

Procedures for Hearings Conducted Pursuant to 40 CFR Part 7--Nondiscrimination in Programs and Activities Receiving Federal Assistance from the U.S. Environmental Protection Agency

1. Purpose

The purpose of this document is to clarify the U.S. Environmental Protection Agency's (EPA or Agency) procedures for hearings in administrative complaints of discrimination in programs and activities receiving EPA assistance, as those procedures are set forth in 40 C.F.R. §§ 7.130 and 7.135. Like EPA's existing Part 7 adjudicative procedures, this document comprises internal Agency "housekeeping" rules of practice, relating primarily to grants made by the Agency. It does not alter the Part 7 procedures, or the substantive rights afforded to parties therein.

The federal nondiscrimination statutes that Part 7 implements are Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-7; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; Section 13 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251 note; Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq.; and the Age Discrimination Act of 1975, 42 U.S.C. § 6101. These statutes prohibit discrimination by applicants for and recipients of EPA assistance.

2. Scope, applicability, and use of number and gender

a. EPA will apply the procedures in this document to answers filed and to hearings requested under 40 C.F.R. § 7.130, to hearings requested under § 7.135, and to consequent decisions and administrative review, concerning nondiscrimination in programs and activities receiving federal assistance from the Agency.

b. As used in this document, words in the singular include the plural, and words in the masculine gender include the feminine gender, and vice versa, as the case may require.

3. Definitions

The following definitions are used in this document:

Administrative Law Judge means an Administrative Law Judge (ALJ), appointed under 5 U.S.C. § 3105, of the Office of Administrative Law Judges (OALJ), described in 40 C.F.R. § 1.25(a).

Administrator means the Administrator of EPA or his delegate.

ALJ's determination means the decision issued by the ALJ pursuant to 40 C.F.R. § 7.130(b), resolving all outstanding issues in the proceeding.

Business confidentiality claim means a confidentiality claim as defined on in 40 C.F.R. § 2.201(h).

Clerk of the Board means the Clerk of the Environmental Appeals Board, Mail Code 1103B, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue N.W., Washington, D.C. 20460.

Consolidated Rules of Practice means the regulations in 40 C.F.R. Part 22.

Director means the Director of EPA's Office of Civil Rights ("OCR"), as defined in 40 C.F.R. § 7.25.

Environmental Appeals Board ("*Board*") means the Board within the Agency described in 40 C.F.R. § 1.25.

Final decision means: (i) OCR's finding of compliance, or its finding of noncompliance upon which the recipient did not file an answer or request for hearing within the 30 days of receipt specified in 40 C.F.R. § 7.130(b)(2);

(ii) OCR's denial of a request for restoration of eligibility upon which the recipient did not file a request for hearing within the 30 days of receipt referenced in 40 C.F.R.

§ 7.135(c);

(iii) an ALJ's determination, upon which:

(A) the recipient did not file exceptions within the 30 days of receipt specified in 40 C.F.R. § 7.130(b)(3), or the Board did not grant review;

(B) the recipient did not move to reopen the hearing within 20 days; or

(C) the recipient did not move to set aside a default order within 30 days; or

(iv) the Administrator's final decision as set forth in 40 C.F.R. § 7.130(b)(3) and Subsection 32.b. of this document.

Finding and Notice means OCR's finding of noncompliance, or OCR's denial of a request for restoration of eligibility for assistance, and notice of the opportunity for a hearing, pursuant to 40 C.F.R. §§ 7.130(b)(1) or 7.135(c).

Hearing means an evidentiary hearing on the record, open to the public to the extent consistent with § 22.22(a)(2), and conducted as part of a proceeding.

Hearing Clerk means the OALJ Hearing Clerk, Mail Code 1900, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue N.W., Washington D.C. 20460.

Party means any person who participates in a proceeding as the Director or as a recipient.

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.

Proceeding means the entirety of a single administrative adjudication, from the filing of a Finding and Notice through the issuance of a final decision, including any action on a motion to reconsider.

Recipient means the applicant or recipient or other person named in a Finding and Notice, against whom OCR has made a finding of noncompliance pursuant to 40 C.F.R. § 7.130(b)(1) or a denial of restoration of eligibility pursuant to 40 C.F.R. § 7.135(c).

4. Powers and duties of the Environmental Appeals Board and Administrative Law Judge; disqualification, withdrawal, and reassignment

a. Environmental Appeals Board

(1) The Board rules on appeals from the ALJ's determination, and rulings and orders of an ALJ in proceedings pursuant to 40 C.F.R. §§ 7.130 and 7.135.** When an appeal or motion is referred to the Administrator by the Board, all parties will be so notified and references to the Board in these procedures will be interpreted as referring to the Administrator. Motions directed to the Administrator will not be considered except for motions for disqualification pursuant to subsection (c) of this section, or motions filed in matters that the Board has referred to the Administrator.

(2) In exercising its duties and responsibilities pursuant to the procedures in this document, the 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 the procedures in this document or with an order of the 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 and all relief sought by the party in the proceeding.

b. Administrative Law Judge. The ALJ will conduct a fair and impartial proceeding, assure that the facts are fully elicited, adjudicate all issues, and avoid delay. The ALJ may:

- (1) Conduct hearings under 40 C.F.R. §§ 7.130 and 7.135.
- (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 fact, law, or discretion;
- (8) Require parties to attend conferences for the settlement or simplification of the issues, or of the expedition of the proceedings;
- (9) Issue subpoenas; and
- (10) Do all other acts and take all measures necessary for the efficient, fair and impartial adjudication of issues arising in proceedings governed by 40 C.F.R. §§ 7.130 and 7.135.

c. Disqualification, withdrawal and reassignment.

(1) Members of the Board or the ALJ may not perform functions provided for in these procedures 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 a member of the Board or the ALJ request that he disqualify himself from the proceeding. If such a motion to disqualify the ALJ is denied, a party may appeal that ruling to the Board. If a motion to disqualify a member of the Board is denied, a party may appeal that ruling to the Administrator. There will be no interlocutory appeal of the ruling on a motion for disqualification. A member of the Board or the ALJ may at any time withdraw from any proceeding in which he deems himself to be disqualified or unable to act for any reason.

(2) If the ALJ is disqualified or withdraws from the proceeding, the Chief ALJ will assign another, qualified ALJ who has none of the infirmities listed in paragraph (1) of this section.

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

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 will be filed with the Hearing Clerk when the proceeding is before the ALJ, or filed with the Clerk of the Board when the proceeding is before the Board. A document is filed when it is received by the appropriate Clerk. The ALJ or the Board may by order authorize facsimile or electronic filing, subject to any appropriate conditions and limitations.

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

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

b. Service of documents.

A copy of each document filed in the proceeding will be served on the ALJ or the Board, as appropriate, and on each party.

(1) Service of the Finding and Notice.

(i) The Director will serve on the recipient, or on a representative authorized to receive service on the recipient's behalf, a copy of the signed original of the Finding and Notice, together with a copy of these Hearing Procedures. Service will be made by registered mail, return receipt requested.

(ii)(A) When the recipient is a corporation, a partnership, or an unincorporated association which is subject to suit under a common name, the Director will 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) When the recipient is a state or local unit of government, agency, department, corporation, or other instrumentality, the Director will serve the chief executive officer thereof, or as otherwise permitted by law. Where recipient is a state or local officer, the Director will serve such officer.

(iii) Proof of service of the Finding and Notice will be made by properly executed receipt. Such proof of service will be filed with the Hearing Clerk immediately upon completion of service.

(2) Service of filed documents other than the Finding and Notice, answer, rulings, orders, and decisions. All filed documents other than the Finding and Notice, answer, rulings, orders, and decisions will be served personally, by first class mail (including registered mail, return receipt requested; Overnight Express; and Priority Mail), or by any reliable commercial delivery service. The ALJ or the 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 ALJ or of the Board there are no specific requirements as to the form of documents.

(2) The first page of every filed document will contain a caption identifying the recipient and the docket

number. All legal briefs and legal memoranda greater than 20 pages in length (excluding attachments) will contain a table of contents and a table of authorities with page references.

(3) The original of any filed document (other than exhibits) will 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 will contain the name, address, and telephone number of an individual authorized to receive service relating to the proceeding. Parties will promptly file any changes in this information with the Hearing Clerk, and serve copies on the ALJ 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 will satisfy the requirements of Subsections 5(b)(2) and 5(c)(5), and the requirements of the following section.

(5) The Board or the ALJ may exclude from the record any document which does not comply with this section. Written notice of such exclusion, stating the reasons therefore, shall be promptly given to the person submitting the document. Such person may amend and resubmit any excluded document upon motion granted by the Board or the ALJ, 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 40 C.F.R. §§ 7.130 or 7.135 will 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 will be available to the public for inspection and copying.

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

(i) One version of the document will be complete, including the information claimed to be confidential. The cover page will include the information required under Subsection 5(c)(2) of this section and the words "Business Confidentiality Asserted." The specific portion(s) alleged to be confidential will be clearly identified within the document.

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

(3) Both versions of the document will be served on the ALJ and the Director. Both versions of the document will be served on any party, amicus curiae, or representative thereof who is authorized to receive the information claimed to be confidential by the person making the claim of confidentiality. Only the redacted version will be served on persons not authorized to receive the confidential information.

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

6. Filing and service of rulings, orders and decisions

All rulings, orders, decisions, and other documents issued by the ALJ will be filed with the Hearing Clerk. All such documents issued by the Board will be filed with the Clerk of the Board. Copies of such rulings, orders, decisions, or other documents will be served personally, by first class mail

(including by registered mail, 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 Board, the OALJ, or the Hearing Clerk, as appropriate.

7. Computation and extension of time

a. Computation.

In computing any period of time prescribed or allowed in these procedures, except as otherwise provided, the day of the event from which the designated period begins to run will not be included. Saturdays, Sundays, and federal holidays will be included. When a stated time expires on a Saturday, Sunday, or federal holiday, the stated time period will be extended to include the next business day.

b. Extensions of time.

The Board or the ALJ 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 will be filed sufficiently in advance of the due date so as to allow other parties reasonable opportunity to respond and to allow the ALJ or Board reasonable opportunity to issue an order.

c. Service by mail or commercial delivery service.

Service is complete when the return receipt is signed.

8. Ex parte discussion of proceeding

a. At no time after the issuance of the Finding and Notice will the members of the Board, the ALJ 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 Board or the ALJ during the pendency of the proceeding and relating to the merits thereof, by or on behalf of any party, will be regarded as argument made in the proceeding and will be served upon all other parties. The other parties will be given an opportunity to reply to such memorandum or communication. The requirements of this section will not apply to any person who has formally recused himself from all adjudicatory functions in a proceeding.

b. Inquiries merely as to the status of a proceeding or as to procedural matters will be directed to the ALJ's legal staff assistant or staff attorney. Parties, amicj curiae, and their representatives will not communicate by electronic mail directly with the ALJ, and will not initiate telephone contact with the ALJ, unless specifically requested to do so by the ALJ. Inquiries about matters pending before the Board will be made to the Clerk of the Board.

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 will be made available by the Hearing Clerk, or the Clerk of the Board, as appropriate.

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

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.

11. Commencement of a proceeding and service of Finding and Notice

A proceeding for the denial, annulment, suspension or termination of EPA assistance is commenced by OCR sending the applicant or recipient a Finding and Notice, by registered mail, return receipt requested, as provided in 40 C.F.R. § 7.130(b)(1). On the same date, OCR will file the Finding and Notice with the Hearing Clerk.

12. Answer and Requests for Hearing

a. Upon issuance of a finding of noncompliance by OCR, the recipient has the opportunity to file an answer. The recipient will file a written answer with the Hearing Clerk, and will serve by registered mail, return receipt requested, a copy on the Chief ALJ within 30 days after service of the Finding and Notice, and may request a hearing. The answer will, under oath or affirmation, clearly and directly admit, deny, or explain each factual allegation of the Finding and Notice, unless the recipient is without knowledge, in which case its answer will so state, and such statement will be deemed a denial. Allegations of fact in the Finding and Notice not admitted, denied, or explained in the answer will be deemed admitted. The answer also will state the circumstances or arguments which constitute the grounds of any defense. All affirmative defenses will be separately stated and numbered. The recipient's failure to file an answer with the Hearing Clerk within the 30-day period following service of the Finding and Notice will be deemed to be a waiver of its rights to a hearing, in which event the Finding and Notice will be deemed to be the final decision.

b. When responding to a denial by OCR of a request for restoration of eligibility, the recipient may file a written request for hearing within 30 days after service of the denial. The request will be filed with the Hearing Clerk, with a copy sent by registered mail, return receipt requested, to the Chief ALJ. It will list the reasons that the recipient believes OCR was in error. The recipient's failure to file a request within the 30-day period following service of the denial of restoration of eligibility will be deemed to be a waiver of its right to a hearing, in which event the denial of restoration of eligibility will be deemed to be the final decision.

13. Motions

a. General.

Motions will be served as provided by Subsection 5.b(2). Upon the filing of a motion, other parties may file responses to the motion, and the movant will be permitted to reply only by order of the ALJ or the

Board, as appropriate. All motions, except those made orally on the record during a hearing, will:

- (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 receipt of such motion. The movant's reply to any written response must be filed within 10 days after receipt of such response and will be limited to issues raised in the response. The ALJ or the 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 will 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.

14. Amendments

a. The Director may amend the Finding and Notice once as a matter of right at any time before the recipient files an answer. Otherwise the Director may amend the Finding and Notice only upon the ALJ's order granting a motion to amend. The recipient will have 20 additional days from the date of receipt of the amended Finding and Notice to file its answer with the Hearing Clerk.

b. The recipient may amend his answer upon the ALJ's order granting a motion to amend, finding no prejudice to the Director.

15. Amici Curiae

a. Any interested person or organization may file a motion to participate in a proceeding as amicus curiae. Such motion will be filed with the Hearing Clerk and a copy served on the ALJ and on each party prior to the prehearing exchange, or if none is ordered, at least 20 days before the commencement of the hearing, unless the movant shows good cause for filing the motion later. The ALJ may grant the motion if he finds that the movant has a legitimate interest in the proceedings, that such participation will not unduly delay the outcome, and that it may contribute materially to the proper disposition thereof. Amicus curiae is not a party and may not introduce evidence at a hearing.

b. A person submitting a complaint pursuant to 40 C.F.R. § 7.120 is not a party to the proceeding but may petition per Subsection 15.a. above, after a proceeding is initiated, to become amicus curiae.

c. Amicus curiae may submit a prehearing brief, posthearing brief, and a brief in response to any motion for summary judgment or for review by the Administrator. The brief will be filed with the Hearing Clerk and served on each party and the ALJ within the time limits applicable to the party whose position amicus curiae deems itself to support; or, if it does not deem itself to support the position of any party, within the longest time limit applicable to any party at that particular stage of the proceedings. Any party to the proceeding may file with the Hearing Clerk a response to an amicus curiae brief within 15 days after receipt of the brief.

d. Amicus curiae may request that the ALJ propound specific questions to a witness. The ALJ, in his

discretion, may grant any such request if he believes the proposed additional testimony may assist materially in elucidating factual matters at issue between the parties and will not expand the issues.

e. After leave to participate as amicus curiae is granted, all decisions and exceptions to the ALJ's determination will be served upon amicus curiae at the same times and in the same manner required for service on parties.

16. Consolidation

Upon motion of a party or upon his own initiative, the ALJ may provide for proceedings to be joined or consolidated for hearing with proceedings in other federal departments or agencies, by agreement with such other departments or agencies. All parties to any consolidated proceeding will be promptly served with notice of such consolidation.

17. Prehearing information exchange; prehearing conference; other discovery

a. Prehearing information exchange.

(1) In accordance with an order issued by the ALJ, each party will file a prehearing information exchange. Except as provided in Section 23 , a document or exhibit that has not been included in prehearing information exchange will not be admitted into evidence, and any witness whose name and testimony summary has not been included in prehearing information exchange will not be allowed to testify. Parties are not required to exchange information relating to settlement that would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence. Documents and exhibits may be marked for identification as ordered by the ALJ.

(2) Each party's prehearing information exchange will 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 it intends to introduce into evidence at the hearing.

b. Prehearing conference.

The ALJ, 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) Simplification of issues and stipulation of facts not in dispute;
- (2) Necessity or desirability of amendments to pleadings;
- (3) Exchange of exhibits, documents, prepared testimony, and admissions or stipulations of fact that will avoid unnecessary proof;
- (4) Limitation of the number of expert or other witnesses;
- (5) Time and place for the hearing; and
- (7) Any other matters that may expedite the proceeding.

c. Record of the prehearing conference.

No transcript of a prehearing conference relating to settlement will be made. With respect to other prehearing conferences, no transcript of any prehearing conferences will be made unless ordered by the ALJ. The ALJ will ensure that the record of the conference includes any stipulations, agreements, rulings,

or orders made during the conference.

d. Location of prehearing conference.

The prehearing conference will be held in the county where the recipient resides or conducts the business that the hearing concerns, in the city in which the relevant EPA Regional Office is located, or in Washington, D.C., unless the ALJ determines that there is good cause to hold it at another location or by telephone.

e. Affidavits.

Within 15 days of service of an affidavit in a prehearing exchange, any party may file with the Hearing Clerk written objections to any affidavit, requesting permission to test the truth of assertions therein at hearing. In such event the assertions objected to will not be received in evidence unless the affiant is made available for cross-examination, or the ALJ determines that cross-examination is not necessary for the full and true disclosure of facts referred to in such assertions.

f. Depositions.

Within 30 days after completion of the prehearing exchange, or as directed by the ALJ, any party may file with the Hearing Clerk a motion to take a deposition. The motion will include a statement of (i) the name of the witness and proposed time and place for the taking of the deposition, (ii) whether any alternative methods of discovery, such as interrogatories, are suitable, and (iii) the need for preservation of relevant and probative evidence for hearing. The ALJ will authorize the taking of the deposition, considering the motion and any response thereto, the potential for delay of the proceeding, and the convenience of the parties. Expenses in the reporting of depositions will be borne by the party requesting the deposition.

g. Other discovery.

Within 30 days after the completion of the prehearing exchange, or as directed by the ALJ, any party may serve upon an opposing party a request for (i) responses to written interrogatories, (ii) production of documents, (iii) the admission of the genuineness and authenticity of documents in the prehearing exchange or enclosed with the request, and/or (iv) the admission of the truth of any relevant matters of fact stated in the request. If no sufficient response is received by the requesting party within 15 days of receipt of the request, the requesting party may file with the Hearing Clerk a motion to compel discovery. Copies of requests and responses thereto will be served on all parties, and may be filed with the Hearing Clerk as proposed supplements to the prehearing exchange, as accompanied by a motion to supplement the prehearing exchange.

h. Subpoenas

The ALJ may require the attendance of witnesses or the production of documentary evidence. Subpoenas will be served in accordance with Section 6. Witnesses summoned before the ALJ will be paid the same fees and mileage that are paid witnesses in the courts of the United States. Any fees will be paid by the party at whose request the witness appears. Where a witness appears pursuant to a request initiated by the ALJ, fees will be paid by the Agency.

i. Obtaining information under other laws.

Nothing in this section will limit a party's right to request admissions or stipulations, a recipient'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 obtain information.

j. 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 Subsections (f), (g), and (h) of this section, will 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.

k. Failure to exchange information.

When a party fails to provide information within its control as required pursuant to this section, the ALJ 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 Section 18.

18. Default

A party may be found to be in default, upon motion or upon the ALJ's own initiative, for failure to comply with an order of the ALJ or for failure to appear at a prehearing conference or hearing. Default by the recipient constitutes, for purposes of the pending proceeding only, an admission of all of the facts alleged in the Finding and Notice, and a waiver of the recipient's right to contest such factual allegations. If the ALJ finds that the recipient is in default, the ALJ will issue a decision on default, which will constitute the ALJ's determination. Default by the Director constitutes a waiver of OCR's right to proceed on the merits of the action, and will result in the dismissal of the Finding and Notice. Upon motion filed within 30 days of receipt of the decision on default, and for good cause shown, the ALJ may set aside a decision by default.

19. Accelerated decision

a. General.

The ALJ 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.

b. Effect.

(1) If an accelerated decision is issued as to all issues and claims in the proceeding, the decision constitutes the ALJ's determination, and will be filed with the Hearing Clerk.

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

20. Assignment of ALJ; scheduling the hearing

a. Assignment of ALJ.

When an answer is filed with the Hearing Clerk, the Hearing Clerk will forward a copy of the Finding and Notice, or denial of restoration of eligibility and any other documents filed in the proceeding, to the Chief ALJ, who will serve as the ALJ, or assign another ALJ to preside in the proceeding. The ALJ will notify the parties of his assignment.

b. Notice of hearing.

The ALJ will hold a hearing if the proceeding presents genuine issues of material fact. The ALJ will 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 ALJ may require the attendance of witnesses or the production of documentary evidence by subpoena, 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 will be granted except upon motion and for good cause shown.

d. Location of the hearing.

The location of the hearing will be determined in accordance with the method for determining the location of a prehearing conference under Subsection 17.d.

21. Prehearing briefs and opening and/or closing statements

The ALJ may require parties to file prehearing briefs with the Hearing Clerk prior to the beginning of a hearing. Opening and/or closing statements may be made at hearings.

22. Evidence

a. General.

(1) The ALJ will admit all evidence that is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value, except that evidence relating to settlement that 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 Subsection 17.a, .f, .g, or .h to all parties at least 15 days before the hearing date, the ALJ will 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 will 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 will not prevent information from being introduced into evidence, but will instead require that the information be treated in accordance with 40 CFR Part 2, Subpart B. The ALJ or the Board may consider such evidence in a proceeding closed to the public, and which may take place before some, but not all, parties, as necessary. Such proceeding will 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 will be examined orally, under oath or affirmation, except as otherwise provided in paragraphs c and d of this section or by the ALJ. Parties will 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 ALJ 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 will 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 will deliver a copy of the testimony to the ALJ, the reporter, and opposing counsel. The witness presenting the testimony will swear to or affirm the testimony and will be subject to appropriate oral cross-examination.

d. Admission of affidavits where the witness is unavailable.

The ALJ may admit into evidence affidavits of witnesses who are unavailable. The term "unavailable" will have the meaning accorded to it by Rule 804(a) of the Federal Rules of Evidence.

e. Exhibits.

(1) Where practicable, an original and one copy of each exhibit will be filed with the ALJ for the record and a copy will be furnished to each party. A true copy of any exhibit may be substituted for the original.

(2) Except for federal laws and regulations, and published decisions of any court or federal administrative tribunal, any document (or part thereof) which is referenced in any brief, motion, or legal memorandum, or at the hearing, or is otherwise relied upon by any party, must be produced as an exhibit, either in its entirety or relevant pages, and marked for identification.

(3) Letters expressing views or urging action and other written material not filed with the Hearing Clerk by a party or amicus curiae, regarding matters at issue in a hearing, are not deemed part of the evidence or record of the proceeding.

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 will be given adequate opportunity to show that such facts are erroneously noticed.

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 ALJ on any objection and the reasons given for it will be part of the record. An exception to each objection overruled will be automatic and is not waived by further participation in the hearing.

b. Offers of proof.

Whenever the ALJ denies a motion for admission into evidence, the party offering the information may make an offer of proof, which will be included in the record. The offer of proof for excluded oral testimony will consist of a brief statement describing the nature of the information excluded. The offer of

proof for excluded documents or exhibits will consist of the documents or exhibits excluded. Where the Board decides that the ruling of the ALJ in excluding the information from evidence was both erroneous and prejudicial, the hearing may be reopened to permit the taking of such evidence.

24. Burden of presentation; burden of persuasion; preponderance of the evidence standard

a. The Director has the burdens of presentation and persuasion. Following the Director's establishment of a prima facie case, the recipient will have the burden of presenting any defense to the allegations set forth in the Finding and Notice. The recipient has the burdens of presentation and persuasion for any affirmative defenses. The Director may present evidence of less discriminatory alternatives and of pretext.

b. Each matter of controversy will be decided by the ALJ upon a preponderance of the evidence.

25. Filing the transcript

The hearing will be transcribed verbatim. Promptly following the taking of the last evidence, the reporter will transmit to the 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 will transmit to the ALJ a copy of the transcript. A certificate of service will accompany each copy of the transcript. The Hearing Clerk will notify all parties of the availability of the transcript and will 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 ALJ. 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.

26. Proposed findings, conclusions, and order

After the hearing, any party may file proposed findings of fact, conclusions of law, and proposed relief authorized by 40 C.F.R. § 7.130 or § 7.135, together with briefs in support thereof. The ALJ will set a schedule for filing these documents and any reply briefs, but will not require them before the last date for filing motions under Section 26 to conform the transcript to the actual testimony. All submissions will be in writing, will be served upon all parties, and will contain adequate references to the record and authorities relied on.

27. Oral argument

a. If any party desires to argue a case orally on a motion, or on exceptions or replies to exceptions to an ALJ's determination, he will make such request in writing. The ALJ or the Board, as appropriate, may grant or deny such requests in its discretion. If the request is granted, the ALJ or the Board will serve notice of oral argument on all parties. The notice will set forth the order of presentation, the amount of time allotted, and the time and place for argument. Any persons who will make the oral argument, and who are not the attorney or representative of record, will file with the Hearing Clerk or Clerk of the Board, as appropriate, an entry of appearance, not later than seven days before the date set for oral argument.

b. The purpose of oral argument is to elaborate upon and clarify the written argument in the briefs. Reading at length from the brief or other texts is not favored. Participants will confine their arguments to points of controlling importance and to points upon which exceptions have been filed.

c. Pamphlets, charts, and other written material may be presented at oral argument only if such material is limited to facts already in the record, or documents in prehearing exchanges or exhibits.

28. ALJ's determination

a. After the time for submission of post hearing briefs has expired, the ALJ will issue his determination. It will contain findings of fact, conclusions regarding all material issues of law or discretion, and reasons therefor. It will be filed with the Hearing Clerk and copies served upon all parties, amici curiae, and the Clerk of the Board.

b. The ALJ's determination will become the final decision of the Agency 45 days after its service upon the parties, and will constitute "final agency action" within the meaning of 5 U.S.C. § 704, unless:

(1) The recipient files exceptions within 30 days of receipt of the ALJ's determination and the Board grants review under Subsection 31.b. of this document;

(2) A party moves to reopen the hearing within 20 days of receipt of the determination; or

(3) A party moves to set aside a default order within 30 days of receipt of the default order.

29. 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 receipt of the ALJ's determination and will state the specific grounds upon which relief is sought. When the movant seeks to introduce new evidence, the motion will: 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 will be made to the ALJ and filed with the Hearing Clerk.

b. Disposition of motion to reopen a hearing.

Within 15 days following receipt of a motion to reopen a hearing, any other party to the proceeding may file with the Hearing Clerk and serve on the ALJ and on all other parties a response. A reopened hearing will be governed by the applicable sections of these procedures. The filing of a motion to reopen a hearing will automatically stay the running of the time periods for an ALJ's determination becoming final under Subsection 29.b. and for appeal under Subsection 31.a. These time periods will begin again in full when the motion is denied or an amended ALJ's determination is served.

30. Appeal from or review of interlocutory orders or rulings

a. Request for interlocutory appeal.

Appeals from orders or rulings other than an ALJ's determination shall be allowed only at the discretion of the Board. A party seeking interlocutory appeal of such orders or rulings to the Board will file a motion within 10 days of receipt of the order or ruling, requesting that the ALJ forward the order or

ruling to the Board for review, and stating briefly the grounds for the appeal.

b. Availability of interlocutory appeal.

The ALJ may recommend any order or ruling for review by the 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 ALJ has recommended review and the Board determines that interlocutory review is inappropriate, or takes no action within 30 days of the ALJ's recommendation, the appeal is dismissed. When the ALJ declines to recommend review of an order or ruling, it may be reviewed by the Board only upon appeal from the ALJ's determination, except when the 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 receipt of an order of the ALJ refusing to recommend such order or ruling for interlocutory review.

31. Review by the Administrator, effective date, submission to Congress

a. Within 30 days after receipt of the ALJ's determination, the recipient may file exceptions to the determination with the Board, as the Administrator's delegate under EPA Delegation No. 1-116. The exceptions may be filed with the Clerk of the Board by mailing, via USPS first class mail, an original and one copy to:

Clerk of the Board
U.S. EPA Environmental Appeals Board
1200 Pennsylvania Avenue, N.W. (MC 1103B)
Washington, D.C. 20460

or by hand delivery (e.g., courier, Fed-Ex, UPS, DHL) to:

Clerk of the Board
U.S. EPA Environmental Appeals Board
607 Fourteenth Street, N.W., Suite 500
Washington, D.C. 20005

The exceptions will include a statement of reasons therefor. If exceptions are filed with the Clerk of the Board, the Board may rule on whether it will review the ALJ's determination, within 45 days after receipt of the ALJ's determination. If the Board intends to review the ALJ's determination, the Board will serve on each party and amici curiae a Notice of Review and briefing schedule. If the Board declines review of the ALJ's determination, the Board will serve on each party and amici curiae a Notice Denying Review, and the ALJ's determination will constitute the final decision.

b. Upon completion of review, the Board will issue and serve a decision upon all parties and amici curiae.

The decision will adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the ALJ's determination, and set forth the reasons for its actions. The Board may remand the case to the ALJ for further action. The Board's decision, except an order of remand, or a decision under Subsection c. of this section, will become effective on the date of issuance and constitute "final agency action" within the meaning of 5 U.S.C. § 704. The Board's decision is the decision of the Administrator pursuant to EPA Delegation 1-116, and will not be subject to further administrative appeal.

c. Motion to reconsider the Board's decision.

Motions to reconsider the Board's decision will be filed within 10 days of receipt of the decision. 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 will be directed to, and decided by, the Board. Motions for reconsideration directed to the Administrator, rather than to the Board, will not be considered, except in cases that the Board, in its discretion, has deemed it appropriate to refer to the Administrator pursuant to 40 C.F.R. § 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 Board.

d. If the Board's final decision is to deny an application, or annul, suspend, or terminate EPA assistance, the Administrator will submit a full written report of the circumstances and grounds for such action to the Committees of the House and Senate having legislative jurisdiction over the program or activity involved. Such decision will become effective 30 days from the date on which the report is submitted to Congress.

32. Post-Termination proceedings

A recipient receiving a decision terminating, discontinuing, or refusing federal financial assistance in proceedings pursuant to 40 C.F.R. Part 7 may request the restoration of eligibility for federal financial assistance from OCR pursuant to 40 C.F.R. § 7.135. If OCR denies the request, the recipient may file with the Hearing Clerk a written request for a hearing in accordance with Paragraph 12.b., above.