



FLD 092 718 576

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

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EPA  
FEB 7 2 41 PM '00

FEB 07 2000

4WD-RCRA

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

Albert F. Styring, President  
~~V.A.W. of America, Inc.~~  
9 Aluminum Drive  
Ellenville, New York 12428.

RECEIVED  
RCRA

FEB 14 2000

Hazardous Waste Regulation

SUBJ: Administrative Order Under Section 3008(a) of RCRA  
V.A.W. of America, Inc.  
St. Augustine, Florida  
FLD 092 980 937

Dear Mr. Styring:

Enclosed please find a Complaint and Compliance Order ("Order") issued pursuant to Section 3008(a) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928(a), which specifies the U.S. Environmental Agency's (EPA's) determination of certain violations by V.A.W. of America, Inc., of RCRA 42 U.S.C. §§ 6901 et seq., as amended. The Order states in full the reasons for the determination of the violations. A penalty of \$22,546 is proposed in the Order for these violations.

Embodied with the Order is a Notice of Opportunity to Request a Hearing (Section XVII of the Complaint). Should you desire to contest the Order, a written answer and request for hearing is required to be filed with the Regional Hearing Clerk at the above address within thirty (30) days from your receipt of this Order. A copy of your answer and hearing request should also be sent to Judy Marshall, Associate Regional Counsel, at the above address. In addition, you may request an informal settlement conference with the Agency, as outlined in the Complaint in Section XIX. A request for an informal settlement conference, however, does not stay the 30-day period for filing an answer and a request for hearing.

This Complaint and Compliance Order will become effective as provided in Section 3008(b) of RCRA, 42 U.S.C. § 6928(b), and 40 C.F.R. Part 22. EPA encourages settlement of this matter, and should you desire to enter into good-faith settlement negotiations, you should contact Judy Marshall at (404) 562-9533, to set up an informal settlement conference. Any technical questions you may have should be directed to Donna Webster of the South Enforcement and Compliance Section at (404) 562-8615.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Jewell Grubbs". The signature is fluid and cursive, with a large initial "J" and "G".

Jewell Grubbs, Chief  
RCRA Enforcement and Compliance Branch  
Waste Management Division

Enclosure

cc w/encl: Vicky Valade, FDEP

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 4

IN THE MATTER OF:	)	DOCKET NO: RCRA-2000-04-00
	)	
V.A.W. of America, Inc.	)	Proceeding Under Section 3008(a)
9 Aluminum Drive	)	of the Resource Conservation and
Ellenville, New York 12428	)	Recovery Act, 42 U.S.C. § 6928(a)
	)	
EPA ID No.: FLD 092 980 937	)	
	)	
RESPONDENT.	)	
<hr/>		

COMPLAINT AND COMPLIANCE ORDER

I. NATURE OF THE ACTION

1. This is a civil administrative enforcement action, ordering compliance with the requirements of Subtitle C of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6921 et seq., and the Florida Statutes (Fla. Stat.), Part IV Resource Recovery and Management, Section 403-701 et seq. (LEXIS 1995). This action is seeking injunctive relief and the imposition of civil penalties pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), for violations of RCRA and regulations promulgated pursuant thereto and set forth at Title 40 of the Code of Federal Regulations (C.F.R.), Parts 260 through 270; and Fla. Stat. § 403-701 and regulations promulgated pursuant thereto and set forth at the Florida Administrative Code Annotated (Fla. Admin. Code Ann. r.), Chapter 62-730.

II. THE PARTIES

2. Complainant is the Chief, RCRA Enforcement and Compliance Branch, Waste Management Division, United States Environmental Protection Agency (EPA), Region 4. Complainant is authorized to issue the instant Complaint and Compliance Order (Order) pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), and applicable delegations of authority. Pursuant to Section 3008(a)(2) of RCRA, 42 U.S.C. § 6928(a)(2), Complainant has given notice of this action to the State of Florida prior to issuing this Order.

3. Respondent is V.A.W. of America, Inc. (VAW), a wholly owned subsidiary of VAW North American Holdings, Inc., and is incorporated in the State of New York and authorized to do business in the State of Florida.

4. Respondent is a "person" as defined in Section 1004(15) of RCRA, 42 U.S.C. § 6903(15), and 40 C.F.R. § 260.10, and the equivalent Florida regulations.

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### III. JURISDICTION

5. This Order is issued pursuant to Section 3008(a)(1) of RCRA, 42 U.S.C. § 6928(a)(1), and EPA's "Consolidated Rules of Practice Governing Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits," 40 C.F.R. Part 22, as amended by 64 Fed. Reg. 40138 (July 23, 1999).

6. Pursuant to Section 3006 of RCRA, 42 U.S.C. § 6926, on February 12, 1985, the State of Florida (the State) received final authorization from EPA to carry out certain portions of the State hazardous waste program in lieu of the federal program set forth in RCRA. The requirements of the authorized State program are found in Fla. Stat. § 403.701 et seq. and Fla. Admin. Code Ann. r. 62-730. For purposes of this Order, citations herein to the requirements of 40 C.F.R. Parts 124 and 260 through 270 shall constitute a citation to the equivalent requirements of the Florida Administrative Code.

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

8. Based on available information, EPA has determined that Respondent is in violation of certain requirements of Section 3005 of RCRA, 42 U.S.C. § 6925, and the regulations adopted pursuant thereto.

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

### IV. STATUTORY AND REGULATORY BACKGROUND

10. Section 3002(a) of RCRA, 42 U.S.C. § 6922(a), sets forth standards applicable to generators of hazardous waste. The implementing regulations for this requirement are found in 40 C.F.R. Part 262, and became effective on November 19, 1980.

11. Pursuant to 40 C.F.R. § 262.11, a person who generates a solid waste as defined in 40 C.F.R. § 261.2 must determine if that waste is a hazardous waste.

12. Pursuant to 40 C.F.R. § 262.34(a)(2), a generator may accumulate hazardous waste on-site for 90 days or less without a permit provided that the date upon which each period of accumulation begins is clearly marked and visible for inspection on each container.

13. Pursuant to 40 C.F.R. § 262.34(a)(3), a generator may accumulate hazardous waste on-site for 90 days or less without a permit provided that, while being accumulated on-site, each container is labeled or marked clearly with the words "Hazardous Waste."

14. Pursuant to 40 C.F.R. § 262.34(a)(4), a generator may accumulate hazardous waste on-site for 90 days or less without a permit provided that the generator complies with the requirements of, inter alia, 40 C.F.R. Part 265, Subpart C. 40 C.F.R. Part 265, Subpart C requires, at 40 C.F.R. § 265.31, that the Facility must be maintained and operated to minimize the possibility of a release of hazardous waste or hazardous waste constituents to air, soil or surface water which could threaten human health or the environment.

15. Pursuant to 40 C.F.R. § 262.34(a)(4), a generator may accumulate hazardous waste on-site for 90 days or less without a permit provided that the generator complies with the requirements of, inter alia, 40 C.F.R. Part 265, Subpart D. 40 C.F.R. Part 265, Subpart D requires, at 40 C.F.R. § 265.52(d), that the contingency plan must list names, addresses and phone numbers of all persons qualified to act as emergency coordinator, and this list must be kept up to date.

16. Pursuant to 40 C.F.R. § 262.34(a) and (b), a generator may accumulate hazardous waste on-site for 90 days or less without a permit provided that the generator complies with the requirements of 40 C.F.R. § 262.34(a). A generator who accumulates hazardous waste for more than 90 days is an operator of a storage facility and is subject to the requirements of 40 C.F.R. Parts 264 and 265 and the permit requirements of 40 C.F.R. Part 270. Section 3005(a) of RCRA, 42 U.S.C. § 6925(a), prohibits the treatment, storage, or disposal of hazardous waste without a permit issued pursuant to RCRA.

17. Pursuant to 40 C.F.R. § 262.34(c), a generator may accumulate as much as 55 gallons of hazardous waste in containers at or near the point of generation where wastes initially accumulate provided that he complies with, inter alia, 40 C.F.R. § 265.173(a). 40 C.F.R. § 265.173(a) requires that a container holding hazardous waste must always be closed during storage, except when it is necessary to add or remove waste.

#### V. STATEMENT OF FACTS RELATED TO RESPONDENT'S MANAGEMENT OF HAZARDOUS WASTE

18. Respondent is the "owner" and "operator" of a "facility" located at 200 Riveria Boulevard in St. Augustine, Florida (the Facility), as those terms are defined in 40 C.F.R. § 260.10.

19. At the Facility, Respondent purchases aluminum ingots, which are heated and extruded, given a protective coating through a chemical conversion process, and painted according to customer specifications.

20. Respondent, as a result of its aluminum extrusion and coating processes, produces wastes which are both "solid wastes" and "hazardous wastes" as defined in 40 C.F.R. §§ 261.2 and 261.3, respectively, and is a "generator" of hazardous waste as that term is defined in 40 C.F.R. § 260.10.

21. As a result of the chemical conversion process, Respondent generates D002 alkali wastes.

22. As a result of its painting process, Respondent generates F003 waste xylene and D001/D035/F003/F005 waste xylene still bottoms.

23. As a result of its maintenance operations, Respondent generates used oil and used oil filters.

24. On May 17, 1994, Respondent filed a Notification of Regulated Waste Activity indicating that Respondent was a large quantity generator (LQG) of hazardous waste.

25. On June 9, 1998, the Florida Department of Environmental Protection (FDEP) conducted a hazardous waste inspection at Respondent's Facility. At that time, Respondent was an LQG.

26. On the date of the inspection, there were two 5-gallon containers filled with greenish liquid and rags. Respondent was unable to identify the contents of the containers.

27. On the date of the inspection, there were three containers in Respondent's 90-day storage area which were not marked with dates for which the periods of accumulation began, and were not marked with the words "Hazardous Waste."

28. On the date of the inspection, used oil was leaking from used oil filters stored in a cardboard box.

29. On the date of the inspection, used oil was on the ground outside of a secondary containment structure for Respondent's used oil storage tanks.

30. On the date of the inspection, Respondent's contingency plan had not been updated to list the address and phone number of the emergency coordinator.

31. On the date of the inspection, there was one container in Respondent's 90-day storage area that had an accumulation date of December 11, 1997; and one container that had an accumulation date of December 19, 1997.

32. Respondent does not have a permit to store hazardous waste at its Facility for more than 90 days.

33. On the date of the inspection, there was one container of F003 waste in Respondent's satellite accumulation area. The container was open with a portion of the top cut out, and no waste was being added or removed from the container.

VI. COUNT 1: Violation of 40 C.F.R. § 262.11

34. The preceding factual allegations are incorporated by reference as if fully set forth herein.

35. Pursuant to 40 C.F.R. § 262.11, a person who generates a solid waste as defined in 40 C.F.R. § 261.2 must determine if that waste is a hazardous waste.

36. Respondent failed to make a hazardous waste determination on the contents of two 5-gallon containers filled with greenish liquid and rags.

37. Therefore, Respondent has violated 40 C.F.R. § 262.11.

VII. COUNT 2: Violation of 40 C.F.R. § 262.34(a)(2)

38. The preceding factual allegations are incorporated by reference as if fully set forth herein.

39. Pursuant to 40 C.F.R. § 262.34(a)(2), a generator may accumulate hazardous waste on-site for 90 days or less without a permit provided that the date upon which each period of accumulation begins is clearly marked and visible for inspection on each container.

40. Respondent failed to mark three containers in its 90-day storage area with dates for which the periods of accumulation began.

41. Therefore, Respondent has violated 40 C.F.R. § 262.34(a)(2).

VIII. COUNT 3: Violation of 40 C.F.R. § 262.34(a)(3)

42. The preceding factual allegations are incorporated by reference as if fully set forth herein.

43. Pursuant to 40 C.F.R. § 262.34(a)(3), a generator may accumulate hazardous waste on-site for 90 days or less without a permit provided that, while being accumulated on-site, each container is labeled or marked clearly with the words "Hazardous Waste."

44. Respondent failed to mark three containers in its 90-day storage area with the words "Hazardous Waste."

45. Therefore, Respondent has violated 40 C.F.R. § 262.34(a)(3).

IX. COUNT 4: Violation of 40 C.F.R. §§ 262.34(a)(4) and 265.31

46. The preceding factual allegations are incorporated by reference as if fully set forth herein.

47. Pursuant to 40 C.F.R. § 262.34(a)(4), a generator may accumulate hazardous waste on-site for 90 days or less without a permit provided that the generator complies with the requirements of, *inter alia*, 40 C.F.R. Part 265, Subpart C. 40 C.F.R. Part 265, Subpart C requires, at 40 C.F.R. § 265.31, that the Facility must be maintained and operated to minimize the possibility of a release of hazardous waste or hazardous waste constituents to air, soil or surface water which could threaten human health or the environment.

48. Respondent failed to maintain and operate its Facility in a manner to minimize the possibility of a release of hazardous waste or hazardous waste constituents to air, soil or surface water, by allowing used oil to leak from used oil filters stored in a cardboard box and by allowing used oil to accumulate on the ground outside of a secondary containment structure for Respondent's used oil storage tanks.

49. Therefore, Respondent has violated 40 C.F.R. §§ 262.34(a)(4) and 265.31.

X. COUNT 5: Violation of 40 C.F.R. §§ 262.34(a)(4) and 265.52(d)

50. The preceding factual allegations are incorporated by reference as if fully set forth herein.

51. Pursuant to 40 C.F.R. § 262.34(a)(4), a generator may accumulate hazardous waste on-site for 90 days or less without a permit provided that the generator complies with the requirements of, *inter alia*, 40 C.F.R. Part 265, Subpart D. 40 C.F.R. Part 265, Subpart D requires, at 40 C.F.R. § 265.52(d), that the contingency plan must list names, addresses and phone numbers of all persons qualified to act as emergency coordinator, and this list must be kept up to date.

52. Respondent failed to update its contingency plan to list the address and phone number of the emergency coordinator.

53. Therefore, Respondent has violated 40 C.F.R. §§ 262.34(a)(4) and 265.52(d).

XI. COUNT 6: Violation of 40 C.F.R. §§ 262.34(a) and (b), Part 270 and 3005(a) of RCRA

54. The preceding factual allegations are incorporated by reference as if fully set forth herein.

55. Pursuant to 40 C.F.R. § 262.34(a) and (b), a generator may accumulate hazardous waste on-site for 90 days or less without a permit provided that the generator complies with the



requirements of 40 C.F.R. § 262.34(a). A generator who accumulates hazardous waste for more than 90 days is an operator of a storage facility and is subject to the requirements of 40 C.F.R. Parts 264 and 265 and the permit requirements of 40 C.F.R. Part 270. Section 3005(a) of RCRA, 42 U.S.C. § 6925(a), prohibits the treatment, storage, or disposal of hazardous waste without a permit issued pursuant to RCRA.

56. Respondent stored one container of hazardous waste from December 11, 1997 until at least June 9, 1998, and one container of hazardous waste from December 19, 1997 until at least June 9, 1998, without a hazardous waste storage permit.

57. Therefore, Respondent has violated 40 C.F.R. §§ 262.34(a) and (b), Part 270 and 3005(a) of RCRA.

#### XII. COUNT 7: Violation of 40 C.F.R. §§ 262.34(c) and 265.173(a)

58. The preceding factual allegations are incorporated by reference as if fully set forth herein.

59. Pursuant to 40 C.F.R. § 262.34(c), a generator may accumulate as much as 55 gallons of hazardous waste in containers at or near the point of generation where wastes initially accumulate provided that he complies with, *inter alia*, 40 C.F.R. § 265.173(a). 40 C.F.R. § 265.173(a) requires that a container holding hazardous waste must always be closed during storage, except when it is necessary to add or remove waste.

60. Respondent stored one container of F003 waste in its satellite accumulation area with an open top, and no waste was being added or removed from the container.

61. Therefore, Respondent has violated 40 C.F.R. §§ 262.34(c) and 265.173(a).

#### XIII. ORDER

62. Pursuant to 40 C.F.R. § 22.37(b), the Order hereby included is equivalent to a Compliance Order under Section 3008 of RCRA, 42 U.S.C. § 6928. Based upon the foregoing, Respondent is ordered to comply with the requirements of Subtitle C of RCRA, 42 U.S.C. §§ 6921, *et seq.*, 40 C.F.R. Parts 260 through 270; to make all required submittals and certifications to Complainant; and to undertake the following acts within the times specified below pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a):

A. Within thirty (30) calendar days of the effective date of this Complaint and Compliance Order, Respondent shall submit to EPA and FDEP documentation that it is in compliance with the violations alleged herein.

B. The documentation required to be submitted under this Section shall be mailed to:

Jeffrey T. Pallas, Chief  
South Enforcement and Compliance Section  
RCRA Enforcement and Compliance Branch  
Waste Management Division  
U.S. Environmental Protection Agency, Region 4  
61 Forsyth Street, SW  
Atlanta, Georgia 30303-8909

and to:

Satish Kastury, Administrator  
Hazardous Waste Programs  
Florida Department of Environmental Protection  
2600 Blair Stone Road  
Tallahassee, Florida 32399-2400

and to:

Vicky Valade  
Compliance and Enforcement Manager  
Hazardous Waste Section  
Florida Department of Environmental Protection  
Northeast District  
7825 Baymeadows Way, Suite 200B  
Jacksonville, Florida 32256-7577.

#### XIV. PROPOSED CIVIL PENALTY

63. Sections 3008(a) and (g) of RCRA, 42 U.S.C. §§ 6928(a) and (g), authorize the assessment of a civil penalty of up to TWENTY-FIVE THOUSAND DOLLARS (\$25,000) per day for each violation of Subtitle C of RCRA, 42 U.S.C. §§ 6921, et seq., and the regulations promulgated thereunder, and up to TWENTY-SEVEN THOUSAND FIVE HUNDRED DOLLARS (\$27,500) for each violation occurring on or after January 30, 1997.

64. Based upon the facts alleged in this Order and upon those factors which EPA must consider pursuant to Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3), and the "October 1990 RCRA Civil Penalty Policy," including: (1) the seriousness of the violations; (2) any good faith efforts by the Respondent to comply with applicable requirements; (3) the potential for harm to human health or the environment; (4) the extent to which the conduct of Respondent has deviated from the regulatory requirements; (5) the presence of multiple violations; (6) the number of days over which the violations occurred; and (7) the economic benefits accruing to the

Respondent; as well as such other matters as justice may require, Complainant proposes that Respondent be assessed a civil penalty of \$ 22,546 for the violations alleged in this Order. The proposed penalty is calculated in accordance with RCRA and the "October 1990 RCRA Civil Penalty Policy."

65. In accordance with the "October 1990 RCRA Civil Penalty Policy," EPA prepared penalty calculation worksheets and narrative summaries explaining the reasoning behind the penalty proposed for the violations alleged herein. Both the worksheets and the narrative summaries are provided as Exhibit A to this Order and are adopted and incorporated by reference as if fully set forth herein.

#### XV. IMMINENT AND SUBSTANTIAL ENDANGERMENT

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

#### XVI. POTENTIAL CONSEQUENCE OF FAILURE TO COMPLY WITH COMPLIANCE ORDER

67. If Respondent fails to comply with any requirement of this Order or any regulation promulgated pursuant to RCRA, Respondent shall be subject to liability through the imposition of additional penalties of up to TWENTY-SEVEN THOUSAND FIVE HUNDRED DOLLARS (\$27,500) for each day of non-compliance in accordance with Section 3008 of RCRA, 42 U.S.C. § 6928, and may be subject to further enforcement action including injunction from any further treatment, storage or disposal of hazardous wastes, and such other and further relief as may be necessary to achieve compliance with Subtitle C of RCRA.

#### XVII. OPPORTUNITY TO REQUEST A HEARING

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

69. The written Answer should clearly and directly admit, deny or explain each of the factual allegations contained in this Order with regard to which Respondent has any knowledge. Where Respondent has no knowledge of a particular factual allegation and so states, the allegation is deemed denied. The Answer shall state: (a) the circumstances or arguments which

are alleged to constitute the grounds for defense; (b) the facts which Respondent disputes; (c) the basis for opposing any proposed relief; and (d) whether a hearing is requested. Failure to admit, deny or explain any material factual allegation contained herein constitutes an admission of the allegation.

70. If a written Answer to this Order is not filed with the Regional Hearing Clerk within thirty (30) days after Respondent's receipt of this Order, Respondent may be found in default pursuant to 40 C.F.R. § 22.17.

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

72. The written Answer must be sent to:

Region 4 Hearing Clerk  
U.S. Environmental Protection Agency, Region 4  
61 Forsyth Street, SW  
Atlanta, Georgia 30303-8909

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

Judy K. Marshall  
Associate Regional Counsel  
Environmental Accountability Division  
U.S. Environmental Protection Agency, Region 4  
61 Forsyth Street, S.W.  
Atlanta, Georgia 30303  
(404) 562-9533.

73. Hearings held on the assessment of civil penalties will be conducted in accordance with the provisions of the Administrative Procedure Act, 5 U.S.C. §§ 552, et seq., and the "Consolidated Rules of Practice Governing Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits," 40 C.F.R. Part 22, as amended by 64 Fed. Reg. 40138 (July 23, 1999).

## XVIII. APPEAL RIGHTS AND EXHAUSTION OF ADMINISTRATIVE REMEDIES

74. The decision issued by the Presiding Officer after a hearing constitutes an initial decision. Likewise, a Default Order issued by the Presiding Officer constitutes an initial decision. Respondent has the right to appeal an adverse initial decision to the Environmental Appeals Board (EAB). Such an appeal must be made in accordance with 40 C.F.R. § 22.30(a)(1) within 30 days after the initial decision is served. Pursuant to 40 C.F.R. § 22.7(c), "where a document is served by first class mail or commercial delivery service, but not by overnight or same-day delivery, 5 days shall be added to the time allowed by these Consolidated Rules of Practice for the filing of a responsive document." Therefore, the maximum time period for the filing of an appeal under 40 C.F.R. § 22.30(a)(1) is 35 days unless an extension is granted by the EAB. Note that the 45 day period provided in 40 C.F.R. § 22.27(c) (discussing when an initial decision becomes a final order) does not pertain to nor extend the 30 days prescribed in 40 C.F.R. § 22.30(a)(1) for filing an appeal.

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

## XIX. INFORMAL SETTLEMENT CONFERENCE

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

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

Judy K. Marshall  
Associate Regional Counsel  
U.S. Environmental Protection Agency, Region 4  
61 Forsyth Street, SW  
Atlanta, Georgia 30303-8909  
(404) 562-9533.


78. The scheduling of an informal conference does not relieve Respondent of the obligation to file a written Answer within thirty (30) days of Respondent's receipt of this Order. A request for an informal conference does not extend the thirty-day period in which a written Answer and request for hearing must be submitted. The informal conference may be pursued simultaneously with a request for a hearing.

XX. EFFECTIVE DATE

79. This Order will become effective as provided in Section 3008(b) of RCRA, 42 U.S.C. § 6928(b), and the "Consolidated Rules of Practice Governing Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits," 40 C.F.R. Part 22 as amended by 64 Fed. Reg. 40138 (July 23, 1999).

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
Region 4

Complainant

  
\_\_\_\_\_  
Jeffrey Grubbs, Chief  
RCRA Enforcement and Compliance Branch  
Waste Management Division

Dated: 2/7/00

## CERTIFICATE OF SERVICE

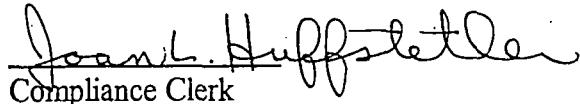
I hereby certify that I have caused a copy of the foregoing Complaint and Compliance Order to be served upon the person designated below on the date below, by causing said copy to be deposited in the U.S. Mail, First Class (Certified Mail, Return Receipt Requested, postage prepaid), at Atlanta, Georgia, in an envelope addressed to:

Albert F. Styring, President  
V.A.W. of America, Inc.  
9 Aluminum Drive  
Ellenville, New York 12428.

I have further caused the original and one copy of said and the Certificate of Service to be filed with the Regional Hearing Clerk, United States Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8909, on the date specified below.

These are said persons' addresses last known to subscriber.


Dated this 7<sup>th</sup> day of February 2000.

  
Joan L. Huffstetler

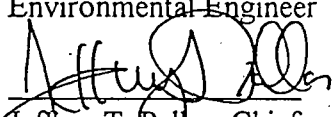
Compliance Clerk  
South Enforcement and Compliance Section  
RCRA Enforcement and Compliance Branch  
Waste Management Division

**Penalty Computation Summary Sheet**  
**Current Penalties**

Count: 1	Failure to make a Hazardous Waste Determination 40 C.F.R. § 262.11	<u>\$ 110</u>
Counts: 2 & 3	Container Labeling Violations 40 C.F.R. § 262.34(a)(2) and (3)	<u>\$ 1,100</u>
Count: 4	Failure to Maintain Facility 40 C.F.R. §§ 262.34(a)(4) and 265.31	<u>\$ 7,150</u>
Count: 5	Failure to Update Contingency Plan 40 C.F.R. §§ 262.34(a)(4) and 265.52(d)	<u>\$ 1,648</u>
Count: 6	Storage of Hazardous Waste Without a Permit 40 C.F.R. §§ 262.34(a) and (b), Part 270 and 3005 (a) of RCRA	<u>\$ 11,438</u>
Count: 7	Open Container 40 C.F.R. §§ 262.34(a)(4) and 265.173	<u>\$ 1,100</u>
<b>Total</b>		<u><b>\$ 22,546</b></u>

  
Donna Webster  
Environmental Engineer

1/3/00  
Date

  
Jeffrey T. Pallas, Chief  
South Enforcement  
and Compliance Section

2/7/00  
Date



## Penalty Calculation Worksheet

Count 1

Facility Name: VAW of America, Inc.

EPA ID No: FLD 092 980 937

Facility Address: St. Augustine, Florida

Regulation(s)/

Requirements Violated:

40 C.F.R. § 262.11

Failure to Make a Hazardous Waste

Determination

1. Gravity Based Penalty from Matrix.....\$ 100
  - a. Potential for Harm.....Minor
  - b. Extent of Deviation from the Requirement.....Minor
2. Amount from appropriate multi-day matrix.....\$ 0
  - a. Number of days of Violation.....1
  - b. Number of days of violation used for multi-day penalty.....0
  - c. Multiply line 2 by 2(b).....\$ 0
3. Add line 1 to 2(c).....\$ 100
4. Percent increase/decrease for good faith or lack of good faith effort.....0 %
5. Percent increase/decrease for willfulness and/or negligence.....0 %
6. Percent increase for history of noncompliance.....0 %
7. Percent decrease for other unique factors.....0 %
8. Percent increase for inflation.....10 %
9. Total of lines 4 through 8.....10 %
10. Multiply line 3 by line 9.....\$ 10
11. Calculate and insert economic benefit.....\$ 0
12. Add line 3, 9, and 10.....\$ 110
13. Total Penalty.....\$ 110

## Justification of Penalty Calculation

### Count 1

Facility Name: VAW of America, Inc.  
EPA ID No: FLD 092 980 937  
Facility Address: St. Augustine, Florida  
Regulation(s)/  
Requirements Violated: 40 C.F.R. § 262.11  
Failure to Make a Hazardous Waste  
Determination

### Violation Narrative:

VAW of America, Inc.(VAW) is a large quantity generator of hazardous waste. The regulations at 40 C.F.R. § 262.11 require generators of a solid waste to determine if that waste is a hazardous waste. At the time of the inspection, the facility personnel could not identify the contents of two 5-gallon containers of liquid waste located in the maintenance shop. Subsequent to the inspection, the facility identified the contents of the containers as a non-hazardous cleaning material and removed them from the area.

#### 1. Gravity Based Penalty: \$ 100

##### a. Potential for Harm: Minor

Risk of Exposure: Minor

The generator requirement to establish whether a solid waste is a hazardous waste was established to minimize the exposure to hazardous waste by properly identifying and subsequently managing hazardous waste containers. In this case, the violations pose a relatively low risk of exposure of humans or other environmental receptors to hazardous waste or constituents since there were only two 5-gallon containers and the unlabeled containers were found to be non-hazardous. The potential for harm due to risk of exposure is minor.

Harm to the RCRA Regulatory Program: Minor

The intent of the regulation is to minimize the possibility of exposure of employees by making them aware of hazardous waste in the workplace. VAW's failure to make a hazardous waste determination on the material has a small adverse effect on implementation of the RCRA regulations. Therefore, the failure to make a hazardous waste determination in this case poses a minor potential for harm to the RCRA regulatory program.

b. Extent of Deviation: Minor

This criteria relates to the "degree to which the violation renders inoperative the requirement violated." A minor violator deviates somewhat from the regulatory or statutory requirements but most of the requirements are met. VAW manages a large facility with many drums of properly identified hazardous waste. In this situation, the waste in question was not hazardous but facility personnel could not make that assessment at the time of the inspection. The extent of deviation from the requirement in this situation is minor.

c. Summary of Gravity Penalty: Minor-Minor

The gravity-based penalty for Minor-Minor violations ranges from \$100 to \$499 in the penalty assessment matrix. EPA selected the low-range figure of \$100 because VAW handles numerous containers of properly identified hazardous waste, there was only a small amount of unidentified material, and the material in question was not hazardous.

2. Multi-day Penalties      \$0

EPA cannot document VAW's failure to make a hazardous waste determination for days other than the date of the inspection. Therefore, no multi-day penalties were assessed.

3. Adjustment Factors

a.      Good Faith Efforts      0 %  
No adjustment was made.

b.      Willfulness/Negligence      0 %  
No adjustment was made.

c.      History of Noncompliance      0 %  
No adjustment was made.

d.      Other Unique Factors      0 %  
No adjustment was made.

e.      Inflation      10 %  
In accordance with 61 Fed. Reg. 69360, a 10 percent increase to the gravity-based penalty is applied to account for inflation. This rule was effective on January 30, 1997, and applies to violations which have occurred thereafter.

f.      Subtotal Percentage Adjustments      10 %

4. Economic Benefit      \$0

The economic benefit for failing to make a waste determination is insignificant since a generator can use knowledge rather than testing the waste. Therefore, no economic benefit was calculated as a result of this violation.

5. Total Penalty \$ 110

## Penalty Calculation Worksheet

### Counts 2 & 3

Facility Name: VAW of America, Inc.  
EPA ID No: FLD 092 980 937  
Facility Address: St. Augustine, Florida  
Regulation(s)/  
Requirements Violated: 40 C.F.R. § 262.34(a)(2) and (3)  
Container Labeling Violations

1. Gravity Based Penalty from Matrix.....\$ 1,000
  - a. Potential for Harm..... Minor
  - b. Extent of Deviation from the Requirement..... Moderate
2. Amount from appropriate multi-day matrix.....\$ 0
  - a. Number of days of Violation..... 1
  - b. Number of days of violation used for multi-day penalty..... 0
  - c. Multiply line 2 by 2(b).....\$ 0
3. Add line 1 to 2(c).....\$ 1000
4. Percent increase/decrease for good faith or lack of good faith effort..... 0 %
5. Percent increase/decrease for willfulness and/or negligence..... 0%
6. Percent increase for history of noncompliance..... 0%
7. Percent decrease for other unique factors..... 0%
8. Percent increase for inflation..... 10%
9. Total of lines 4 through 8..... 10 %
10. Multiply line 3 by line 9.....\$ 100
11. Calculate and insert economic benefit.....\$ 0
12. Add line 3, 9, and 10.....\$ 1100
13. Total Penalty.....\$ 1100

## Justification of Penalty Calculation

### **Counts 2 & 3**

Facility Name: VAW of America, Inc.  
EPA ID No: FLD 092 980 937  
Facility Address: St. Augustine, Florida  
Regulation(s)/  
Requirements Violated: 40 C.F.R. § 262.34(a)(2) and (3)  
Container Labeling Violations

#### Violation Narrative:

VAW is a large quantity generator of hazardous waste. The regulations at 40 C.F.R. § 262.34(a)(2) and (3) require hazardous waste generators to clearly label the hazardous waste with the date accumulation begins and with the words "Hazardous Waste." At the time of the inspection, five (5) drums were not clearly dated, and five (5) drums were not labeled "Hazardous Waste." Because each violation is a part of the pre-transport requirements and arise from the same container management practices, the labeling violations have been combined for purposes of penalty calculation.

#### 1. Gravity Based Penalty: \$ 1000

##### a. Potential for Harm: Minor

Risk of Exposure: Minor

The generator requirement to label and date hazardous waste ensures worker safety and assists the generator in identifying which wastes must be shipped off-site for disposal. In this case, the violations pose a relatively low risk of exposure of humans or other environmental receptors to hazardous waste or constituents since the inadequately labeled containers were stored in the less than 90 day storage area and were being managed as hazardous waste. The potential for harm due to risk of exposure is minor.

Harm to the RCRA Regulatory Program: Minor

The intent of the regulation is to minimize the possibility of exposure of employees by enabling them to easily identify hazardous waste and alerting them to the need for off-site disposal within the necessary time frames. VAW's failure to adequately label and date these containers has a small adverse effect on implementation of the RCRA regulations, because they were being managed as hazardous waste. Therefore, the failure to properly label containers in this case poses a minor potential for harm to the RCRA regulatory program.

b. Extent of Deviation: Moderate

This criteria relates to the "degree to which the violation renders inoperative the requirement violated." A moderate violator significantly deviates from the requirements of the regulation or statute but some of the requirements are implemented as intended. At the time of the inspection, VAW was managing sixteen (16) drums of hazardous waste, eight (8) of which were not correctly labeled, either with the words "Hazardous Waste," the date of accumulation, or both. The extent of deviation from the requirement in this situation is moderate.

c. Summary of Gravity Penalty: Minor-Moderate

The gravity-based penalty for Minor-Moderate violations ranges from \$500 to \$1,499 in the penalty assessment matrix. EPA selected the mid-range figure of \$1,000 because VAW failed to note and correct fully half of the labels for the drums being stored at the time of the inspection, but was properly managing these containers as hazardous waste.

2. Multi-day Penalties      \$0

EPA cannot document VAW's failure to correctly label the containers for days other than the date of the inspection. Therefore, no multi-day penalties were assessed.

3. Adjustment Factors

a.      Good Faith Efforts      0 %  
No adjustment was made.

b.      Willfulness/Negligence      0 %  
No adjustment was made.

c.      History of Noncompliance      0 %  
No adjustment was made.

d.      Other Unique Factors      0 %  
No adjustment was made.

e.      Inflation      10 %  
In accordance with 61 Fed. Reg. 69360, a 10 percent increase to the gravity-based penalty is applied to account for inflation. This rule was effective on January 30, 1997, and applies to violations which have occurred thereafter.

f.      Subtotal Percentage Adjustments      10 %

4. Economic Benefit      \$0

The economic benefit for failing to properly date and label containers is insignificant, i.e., less than \$2500. Therefore, no economic benefit was calculated as a result of this violation.

5. Total Penalty \$ 1100



### Penalty Calculation Worksheet

#### Count 4

Facility Name: VAW of America, Inc.  
EPA ID No: FLD 092 980 937  
Facility Address: St. Augustine, Florida  
Regulation(s)/  
Requirements Violated: 40 C.F.R. §§ 262.34(a)(4) and 265.31  
Failure to Maintain the Facility to  
Prevent A Release

1. Gravity Based Penalty from Matrix.....\$ 6,500
  - a. Potential for Harm.....Moderate
  - b. Extent of Deviation from the Requirement.....Moderate
2. Amount from appropriate multi-day matrix.....\$ 0
  - a. Number of days of Violation.....1
  - b. Number of days of violation used for multi-day penalty.....0
  - c. Multiply line 2 by 2(b).....\$ 0
3. Add line 1 to 2(c).....\$ 6,500
4. Percent increase/decrease for good faith or lack of good faith effort.....0 %
5. Percent increase/decrease for willfulness and/or negligence.....0%
6. Percent increase for history of noncompliance.....0%
7. Percent decrease for other unique factors.....0 %
8. Percent increase for inflation.....10 %
9. Total of lines 4 through 8.....10 %
10. Multiply line 3 by line 9.....\$ 650
11. Calculate and insert economic benefit.....\$ 0
12. Add line 3, 9, and 10.....\$ 7,150
13. Total Penalty.....\$ 7,150

## Justification of Penalty Calculation

### **Count 4**

Facility Name: VAW of America, Inc.  
EPA ID No: FLD 092 980 937  
Facility Address: St. Augustine, Florida  
Regulation(s)/  
Requirements Violated: 40 C.F.R. §§ 262.34(a)(4) and 265.31  
Failure to Maintain the Facility to  
Prevent A Release

### Violation Narrative:

VAW is a large quantity generator of hazardous waste. The regulations at 40 C.F.R. §§ 262.34(a)(4) and 265.31 require generators of hazardous waste to maintain and operate the facility to minimize the possibility of a release of hazardous waste or hazardous waste constituents. VAW allowed used oil to accumulate on the ground outside of a secondary containment structure for used oil storage tanks, and allowed used oil to leak from used oil filters stored in a cardboard box. Used oil contains hazardous constituents and may also be hazardous waste.

#### 1. Gravity Based Penalty: \$ 2,000

##### a. Potential for Harm: Moderate

Risk of Exposure: Moderate

In this case, the violations may pose a significant risk of exposure of humans or other environmental receptors to hazardous waste or constituents since the used oil and filters were managed on a concrete surface and on the ground. The potential for harm due to risk of exposure is moderate.

Harm to the RCRA Regulatory Program: Moderate

The intent of the regulation is to protect health, safety, and the environment through proper management of hazardous waste facilities. VAW's failure to manage the used oil and used oil filters to prevent a release may have a significant adverse effect on implementation of the RCRA regulations because VAW is not only a large quantity generator of hazardous waste, and should be familiar with the requirements for operating a hazardous waste facility, they also generate 700 to 1500 gallons of used oil for recycling twice a month. Although they operate twenty-four (24) hours per day and generate large amounts of used oil on a regular basis, they still failed to notice that both used oil containers as well as containers of used oil filters were leaking. Therefore, the failure to properly maintain the facility in this case poses

a moderate potential for harm to the RCRA regulatory program.

b. Extent of Deviation: Moderate

This criteria relates to the "degree to which the violation renders inoperative the requirement violated." A moderate violator significantly deviates from requirements of the regulation or statute but some of the requirements are implemented as intended. VAW stored used oil filters in unsuitable containers, allowing the used oil to leak onto the ground surface, and also allowed used oil releases to accumulate outside of the secondary containment area for the used oil; however, VAW does handle most of its used oil properly. Therefore, the extent of deviation from the requirements, in this case, is moderate.

c. Summary of Gravity Penalty: Moderate-Moderate

The gravity-based penalty for Minor-Major violations ranges from \$5,000 to \$7,999 in the penalty assessment matrix. EPA selected the mid-range figure of \$6,500 because, although the amount of material on the ground surface and concrete was small compared to the amount VAW handles on a regular basis, a facility with the size and experience of VAW should be aware of and immediately address leaking containers of both used oil and used oil filters.

2. Multi-day Penalties      \$0

EPA cannot document VAW's failure to maintain the facility to prevent a release on other than the date of the inspection. Therefore, no multi-day penalties were assessed.

3. Adjustment Factors

a.      Good Faith Efforts      0 %  
No adjustment was made.

b.      Willfulness/Negligence      0 %  
No adjustment was made.

c.      History of Noncompliance      0 %  
No adjustment was made.

d.      Other Unique Factors      0 %  
No adjustment was made.

e.      Inflation      10 %  
In accordance with 61 Fed. Reg. 69360, a 10 percent increase to the gravity-based penalty is applied to account for inflation. This rule was effective on January 30, 1997, and applies to violations which have occurred thereafter.

f. Subtotal Percentage Adjustments 10 %

4. Economic Benefit \$0

The economic benefit for failing to maintain the facility is insignificant, i.e., less than \$2500. Therefore, no economic benefit was calculated as a result of this violation.

5. Total Penalty \$ 7,150

Penalty Calculation Worksheet

Count 5

Facility Name: VAW of America, Inc.  
EPA ID No: FLD 092 980 937  
Facility Address: St. Augustine, Florida  
Regulation(s)/  
Requirements Violated: 40 C.F.R. §§ 262.34(a)(4) and 265.52(d)  
Failure to Update the Contingency Plan

1. Gravity Based Penalty from Matrix.....\$ 1,499
  - a. Potential for Harm..... Minor
  - b. Extent of Deviation from the Requirement..... Moderate
2. Amount from appropriate multi-day matrix.....\$ 0
  - a. Number of days of Violation..... 1
  - b. Number of days of violation used for multi-day penalty..... 0
  - c. Multiply line 2 by 2(b).....\$ 0
3. Add line 1 to 2(c).....\$ 1,499
4. Percent increase/decrease for good faith or lack of good faith effort..... 0 %
5. Percent increase/decrease for willfulness and/or negligence..... 0%
6. Percent increase for history of noncompliance..... 0%
7. Percent decrease for other unique factors..... 0%
8. Percent increase for inflation..... 10%
9. Total of lines 4 through 8..... 10%
10. Multiply line 3 by line 9.....\$ 149
11. Calculate and insert economic benefit.....\$ 0
12. Add line 3, 9, and 10.....\$ 1648
13. Total Penalty.....\$ 1648

## Justification of Penalty Calculation

Count 5

Facility Name: VAW of America, Inc.  
EPA ID No: FLD 092 980 937  
Facility Address: St. Augustine, Florida  
Regulation(s)/  
Requirements Violated: 40 C.F.R. §§ 262.34(a)(4) and 265.52(d)  
Failure to Update the Contingency Plan

### Violation Narrative:

VAW is a large quantity generator of hazardous waste. The regulations at 40 C.F.R. §§ 262.34(a)(4) and 265.52(d) require facilities to maintain a contingency plan which lists the names, addresses, and phone numbers of all persons designated as emergency coordinator, and to keep this list up to date. At the time of the inspection, the contingency plan failed to list the address and phone number of the emergency coordinator.

#### 1. Gravity Based Penalty: \$ 1,499

##### a. Potential for Harm: Minor

Risk of Exposure: Minor

At the time of the inspection, VAW had an adequate contingency plan containing the name of the emergency coordinator. Employees were trained in emergency response procedures and hazardous waste management. The potential for harm due to risk of exposure is minor.

Harm to the RCRA Regulatory Program: Minor

The intent of the regulation is to minimize the possibility of exposure or harm to employees by having a coordinated plan for the entire facility to use in the event of an emergency. VAW's failure to update the address and phone number of the emergency coordinator has a small adverse effect on implementation of the RCRA regulations because the name of the emergency coordinator had not changed. Therefore, the failure to update the contingency plan in this case poses a minor potential for harm to the RCRA regulatory program.

##### b. Extent of Deviation: Moderate

This criteria relates to the "degree to which the violation renders inoperative the requirement violated." A moderate violator significantly deviates from the requirements deviates somewhat from the regulatory or statutory requirements but most of the requirements are met. VAW had an adequate contingency plan on which the employees

were trained; however, there was no address or phone number for the emergency coordinator. In the event of an emergency, quick contact with an emergency coordinator is fundamental to the effectiveness of a contingency plan. VAW operates 24 hours per day, in three (3) shifts. Therefore, the emergency coordinator is not always at the facility during the hours of operation, and the address and phone number are of primary importance. The extent of deviation from the requirement in this situation is therefore moderate.

c. Summary of Gravity Penalty: Minor-Moderate

The gravity-based penalty for Minor-Moderate violations ranges from \$500 to \$1,499 in the penalty assessment matrix. EPA selected the upper-range figure of \$1,499 because although VAW had selected an adequate contingency plan with an emergency coordinator designated and trained, the facility operates 24 hours a day, which makes the home address and phone number even more important in the event of an emergency during other shifts.

2. Multi-day Penalties      \$0

EPA cannot document VAW's failure to update the contingency plan for days other than the date of the inspection. Therefore, no multi-day penalties were assessed.

3. Adjustment Factors

a.      Good Faith Efforts      0 %  
No adjustment was made.

b.      Willfulness/Negligence      0 %  
No adjustment was made.

c.      History of Noncompliance      0 %  
No adjustment was made.

d.      Other Unique Factors      0 %  
No adjustment was made.

e.      Inflation      10 %  
In accordance with 61 Fed. Reg. 69360, a 10 percent increase to the gravity-based penalty is applied to account for inflation. This rule was effective on January 30, 1997, and applies to violations which have occurred thereafter.

f.      Subtotal Percentage Adjustments      10 %

4. Economic Benefit      \$0

The economic benefit for non-compliance with this regulation was insignificant, i.e., less

than \$2500. Therefore, no economic benefit was calculated as a result of this violation.

5. Total Penalty \$ 1648



## Penalty Calculation Worksheet

Count 6

Facility Name: VAW of America, Inc.  
EPA ID No: FLD 092 980 937  
Facility Address: St. Augustine, Florida  
Regulation(s)/  
Requirements Violated: 40 C.F.R. §§ 262.34(a) and (b), Part 270  
And 3005(a) of RCRA  
Storing Hazardous Waste Without a Permit

1. Gravity Based Penalty from Matrix.....\$ 1,499
  - a. Potential for Harm.....Minor
  - b. Extent of Deviation from the Requirement.....Moderate
2. Amount from appropriate multi-day matrix.....\$ 100
  - a. Number of days of Violation.....90
  - b. Number of days of violation used for multi-day penalty.....89
  - c. Multiply line 2 by 2(b).....\$ 8,900
3. Add line 1 to 2(c).....\$ 10,399
4. Percent increase/decrease for good faith or lack of good faith effort.....0%
5. Percent increase/decrease for willfulness and/or negligence.....0%
6. Percent increase for history of noncompliance.....0%
7. Percent decrease for other unique factors.....0%
8. Percent increase for inflation.....10%
9. Total of lines 4 through 8.....10%
10. Multiply line 3 by line 9.....\$ 1,039
11. Calculate and insert economic benefit.....\$ 0
12. Add line 3, 9, and 10.....\$ 11,438
13. Total Penalty.....\$ 11,438

## Justification of Penalty Calculation

### Count 6

Facility Name: VAW of America, Inc.  
EPA ID No: FLD 092 980 937  
Facility Address: St. Augustine, Florida  
Regulation(s)/  
Requirements Violated: 40 C.F.R. §§ 262.34(a) and (b), Part 270  
And 3005(a) of RCRA  
Storing Hazardous Waste Without a Permit

### Violation Narrative:

VAW is a large quantity generator of hazardous waste. The regulations at 40 C.F.R. §§ 262.34(a) and (b), Part 270 and Section 3005 (a) of RCRA require generators of a hazardous waste to obtain a permit for the storage of hazardous waste for greater than 90 days. At the time of the inspection, two (2) drums of hazardous waste were noted in the less than 90 day storage area which had accumulation dates of 180 and 172 days prior to the date of the inspection. VAW does not have a permit to store hazardous waste for greater than 90 days.

#### 1. Gravity Based Penalty: \$ 500

##### a. Potential for Harm: Minor

Risk of Exposure: Minor

RCRA allows generators to store hazardous waste for up to 90 days in order to allow generators to operate their facilities without the undue burden of applying for a hazardous waste storage permit and imposing the stricter safety standards necessary for a storage facility. In this case, the violations pose a relatively low risk of exposure of humans or other environmental receptors to hazardous waste or constituents because the containers were properly closed, labeled and managed as hazardous waste. The potential for harm due to risk of exposure is minor.

Harm to the RCRA Regulatory Program: Moderate

VAW's failure to send the two (2) drums for disposal within the 90 days allowed has a significant adverse effect on implementation of the RCRA regulations because VAW had weekly container inspections documented and yet had failed to note that these drums were overdue for disposal by more than twelve (12) weeks.. Therefore, the failure to dispose of the hazardous waste within 90 days in this case poses a moderate potential for harm to the RCRA regulatory program.

##### b. Extent of Deviation: Moderate

This criteria relates to the "degree to which the violation renders inoperative the requirement violated." A moderate violator significantly deviates from the requirements of the regulation or statute but some of the requirements are implemented as intended. In this situation, VAW was storing fourteen (14) drums of hazardous waste which were within the allowable time period, but had stored two (2) other drums for twice as long as the period allowed by the regulations. The extent of deviation from the requirement in this situation was moderate.

c. Summary of Gravity Penalty: Minor-Moderate

The gravity-based penalty for Minor-Moderate violations ranges from \$500 to \$1,499 in the penalty assessment matrix. EPA selected the upper-range figure of \$1,499 because of the harm to the program was moderate, i.e. - VAW had weekly container inspections documented and yet had failed to note that these drums were overdue for disposal by more than twelve (12) weeks.

2. Multi-day Penalties      \$8,900

Multi-day penalties are discretionary for Minor-Moderate category violations. EPA chose to exercise this discretion for deterrence of future violations. A generator may store waste for up to ninety (90) days without obtaining a permit. VAW had not only stored over the ninety (90) days, but had stored the waste for an additional ninety (90) days as well, without noting that this waste was overdue for disposal. Multi-day penalties were assessed for the 89 days of the violation past the first day. The multi-day penalty matrix for Minor-Moderate violations may range from \$100 to \$300. EPA chose the low-range figure of \$100 because the drums were handled as hazardous waste and EPA has deemed that the total penalty amount for this violation to be adequate to deter future violations.

3. Adjustment Factors

- a.      Good Faith Efforts      0 %  
No adjustment was made.
- b.      Willfulness/Negligence      0 %  
No adjustment was made.
- c.      History of Noncompliance      0 %  
No adjustment was made.
- d.      Other Unique Factors      0 %  
No adjustment was made.
- e.      Inflation      10 %  
In accordance with 61 Fed. Reg. 69360, a 10 percent increase to the gravity-based

1997, and applies to violations which have occurred thereafter.

f. Subtotal Percentage Adjustments 10 %

4. Economic Benefit \$0

The economic benefit for non-compliance with this regulation was insignificant, i.e., less than \$2500, because VAW could have avoided the cost of applying for a permit by storing the wastes for 90 days or less at little or no additional cost. Therefore, no economic benefit was calculated as a result of this violation.

5. Total Penalty \$ 11,438

### Penalty Calculation Worksheet

Count 7

Facility Name: VAW of America, Inc.  
EPA ID No: FLD 092 980 937  
Facility Address: St. Augustine, Florida  
Regulation(s)/  
Requirements Violated: 40 C.F.R. §§ 262.34(c) and 265.173(a)  
Open Container

1. Gravity Based Penalty from Matrix.....\$ 1,000
  - a. Potential for Harm.....Minor
  - b. Extent of Deviation from the Requirement.....Moderate
2. Amount from appropriate multi-day matrix.....\$ 0
  - a. Number of days of Violation.....1
  - b. Number of days of violation used for multi-day penalty.....0
  - c. Multiply line 2 by 2(b).....\$ 0
3. Add line 1 to 2(c).....\$ 1,000
4. Percent increase/decrease for good faith or lack of good faith effort.....0 %
5. Percent increase/decrease for willfulness and/or negligence.....0%
6. Percent increase for history of noncompliance.....0%
7. Percent decrease for other unique factors.....0%
8. Percent increase for inflation.....10%
9. Total of lines 4 through 8.....10%
10. Multiply line 3 by line 9.....\$ 100
11. Calculate and insert economic benefit.....\$ 0
12. Add line 3, 9, and 10.....\$ 1,100
13. Total Penalty.....\$ 1,100

## Justification of Penalty Calculation

Count 7

Facility Name: VAW of America, Inc.  
EPA ID No: FLD 092 980 937  
Facility Address: St. Augustine, Florida  
Regulation(s)/  
Requirements Violated: 40 C.F.R. §§ 262.34(c) and 265.173(a)  
Open Container

### Violation Narrative:

VAW is a large quantity generator of hazardous waste. The regulations at 40 C.F.R. §§ 262.34(c) and 265.173(a) requires containers of hazardous waste to always be closed during storage except when adding or removing waste. At the time of the inspection, one 55-gallon accumulation drum of still bottoms from the xylene distillation unit was open. A portion of the top of the container had been cut out.

#### 1. Gravity Based Penalty: \$ 1,000

##### a. Potential for Harm: Minor

Risk of Exposure: Moderate

The intent of the generator requirement to keep containers closed is to minimize the possibility of exposure of employees to volatile organics, by reducing the likelihood of spills and the inhalation of fumes. The accumulation of still bottoms containing a potential carcinogen (xylene) in an open container poses a significant risk of exposure of humans or other environmental receptors to hazardous waste or constituents. The potential for harm due to risk of exposure is moderate.

Harm to the RCRA Regulatory Program: Minor

Because the Respondent did comply with the regulations for most of its containers at the facility, the harm to RCRA's regulatory program for the purpose of this violation is determined to be minor.

##### b. Extent of Deviation: Moderate

This criteria relates to the "degree to which the violation renders inoperative the requirement violated." A minor violator deviates somewhat from the regulatory or statutory requirements but most of the requirements are met. In this situation, VAW

collected the still bottoms in a container with the lid cut out, indicating that this may have been its typical operating procedure for accumulation of the still bottoms, and not a one-time case of an employee failing to replace a lid. Therefore, the extent of deviation is moderate.

c. Summary of Gravity Penalty: Minor-Moderate

The gravity-based penalty for Minor-Moderate violations ranges from \$500 to \$1,499 in the penalty assessment matrix. EPA selected the mid-range figure of \$1,000 because, although only one (1) drum was found open, this drum contained a hazardous waste which was a volatile organic and potential carcinogen, and appeared to be continuously open.

2. Multi-day Penalties      \$0

EPA cannot document VAW's failure to make a hazardous waste determination for days other than the date of the inspection. Therefore, no multi-day penalties were assessed.

3. Adjustment Factors

a.      Good Faith Efforts      0 %  
No adjustment was made.

b.      Willfulness/Negligence      0 %  
No adjustment was made.

c.      History of Noncompliance      0 %  
No adjustment was made.

d.      Other Unique Factors      0 %  
No adjustment was made.

e.      Inflation      10 %  
In accordance with 61 Fed. Reg. 69360, a 10 percent increase to the gravity-based penalty is applied to account for inflation. This rule was effective on January 30, 1997, and applies to violations which have occurred thereafter.

f.      Subtotal Percentage Adjustments      10 %

4. Economic Benefit      \$0

The economic benefit for non-compliance with this regulation was insignificant, i.e., less than \$2500 since VAW could have easily replaced the lid. Therefore, no economic benefit was calculated as a result of this violation.

5. Total Penalty      \$ 1,100

develop an effective process permitting elected officials and other representatives of State, local and tribal governments "to provide meaningful and timely input to the development of regulatory proposals containing significant unfunded mandates."

Today's rule does not create a mandate on State, local or tribal governments. This rule does not impose any enforceable duties on these entities. Instead, it merely revises the procedural rules governing EPA's administrative enforcement proceedings.

#### F. Executive Order 13045

Executive Order 13045: "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997) applies to any rule that: (1) is determined to be "economically significant" as defined under E.O. 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This final rule is not subject to the E.O. 13045 because it is not "economically significant" as defined in E.O. 12866, and because it does not involve decisions based on environmental health or safety risks.

#### G. Executive Order 13084

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected and other representatives of Indian tribal governments "to provide meaningful and timely input in the

development of regulatory policies on matters that significantly or uniquely affect their communities."

Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

#### H. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104-113, section 12(d) (15 U.S.C. 272 note), directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA requires EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

#### I. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

#### List of Subjects in 40 CFR Part 22

Environment protection, Administrative practice and procedure, Air pollution control, Hazardous substances, Hazardous waste, Penalties, Pesticides and pests, Poison prevention, Superfund, Waste treatment and disposal, Water pollution control, Water supply.

Dated: June 30, 1999.

Carol M. Browner,  
Administrator.

Therefore, 40 CFR part 22 is revised to read as follows:

### PART 22—CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES, ISSUANCE OF COMPLIANCE OR CORRECTIVE ACTION ORDERS, AND THE REVOCATION, TERMINATION OR SUSPENSION OF PERMITS

#### Subpart A—General

##### Sec.

- 22.1 Scope of this part.
- 22.2 Use of number and gender.
- 22.3 Definitions.
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- 22.5 Filing, service, and form of all filed documents; business confidentiality claims.
- 22.6 Filing and service of rulings, orders and decisions.
- 22.7 Computation and extension of time.
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#### Subpart B—Parties and Appearances

- 22.10 Appearances.
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#### Subpart C—Prehearing Procedures

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- 22.14 Complaint.
- 22.15 Answer to the complaint.
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- 22.21 Assignment of Presiding Officer; scheduling the hearing.
- 22.22 Evidence.
- 22.23 Objections and offers of proof.
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#### Subpart E—Initial Decision and Motion to Reopen a Hearing

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

#### Subpart F—Appeals and Administrative Review

- 22.29 Appeal from or review of interlocutory orders or rulings.
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**Subpart G—Final Order**

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

**Subpart H—Supplemental Rules**

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

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

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

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

**Subpart A—General****§ 22.1 Scope of this part.**

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

(1) The assessment of any administrative civil penalty under

section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act as amended (7 U.S.C. 136f(a));

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

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

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

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

- (A) Includes claims under section 3008(a) of the SWDA; or  
 (B) Includes a suspension or revocation of authorization to operate under section 3005(e) of the SWDA; or  
 (C) Seeks penalties under section 3008(h)(2) of the SWDA for non-compliance with an order issued pursuant to section 3008(h).

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

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

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

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

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

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

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

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

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

**§ 22.2 Use of number and gender.**

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

**§ 22.3 Definitions.**

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

*Act* means the particular statute authorizing the proceeding at issue.

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

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

*Agency* means the United States Environmental Protection Agency.

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

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

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

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

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

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

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

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

**Final order** means:

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

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

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

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

**Hearing Clerk** means the Hearing Clerk, Mail Code 1900, U.S. Environmental Protection Agency, 401 M St. SW., Washington, DC 20460.

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

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

**Permit Action** means the revocation, suspension or termination of all or part of a permit issued under section 102 of the Marine Protection, Research and Sanctuaries Act (33 U.S.C. 1412).

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

or local unit of government, or of any foreign government.

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

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

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

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

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

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

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

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

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

referred to the Administrator by the Environmental Appeals Board, all parties shall be so notified and references to the Environmental Appeals Board in these Consolidated Rules of Practice shall be interpreted as referring to the Administrator. If a case or motion is referred to the Administrator by the Environmental Appeals Board, the Administrator may consult with any EPA employee concerning the matter, provided such consultation does not violate § 22.8. Motions directed to the Administrator shall not be considered except for motions for disqualification pursuant to paragraph (d) of this section, or motions filed in matters that the Environmental Appeals Board has referred to the Administrator.

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

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

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

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

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

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

(3) Administer oaths and affirmations and take affidavits;

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

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

(6) Admit or exclude evidence;

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

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

(9) Issue subpoenas authorized by the Act; and

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

(d) *Disqualification, withdrawal and reassignment.* (1) The Administrator, the Regional Administrator, the members of the Environmental Appeals Board, the Regional Judicial Officer, or the Administrative Law Judge may not perform functions provided for in these Consolidated Rules of Practice regarding any matter in which they have a financial interest or have any relationship with a party or with the subject matter which would make it inappropriate for them to act. Any party may at any time by motion to the Administrator, Regional Administrator, a member of the Environmental Appeals Board, the Regional Judicial Officer or the Administrative Law Judge request that he or she disqualify himself or herself from the proceeding. If such a motion to disqualify the Regional

Administrator, Regional Judicial Officer or Administrative Law Judge is denied, a party may appeal that ruling to the Environmental Appeals Board. If a motion to disqualify a member of the Environmental Appeals Board is denied, a party may appeal that ruling to the Administrator. There shall be no interlocutory appeal of the ruling on a motion for disqualification. The Administrator, the Regional Administrator, a member of the Environmental Appeals Board, the Regional Judicial Officer, or the Administrative Law Judge may at any time withdraw from any proceeding in which he deems himself disqualified or unable to act for any reason.

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

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

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

(a) *Filing of documents.* (1) The original and one copy of each document intended to be part of the record shall be filed with the Regional Hearing Clerk when the proceeding is before the Presiding Officer, or filed with the Clerk of the Board when the proceeding is before the Environmental Appeals Board. A document is filed when it is received by the appropriate Clerk. The

Presiding Officer or the Environmental Appeals Board may by order authorize facsimile or electronic filing, subject to any appropriate conditions and limitations.

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

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

(b) *Service of documents.* A copy of each document filed in the proceeding shall be served on the Presiding Officer or the Environmental Appeals Board, and on each party.

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

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

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

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

(iii) Proof of service of the complaint shall be made by affidavit of the person making personal service, or by properly executed receipt. Such proof of service

shall be filed with the Regional Hearing Clerk immediately upon completion of service.

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

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

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

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

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

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

(d) *Confidentiality of business information.* (1) A person who wishes to

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

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

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

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

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

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

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

All rulings, orders, decisions, and other documents issued by the Regional Administrator or Presiding Officer shall be filed with the Regional Hearing Clerk. All such documents issued by the Environmental Appeals Board shall be filed with the Clerk of the Board. Copies of such rulings, orders, decisions or other documents shall be served personally, by first class mail (including by certified mail or return receipt

requested, Overnight Express and Priority Mail), by EPA's internal mail, or any reliable commercial delivery service, upon all parties by the Clerk of the Environmental Appeals Board, the Office of Administrative Law Judges or the Regional Hearing Clerk, as appropriate.

#### § 22.7 Computation and extension of time.

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

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

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

#### § 22.8 Ex parte discussion of proceeding.

At no time after the issuance of the complaint shall the Administrator, the members of the Environmental Appeals Board, the Regional Administrator, the Presiding Officer or any other person who is likely to advise these officials on any decision in the proceeding, discuss ex parte the merits of the proceeding with any interested person outside the Agency, with any Agency staff member who performs a prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person. Any ex parte memorandum or other communication

addressed to the Administrator, the Regional Administrator, the Environmental Appeals Board, or the Presiding Officer during the pendency of the proceeding and relating to the merits thereof, by or on behalf of any party shall be regarded as argument made in the proceeding and shall be served upon all other parties. The other parties shall be given an opportunity to reply to such memorandum or communication. The requirements of this section shall not apply to any person who has formally recused himself from all adjudicatory functions in a proceeding, or who issues final orders only pursuant to § 22.18(b)(3).

#### § 22.9 Examination of documents filed.

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

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

### Subpart B—Parties and Appearances

#### § 22.10 Appearances.

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

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

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

by any agreements, arrangements and other matters previously made in the proceeding unless otherwise ordered by the Presiding Officer or the Environmental Appeals Board for good cause.

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

#### § 22.12 Consolidation and severance.

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

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

### Subpart C—Prehearing Procedures

#### § 22.13 Commencement of a proceeding.

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

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

#### § 22.14 Complaint.

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

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

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

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

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

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

(ii) Where a specific penalty demand is not made, the number of violations (where applicable, days of violation) for which a penalty is sought, a brief explanation of the severity of each violation alleged and a recitation of the statutory penalty authority applicable for each violation alleged in the complaint;

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

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

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

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

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

(8) Instructions for paying penalties, if applicable.

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

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

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



**§ 22.15 Answer to the complaint.**

(a) *General.* Where respondent: Contests any material fact upon which the complaint is based; contends that the proposed penalty, compliance or corrective action order, or Permit Action, as the case may be, is inappropriate; or contends that it is entitled to judgment as a matter of law, it shall file an original and one copy of a written answer to the complaint with the Regional Hearing Clerk and shall serve copies of the answer on all other parties. Any such answer to the complaint must be filed with the Regional Hearing Clerk within 30 days after service of the complaint.

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

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

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

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

**§ 22.16 Motions.**

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

- (1) Be in writing;
- (2) State the grounds therefor, with particularity;
- (3) Set forth the relief sought; and
- (4) Be accompanied by any affidavit, certificate, other evidence or legal memorandum relied upon.

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

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

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

**§ 22.17 Default.**

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

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

(c) *Default order.* When the Presiding Officer finds that default has occurred,

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

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

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

(a) *Quick resolution.* (1) A respondent may resolve the proceeding at any time by paying the specific penalty proposed in the complaint or in complainant's prehearing exchange in full as specified by complainant and by filing with the Regional Hearing Clerk a copy of the check or other instrument of payment. If the complaint contains a specific proposed penalty and respondent pays that proposed penalty in full within 30 days after receiving the complaint, then no answer need be filed. This paragraph (a) shall not apply to any complaint which seeks a compliance or corrective action order or Permit Action. In a proceeding subject to the public comment provisions of § 22.45, this quick resolution is not available until 10 days after the close of the comment period.

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

Within 60 days after receiving the complaint, the respondent shall pay the full amount of the proposed penalty. Failure to make such payment within 60 days of receipt of the complaint may subject the respondent to default pursuant to § 22.17.

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

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

(2) *Consent agreement.* Any and all terms and conditions of a settlement shall be recorded in a written consent agreement signed by all parties or their representatives. The consent agreement shall state that, for the purpose of the proceeding, respondent: Admits the jurisdictional allegations of the complaint; admits the facts stipulated in the consent agreement or neither admits nor denies specific factual allegations contained in the complaint; consents to the assessment of any stated civil penalty, to the issuance of any specified compliance or corrective action order, to any conditions specified in the consent agreement, and to any stated Permit Action; and waives any right to contest the allegations and its right to appeal the proposed final order accompanying the consent agreement. Where complainant elects to commence a proceeding pursuant to § 22.13(b), the consent agreement shall also contain the elements described at § 22.14(a)(1)-(3) and (8). The parties shall forward the executed consent agreement and a proposed final order to the Regional Judicial Officer or Regional Administrator, or, in a proceeding commenced at EPA Headquarters, the Environmental Appeals Board.

(3) *Conclusion of proceeding.* No settlement or consent agreement shall dispose of any proceeding under these Consolidated Rules of Practice without a final order from the Regional Judicial Officer or Regional Administrator, or, in a proceeding commenced at EPA Headquarters, the Environmental Appeals Board, ratifying the parties' consent agreement.

(c) *Scope of resolution or settlement.* Full payment of the penalty proposed in a complaint pursuant to paragraph (a) of this section or settlement pursuant to paragraph (b) of this section shall not in any case affect the right of the Agency or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. Full payment of the penalty proposed in a complaint pursuant to paragraph (a) of this section or settlement pursuant to paragraph (b) of this section shall only resolve respondent's liability for Federal civil penalties for the violations and facts alleged in the complaint.

(d) *Alternative means of dispute resolution.* (1) The parties may engage in any process within the scope of the Alternative Dispute Resolution Act ("ADRA"), 5 U.S.C. 581 *et seq.*, which may facilitate voluntary settlement efforts. Such process shall be subject to the confidentiality provisions of the ADRA.

(2) Dispute resolution under this paragraph (d) does not divest the Presiding Officer of jurisdiction and does not automatically stay the proceeding. All provisions of these Consolidated Rules of Practice remain in effect notwithstanding any dispute resolution proceeding.

(3) The parties may choose any person to act as a neutral, or may move for the appointment of a neutral. If the Presiding Officer grants a motion for the appointment of a neutral, the Presiding Officer shall forward the motion to the Chief Administrative Law Judge, except in proceedings under subpart I of this part, in which the Presiding Officer shall forward the motion to the Regional Administrator. The Chief Administrative Law Judge or Regional Administrator, as appropriate, shall designate a qualified neutral.

#### § 22.19 Prehearing information exchange; prehearing conference; other discovery.

##### (a) *Prehearing information exchange.*

(1) In accordance with an order issued by the Presiding Officer, each party shall file a prehearing information exchange. Except as provided in § 22.22(a), a document or exhibit that has not been included in prehearing information exchange shall not be admitted into evidence, and any witness whose name and testimony summary has not been included in prehearing information exchange shall not be allowed to testify. Parties are not required to exchange information relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence. Documents and exhibits shall

be marked for identification as ordered by the Presiding Officer.

(2) Each party's prehearing information exchange shall contain:

(i) The names of any expert or other witnesses it intends to call at the hearing, together with a brief narrative summary of their expected testimony, or a statement that no witnesses will be called; and (ii) Copies of all documents and exhibits which it intends to introduce into evidence at the hearing.

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

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

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

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

(7) Any other matters which may expedite the disposition of the proceeding.

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

shall ensure that the record of the proceeding includes any stipulations, agreements, rulings or orders made during the conference.

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

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

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

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

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

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

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

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

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

(4) The Presiding Officer may require the attendance of witnesses or the production of documentary evidence by subpoena, if authorized under the Act. The Presiding Officer may issue a subpoena for discovery purposes only in accordance with paragraph (e)(1) of this section and upon an additional showing of the grounds and necessity therefor. Subpoenas shall be served in

accordance with § 22.5(b)(1). Witnesses summoned before the Presiding Officer shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. Any fees shall be paid by the party at whose request the witness appears. Where a witness appears pursuant to a request initiated by the Presiding Officer, fees shall be paid by the Agency.

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

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

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

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

(2) Exclude the information from evidence; or

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

§ 22.20 Accelerated decision; decision to dismiss.

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

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

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

#### Subpart D—Hearing Procedures

§ 22.21 Assignment of Presiding Officer; scheduling the hearing.

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

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

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

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

§ 22.22 Evidence.

(a) *General.* (1) The Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly



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

(2) In the presentation, admission, disposition, and use of oral and written evidence, EPA officers, employees and authorized representatives shall preserve the confidentiality of information claimed confidential, whether or not the claim is made by a party to the proceeding, unless disclosure is authorized pursuant to 40 CFR part 2. A business confidentiality claim shall not prevent information from being introduced into evidence, but shall instead require that the information be treated in accordance with 40 CFR part 2, subpart B. The Presiding Officer or the Environmental Appeals Board may consider such evidence in a proceeding closed to the public, and which may be before some, but not all, parties, as necessary. Such proceeding shall be closed only to the extent necessary to comply with 40 CFR part 2, subpart B, for information claimed confidential. Any affected person may move for an order protecting the information claimed confidential.

(b) *Examination of witnesses.* Witnesses shall be examined orally, under oath or affirmation, except as otherwise provided in paragraphs (c) and (d) of this section or by the Presiding Officer. Parties shall have the right to cross-examine a witness who appears at the hearing provided that such cross-examination is not unduly repetitious.

(c) *Written testimony.* The Presiding Officer may admit and insert into the record as evidence, in lieu of oral testimony, written testimony prepared by a witness. The admissibility of any part of the testimony shall be subject to the same rules as if the testimony were produced under oral examination. Before any such testimony is read or admitted into evidence, the party who has called the witness shall deliver a

copy of the testimony to the Presiding Officer, the reporter, and opposing counsel. The witness presenting the testimony shall swear to or affirm the testimony and shall be subject to appropriate oral cross-examination.

(d) *Admission of affidavits where the witness is unavailable.* The Presiding Officer may admit into evidence affidavits of witnesses who are unavailable. The term "unavailable" shall have the meaning accorded to it by Rule 804(a) of the Federal Rules of Evidence.

(e) *Exhibits.* Where practicable, an original and one copy of each exhibit shall be filed with the Presiding Officer for the record and a copy shall be furnished to each party. A true copy of any exhibit may be substituted for the original.

(f) *Official notice.* Official notice may be taken of any matter which can be judicially noticed in the Federal courts and of other facts within the specialized knowledge and experience of the Agency. Opposing parties shall be given adequate opportunity to show that such facts are erroneously noticed.

#### § 22.23 Objections and offers of proof.

(a) *Objection.* Any objection concerning the conduct of the hearing may be stated orally or in writing during the hearing. The party raising the objection must supply a short statement of its grounds. The ruling by the Presiding Officer on any objection and the reasons given for it shall be part of the record. An exception to each objection overruled shall be automatic and is not waived by further participation in the hearing.

(b) *Offers of proof.* Whenever the Presiding Officer denies a motion for admission into evidence, the party offering the information may make an offer of proof, which shall be included in the record. The offer of proof for excluded oral testimony shall consist of a brief statement describing the nature of the information excluded. The offer of proof for excluded documents or exhibits shall consist of the documents or exhibits excluded. Where the Environmental Appeals Board decides that the ruling of the Presiding Officer in excluding the information from evidence was both erroneous and prejudicial, the hearing may be reopened to permit the taking of such evidence.

#### § 22.24 Burden of presentation; burden of persuasion; preponderance of the evidence standard.

(a) The complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the

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

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

#### § 22.25 Filing the transcript.

The hearing shall be transcribed verbatim. Promptly following the taking of the last evidence, the reporter shall transmit to the Regional Hearing Clerk the original and as many copies of the transcript of testimony as are called for in the reporter's contract with the Agency, and also shall transmit to the Presiding Officer a copy of the transcript. A certificate of service shall accompany each copy of the transcript. The Regional Hearing Clerk shall notify all parties of the availability of the transcript and shall furnish the parties with a copy of the transcript upon payment of the cost of reproduction, unless a party can show that the cost is unduly burdensome. Any person not a party to the proceeding may receive a copy of the transcript upon payment of the reproduction fee, except for those parts of the transcript ordered to be kept confidential by the Presiding Officer. Any party may file a motion to conform the transcript to the actual testimony within 30 days after receipt of the transcript, or 45 days after the parties are notified of the availability of the transcript, whichever is sooner.

#### § 22.26 Proposed findings, conclusions, and order.

After the hearing, any party may file proposed findings of fact, conclusions of law, and a proposed order, together with briefs in support thereof. The Presiding Officer shall set a schedule for filing these documents and any reply briefs, but shall not require them before the last date for filing motions under § 22.25 to conform the transcript to the actual testimony. All submissions shall be in writing, shall be served upon all parties, and shall contain adequate references to the record and authorities relied on.

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

##### § 22.27 Initial Decision.

(a) *Filing and contents.* After the period for filing briefs under § 22.26 has expired, the Presiding Officer shall issue an initial decision. The initial decision shall contain findings of fact,

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

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

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

(1) A party moves to reopen the hearing;

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

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

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

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

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

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

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

#### Subpart F—Appeals and Administrative Review

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

(a) *Request for interlocutory appeal.* Appeals from orders or rulings other than an initial decision shall be allowed only at the discretion of the Environmental Appeals Board. A party seeking interlocutory appeal of such orders or rulings to the Environmental Appeals Board shall file a motion within 10 days of service of the order or ruling, requesting that the Presiding Officer forward the order or ruling to the Environmental Appeals Board for review, and stating briefly the grounds for the appeal.

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

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

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

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

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

(a) *Notice of appeal.* (1) Within 30 days after the initial decision is served, any party may appeal any adverse order or ruling of the Presiding Officer by filing an original and one copy of a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board (Clerk of the Board (Mail Code 1103B), United States Environmental Protection Agency, 401 M Street, SW, Washington, DC, 20460. Hand deliveries may be made at Suite 500, 607 14th Street, NW.). One copy of any document filed with the Clerk of the Board shall also be served on the Regional Hearing Clerk. Appellant also shall serve a copy of the notice of appeal upon the Presiding Officer. Appellant shall simultaneously serve one copy of the notice and brief upon all other parties and non-party participants. The notice of appeal shall summarize the order or ruling, or part thereof, appealed from. The appellant's brief shall contain tables of contents and authorities (with page references), a statement of the issues presented for review, a statement of the nature of the case and the facts relevant to the issues presented for review (with appropriate references to the record), argument on the issues presented, a short conclusion stating the precise relief sought, alternative findings of fact, and alternative conclusions regarding issues of law or discretion. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal on any issue within 20 days after the date on which the first notice of appeal was served.

(2) Within 20 days of service of notices of appeal and briefs under paragraph (a)(1) of this section, any other party or non-party participant may

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

Response briefs shall be limited to the scope of the appeal brief. Further briefs may be filed only with the permission of the Environmental Appeals Board.

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

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

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

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

(f) *Decision.* The Environmental Appeals Board shall adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed, and shall set forth in the final order the reasons for its actions. The Environmental Appeals Board may assess a penalty that is higher or lower than the amount recommended to be assessed in the decision or order being reviewed or from the amount sought in the complaint, except that if the order being reviewed is a default order, the Environmental Appeals Board may not

increase the amount of the penalty above that proposed in the complaint or in the motion for default, whichever is less. The Environmental Appeals Board may adopt, modify or set aside any recommended compliance or corrective action order or Permit Action. The Environmental Appeals Board may remand the case to the Presiding Officer for further action.

#### Subpart G—Final Order

##### § 22.31 Final order.

(a) *Effect of final order.* A final order constitutes the final Agency action in a proceeding. The final order shall not in any case affect the right of the Agency or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. The final order shall resolve only those causes of action alleged in the complaint, or for proceedings commenced pursuant to § 22.13(b), alleged in the consent agreement. The final order does not waive, extinguish or otherwise affect respondent's obligation to comply with all applicable provisions of the Act and regulations promulgated thereunder.

(b) *Effective date.* A final order is effective upon filing. Where an initial decision becomes a final order pursuant to § 22.27(c), the final order is effective 45 days after the initial decision is served on the parties.

(c) *Payment of a civil penalty.* The respondent shall pay the full amount of any civil penalty assessed in the final order within 30 days after the effective date of the final order unless otherwise ordered. Payment shall be made by sending a cashier's check or certified check to the payee specified in the complaint, unless otherwise instructed by the complainant. The check shall note the case title and docket number. Respondent shall serve copies of the check or other instrument of payment on the Regional Hearing Clerk and on complainant. Collection of interest on overdue payments shall be in accordance with the Debt Collection Act, 31 U.S.C. 3717.

(d) *Other relief.* Any final order requiring compliance or corrective action, or a Permit Action, shall become effective and enforceable without further proceedings on the effective date of the final order unless otherwise ordered.

(e) *Final orders to Federal agencies on appeal.* (1) A final order of the Environmental Appeals Board issued pursuant to § 22.30 to a department, agency, or instrumentality of the United States shall become effective 30 days after its service upon the parties unless

the head of the affected department, agency, or instrumentality requests a conference with the Administrator in writing and serves a copy of the request on the parties of record within 30 days of service of the final order. If a timely request is made, a decision by the Administrator shall become the final order.

(2) A motion for reconsideration pursuant to § 22.32 shall not toll the 30-day period described in paragraph (e)(1) of this section unless specifically so ordered by the Environmental Appeals Board.

##### § 22.32 Motion to reconsider a final order.

Motions to reconsider a final order issued pursuant to § 22.30 shall be filed within 10 days after service of the final order. Motions must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Motions for reconsideration under this provision shall be directed to, and decided by, the Environmental Appeals Board. Motions for reconsideration directed to the Administrator, rather than to the Environmental Appeals Board, will not be considered, except in cases that the Environmental Appeals Board has referred to the Administrator pursuant to § 22.4(a) and in which the Administrator has issued the final order. A motion for reconsideration shall not stay the effective date of the final order unless so ordered by the Environmental Appeals Board.

#### Subpart H—Supplemental Rules

##### § 22.33 [Reserved]

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

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

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

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

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

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

**§ 22.36** [Reserved].

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

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

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

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

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

between this section and §§ 22.1 through 22.32, this section shall apply.

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

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

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

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

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

(c) *Payment of civil penalty assessed.* Payment of civil penalties assessed in the final order shall be made by forwarding a cashier's check, payable to the "EPA, Hazardous Substances

Superfund," in the amount assessed, and noting the case title and docket number, to the appropriate regional Superfund Lockbox Depository.

**§ 22.40** [Reserved].

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

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

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

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

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

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

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

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

Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

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

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

- (1) The docket number of the order;
- (2) The address and phone number of the Regional Hearing Clerk from whom a copy of the order may be obtained;
- (3) The location of the facility where violations were found;
- (4) A description of the violations;
- (5) The penalty that was assessed; and
- (6) A notice that any interested person may, within 30 days of the date the order becomes final, obtain judicial review of the penalty order pursuant to section 1447(b) of the Safe Drinking Water Act, and instruction that persons seeking judicial review shall provide copies of any appeal to the persons described in 40 CFR 135.11(a).

#### § 22.44 [Reserved]

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

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

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

(2) *Type and content of public notice.* The complainant shall provide public notice of the complaint (or the proposed consent agreement if § 22.13(b) is

applicable) by a method reasonably calculated to provide notice, and shall also provide notice directly to any person who requests such notice. The notice shall include:

- (i) The docket number of the proceeding;
- (ii) The name and address of the complainant and respondent, and the person from whom information on the proceeding may be obtained, and the address of the Regional Hearing Clerk to whom appropriate comments shall be directed;
- (iii) The location of the site or facility from which the violations are alleged, and any applicable permit number;
- (iv) A description of the violation alleged and the relief sought; and
- (v) A notice that persons shall submit comments to the Regional Hearing Clerk, and the deadline for such submissions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(C) Provide public notice of the order.

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

coincident notice by certified mail to the Administrator and the Attorney General. Written notice of appeal also shall be filed with the Regional Hearing Clerk, and sent to the Presiding Officer and the parties.

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

§§ 22.46–22.49 [Reserved].

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

##### § 22.50 Scope of this subpart.

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

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

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

(b) *Relationship to other provisions.* Sections 22.1 through 22.45 apply to

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

##### § 22.51 Presiding Officer.

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

##### § 22.52 Information exchange and discovery.

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

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