002).

²⁰⁶ 40 C.F.R. § 22.19(g)(1)-(3). *See, e.g., In re Jiffy Builders, Inc.*, 8 E.A.D. 315, 319 (EAB 1999) (Presiding officer has right to issue a default order for failure to comply with prehearing order); *In re B&L Plating, Inc.*, 2003 EPA App. LEXIS 8, at 21 n.18 (EAB Oct. 20, 2003).

establish that it had good cause for its late disclosure.²⁰⁷

g) Filing and Service

Pursuant to 40 C.F.R. § 22.5(a)(1), the original and one copy of each party's Pre-Hearing Information Exchange must be filed with either the Regional Hearing Clerk or EPA Headquarters' Hearing Clerk, as appropriate. Additionally, a copy of each party's Pre-Hearing Information Exchange must be served upon the Presiding Officer and all other parties.²⁰⁸ A Pre-Hearing Information Exchange may be served either: personally; by first class mail (including certified mail, return receipt requested, Overnight Express and Priority Mail); or by any reliable commercial delivery service.²⁰⁹ The Presiding Officer, at his or her discretion, may authorize facsimile or electronic service of a Pre-Hearing Information Exchange.²¹⁰

2. "Other Discovery" Practice

As previously discussed, discovery practice in addition to the Pre-Hearing Information Exchange (e.g., use of depositions or requests for interrogatories) is very limited in Part 22 actions and is permitted only after the completion of the Pre-Hearing Information Exchange phase.²¹¹ A party seeking other discovery must file with the Presiding Officer a motion in which the moving party: specifies the method of discovery sought; provides a copy of the proposed discovery instrument; describes in detail the nature of the information being sought, and where relevant, the proposed time and place where such additional discovery will be conducted.²¹² The motion must also comply with the general requirements for motions set forth in 40 C.F.R. § 22.16. Finally, the requesting party must make an attempt prior to filing its motion to obtain such information voluntarily from its adversary.²¹³ Under the CROP, a Presiding Officer may order such other discovery *only if* it will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party; seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and seeks information that has significant probative value²¹⁴ on a disputed issue of material fact relevant to liability or the relief sought.²¹⁵ With regard to requests for depositions, the Part 22

²⁰⁷ 40 C.F.R. § 22.22(a)(1).

²⁰⁸ 40 C.F.R. § 22.5(b).

²⁰⁹ 40 C.F.R. § 22.5(b)(2).

²¹⁰ *Id.*

²¹¹ 40 C.F.R. § 22.19(e)(1).

²¹² *Id.*

²¹³ 40 C.F.R. § 22.19(e)(1)(ii). *See also In re Lake County*, No. CAA-8-99-11, at 8 (ALJ June 28, 2000).

²¹⁴ *See, e.g., In re Chautauqua Hardware Corp.*, 3 E.A.D. 616, 622 (CJO 1991) (The EAB has held that "[t]he phrase 'probative value' denotes the tendency of a piece of information to prove a *fact* that is of consequence in the case."). *See also In re Tenn. Valley Auth.*, 9 E.A.D. 357, 375 n.16; *In re Advanced Elec., Inc.*, 10 E.A.D. 385, 395 (EAB 2002).

²¹⁵ 40 C.F.R. § 22.19(e)(1)(i)-(iii). *See, e.g., In re Int'l Paper Co.*, No. CAA-R6-P-9-LA-98030, 2000 EPA ALJ LEXIS 40, at 6 (ALJ, Jan. 26, 2000); *In re Chempace Corp.*, 9 E.A.D. 119, 135-36 (EAB 2000); *In re Advanced Elec., Inc.*, 10 E.A.D. 385, 397 (EAB 2002); *In re Doug Blossom*, No. CWA-10-2002-0131, 2003 EPA RJO LEXIS 66, at 2-3 (RJO Nov. 28, 2003).

Rules contain supplemental requirements.²¹⁶ Generally, the decision whether to grant a Motion for Other Discovery is within the discretion of the Presiding Officer.²¹⁷

3. Subpoena Authority

The CROP specifically address the use of subpoenas in Part 22 actions. 40 C.F.R. § 22.19(e)(4) provides that a Presiding Officer may issue a subpoena for discovery related purposes if the moving party satisfies the conditions set forth in 40 C.F.R. § 22.19(e)(1) and makes an additional showing of the grounds and necessity for the subpoena. Furthermore, “[a]s a condition precedent to granting a request for the issuance of subpoenas, [40 C.F.R. § 22.21(b)] requires a showing of the grounds and necessity therefore along with the materiality and relevancy of the evidence to be adduced.”²¹⁸ However, the Consolidated Rules themselves do not provide a source of legal authority for the issuance of subpoenas in Part 22 actions. Rather, a Presiding Officer must rely upon the authority provided by the federal environmental statute being enforced by the EPA in the action.²¹⁹ A party seeking the issuance of a subpoena must file a motion with the Presiding Officer and comply with the general requirements for motions under 40 C.F.R. § 22.16. Witness fees, including travel costs, are to be paid by the party requesting the subpoena and are equivalent to fees paid for witnesses in federal court.²²⁰ Subpoenas are required to be served in accordance with 40 C.F.R. § 22.5(b)(1), the service requirements for complaints.²²¹ Once a subpoena has been issued, the receiving party can file a Motion to Quash the Subpoena if it believes that the subpoena was improperly issued or that good cause exists for the subpoena not to be enforced.²²²

²¹⁶ Under the CROP, a Presiding Officer may only order depositions upon oral questions if, in addition to satisfying the requirements of 40 C.F.R. § 22.19(e)(1)(i)-(iii), the party moving for the depositions establishes that: the information being sought by the depositions cannot reasonably be obtained by alternative methods of discovery; or there is substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing. 40 C.F.R. § 22.19(e)(3). *See, e.g., In re* Env'tl. Prot. Serv., Inc., No. TSCA-03-2001-0331, 2003 EPA ALJ LEXIS 30, at 1 (ALJ Apr. 25, 2003).

²¹⁷ *In re* Chempace Corp., 9 E.A.D. 119, 134 (EAB 2000).

²¹⁸ *In re* Julie's Limousine & Coachworks, Inc., No. CAA-04-2002-1508, 2003 EPA ALJ LEXIS 28, at 3 (ALJ Apr. 23, 2003). *See also In re* Crown Cent. Petroleum Corp., No. CWA-8-2000-06, 2001 EPA ALJ LEXIS 29 (ALJ Apr. 26, 2001); *In re* Robert & Susan Wheeler, No. CWA-05-2001-0019, 2002 EPA ALJ LEXIS 63, at 4-5 (ALJ Oct. 1, 2002).

²¹⁹ 40 C.F.R. § 22.4(c)(9). The following is a list of citations to the more frequently utilized statutory provisions which provide a Presiding Officer with the legal authority to issue a subpoena in connection with a Part 22 proceeding: RCRA Section 9006(b), 42 U.S.C. § 6991e(b); RCRA Section 3008(b), 42 U.S.C. § 6928(b); TSCA Section 11(c), 15 U.S.C. § 2610(c); CAA Section 307(a), 42 U.S.C. § 7607(a); EPCRA Section 325(f)(2), 42 U.S.C. § 11045(f)(2); CWA Section 309(g)(10), 33 U.S.C. § 1319(g)(10); CWA Section 311(b)(6)(I), 33 U.S.C. § 1321(b)(6)(I).

²²⁰ 40 C.F.R. § 22.19(e)(4).

²²¹ *Id.*

²²² *See, e.g., In re* Atlas Metals & Iron Corp., No. TSCA-PCB-VIII-91-08, 1992 EPA ALJ LEXIS 306 (ALJ Aug. 11, 1992); *In re* ARCO Chem. Co., Nos. EPCRA-III-240 and CERCLA-III-027, 1999 EPA ALJ LEXIS 14, at 3 (ALJ Mar. 8, 1999); *In re* Doug Blossom, No. CWA-10-2002-0131, 2004 EPA ALJ LEXIS 9, at 6 (ALJ Apr. 30, 2004) (absent extraordinary circumstances a non-party expert witness cannot be forced to testify against his or her will).

4. Other Information Gathering Authorities

Despite the CROP's restrictions on discovery in addition to the Pre-Hearing Information Exchange, while a Part 22 action is pending a respondent is permitted to utilize the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to obtain information and documents from the Agency, even if the scope of the FOIA request directly pertains to the issues being addressed in the Part 22 proceeding.²²³ A Presiding Officer, however, is not required to stay a Part 22 proceeding pending resolution of issues or litigation that might arise from a respondent's use of the FOIA.²²⁴ The Part 22 Rules also permit the complainant to utilize any other information gathering resources it possesses to obtain information from a respondent during a Part 22 action. More specifically, 40 C.F.R. § 22.19(e)(5) states, in pertinent part, that nothing in the Part 22 Rules shall limit "EPA's authority under any applicable law to conduct inspections, issue information request letters or administrative subpoenas, or otherwise obtain information."²²⁵

5. Privileges against Disclosure/Discovery

Although the CROP do not specifically address the use of evidentiary-based privileges, the EAB and OALJ have recognized and upheld such privileges to shield from disclosure information and materials that otherwise might be discoverable in a Part 22 action.²²⁶

a) Deliberative Process Privilege

The deliberative process privilege has been recognized in Part 22 actions. The privilege protects from disclosure "documents 'reflecting advisory opinions, recommendations and deliberations comprising part of the process by which governmental decisions and policies are formulated.'²²⁷ In order to be covered by the deliberative process privilege a document must be pre-decisional and deliberative.²²⁸

²²³ 40 C.F.R. § 22.19(e)(5). See also *In re Advanced Elec., Inc.*, 10 E.A.D. 385, 397 n.24 (EAB 2002).

²²⁴ *In re Env'tl. Prot. Serv., Inc.*, No. TSCA-03-2001-0331, 2003 EPA ALJ LEXIS 30 (ALJ Apr. 25, 2003).

²²⁵ 64 Fed. Reg. 40138, 40161 (July 23, 1999) ("FOIA requests, inspections [and] statutorily provided information collection requests . . . issued by an authorized Agency official . . . do not constitute discovery and are not restricted by the [Consolidated Rules of Practice].") See also *In re Goodman Oil Co.*, No. RCRA-10-2000-0113, 2001 EPA ALJ LEXIS 152, at 38-39 (ALJ Sept. 6, 2001); *In re Env'tl. Prot. Serv., Inc.*, No. TSCA-03-2001-0331, 2002 EPA ALJ LEXIS 5, at 3 (ALJ Jan. 24, 2002); *In re Wayne Vaughn Sr.*, No. CWA-9-2001-0002, 2002 EPA ALJ LEXIS 43, at 10-13 (ALJ July 25, 2002). But cf. *In re ARCO Chem. Co.*, No. EPCRA-III-240, 1999 EPA ALJ LEXIS 14 (ALJ Mar. 8, 1999) (Presiding Officer quashed EPA's subpoenas because statutory authority EPA relied upon for subpoenas was limited to gathering information for allocation of liability in settlements under CERCLA Section 112, not for use in connection with an enforcement proceeding for violations of CERCLA Section 103).

²²⁶ *In re Chautauqua Hardware Corp.*, 3 E.A.D. 616, 1991 EPA App. LEXIS 48, at 14 (CJO June 24, 1991).

²²⁷ *In re Safety-Kleen Corp.*, No. V-W-005-93 (consolidated), 1994 EPA ALJ LEXIS 42, at 8-9 (ALJ July 1, 1994) (quoting *In re Chautauqua Hardware Corp.*, 1991 EPA App. LEXIS 48, at 15 (CJO June 24, 1991)).

²²⁸ See, e.g., *In re Safety-Kleen Corp.*, 1994 EPA ALJ LEXIS 42, at 10 (ALJ July 1, 1994) (quoting *In re Chautauqua Hardware Corp.*, 1991 EPA App. LEXIS 48, at 17 (CJO June 24, 1991)) ("To be 'predecisional', a document must involve 'only those communications that occur before the adoption of the final rule or policy.'"); *Id.* at 10 (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854,

With exception, the general rule is that factual information must be disclosed, while “materials embodying officials’ opinions” are protected from disclosure by the privilege.²²⁹ Claims of deliberative process privilege are usually construed “narrowly as consistent with efficient government operation.”²³⁰

b) Attorney-Client Privilege

Although not specifically addressed in the Consolidated Rules of Practice, the Attorney-Client Privilege has been recognized in connection with Part 22 proceedings.²³¹ Generally, the privilege protects from disclosure “confidential communications made for the purposes of facilitating the rendition of professional legal services to the client.”²³²

c) Attorney Work-Product Privilege

The Attorney Work-Product Privilege has been recognized in conjunction with Part 22 proceedings.²³³ Generally, the standard enunciated in Federal Rule of Civil Procedure 26(b)(3) has been followed by Presiding Officers in addressing the privilege. More specifically, in order to obtain discovery of documents or other material prepared in anticipation of litigation or for trial, a party seeking discovery must establish that it has a “substantial need” for the documents or material, and that it is unable to proceed “without undue hardship” if it does not obtain access to such documents or material.²³⁴

6. Confidential Business Information

When a respondent provides or divulges information to the Agency concerning its business, it is entitled to make a claim of that such information should be treated as being confidential and that subsequent disclosure by the Agency of the information to third-parties should be limited.²³⁵ This information is commonly referred to as “Confidential Business Information” or “CBI.” Generally, EPA treats information claimed as being confidential as CBI unless and until it makes a determination that

866 (D.C. Cir. 1980)) (“Material is deliberative if it reflects the give-and-take of the consultative process.”); *In re Chautauqua Hardware Corp.*, 1991 EPA App. LEXIS 48, at 17 (“To be deliberative a document must “somehow reflect or reveal the deliberative process by which a final policy was formulated.”).

²²⁹ *In re Safety-Kleen Corp.*, 1994 EPA ALJ LEXIS 42, at 11

²³⁰ *In re Borough of Naugatuck*, No. 2-I-97-1017, 1998 EPA ALJ LEXIS 3, at 6 (ALJ Mar. 25, 1998) (quoting *Coastal States*, 617 F.2d at 868).

²³¹ See, e.g., *In re Hawaiian Indep. Refinery, Inc.*, No. RCRA-09-91-0007, 1992 EPA ALJ LEXIS 311, at 11 (ALJ July 14, 1992); *In re Gen. Elec. Co.*, No. TSCA-III-520 (consolidated), 1994 EPA ALJ LEXIS 18, at 3-5 (ALJ Sept. 1, 1994); *In re Tenn. Valley Auth.*, No. CAA-2000-04-006, 2000 EPA ALJ LEXIS 22 (ALJ June 29, 2000).

²³² *In re Safety-Kleen Corp.*, 1994 EPA ALJ LEXIS 42, at 6.

²³³ See, e.g., *In re Halocarbon Prod. Corp.*, No. TSCA-90-H-18, 1993 EPA ALJ LEXIS 153, at 5 (ALJ Feb. 2, 1993); *In re Atlas Metal & Iron Corp.*, No. TSCA-PCB-VIII-91-08, 1992 EPA ALJ LEXIS 306 (ALJ Aug. 11, 1992).

²³⁴ *In re Halocarbon Prod. Corp.*, 1993 EPA ALJ LEXIS 153 at 6. See also *In re Atlas Metal*, 1992 EPA ALJ LEXIS 306, at 3; *In re Hall-Kimbrell Env'tl. Serv., Inc.*, 1992 EPA ALJ LEXIS 93, at 4 (ALJ Oct. 8, 1992).

²³⁵ 40 C.F.R. § 22.22(a)(2).

the information is not entitled to such protection. In Part 22 actions, CBI claims are frequently made when a respondent discloses financial information in support of a “ability-to-pay” penalty mitigation argument,²³⁶ or when a respondent makes a disclosure of manufacturing or trade-related information in its Pre-Hearing Information Exchange. The Agency has promulgated regulations set forth at 40 C.F.R. Part 2, Subpart B that address, among other things, what materials are entitled to protection as CBI and the procedures EPA must utilize to protect the confidentiality of such information. However, a claim of confidentiality will not prevent the information from being introduced into evidence at a hearing, but may result in special measures being implemented to prevent or limit disclosure to third-parties (e.g., holding a closed portion of the hearing when such information is discussed).²³⁷

7. Protective Orders

The CROP expressly provide Presiding Officers with the authority to take actions which they deem necessary to protect the confidentiality of information, including, but not limited to, issuing Protective Orders. Generally, a Presiding Officer will issue a Protective Order when it has been established by a party that “good cause exists for issuance of an Order requiring limited disclosure of such information.”²³⁸ A Protective Order can be drafted by a Presiding Officer to impose a wide range of case-specific restrictions or prohibitions on the use of information deemed to be confidential, and may be especially useful in cases in which CBI or other confidential information is being utilized as evidence.²³⁹

E. Motion Practice

Generally, any time a party is requesting that a Presiding Officer, Regional Judicial Officer or the EAB undertake some type of action, the request should be made in the form of a motion. Motion practice under the Consolidated Rules of Practice is governed by 40 C.F.R. § 22.16 which sets forth standards that are generally applicable to motions filed during a Part 22 proceeding. Additionally, the CROP contain supplemental requirements for certain types of motions, like a Motion for Default (40 C.F.R. § 22.17(a)) or a Motion for Accelerated Decision (40 C.F.R. § 22.20). Motions made prior to the filing of an answer are within the jurisdiction of either the RJO, for cases initiated by one of the EPA’s Regional Offices, or the EAB, for cases initiated by EPA Headquarters.²⁴⁰ Motions made after the filing of an answer are within the jurisdiction of the ALJ designated as the Presiding Officer for the matter.²⁴¹ Oral argument concerning motions is held at the discretion of the RJO,

²³⁶ See, e.g., *In re Jehovah-Jireh Corp.*, No. CWA-5-99-016, 2001 EPA ALJ LEXIS 42, at 62, n.32 (ALJ July 25, 2001); *In re F.R.&S.*, No. CAA-03-2002-0215, 2005 EPA ALJ LEXIS 3 (ALJ Jan. 31, 2005).

²³⁷ 40 C.F.R. § 22.22(a)(2).

²³⁸ 40 C.F.R. §§ 22.22(a)(2), 22.4(c)(10); *In re Ronald H. Hunt*, No. TSCA-03-2003-0285, 2004 EPA ALJ LEXIS 133, at 4 (ALJ Aug. 3, 2004).

²³⁹ *In re Ronald H. Hunt*, 2004 EPA ALJ LEXIS 133, at 5-8; *In re Dennis Anderson Constr. Corp.*, No. CAA-III-025, 1994 EPA ALJ LEXIS 75, at 4-6 (ALJ June 6, 1994).

²⁴⁰ 40 C.F.R. § 22.16(c).

²⁴¹ *Id.* The exceptions to this rule concern Motions for Interlocutory Review under 40 C.F.R. § 22.29(c)

Presiding Officer or EAB.²⁴² The CROP do not limit the types of motions that can be filed in connection with a Part 22 proceeding.

1. Dispositive Motions

The Part 22 Rules specifically address the use of three different types of dispositive motions: Motion for Default; Motion for Accelerated Decision; and Motion to Dismiss.²⁴³

a) Motion for Default

Motions for Default are governed by the general requirements for all motions set forth in 40 C.F.R. § 22.16, and supplemental requirements set forth in 40 C.F.R. § 22.17. More specifically, under the Part 22 Rules a Motion for Default can be filed to address the following situations: failure of a respondent to file a timely answer to a complaint; failure of a party to comply with the Pre-Hearing Information Exchange requirements of 40 C.F.R. § 22.19(a) or an Order issued by a Presiding Officer; or failure of a party to appear at a conference or hearing.²⁴⁴ Under 40 C.F.R. § 22.17(c), “[w]hen a Presiding Officer finds that [a] default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding, unless the record shows good cause why a default order should not be issued.”²⁴⁵ However, despite the apparent mandatory language of 40 C.F.R. § 22.17(c), it has been held that an ALJ still retains some level of discretion and that issuance of a Default Order is not a matter of right.²⁴⁶ Generally, a Default Order is deemed to be a “harsh and disfavored sanction” and an inappropriate sanction to address a “marginal failure to comply with time requirements.”²⁴⁷ However, where a single act of tardiness or non-compliance may not warrant a Default Order, subsequent and repeated failures by a party may justify its issuance.²⁴⁸

A default by a respondent “constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent’s right to contest such factual allegations.”²⁴⁹ In such a situation, the relief proposed in the complaint or the Motion for Default will be ordered unless it is clearly inconsistent with the record for the case or the purposes of the federal environmental

and motions filed under 40 C.F.R. Part 22, Subpart I, 40 C.F.R. § 22.51.

²⁴² 40 C.F.R. § 22.16(d).

²⁴³ *In re Newell Recycling Co.*, 8 E.A.D. 598, 625 n.20 (EAB 1999); *In re Mayaguez Re’ Sewage Treatment Plant*, 4 E.A.D. 772 (EAB 1993), *aff’d* P.R. Aqueduct & Sewer Auth. v. EPA, 35 F.3d 300 (1st Cir. 1994).

²⁴⁴ 40 C.F.R. § 22.17(a).

²⁴⁵ 40 C.F.R. § 22.17(c). In determining whether “good cause” exists, the “totality of the circumstances” of the matter is considered. See *In re Pyramid Chem. Co.*, 11 E.A.D. ___, Slip op. at 6 (EAB Sept. 16, 2004); *In re Jiffy Builders, Inc.*, 8 E.A.D. at 319; *In re Thermal Reduction Co.*, 4 E.A.D. 128, 131 (EAB 1992). See also *In re Steven L. Tuttle*, No. FIFRA-10-2004-0056, 2005 EPA ALJ LEXIS 42, at 6 (ALJ July 15, 2005).

²⁴⁶ *In re J.M. Inchaustegui*, No. RCRA-6-2000-007, 2002 EPA ALJ LEXIS 10, at 9 (ALJ Feb. 28, 2002).

²⁴⁷ *Id.* at 8-9.

²⁴⁸ *Id.* at *14-15; *In re Jiffy Builders, Inc.*, 8 E.A.D. at 319.

²⁴⁹ 40 C.F.R. § 22.17(a).

law being enforced in the action.²⁵⁰ A penalty assessed by a Default Order becomes due and payable thirty days after the Default Order becomes final.²⁵¹ Compliance or Corrective Action Orders become effective on the date a Default Order becomes final.²⁵² A default by the complainant will result in the dismissal of the complaint with prejudice.²⁵³ If a Default Order resolves all outstanding issues and claims in the proceeding, it will constitute an Initial Decision for the matter.²⁵⁴

b) Motion to Set Aside Default Order

40 C.F.R. § 22.17(c) provides that a Presiding Officer may set aside a Default Order for “good cause.” A Motion to Set Aside a Default should provide an adequate justification for the non-compliance that provided the basis for the issuance of the Default Order.²⁵⁵ In ruling upon such motions, Presiding Officers will consider, *inter alia*: the likelihood that the action would have had a different outcome had there been a hearing; whether the defaulting party has cured its non-compliance and default in a timely manner; and whether the Default Order addresses just liability or both liability and penalty.²⁵⁶ As a general matter, Default Orders are not favored and “doubts are usually resolved in favor of the defaulting party.”²⁵⁷

c) Motion for Accelerated Decision

Provision 40 C.F.R. § 22.20(a) provides, in pertinent part, that:

The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

A Motion for Accelerated Decision under 40 C.F.R. § 22.20(a) is the Part 22 equivalent of a Motion for Summary Judgment under Rule 56 of the Federal Rules of Civil Procedure.²⁵⁸ As a result, the EAB and OALJ have looked to Federal Rule

²⁵⁰ 40 C.F.R. § 22.17(c). *See also In re Four Strong Builders, Inc.*, No. CAA-03-2004-0400, 2005 EPA ALJ LEXIS 35, at 6 (ALJ July 12, 2005).

²⁵¹ 40 C.F.R. § 22.17(d).

²⁵² *Id.*

²⁵³ 40 C.F.R. § 22.17(a).

²⁵⁴ 40 C.F.R. § 22.17(c).

²⁵⁵ *In re Rybond, Inc.*, 6 E.A.D. 614, 625 (EAB 1996); *In re Jiffy Builders*, 8 E.A.D. 315, 319 (EAB 1999).

²⁵⁶ *See e.g., In re Jiffy Builders*, 8 E.A.D. at 319; *In re Rybond, Inc.*, 6 E.A.D. at 625; *In re Thermal Reduction Co.*, 4 E.A.D. at 131; *In re Chie Ping Wu & Ping Auto Ctrs.*, No. RCRA-3-99-003, 2000 EPA ALJ LEXIS 75, at 6 (ALJ Nov. 20, 2000).

²⁵⁷ *In re Thermal Reduction Co.*, 4 E.A.D. at 131. *See also In re Detroit Plastic Molding Co.*, 3 E.A.D. 103, 107 (CJO 1990); *In re House Analysis & Assocs. & Fred Powell*, 4 E.A.D. 501 (EAB 1993); *In re Cornerstone Baptist Church*, No. TSCA-V-C-55-90, 1999 EPA ALJ LEXIS 43 (ALJ Aug. 10, 1999).

²⁵⁸ *See In re Rogers Corp.*, 9 E.A.D. 534, 549 (EAB 2000). *See also In re BWX Tech., Inc.*, 9 E.A.D. 61, 74 (EAB 2000); *In re Clarksburg Casket Co.*, 8 E.A.D. 496, 501-02 (EAB 1999); *In re Billy Yee*, 10

of Civil Procedure 56 and federal court decisions concerning Rule 56 for guidance on interpreting 40 C.F.R. § 22.20(a) and ruling on Motions for Accelerated Decision.²⁵⁹ Under 40 C.F.R. § 22.20(a), a party moving for accelerated decision must establish that no genuine issue of material fact exists in the matter and that it is entitled to judgment as a matter of law. A factual dispute is deemed to be “material” if “under the governing law, it might affect the outcome of the proceeding.”²⁶⁰ An issue concerning a material fact is deemed to be “genuine” if the evidence is such that a reasonable finder-of-fact could find for the non-moving party.²⁶¹ The burden of proving the absence of a genuine issue of material fact rests with the party moving for accelerated decision.²⁶² In considering a Motion for Accelerated Decision, the Presiding Officer must construe the factual record and all reasonable inferences to be drawn there from in the light most favorable to the non-moving party.²⁶³ A mere allegation of a factual dispute or a simple denial of liability is inadequate to defeat a Motion for Accelerated Decision.²⁶⁴ If an Order granting accelerated decision addresses all of the issues and claims presented in an action, then the Order constitutes an Initial Decision.²⁶⁵ However, if an Order is issued granting accelerated decision on less than all the claims in a matter (i.e. partial accelerated decision), then the Presiding Officer is required to set forth “what material facts remain controverted” and require a hearing to be held in the case.²⁶⁶

d) Motion to Dismiss

Provision 40 C.F.R. § 22.20(a), provides, in pertinent part, that:

The Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

It has been held that a Motion to Dismiss under 40 C.F.R. § 22.20(a) is analogous

E.A.D. 1, 10 (EAB 2001); *In re Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 793 (EAB 2000).

²⁵⁹ *In re BWX Tech., Inc.*, 9 E.A.D. at 74; *In re Newell Recycling Co.*, 8 E.A.D. at 613 n.14; *In re Ronald H. Hunt*, 2004 EPA ALJ LEXIS 132, at 9-10.

²⁶⁰ *In re BWX Tech., Inc.*, 9 E.A.D. at 75; *In re Leonard Greak*, No. TSCA-3-2000-0016, 2001 EPA ALJ LEXIS 102, at 6 (ALJ Apr. 6, 2001); *In re Dearborn Ref. Co.*, No. RCRA-05-2001-0019, 2003 EPA ALJ LEXIS 1, at 6 (ALJ Jan. 17, 2003); *In re P.R. Aqueduct & Sewer Auth.*, 2000 EPA ALJ LEXIS 2, at 6-7 (ALJ Jan. 4, 2000).

²⁶¹ *In re BWX Tech., Inc.*, 9 E.A.D. at 75; *In re Dearborn Ref. Co.*, 2003 EPA ALJ LEXIS 1, at 6-7; *In re P.R. Aqueduct & Sewer Auth.*, 2000 EPA ALJ LEXIS 2, at 6-7.

²⁶² *In re Bil-Dry Corp.*, No. RCRA-III-264, 1997 EPA ALJ LEXIS 65, at 8 (ALJ Aug. 8, 1997); *In re Leonard Greak*, 2001 EPA ALJ LEXIS 102, at 6; *In re Ronald Hunt*, 2004 EPA ALJ LEXIS 132, at 9.

²⁶³ *In re Bil-Dry Corp.*, 1997 EPA ALJ LEXIS 65, at 8; *In re Leonard Greak*, 2001 EPA ALJ LEXIS 102, at 7-8.

²⁶⁴ *In re Bil-Dry Corp.*, 1997 EPA ALJ LEXIS 65, at 8; *In re Ronald Hunt*, 2004 EPA ALJ LEXIS 132, at 10.

²⁶⁵ 40 C.F.R. § 22.20(b)(1).

²⁶⁶ 40 C.F.R. § 22.20(b)(2).

to a Motion for Dismissal under the Federal Rules of Civil Procedure.²⁶⁷ As a result, the EAB and OALJ have looked to Rule 12(b)(6) of the Federal Rules of Civil Procedure and respective federal court decisions for guidance.²⁶⁸ In ruling upon a respondent's Motion to Dismiss, a Presiding Officer is required to resolve all ambiguities and draw all reasonable inferences in favor of the complainant and to presume that all "well-pled" facts in the complaint are true.²⁶⁹ To prevail on a Motion to Dismiss, the respondent must show that the complainant's allegations, even if assumed to be true, do not establish a violation of the underlying federal environmental law being charged in the matter.²⁷⁰ In other words, if a complainant fails to allege all facts necessary to support its claims or can prove no set of facts in support of such claims, then the complaint may be dismissed.²⁷¹ If a decision to dismiss addresses all issues and claims in the proceeding, then it will constitute an Initial Decision and the complaint will be dismissed with prejudice.²⁷²

e) Examples of Other Motions

i. Motion for Extension of Time

Perhaps the most frequently utilized motion in Part 22 cases is a Motion for an Extension or Enlargement of Time. Provision 40 C.F.R. § 22.7(b), provides that:

The Environmental Appeals Board or the Presiding Officer may grant an extension of time for filing any document: upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties; or on its own initiative.

In order to be timely, a Motion for Extension of Time must be filed "sufficiently in advance of the due date so as to allow other parties reasonable opportunity to respond and to allow the Presiding Officer or Environmental Appeals Board reasonable opportunity to issue an order."²⁷³ The decision whether to grant a Motion

²⁶⁷ *In re Asbestos Specialists, Inc.*, 4 E.A.D. 819, 827 (EAB 1993); *In re Colleen Tillion*, 2005 EPA ALJ LEXIS 28, at 12-13; *In re Julie's Limousine*, 2002 EPA ALJ LEXIS 74.

²⁶⁸ *In re Commercial Cartage Co.*, 5 E.A.D. 112, 117 n.9 (EAB 1994); *In re Asbestos Specialists, Inc.*, 4 E.A.D. at 827 n.20; *In re Wego Chem. & Mineral Corp.*, 4 E.A.D. 513, 524 n.10 (EAB 1993); *In re Hous. Auth. of Moundsville*, No. CAA-03-2003-0211, 2004 EPA ALJ LEXIS 6, at 3-4 (ALJ Mar. 23, 2004); *In re DMB N.C. 2, LLC*, No. CWA-04-2002-5005, 2003 EPA ALJ LEXIS 48, at 4-5 (ALJ July 10, 2003).

²⁶⁹ *In re Commercial Cartage Co.*, 5 E.A.D. at 117; *In re DMB N.C. 2*, 2003 EPA ALJ LEXIS 48, at 6; *In re Colleen Tillion*, 2005 EPA ALJ LEXIS 28, at 13-14.

²⁷⁰ *In re Colleen Tillion*, 2005 EPA ALJ LEXIS 28, at 14; *In re Julie's Limousine*, 2002 EPA ALJ LEXIS 74, at 3-4.

²⁷¹ *In re DMB N.C. 2*, 2003 EPA ALJ LEXIS 48, at 7

²⁷² 40 C.F.R. § 22.20(b)(1). See also *In re Hillyard Indus.*, No. FIFRA-07-2004-0124, 2004 EPA ALJ LEXIS 14, at 1-2 (ALJ May 11, 2004).

²⁷³ 40 C.F.R. § 22.7(b). See also *In re Beaumont Co.*, No. TSCA-09-2004-0004, 2005 EPA ALJ LEXIS 34, at 5 (ALJ June 9, 2005).

for Extension of Time rests within the discretion of the Presiding Officer or EAB, as appropriate.²⁷⁴ Such motions must comply with the requirements set forth in 40 C.F.R. § 22.16.²⁷⁵ As a matter of practice, a party moving for an extension should attempt to obtain the consent of its adversary before filing a Motion for Extension of Time.

ii. Motion for Site Visit

Depending upon the facts of a case, one or more parties may believe that it would be beneficial for the Presiding Officer to visit the site at which the alleged violations occurred. The CROP do not address site visits or the standard a Presiding Officer should utilize in deciding upon whether to conduct a site visit.²⁷⁶ As with other matters under the CROP, the ALJs have looked to the Federal Rules of Civil Procedure and relevant federal court decisions for guidance.²⁷⁷ The decision whether to conduct a site visit rests within the discretion of a Presiding Officer.²⁷⁸ Generally, a Presiding Officer will consider some or all of the following factors in ruling upon a request for a site visit: whether the purpose of the site visit is evidentiary in nature or to familiarize the judge with the premises to better understand and weigh testimony and evidence; the impact of a site visit on the orderliness of the proceedings; whether the value of a site visit has been compromised after passage of time; whether other evidence to be introduced at a hearing will make a site visit redundant; and whether the visit be time-consuming or logistically difficult.²⁷⁹ If a Presiding Officer agrees to a site visit, procedural safeguards (including, requiring the presence of all parties and a court reporter) likely will be implemented.²⁸⁰ Motions for site visits are rarely granted.²⁸¹

iii. Motion in Limine

A Motion in Limine may be filed by a party to limit the introduction of evidence into the record of a Part 22 proceeding.²⁸² The CROP do not address specifically the use of Motions in Limine.²⁸³ However, 40 C.F.R. § 22.22(a)(1)

²⁷⁴ 40 C.F.R. § 22.4(c)(10). *See also In re Mark & Dan Johnson*, No. CWA-08-2003-0098, 2004 EPA ALJ LEXIS 15, at 3, n.2 (ALJ May 11, 2004).

²⁷⁵ *See In re Von Roll Am., Inc.*, No. CAA-05-2004-0045, 2005 EPA ALJ LEXIS 4, at 3 (ALJ Feb. 8, 2005).

²⁷⁶ *In re The Barden Corp.*, No. CAA-1-2000-0070, 2001 EPA ALJ LEXIS 177 at 3-4 (ALJ Nov. 20, 2001).

²⁷⁷ *In re Doug Blossom*, No. CWA-10-2002-0131, 2004 EPA ALJ LEXIS 10, at 3 (ALJ Apr. 30, 2004); *In re The Barden Corp.*, 2001 EPA ALJ LEXIS 177 at 4.

²⁷⁸ *In re The Barden Corp.*, 2001 EPA ALJ LEXIS 177, at 4.

²⁷⁹ *Id.* at 4-5; *In re Doug Blossom*, 2004 EPA ALJ LEXIS 10, at 3-4.

²⁸⁰ *Id.* at 5.

²⁸¹ *Id.* at 4.

²⁸² *In re Julie's Limousine & Coachworks, Inc.*, No. CAA-04-2002-1508, 2003 EPA ALJ LEXIS 37, at 28 (ALJ May 2, 2003).

²⁸³ *In re Hous. Auth. of Moundsville*, No. CAA-03-2003-2011, 2004 EPA ALJ LEXIS 116, at 14 (ALJ June 7, 2004).

requires a Presiding Officer to “admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value.”²⁸⁴ As a result, a Motion in Limine will be granted “only if the evidence sought to be excluded is clearly inadmissible for any purpose.”²⁸⁵ Denial of a Motion in Limine “does not mean that all evidence contemplated by the motion” will be admitted at a hearing, but rather that, without the context of the hearing, the Presiding Officer is “unable to determine whether the evidence in question should be excluded.”²⁸⁶ Motions in Limine are generally disfavored.²⁸⁷

iv. Motion to Strike

A Motion to Strike is considered to be “the appropriate remedy for the elimination of impertinent or redundant matter in any pleading, and [is] the primary procedure for objecting to an insufficient defense.”²⁸⁸ Motions to Strike are not specifically addressed in the CROP.²⁸⁹ As a result, Presiding Officers have looked to Federal Rule of Civil Procedure 12(f) and respective case law for guidance on ruling on such motions.²⁹⁰ A Motion to Strike Affirmative defenses is “generally viewed with disfavor” and deemed to be a “drastic remedy.”²⁹¹

F. Settlement

1. Settlement Discussions

At any point in time during the course of a Part 22 proceeding, the parties to the action may enter into settlement discussions. The timing and format of settlement discussions are within the control of the parties.²⁹² The discussions may be conducted informally (e.g., by telephone) or in a more formal manner (e.g., face-to-

²⁸⁴ See also *In re Gen. Motors Auto.-N. Am.*, No. RCRA-05-2004-0001, 2005 EPA ALJ LEXIS 31, at 6 (ALJ June 8, 2005); *In re Julie’s Limousine*, 2003 EPA ALJ LEXIS 37, at 28.

²⁸⁵ *In re Hous. Auth. of Moundsville*, 2004 EPA ALJ LEXIS 116, at 6; *In re Strong Steel Prod., LLC*, No. CAA-5-2003-0009, 2005 EPA ALJ LEXIS 7, at 1-2 (ALJ Feb. 18, 2005).

²⁸⁶ *In re Hous. Auth. of Moundsville*, 2004 EPA ALJ LEXIS 116, at 6; *In re Julie’s Limousine*, 2003 EPA ALJ LEXIS 37, at 28.

²⁸⁷ *In re Hous. Auth. of Moundsville*, 2004 EPA ALJ LEXIS 116, at 6; *In re Julie’s Limousine*, 2003 EPA ALJ LEXIS 37, at 28; *In re USA Remediation Serv., Inc.*, No. CAA-03-2002-0159, 2003 EPA ALJ LEXIS 6, at 3-4 (ALJ Feb. 10, 2003).

²⁸⁸ *In re Gen. Motors Auto.-N. Am.*, No. RCRA-05-2004-0001, 2005 EPA ALJ LEXIS 31, at 5 (ALJ June 8, 2005); *In re Dearborn Ref. Co.*, No. RCRA-05-2001-0019, 2003 EPA ALJ LEXIS 10, at 6 (ALJ Jan. 3, 2003).

²⁸⁹ *In re Julie’s Limousine & Coachworks, Inc.*, No. CAA-04-2002-1508, 2003 EPA ALJ LEXIS 37, at 27 (ALJ May 2, 2003); *In re Century Aluminum of W. Va., Inc.*, No. CAA-III-116, 1999 EPA ALJ LEXIS 26, at 1-2 (ALJ June 25, 1999).

²⁹⁰ *Id.* See also *In re J/S ChemCorp.*, No. CWA-02-2000-3407, 2001 EPA ALJ LEXIS 183 (ALJ Oct. 12, 2001).

²⁹¹ *In re Gen. Motors Auto.-N. Am.*, 2005 EPA ALJ LEXIS 31, at 5. See also *In re Julie’s Limousine*, 2003 EPA ALJ LEXIS 37, at 28; *In re Franklin & Leonhardt Excavating Co.*, No. CAA-98-011, 1998 EPA ALJ LEXIS 126, at 10-11 (ALJ Dec. 7, 1998) (explaining that motions to strike generally will be denied); *In re Century Aluminum*, 1999 EPA ALJ LEXIS 26, at 2.

²⁹² 40 C.F.R. § 22.18(b)(1).

face meeting). Furthermore, the parties may engage in settlement discussions even if the respondent to the action has not requested a hearing.²⁹³ However, the fact that the parties elect to participate in settlement negotiations will not affect their obligation to comply with all other requirements of the CROP and any Orders issued by the Presiding Officer.²⁹⁴

2. Confidentiality of Settlement Discussions

Generally, matters that are discussed during the course of settlement discussions held in connection with a Part 22 action are entitled to some level of confidentiality. More specifically, 40 C.F.R. § 22.22(a)(1) utilizes Rule 408 of the Federal Rules of Evidence as a guide for determining the limits of such confidentiality and the admissibility of statements made during settlement discussions. 40 C.F.R. § 22.22(a)(1) provides, in pertinent part, that a Presiding Officer “shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value, *except that evidence relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence (28 U.S.C.) is not admissible.*”²⁹⁵ In other words, information shared during the course of settlement discussions cannot be introduced at a later stage of a Part 22 proceeding to address an issue such as liability.²⁹⁶

3. Alternative Dispute Resolution (“ADR”)

In order to facilitate settlements of Part 22 actions, the Consolidated Rules of Practice specifically authorize the use of Alternative Dispute Resolution (“ADR”) mechanisms consistent with the scope of the Alternative Dispute Resolution Act (“ADRA”).²⁹⁷ Participation in ADR is voluntary.²⁹⁸ Information shared during ADR is subject to the confidentiality provisions of the ADRA.²⁹⁹ Currently, there are two ADR tracts available in Part 22 actions: Party Initiated ADR and ADR sponsored by EPA’s Office of Administrative Law Judges.

a) Party Initiated ADR

Under the ‘Party Initiated ADR’ tract, the parties to a Part 22 action agree, on their own initiative, to the use of ADR and select the type of ADR mechanism and

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ 40 C.F.R. § 22.22(a)(1) (emphasis added).

²⁹⁶ *See, e.g., In re Wego Chem. & Mineral Corp.*, 4 E.A.D. 513, 530-31 (EAB 1993) (finding information from settlement conference admissible to prove equitable estoppel defense); *In re Crown Cent. Petroleum Corp.*, No. CWA-08-2000-06, (ALJ Jan. 8, 2002) (finding statements by respondent during settlement negotiations admissible to establish duration of violation for purpose of calculating penalty); *In re U.S. Air Force Tinker Air Force Base*, No.-6-98-001, at 4-6 (ALJ Aug. 18, 2000) (discussing the inadmissibility of exhibits offered during settlement meetings).

²⁹⁷ 5 U.S.C. § 581, *et seq.*; 40 C.F.R. § 22.18(d)(1).

²⁹⁸ 65 Fed. Reg. 81858, 81859 (Dec. 27, 2000).

²⁹⁹ *Id.*

neutral to be utilized to explore a potential settlement.³⁰⁰ There are numerous types of ADR mechanisms from which a party may choose, including, but not limited to: mediation, arbitration, fact finding by a neutral, and mini-trials.³⁰¹ Under this tract, the Presiding Officer is not divested of jurisdiction of the action during the course of the ADR process and is not required to stay the action pending the ADR process.³⁰² However, a Presiding Officer does have the discretion “to grant a stay in connection with the parties’ use of ADR.”³⁰³

b) OALJ Mediation Process

The second ADR tract available in Part 22 proceedings is a form of mediation sponsored by the Agency’s Office of Administrative Law Judges. This mediation process is initiated only if all parties to the action elect to participate in the process and only if all parties contact the OALJ within a set time period. Participation in this mediation process is voluntary. If ADR is selected, an Administrative Law Judge from the OALJ will be designated to serve as the neutral mediator and a stay of the proceeding for a period of at least 60 days and at most 120 days will take effect. If a settlement is reached during the mediation, the parties will be ordered to memorialize the terms of the settlement in a document called a Consent Agreement/Final Order (“CA/FO”). If a settlement is not attained, the Chief ALJ will designate another ALJ from the OALJ to serve as the Presiding Officer for the matter. The ALJ who served as the neutral during the mediation process cannot serve as the Presiding Officer for the matter after the conclusion of the mediation process. Furthermore, information shared during the ADR process is considered confidential and inadmissible at subsequent stages of the action.³⁰⁴ If the parties elect not to participate in the mediation process, the Chief ALJ will designate an ALJ to serve as Presiding Officer of the matter and the matter will proceed forward to hearing.³⁰⁵

4. Agency Settlement Policies

In order to facilitate settlements of enforcement actions brought by the Agency,

³⁰⁰ 40 C.F.R. § 22.18(d)(3).

³⁰¹ *In re Geron Furniture Inc.*, No. EPCRA-09-94-0009, 1994 EPA ALJ LEXIS 53, at 13-4 (ALJ Aug., 30, 1994) (citing EPA Administrator, *Final Guidance on Use of Alternative Dispute Resolution Techniques in Enforcement Actions* (Aug. 14, 1987)).

³⁰² 40 C.F.R. § 22.18(d)(2).

³⁰³ 64 Fed. Reg. 40138, 40158 (July 23, 1999). Advantages of Party Initiated ADR: can be initiated at any stage of a Part 22 proceeding; a variety of forms of ADR can be utilized; parties can select from a large pool of potential ADR neutrals. Disadvantages of Party Initiated ADR: proceeding is not automatically stayed during ADR; parties must comply with requirements of the CROP and all Orders; parties must bear the expense of the ADR process.

³⁰⁴ *See In re Cmty. Mgmt., Inc.*, No. CWA-03-2001-0407, at 1 n.1 (Jan. 15, 2003).

³⁰⁵ Advantages of OALJ Sponsored ADR: automatic stay of proceeding for up to 120 days allowing the parties to focus on settlement discussions; ALJs possess a level of expertise with the environmental statutes/regulations enforced by the Agency and the Part 22 process; and no expense to parties. Disadvantages of OALJ Sponsored ADR: only mediation offered OALJ; all parties must elect to participate which may be difficult if numerous respondents involved in case; mediation can occur only at initial stage of proceeding and, therefore, cannot take advantage of developments in case and parties’ information exchange; neutrals limited to the ALJ’s of the OALJ; and the ADR ALJ is designated by the Chief ALJ and not selected by the parties.

including Part 22 actions, the Agency has developed a number of settlement policies, including: Supplemental Environmental Projects Policy,³⁰⁶ Self-Disclosure Policy,³⁰⁷ and Small Business Compliance Policy.³⁰⁸ Generally, these policies establish “a framework for EPA to use in exercising its enforcement discretion in determining appropriate settlements.”³⁰⁹ However, the Agency has taken the position that these policies are tools for settlement purposes only and are not to be introduced or utilized “by EPA, defendants, respondents, courts or administrative law judges at a hearing or in a trial.”³¹⁰ Additionally, most of the EPA civil penalty policies provide for penalty reductions based upon good faith cooperation by a Respondent with the Agency.

5. Settlement Document - Consent Agreement/Final Order

If the parties to a Part 22 action agree to settle the matter, the terms of the settlement will be memorialized in a two-part document called a Consent Agreement and Final Order, otherwise referred to as a CA/FO.³¹¹ The Consent Agreement, which is signed by the parties, will set forth the specific terms and conditions of the settlement and include, *inter alia*: the amount and terms of payment of any penalty; a statement by respondent admitting the jurisdictional allegations of the complaint; a waiver by respondent of its right to appeal the CA/FO; terms of compliance or corrective action tasks to be performed by the respondent; terms and conditions of any SEPs; releases of liability; and reservations of rights/authorities for the complainant.³¹² The second part of the CA/FO is the Final Order which “constitutes the final Agency action in a proceeding” and formally concludes the Part 22 proceeding.³¹³ The Final Order will be approved by either the RJO or the EAB, which by signing the Final Order will ratify the settlement terms set forth in the Consent Agreement.³¹⁴ The fully executed CA/FO becomes effective on the date of its filing with the appropriate Hearing Clerk.³¹⁵ The scope of a settlement of a Part

³⁰⁶ 63 Fed. Reg. 24796 (May 5, 1998). On May 5, 1998, EPA issued the revised “Final EPA Supplemental Environmental Projects Policy” (“SEP Policy”). Generally, in exchange for the respondent’s performance of an eligible SEP, EPA will mitigate the penalty it is seeking or will seek against the respondent (i.e., non-complying party) as part of the settlement of an Agency enforcement action.

³⁰⁷ 65 Fed. Reg. 19618 (Apr. 11, 2000). On April 11, 2000, EPA issued the revised final policy “Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations”, commonly referred to as the “Audit Policy.” In exchange for the voluntary disclosure and remediation of a violation consistent with the conditions of the Audit Policy, the Agency may waive certain penalties and forego any recommendation for a criminal prosecution of the violations in most instances.

³⁰⁸ 65 Fed. Reg. 19630 (Apr. 11, 2000). On April 11, 2000, EPA issued the revised final policy “Small Business Compliance Policy.” Under the Policy, EPA will waive or reduce civil penalties for small businesses that make a good faith effort to comply with environmental regulations by voluntarily discovering, promptly disclosing, and expeditiously correcting a violation within required time periods.

³⁰⁹ 63 Fed. Reg. at 24797 (May 5, 1998) (*SEP Policy* at 4).

³¹⁰ *Id.*

³¹¹ 40 C.F.R. § 22.18(b)(2).

³¹² *Id.*

³¹³ 40 C.F.R. § 22.18(b)(3); 40 C.F.R. § 22.31(a).

³¹⁴ 40 C.F.R. § 22.18(b)(3).

³¹⁵ 40 C.F.R. § 22.31(b).

22 action is limited to the violations alleged in the complaint.³¹⁶ Additionally, the Agency retains the right to pursue injunctive/equitable relief and criminal penalties for the matters addressed in the settlement.³¹⁷

6. *Expedited Settlements*

In a number of cases, the Agency will enter into pre-filing negotiations with a person who the Agency intends to name as a respondent in a Part 22 action. The goal of the negotiations is to explore a possible settlement prior to the filing of a complaint. If a pre-filing settlement can be reached, the matter will be simultaneously initiated and settled by the filing of modified CA/FO, frequently referred to as a “Super CA/FO.”³¹⁸ This modified CA/FO is a combination of a traditional CA/FO and complaint.³¹⁹ Once approved by either the RJO or EAB, the modified CA/FO becomes effective upon its filing with the appropriate Hearing Clerk.³²⁰

7. *Quick Resolution Procedure*

In some instances, a respondent who has been served with a Part 22 complaint may want to pay the penalty proposed in the complaint and resolve the action immediately. In 1999, the CROP were amended to address this situation with the addition of what is commonly referred to as the “Quick Resolution Procedure.” Basically, under 40 C.F.R. § 22.18(a)(1), a respondent may resolve a Part 22 proceeding at any time by paying in full the penalty proposed in either the complaint or complainant’s Pre-Hearing Information Exchange.³²¹ However, the Quick Resolution Procedure is not available in all Part 22 actions. For example, the procedure is not available in cases in which the complaint seeks the issuance of a Compliance or Corrective Action Order.³²²

G. Hearing

40 C.F.R. § 22.21(b) provides that a Presiding Officer “shall hold a hearing if the proceeding presents genuine issues of material fact.” Generally, there are two primary purposes for conducting an administrative hearing under the CROP: to provide a respondent with an opportunity to be heard on the record concerning matters alleged in the complaint and to create an administrative record that supports the final decision of the Agency concerning the matter.

³¹⁶ 40 C.F.R. § 22.18(c).

³¹⁷ *Id.*

³¹⁸ 40 C.F.R. § 22.13(b); 40 C.F.R. § 22.18(b)(2).

³¹⁹ 40 C.F.R. § 22.18(b)(2); 40 C.F.R. § 22.14(a)(1)-(3), (8).

³²⁰ 40 C.F.R. § 22.31(b).

³²¹ *See* 40 C.F.R. § 22.18(a)(3) (The primary advantages of utilizing the Quick Resolution Procedure is that a proceeding will be terminated expeditiously and a respondent does not need to incur further costs in litigating the matter. The disadvantages include that using the procedure is a waiver of a respondent’s right to contest the factual allegations in the Complaint and will adversely impact the respondent’s enforcement history).

³²² 40 C.F.R. § 22.18(a)(1).

1. Overview of Hearing Process

A Part 22 hearing is conducted under the supervision and control of the Presiding Officer assigned to the matter.³²³ Both the complainant and respondent are permitted to call witnesses to testify and to introduce exhibits into the record in support of their positions.³²⁴ A court reporter will create a verbatim transcript of the hearing and will attach to the official transcript all exhibits introduced into evidence at the hearing.³²⁵ A Part 22 proceeding normally begins with the parties or their designated representatives entering their appearances on the record. The Presiding Officer will then address preliminary matters which may include, among other things: the sequestration of witnesses, introduction into evidence of stipulations between the parties,³²⁶ and ruling on any motions to be submitted (e.g., a motion in limine). The parties or their representatives will then be permitted to make opening statements. Although optional, opening statements offer an opportunity to frame a party's position on the various issues to be addressed at the hearing and to provide an overview of the evidence to be introduced. The complainant presents its case-in-chief first through witness testimony and the introduction of exhibits.³²⁷ Cross-examination of witnesses is specifically permitted under the CROP.³²⁸ At the conclusion of the complainant's presentation, the respondent will be provided with the opportunity to present evidence in support of its position.³²⁹ Rebuttal presentations by the parties will be permitted as dictated by the issues and evidence in the case. At the conclusion of the presentation of evidence, the parties will have the opportunity for closing statements. Once closing statements have concluded, the Presiding Officer will set a schedule for the filing of Post-Hearing Briefs and address any other administrative matters.³³⁰ After Post-Hearing Briefs have been filed by the parties, the Presiding Officer will review the record of the case and issue a written Initial Decision making factual findings, drawing conclusions of law and assessing, as appropriate, some form of relief/penalty.³³¹

2. Notice, Date and Location of Hearing

40 C.F.R. § 22.21(b) requires a Presiding Officer to provide at least thirty days written notice of the date and location set for a hearing. With regard to location, the Part 22 Rules require that a hearing be held either: in the county where the respondent resides or conducts the business that the hearing concerns; in the city in which the relevant EPA Regional Office is located; or in Washington, D.C.³³²

³²³ 40 C.F.R. § 22.4(c)(1).

³²⁴ 40 C.F.R. § 22.22(b), (e).

³²⁵ 40 C.F.R. § 22.25.

³²⁶ 40 C.F.R. § 22.19(e)(5).

³²⁷ 40 C.F.R. § 22.24(a).

³²⁸ 40 C.F.R. § 22.22(b).

³²⁹ 40 C.F.R. § 22.24(a).

³³⁰ 40 C.F.R. § 22.26.

³³¹ 40 C.F.R. § 22.27(a).

³³² 40 C.F.R. § 22.19(d); 40 C.F.R. § 22.21(d).

3. *Standard of Proof and Burdens of Proof and Persuasion*

The CROP require that Part 22 matters be decided by a preponderance of the evidence, which has been interpreted as meaning a finding that a “conclusion is more likely than not.”³³³ Under the Part 22 Rules, the complainant bears the burdens of production and persuasion with regard to the violations alleged and relief proposed in the complaint. Similarly, the respondent bears the burdens of production and persuasion with regard to any defenses, including any affirmative defenses, and penalty mitigation arguments it raises.³³⁴

4. *Rules of Evidence*

Although the Federal Rules of Evidence (“FRE”) are not binding in Part 22 actions, the EAB and OALJ have looked to the FRE to “inform” and guide their analysis of evidentiary issues.³³⁵ The standard for the introduction of evidence in a Part 22 action is much more lenient than that provided for by the FRE.³³⁶ With the exception of evidence concerning settlements, a Presiding Officer is required under the CROP to “admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value.”³³⁷ As an example, a Presiding Officer is not bound by the FRE’s restrictions on the admissibility of hearsay evidence.³³⁸

5. *Examination of Witnesses*

Witnesses called at a Part 22 hearing are examined under oath/affirmation and are subject to cross-examination concerning their testimony.³³⁹ Cross-examination generally will be limited in scope to matters addressed on direct and must not be “unduly repetitious.”³⁴⁰ Presiding Officers are permitted under the Part 22 Rules to ask questions of witnesses and, as a matter of practice, frequently exercise this authority.³⁴¹ The CROP also permit the introduction of a written summary of testimony in lieu of having a witness testify on direct.³⁴² Furthermore, a Presiding

³³³ 40 C.F.R. § 22.24(b). *See also In re H.E.L.P.E.R., Inc.*, 8 E.A.D. 437, 447 (EAB 1999); *In re B.J. Carney Indus., Inc.*, 7 E.A.D. 171, 217 (EAB 1997); *In re The Bullen Co.*, 9 E.A.D. 620, 632 (EAB 2001); *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB).

³³⁴ 40 C.F.R. § 22.24(a). *See also In re Bricks, Inc.*, No. CWA-05-2000-0012, 2003 EPA App. LEXIS 7, at 5 (EAB Oct. 28, 2003); *In re City of Marshall, Minn.*, 10 E.A.D. 173, 180 (EAB 2001); *In re LVI Env'tl. Servs., Inc.*, 10 E.A.D. 99, 101 (EAB 2001).

³³⁵ *See In re Britton Constr. Co.*, 8 E.A.D. 261, 286 n.14 (EAB 1999).

³³⁶ 40 C.F.R. § 22.24(a). *See In re Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 795 n.26 (EAB 1997) (“Federal Rules of Evidence are more restrictive than our administrative rules.”); *In re CDT Landfill Corp.*, No. CAA-5-99-047, 2003 EPA App. LEXIS 5, at 56 (EAB June 5, 2003); *In re Great Lakes Div. of Nat'l Steel Corp.*, 5 E.A.D. 355, 368-369 (EAB 1994).

³³⁷ 40 C.F.R. § 22.22(a)(1).

³³⁸ *See, e.g., In re Energy Gases, Inc.*, No. EPCRA-02-2000-4002, 2002 EAP ALJ LEXIS 27, at 2 (ALJ May 1, 2002) (Hearsay evidence admissible if reliable); *In re Great Lakes Div. of Nat'l Steel Corp.*, No. EPCRA-007-1991, 1993 EPA ALJ LEXIS 364, at 19 (ALJ July 13, 1993) (Hearsay admissible if sufficiently probative).

³³⁹ 40 C.F.R. § 22.22(b).

³⁴⁰ *Id.*

³⁴¹ 40 C.F.R. § 22.4(c)(4).

³⁴² 40 C.F.R. § 22.22(c).

Officer may take “Official Notice” of “any matter which can be judicially noticed in the Federal courts and of other facts within the specialized knowledge and experience of the Agency.”³⁴³

6. Initial Decision

After Post-Hearing Briefs have been submitted summarizing the evidence presented at hearing and the legal positions of the parties, the Presiding Officer will issue a written ruling, called an Initial Decision, in which the Presiding Officer makes findings of fact, draws conclusions of law, and, when appropriate, imposes some form of relief to address a Respondent’s violations.³⁴⁴ With regard to the assessment of a civil penalty, the CROP require that a Presiding Officer determine the amount of the penalty based upon the evidence in the administrative record of the case and in accordance with any applicable statutory factors contained in the environmental law being enforced in the matter.³⁴⁵ Additionally, a Presiding Officer is required to consider any Agency penalty policies that are applicable to the case, but is not required to follow these policies in calculating a penalty as long as an adequate explanation as to the deviation from the policies is provided.³⁴⁶

7. Initial Decision Becomes Final Order Unless Appealed to EAB

An Initial Decision shall become a Final Order of the Agency forty-five days after its service on the parties to the action and without further proceeding unless: a party moves to reopen the hearing in the case; a party appeals the Initial Decision to the EAB; a party moves to set aside the Default Order that provided the basis for the Initial Decision; or the EAB elects to review the Initial Decision on its own initiative.³⁴⁷ A Final Order issued in connection with a Part 22 case constitutes the final agency action on the matter.³⁴⁸ If a respondent elects not to appeal an Initial Decision to the EAB, then that Initial Decision will become a Final Order and the respondent will be deemed to have waived its rights to judicial review of the case.³⁴⁹

H. Appeal to the EAB

Under the CROP, a party to a Part 22 action may appeal an Initial Decision, ruling or Order to the EAB. The rules governing appeals to the EAB are set forth in 40 C.F.R. Part 22, Subpart F.

³⁴³ 40 C.F.R. § 22.22(f).

³⁴⁴ 40 C.F.R. § 22.27(a).

³⁴⁵ 40 C.F.R. § 22.27(b).

³⁴⁶ *Id.* See *In re* M.A. Bruder & Sons, Inc., 10 E.A.D. 598, 610 (EAB 2002) (“The penalty policies do not bind either the ALJ or the Board since these policies, not having been subject to the rulemaking procedures of the Administrative Procedure Act, lack the force of law.”); *In re* City of Marshall, Minn., 10 E.A.D. 173, 189 n.29; *In re* B&R Oil Co., 8 E.A.D. 39, 63 (EAB 1998); *In re* Employers Ins. of Wausau, 6 E.A.D. 735, 758-759 (EAB 1997).

³⁴⁷ 40 C.F.R. § 22.27(c)(1)-(4).

³⁴⁸ 40 C.F.R. § 22.31(a).

³⁴⁹ 40 C.F.R. § 22.27(d).

1. Notice of Appeal

The first step in the appeal's process is the filing of a Notice of Appeal.³⁵⁰ A Notice of Appeal must be filed with the EAB within thirty days of service of the Initial Decision, Order or ruling being appealed.³⁵¹ A Notice of Appeal is deemed to be filed with the Board on the date that it is received by the Clerk of the Board.³⁵² The EAB requires strict compliance with regard to these time requirements and will dismiss an appeal that is filed late absent a showing of "special or extraordinary circumstances."³⁵³ The scope of the issues in a Notice of Appeal should be limited to those matters raised before the Presiding Officer, specifically addressed in the Initial Decision, ruling or Order being appealed, or pertaining to subject matter jurisdiction.³⁵⁴ It is the normal practice of the Board not to review arguments that are raised for the first time on appeal.³⁵⁵ Generally, a Notice of Appeal will be filed with an accompanying Appellate Brief³⁵⁶ which will include: a statement of the issues being presented; a statement of the nature of the case and the facts that are relevant to the issues presented for review; legal argument on the issues presented for review; references to all portions of the record for the matter, including, but not limited to, the Initial Decision, transcript and hearing exhibits for the case, that support the positions raised by the Appellant on appeal; and a short statement of the precise relief being sought on appeal.³⁵⁷

2. Cross-Appeals and Response Briefs

Once a Notice of Appeal has been filed and served, the CROP permit any other party to file a cross-appeal on any issue of the case that was considered by the Presiding Officer but not addressed in the Notice of Appeal.³⁵⁸ The cross-appeal must be filed within twenty days of the date on which the original Notice of Appeal was served.³⁵⁹ Similarly, within twenty day of being served with a Notice of Appeal,

³⁵⁰ Under 40 C.F.R. § 22.30(b), the EAB may *sua sponte* elect to review an initial decision, ruling or order by a Presiding Officer. Such authority has been exercised sparingly by the Board.

³⁵¹ 40 C.F.R. § 22.30(a)(1). Service with regard to initial decisions, orders and rulings is governed by 40 C.F.R. § 22.7(c). *See also In re Outboard Marine Corp.*, 6 E.A.D. 194, 196-197 (EAB 1995).

³⁵² 40 C.F.R. § 22.5(a)(1).

³⁵³ United States Environmental Protection Agency, The Environmental Appeals Board Practice Manual 17 (2004) (hereinafter "EAB Practice Manual"). *See* 40 C.F.R. § 22.7(b) (extension of time for filing a Notice of Appeal may be granted based showing of good cause and consideration of prejudice to other parties). *See also In re B&L Plating, Inc.*, 2003 EPA App. LEXIS 8, at 17 (EAB Oct. 20, 2003); *In re B&B Wrecking & Excavating, Inc.*, 4 E.A.D. 16 (EAB 1992). *Compare In re Tri-County Builders Supply*, 2004 EPA App. LEXIS 25, at 9 (EAB July 26, 2004) (clerical errors, insufficient oversight, inattentiveness, and family emergency/illness of counsel insufficient to justify late filing); *In re AES P.R., LP*, 8 E.A.D. 324, 330 (EAB 1999) (incorrect address on the petition); *In re Gary Dev. Co.*, 6 E.A.D. 526, 530-531 (EAB 1996) (failure of attorney to update mailing address with Clerk); *In re Apex Microtech., Inc.*, EPCRA Appeal No. 9302 (July 8, 1994) (mistaken filing of Notice of Appeal with Regional Hearing Clerk instead of Board).

³⁵⁴ 40 C.F.R. § 22.30(c).

³⁵⁵ *Id.*; *See also In re Billy Yee*, 10 E.A.D. 1, 11 (EAB 2001); *In re Britton Constr. Co.*, 8 E.A.D. 261, 278 (EAB 1999); *In re B&R Oil Co.*, 8 E.A.D. 39, 49 (EAB 1998).

³⁵⁶ *See* 40 C.F.R. § 22.30(a)(1); EAB Practice Manual at 18.

³⁵⁷ 40 C.F.R. § 22.30(a)(1).

³⁵⁸ *Id.*

³⁵⁹ *Id.* *See also In re Bullen Cos., Inc.*, 9 E.A.D. 620, 625-26, n.10.

the Appellee may file a brief in response to the Notice of Appeal.³⁶⁰ The Response Brief should be limited in scope to the issues raised in the Notice of Appeal.³⁶¹ Further briefs may only be filed with permission of the EAB.³⁶² 40 C.F.R. § 22.30(a)(1) requires that the original and one copy of a Notice of Appeal, accompanying Appellate Brief, cross-appeal and response brief must be filed with the EAB's Clerk of the Board. However, the EAB has requested that parties to an appeal submit the original and five copies of such documents.³⁶³ There is no filing fee for an appeal to the EAB.

3. Oral Argument

Oral argument is held at the discretion of the EAB.³⁶⁴ However, the parties may file a written request with the Board for oral argument by delineating the specific issues to be addressed and the reasons warranting the requested argument.³⁶⁵ Oral arguments before the EAB are open to the public.³⁶⁶

4. Final Decision

After reviewing the entire administrative record of a case, including, but not limited to, the transcript of any hearing held in the matter, the Board will issue a Final Decision.³⁶⁷ The Final Decision will either: adopt, modify, or set aside the findings of fact, conclusions of law or Presiding Officer's exercise of discretion contained in the Initial Decision, ruling or Order being reviewed; adopt or modify any penalty assessed by the Presiding Officer³⁶⁸; adopt, modify or set aside any Compliance/Corrective Action Order or Permit Action issued; and/or remand the case to the Presiding Officer for further action consistent with the Board's Order.³⁶⁹ The EAB has authority to review a Presiding Officer's factual and legal conclusions on a *de novo* basis.³⁷⁰ However, the Board will generally defer to a Presiding Officer's findings of fact where the credibility of witnesses is at issue³⁷¹ or

³⁶⁰ 40 C.F.R. § 22.30(a)(2).

³⁶¹ *Id.*

³⁶² *Id.*

³⁶³ *E.g., EAB Frequently Asked Questions* at 4.

³⁶⁴ 40 C.F.R. § 22.30(d).

³⁶⁵ EAB Practice Manual at 9.

³⁶⁶ *Id.*

³⁶⁷ 40 C.F.R. § 22.30(f).

³⁶⁸ *See In re Titan Wheel Corp. of Iowa*, 10 E.A.D. 526, 533 (EAB 2002) (citing *In re Newell Recycling Co.*, 8 E.A.D. 598, 642 (EAB 1999), *aff'd* *Newell Recycling Co. v. U.S. Env'tl. Prot. Agency*, 231 F.3d 204 (5th Cir. 2000)) (The EAB has held that penalty assessments in Part 22 cases "are sufficiently fact- and circumstance- dependent that the resolution of one case cannot determine the fate of another"); *Id.* at 533 ("[C]omparing penalties between disparate cases does not account for the multiplicity of factors that may impact a penalty determination"). *See also In re Chem. Lab. Prod., Inc.*, 10 E.A.D. 711, 728 (EAB 2002); *In re Schoolcraft Constr., Inc.*, 8 E.A.D. 476, 493-94 (EAB 1999); *In re Spang & Co.*, 6 E.A.D. 226, 242 (EAB 1995).

³⁶⁹ *Id.*

³⁷⁰ EAB Practice Manual at 20. *See also In re Phoenix Constr. Servs., Inc.*, 2004 EPA App. LEXIS 9, at 29 (EAB Apr. 15, 2004); *In re Billy Yee*, 10 E.A.D. at 10; *In re Advanced Elec., Inc.*, 10 E.A.D. at 392; *In re Bil-Dry Corp.*, 9 E.A.D. 575, 588 (EAB 2001).

³⁷¹ *In re Billy Yee*, 10 E.A.D. at 10 (deferring on the credibility of witnesses and issues regarding

concerning discovery-related matters.³⁷² Although the Part 22 Rules grant the Board *de novo* review of penalty determinations, “the Board generally will not substitute its judgment for that of a presiding officer absent a showing that the presiding officer committed clear error or an abuse of discretion in assessing a penalty.”³⁷³ In those cases in which a Presiding Officer has chosen not to apply Agency penalty policies or in which the penalty assessed falls outside the range of penalties provided for by such penalty policies, the EAB “will closely scrutinize the ALJ’s reasons for choosing not to apply the policy to determine [whether the reasons] are compelling.”³⁷⁴

The Final Decision issued by the EAB constitutes a Final Order under the Part 22 Rules and the final agency action in the matter.³⁷⁵ With the exception of cases involving an agency, department or instrumentality of the federal government, the Final Order of the EAB cannot be further appealed to either the Administrator of the EPA or a Regional Administrator.³⁷⁶ A Final Order issued to a department, agency or instrumentality will become effective 30 days after service unless the department, agency, or instrumentality “requests a conference with the Administrator in writing and serves a copy of the request on the parties of record within 30 days of service of the final order”, in which case the decision of the Administrator will become the Final Order in the matter.³⁷⁷ A Final Order issued by the EAB becomes effective upon its filing with the Clerk of the Board.³⁷⁸

discovery may be permissible); *In re Tifa Ltd.*, 9 E.A.D. 145, 151 n.8 (EAB 2000) (deferring on the credibility of witnesses may be permissible); *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998) (deferring on the credibility of witnesses in general).

³⁷² *In re Billy Yee*, 10 E.A.D. at 10; *In re Chempace Corp.*, 9 E.A.D. 119, 135 (EAB 2000) (affording deference on issues regarding discovery).

³⁷³ 40 C.F.R. § 22.30(f); *See also In re M.A. Bruder & Sons*, 10 E.A.D. at 610; *In re Phoenix Constr. Servs.*, 2004 EPA App. LEXIS 9 at 30 (stating that the Board will “ordinarily defer to the presiding officer’s factual findings where credibility of witnesses is at issue”); *In re Carroll Oil*, 10 E.A.D. at 656 (stating that “Board will generally not substitute its judgment for that of an ALJ absent a showing that the ALJ committed clear error or abused his or her discretion in assessing a penalty”); *In re Advanced Elec., Inc.*, 10 E.A.D. at 299 (stating that “the Board generally gives deference to a presiding officer’s penalty determination”); *In re Britton Constr.*, 8 E.A.D. at 293 (citing *In re Predex Corp.*, 7 E.A.D. 591, 597 (EAB 1998), to state that Board will not ordinarily substitute judgment of presiding officer).

³⁷⁴ *In re Chem. Lab. Prod., Inc.*, 10 E.A.D. 711, 725 (EAB 2002). *See also In re M.A. Bruder & Sons*, 10 E.A.D. at 611-13 (EAB 2002) (finding that ALJ’s reasons for departing from the penalty policy not compelling); *In re Chem. Lab. Prod., Inc.*, 10 E.A.D. 711, 726 (EAB 2002) (finding that reasons for not applying agency penalty policies were not compelling); *In re Ray Birnbaum Scrap Yard*, 5 E.A.D. 120, 124 (EAB 1994) (finding that Presiding Officer’s rationale for deviating from penalty guidelines compelling).

³⁷⁵ 40 C.F.R. § 22.31(a); EAB Practice Manual at 5 (“Decisions of the EAB constitute the ‘consummation of the agency’s decision-making process’ and are determinative of the rights of the parties.”) (quoting *City of San Diego v. EPA*, 242 F.3d 1097, 1011 (9th Cir. 2001)).

³⁷⁶ 40 C.F.R. § 22.31(a). The EAB does have the authority to refer a matter to the Administrator under 40 C.F.R. § 22.4(a), but has exercised this authority only in exceptional circumstances.

³⁷⁷ 40 C.F.R. § 22.31(e). *See generally* Environmental Protection Agency Office of Enforcement and Compliance and Assurance, *The Yellow Book: Guide to Environmental Enforcement and Compliance at Federal Facilities* (Feb. 1999) Publication No. EPA 315-B-98-011, available at <http://www.epa.gov/compliance/resources/publications/civil/federal/yellowbk.pdf> (reviewing enforcement involving federal agencies or departments).

³⁷⁸ 40 C.F.R. § 22.31(b).

5. *Interlocutory Appeals*

Interlocutory appeals in connection with Part 22 Rules are governed by 40 C.F.R. § 22.29 and are allowed only at the discretion of the EAB.³⁷⁹ A party seeking certification of an issue for appeal on an interlocutory basis must file a motion with the Presiding Officer “within 10 days after service of the order from which the appeal is requested.”³⁸⁰ A Presiding Officer may recommend any order or ruling for review by the EAB when: 1) the order or ruling involves an “important question of law or public policy concerning which there is substantial grounds for difference of opinion” and 2) “either an immediate appeal from the order or ruling will materially advance the ultimate termination of the proceeding, or review after the final order is issued will be inadequate or ineffective.”³⁸¹ The Board has thirty days to take action and accept an interlocutory appeal for review once it has been certified by a Presiding Officer, or it will be automatically dismissed.³⁸² The Board, however, is not required to issue a substantive ruling within this thirty-day period, but will instead set a schedule for the filing of briefs by the parties or for oral argument.³⁸³

I. Review of Part 22 Actions in Federal Courts

A respondent has a right to obtain judicial review in the federal courts of a Final Order issued in connection with a Part 22 action.³⁸⁴ “The right to judicial review is governed by the particular environmental statute that is the subject of the litigation.”³⁸⁵ In some instances, these statutes will set forth the time requirements for the filing of an appeal to the federal courts and the standard of review to be exercised on appeal in reviewing the Agency’s Final Order.³⁸⁶ The EAB maintains a list of all Part 22 cases that have been reviewed or are currently pending review by the federal courts.³⁸⁷

³⁷⁹ 40 C.F.R. § 22.29(a).

³⁸⁰ *Id.*; EAB Practice Manual at 21. See 40 C.F.R. § 22.29(c) (If certification of an issue for interlocutory appeal by a Presiding Officer is denied, the moving party may appeal directly to the EAB within ten days of the refusal to certify).

³⁸¹ 40 C.F.R. § 22.29(b).

³⁸² 40 C.F.R. § 22.29(c).

³⁸³ EAB Practice Manual at 22.

³⁸⁴ 5 U.S.C. § 704. Complainant cannot appeal final order to federal courts because final order constitutes the final decision of the Agency on the matter and is binding on the complainant, and because the complainant is not deemed to be an aggrieved party in such circumstances.

³⁸⁵ EAB Practice Manual at 16. *E.g.*, FIFRA Section 16(b), 7 U.S.C. § 136n(b); CAA Section 113(d)(4), 42 U.S.C. § 7413(d)(4); TSCA Section 16(a)(3), 15 U.S.C. § 2615(a)(3); CWA Section 309(g)(8), 33 U.S.C. § 1319(g)(8).

³⁸⁶ For example, FIFRA Section 16(b), 7 U.S.C. § 136n(b), provides that a petition for judicial review must be filed within 60 days of an Agency Order’s entry, and Agency’s Order in the matter must be sustained by a federal court “if it is supported by substantial evidence when considered on the record as a whole.” 7 U.S.C. § 136n(b). See generally Jim Rossi, *Final, But Often Fallible: Recognizing Problems with ALJ Finality*, 56 ADMIN. L. REV. 53, 66-75 (2004) (for a discussion of substantial evidence test).

³⁸⁷ See <http://www.epa.gov/boarddec/table2.htm>.

III. EQUAL ACCESS TO JUSTICE ACT

The Equal Access to Justice Act (“EAJA”),³⁸⁸ has been described as a “fee-shifting statute that enables private parties who prevail against the government in certain types of contested proceedings to recover attorney’s fees and expenses when the government’s position is not ‘substantially justified.’”³⁸⁹ More specifically, section 504(a)(1) of EAJA, 5 U.S.C. § 504(a)(1), provides, in pertinent part, that “[a]n agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust.”³⁹⁰ On September 2, 1983, the EPA promulgated regulations, codified at 40 C.F.R. Part 17, to implement EAJA with regard to agency proceedings, including matters conducted under the CROP.³⁹¹

In order to qualify as a “prevailing party”, a person or entity must satisfy certain eligibility requirements (e.g., financial limitations on net worth, number of employees, etc.)³⁹² and must be a “prevailing party” to the extent that the party has “secured resolution of a dispute which changed the legal relationship of the parties because it was no longer a respondent in an administrative proceeding in which complainant sought a substantial penalty.”³⁹³ The burden then shifts to the Agency to establish that its “position” in the adjudication is “substantially justified”³⁹⁴ or that “special circumstances” make an award under the Act unjust.³⁹⁵

An EAJA application must be filed within thirty days of a final disposition in an adversary adjudication.³⁹⁶ The Administrator has delegated to the EAB jurisdiction over EAJA applications submitted in connection with Part 22 proceedings.³⁹⁷ However, pursuant to Agency’s EAJA regulations, applications are initially

³⁸⁸ 5 U.S.C. § 504. EAJA was enacted in 1980 (Pub. L. No. 96-481, 94 Stat. 2325) and became effective on October 1, 1981. The Act is codified under two statutes: 5 U.S.C. Section 504 *et seq.*, which governs adversary administrative adjudications; and 28 U.S.C. Section 2412 *et seq.*, which governs civil, non-tort, court actions.

³⁸⁹ *In re L&C Serv., Inc.*, 8 E.A.D. 110, 115 (EAB 1999); *In re Bricks, Inc.*, No. CWA-05-2000-0012, Slip op. at 1 (ALJ July 16, 2004). EAJA is a “partial waiver of sovereign immunity” by the federal government. *In re Bricks, Inc.*, No. CWA-05-2000-0012, Slip op. at 10 (ALJ July 16, 2004).

³⁹⁰ 5 U.S.C. § 504(a)(1).

³⁹¹ 48 Fed. Reg. 39936 (Sept. 2, 1983). Although the EAJA statute has been amended a number of times, in many instances EPA has failed to update its regulations to reflect such changes. *See In re Hoosier Spline Broach Corp.*, 7 E.A.D. 665, 680 n.35 (EAB 1998); *In re Biddle Sawyer Corp.*, 4 E.A.D. 912, 924 n.39 (EAB 1993); *In re Bricks, Inc.*, No. CWA-05-2000-0012, Slip op. at 2, n.1 (ALJ July 16, 2004).

³⁹² 5 U.S.C. § 504(b)(1)(B).

³⁹³ *In re Argonics, Inc.*, (Docket No. CWA-06-99-1631) (ALJ June 3, 2004).

³⁹⁴ To be “substantially justified” the government’s position in the adjudication must have “a reasonable basis both in law and fact.” *In re L&C Services, Inc.*, 8 E.A.D. 110, 115-16 (EAB 1999); *In re Hoosier Spline Broach Corp.*, 7 E.A.D. 665, 680 (EAB 1998). “The fact that the agency did not prevail does not create a presumption that the agency’s position was not substantially justified.” *In re Biddle Sawyer Corp.*, 4 E.A.D. 912, 935 (EAB 1993).

³⁹⁵ *In re Biddle Sawyer Corp.*, 4 E.A.D. at 938 (citing *Russell v. Nat’l Mediation Bd.*, 775 F.2d 1284, 1290 (5th Cir. 1985)).

³⁹⁶ 5 U.S.C. § 504(a)(2); 40 C.F.R. § 17.14(a).

³⁹⁷ 40 C.F.R. § 17.8. *See also* EPA Delegations Manual Delegation 1-38-A.

considered by a Presiding Officer who issues a “recommended decision” on the merits of the application that becomes an Initial Decision, unless appealed to the EAB.³⁹⁸ On appeal, the Board undertakes a *de novo* review of the recommended decision and will evaluate the issues raised “to determine whether the factual findings are supported by the record and the legal conclusions are consistent with case law or other applicable legal authority.”³⁹⁹

An applicant bears the burden of establishing its entitlement to an award of fees and expenses under EAJA and bears the burden of documenting the appropriateness of the fees and expenses it is seeking.⁴⁰⁰ 5 U.S.C. § 504(b)(1)(A) provides that the following fees and expenses are potentially recoverable in an EAJA action: reasonable expenses of expert witnesses; reasonable cost of any study, analysis, engineering report, test, or project which is found to be necessary for the preparation of the party’s case; and reasonable attorney or agent fees. An applicant may also recover those fees and expenses incurred in connection with a successful application under EAJA.⁴⁰¹ However, an applicant may not be awarded fees and expenses incurred “prior to the issuance of the complaint” because such fees and expenses are not considered to have been incurred in connection with an “adversary adjudication” within the meaning of the EAJA.”⁴⁰²

IV. CONCLUSION

Administrative enforcement actions conducted under the Consolidated Rules of Practice have become an integral and essential component of the Agency’s enforcement strategy. Although frequently overlooked or discounted by members of the regulated community, an adverse determination in a Part 22 proceeding may result in the assessment of significant financial penalties and the issuance of injunctive relief (in the form of a Compliance or Corrective Action Order) requiring the substantial expenditure of time and resources. Additionally, the record created as part of an administrative enforcement action will form the basis for any review by the federal courts of a Final Order issued by the Agency in connection with a Part 22 action. As a result, it is in the interest of all legal practitioners to master the Consolidated Rules of Practice in order to effectively and successfully represent their clients in matters before the Agency.

³⁹⁸ 40 C.F.R. § 17.26.

³⁹⁹ *In re Hoosier Spline Broach Corp.*, 7 E.A.D. 665, 682 (EAB 1998). *See also In re Biddle Sawyer Corp.*, 4 E.A.D. 912, 913 n.2 (EAB 1993).

⁴⁰⁰ *In re Biddle Sawyer Corp.*, 4 E.A.D. 912, 939 (EAB 1993).

⁴⁰¹ *Id.* at 949.

⁴⁰² *In re Argonics, Inc.*, No. CWA-06-99-1631, Slip op. at 20 (ALJ June 3, 2004).