

United States
Environmental Protection
Agency

Office of Administrative
Law Judges

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EPA

Office of Administrative Law Judges

Practice Manual

This document is solely intended as guidance. The policies and procedures in this guidance do not constitute a rulemaking by the Agency, and may not be relied on to create a substantive or procedural right or benefit enforceable at law by any person.

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I. INTRODUCTION

A. Purpose of this Manual

The United States Environmental Protection Agency (EPA) is authorized to institute administrative penalty proceedings against alleged violators under a variety of environmental statutes. Such cases are generally heard by the Administrative Law Judges (ALJs or Judges) within EPA's Office of Administrative Law Judges (OALJ). This Manual is offered as an informal aid to those interested in such proceedings including the procedural Rules¹ which apply thereto. The Manual is *not* intended to be cited or relied upon as authority. It is *not* a complete recitation or explanation of EPA OALJ administrative practices or procedures. Rather, the Manual is intended to primarily highlight those OALJ practices which have generated the most inquiries from parties. Further, because this Manual is being written to be easily understood by non-lawyers, be aware that it does not include every exception, detail and condition in regard to each matter addressed. Therefore, this Manual must be read together with the Rules² for a full understanding of the applicable legal procedures. Additionally, please note that the words "he," "his," "you," "party" and "opposing party" are used for the sake of simplicity in this Manual, and are intended to apply to a *pro se* respondent, respondent's counsel or representative, or EPA counsel, male or female, singular or plural, as appropriate.

The reader is encouraged to direct any comments, concerns, questions or suggestions concerning OALJ's practices and procedures and/or this Manual to OALJ's Staff Attorney, Steven Sarno, at sarno.steven@epa.gov.

B. Statutes Administered by EPA OALJ's

EPCRA, "Emergency Planning and Community Right-To-Know Act"

Authorized by Title III of the Superfund Amendments and Reauthorization Act (SARA), the Emergency Planning & Community Right-to-Know Act (EPCRA) was enacted by Congress as the national legislation on community safety. This law is designed to help local communities protect public health, safety, and the environment from chemical hazards. To implement EPCRA, Congress requires each state to appoint a State Emergency Response Commission (SERC). The SERCs are required to divide their states into Emergency Planning Districts and to name a Local Emergency Planning Committee (LEPC) for each district.

RCRA, "Resource Conservation and Recovery Act" 42 U.S.C. §6901 et seq. (1976)

The Resource Conservation and Recovery Act (RCRA) entrusts EPA with the authority to control hazardous waste from the "cradle-to-grave." This includes the generation, transportation, treatment, storage, and disposal of hazardous waste. RCRA also set forth a framework for the management of non-hazardous solid wastes. The 1986 amendments to RCRA enabled EPA to address environmental problems that could result from underground tanks

¹ *The Consolidated Rules of Practice*, 40 C.F.R. Part 22

² *The Consolidated Rules of Practice*, 40 C.F.R. Part 22

storing petroleum and other hazardous substances.

TCRA, “Toxic Substances Control Act” 15 U.S.C. §2601 et seq. (1976)

The Toxic Substances Control Act of 1976 provides EPA with authority to require reporting, record-keeping and testing requirements, and restrictions relating to chemical substances and/or mixtures. Certain substances are generally excluded from TSCA, including, among others, food, drugs, cosmetics and pesticides. TSCA addresses the production, importation, use, and disposal of specific chemicals including polychlorinated biphenyls (PCBs), asbestos, radon and lead-based paint.

FIFRA, “Federal Insecticide, Fungicide and Rodenticide Act”

The Federal government first regulated pesticides when Congress passed the Insecticide Act of 1910. This law was intended to protect farmers from adulterated or misbranded products. Congress broadened the federal government's control of pesticides by passing the original **Federal Insecticide, Fungicide and Rodenticide Act** (FIFRA) of 1947. FIFRA required the Department of Agriculture to register all pesticides prior to their introduction in interstate commerce.

A 1964 amendment authorized the Secretary of Agriculture to refuse registration to pesticides that were unsafe or ineffective and to remove them from the market. In 1970, Congress transferred the administration of FIFRA to the newly created Environmental Protection Agency (EPA). This was the initiation of a shift in the focus of federal policy from the control of pesticides for reasonably safe use in agricultural production to control of pesticides for reduction of unreasonable risks to man and the environment. This new policy focus was expanded by the passage of the Federal Environmental Pesticide Control Act of 1972 (FEPCA) which amended FIFRA by specifying methods and standards of control in greater detail. Subsequent amendments have clarified the duties and responsibilities of the EPA.

CERCLA, “Comprehensive Environmental Response, Compensation, and Liability Act” 42 U.S.C. §9601 et seq. (1980)

The Comprehensive Environmental Response, Compensation, and Liability Act -- otherwise known as CERCLA or Superfund -- provides a Federal "Superfund" to clean up uncontrolled or abandoned hazardous-waste sites as well as accidents, spills, and other emergency releases of pollutants and contaminants into the environment. Through CERCLA, EPA was given power to seek out those parties responsible for any release and assure their cooperation in the cleanup.

EPA cleans up orphan sites when potentially responsible parties cannot be identified or located, or when they fail to act. Through various enforcement tools, EPA obtains private party cleanup through orders, consent decrees, and other small party settlements. EPA also recovers costs from financially viable individuals and companies once a response action has been completed.

EPA is authorized to implement the Act in all 50 states and U.S. territories. Superfund site identification, monitoring, and response activities in states are coordinated through the state

environmental protection or waste management agencies.

CWA, “Clean Water Act”

The objective of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act (CWA), is to restore and maintain the chemical, physical, and biological integrity of the nation's waters by preventing point and nonpoint pollution sources, providing assistance to publicly owned treatment works for the improvement of wastewater treatment, and maintaining the integrity of wetlands.

CAA, “Clean Air Act”

The Clean Air Act is the law that defines EPA's responsibilities for protecting and improving the nation's air quality and the stratospheric ozone layer. The last major change in the law, the Clean Air Act Amendments of 1990, was enacted by Congress in 1990. Legislation passed since then has made several minor changes.

The Clean Air Act, like other laws enacted by Congress, was incorporated into the United States Code as Title 42, Chapter 85. The House of Representatives maintains a current version of the U.S. Code, which includes Clean Air Act changes enacted since 1990.

C. OALJ's Administrative Law Judges

Currently, there are three Administrative Law Judges (ALJs) who preside over and conduct hearings in EPA administrative proceedings. While these ALJs are technically EPA employees, the unique terms and conditions of their federal employment are designed specifically to assure that the Judges retain complete decisional independence from the Agency and are insulated from any circumstances which could create bias in favor of EPA. ALJs are hired from a single list of qualified candidates created for all the various Federal agencies as a result of a competitive merit examination given by the U.S. Office of Personnel Management. None of the current EPA ALJs had ever been an EPA employee prior to being appointed as a Judge, nor were the Judges selected to serve as ALJs at EPA based upon their prior knowledge or work experience in the field of environmental law. ALJs are not supervised in the substance of their work by any other government personnel and do not undergo performance reviews. Congress, not the Agency, sets the salary paid to the ALJs, and ALJs cannot receive any additional incentives or rewards of any kind, monetary or otherwise, from the Agency for their work, nor can the Agency decrease an ALJ's salary or otherwise negatively effect the other terms and conditions of their employment. Further, all ALJs are appointed essentially “for life,” in that there is no mandatory retirement age for ALJs and ALJs can only be removed from their positions for “good cause” established and determined by the Federal Merit Systems Protection Board on the record after a hearing, and thus cannot be removed arbitrarily or for political reasons. The ALJs at EPA are physically isolated from all other parts of the Agency, in separate offices located at 1099 14th Street, N.W., Washington, D.C. 20005. Moreover, they are strictly limited in their communications with Agency personnel and other parties to their cases by the Rules prohibiting *ex parte* (one party) contact, and are required in their position to comply with provisions of the Administrative Procedure Act, judicial ethical standards, and federal

government ethics laws and regulations.

D. Overview of Proceedings before Administrative Law Judges

An EPA administrative enforcement proceeding begins when the Agency files with an EPA Hearing Clerk a “Complaint” which generally requests that the someone be ordered to pay a monetary penalty for committing one or more alleged violations of an environmental statute.³ It is the obligation of EPA to “serve,” that is provide a copy of the Complaint and Notice of the proceeding, upon the alleged violator, identified as the “Respondent,” in the Complaint.⁴ Upon being served with the Complaint, the Respondent must file with the EPA Hearing Clerk an “Answer” to the Complaint with 30 days. The Answer to the Complaint must “clearly and directly admit, deny or explain each of the factual allegations contained in the complaint . . .” In addition, the Answer should contain any defenses which the Respondent wishes to raise in the proceedings and clearly indicate whether a hearing is being requested.⁵

Upon receiving Answers from all of the Respondents named in the Complaint, the Hearing Clerk forwards the file containing the Complaint and Answer(s) to the Office of Administrative Law Judges (OALJ). It is at this point that the “proceeding before the ALJ” begins, and it generally ends either when the parties file their settlement agreement known as a “Consent Agreement and Final Order” (CAFO) or when the ALJ issues an “initial decision” setting forth the Judge’s determination as to whether the Respondent(s) violated the law as alleged in the Complaint, and if so, the amount of penalty which must be paid as a result.

The first step generally taken by OALJ upon receipt of a case file from a Hearing Clerk is the issuance of a letter to each of the parties (the complainant/EPA attorney, and respondent(s) or their attorney(s)), inviting them to participate in Alternative Dispute Resolution (ADR), which is a confidential settlement process for resolving the case upon terms mutually agreeable to the parties, with an ALJ serving as a neutral mediator. Of course, the parties may settle their case at any time during its pendency, but OALJ’s ADR process provides the assistance of an ALJ in the settlement process for a limited period of time early on in the proceeding if *both parties* agree to participate. A party failing to timely respond to the ADR notice is assumed to be declining participation in the process.

³ Rule 22.14.

⁴ Rule 22.5.

⁵ Rule 22.15.

If one or both parties do not agree to participate in ADR or the parties do not settle the case during the limited ADR period (2 to 4 months), then the case is assigned to *different ALJ* for litigation. There is no communication regarding the case between the ALJ which served as the neutral in the ADR process and the Judge assigned to the case for resolution through litigation. Whatever notes, documents or writings are created or exchanged during the confidential ADR process are destroyed by the neutral at the time the case is referred for another ALJ for litigation.

At the moment the case is assigned to an ALJ for litigation, the parties are expected to begin actively preparing for hearing, and must timely comply with all orders of the Judge and the Rules *even if* they are simultaneously working toward settlement. An EPA administrative hearing is very much like a trial in federal court - a formal process of presenting known documentary evidence as well as expected witness testimony through direct and cross examination before a robe-clad adjudicator. Hearings, and the procedures leading up thereto, are designed to avoid surprise and give each side adequate notice and opportunity to prepare to address the matters at issue. As such, the Rules require that each party file a "prehearing exchange," identifying the documents and witnesses' testimony which it expects to present at the hearing in support of its case. Shortly after receiving the case for litigation, the Judge will issue a "prehearing order" which sets specific deadlines for filing the prehearing exchange and indicates what each party must include therein. Any new evidence or witness' testimony that a party discovers after filing its prehearing exchange which it wishes to present at the hearing should be promptly announced by filing a supplement to the prehearing exchange. In setting the pre-hearing and hearing dates, the ALJs endeavor to swiftly process the case so a decision on it can be rendered within 18 months of receipt.

If a party does not timely file his or her prehearing exchange by the deadline or does not file a timely response to any ALJ order, even if the parties are trying to settle the case, the Judge may assume that the party does not wish to proceed with his case, and issue a "Default Order." If the Respondent defaults, the Order will often require the Respondent to pay the full penalty proposed by Complainant (EPA). If EPA defaults, the case will generally be dismissed with prejudice, meaning it cannot be re-filed against the Respondent at a later date.

To make the most efficient use of the limited time available for hearing and focus on the facts that are truly in dispute, the parties are free to file a wide variety of motions prior to hearing. Some common motions are discussed below. Pre-hearing motions must be filed in writing setting forth the request and justification therefore. A copy of the motion must be served on the opposing party (or its attorney) and the Judge. If the opposing party disagrees with a motion, it must file a written response to the motion within a certain time period. The Judge will then issue a written Order ruling on the motion, a copy of which is provided to all parties. In addition to motions, prior to hearing the parties may also file stipulations, which is a list of facts and/or documents which the parties agree on, and/or pre-hearing briefs which are a parties statement familiarizing the Judge with its side of the case.

OALJ hearings are held in federal courthouses all over the country. The Judge will set the date and place for the hearing. Commonly, about a month prior to hearing, the Judge or his/her staff attorney, will conduct a telephonic prehearing conference with all the parties to generally discuss the upcoming hearing and respond to inquiries in regard thereto. After the hearing, the

parties are given the opportunity to file post-hearing briefs before a written decision is rendered by the ALJ. ALJ decisions are posted on the EPA ALJ website: www.epa.gov/oalj and are also accessible through the legal electronic research tools of Westlaw and Lexis. ALJ decisions can be appealed to the EPA Environmental Appeals Board (EAB).

ANSWERS TO SOME COMMON QUESTIONS REGARDING PRACTICES AND PROCEDURES

Do I need to hire a lawyer to represent me in an EPA Administrative Proceeding?⁶

No, you may represent yourself or have a non-lawyer representative. A corporate officer may represent a Respondent which is a corporation. A partner may represent a partnership. If you are not represented by a lawyer or a qualified representative, you are referred to as appearing “*pro se*,” and you are expected to meet the same ethical standards required of attorneys, and to comply with the Rules and Judge’s orders as if you were an attorney. You may ask the Judge’s staff attorney questions about procedures, like “how do I . . .,” or “what are my procedural options when . . .,” but the staff attorney cannot give you legal advice or otherwise help you with your case.

- As a Respondent, having an attorney represent you, especially if EPA files any motions or if your case goes to hearing, can be extremely beneficial. There are rules of procedure and evidence which apply in enforcement proceedings, the violation of which may substantially affect your case. Furthermore, although the Rules allow it, it has been OALJ’s experience that only in the rarest of cases does a party retain a non-lawyer representative. Nevertheless, such representatives can be useful if they have had substantial prior experience in administrative litigation proceedings or have significant expertise in the particularities of the legal issue in dispute.
- Casenote: An order on default issued as a result of the respondent’s failure to file prehearing exchange was upheld by the EAB which stated that although “more lenient standards of competence and compliance apply to *pro se* litigants” such litigants take on the responsibility for complying with the procedural rules and may suffer adverse consequences in the event of noncompliance.⁷

How should I format a document to be filed in an Administrative Proceeding?⁸

Included in this Manual at [Appendix 1](#) are templates for some documents routinely filed with OALJ. These templates are provided solely to serve as guides and the Judges will accept documents that do not conform to these templates, provided that all applicable regulatory requirements have been satisfied. Further, in regard to formatting documents please note the

⁶ Rule 22.10

⁷ *Rybond, Inc.*, 6 E.A.D. 614, 1996 EPA App. LEXIS 16 *33-34 (EAB 1996).

⁸ Rule 22.5(c))

following:

- The top portion of the first page of the Complaint, including “United States Environmental Protection Agency,” the name of the Respondent(s) and the docket number of the case is called the “caption.” Unless, and until, changed by an ALJ Order, all documents filed in the case must have the *same caption*, including the Respondent’s name and docket number formatted as the caption on the first page of the Complaint. However, the Respondent’s address if contained in the caption on the Complaint need not appear in the caption placed on subsequently filed documents. A sample caption is included among the templates.
- Documents should be printed only on a single side because they are affixed in the Judge’s case file at the top of the page. Furthermore, an adequate margin of at least 1” should be provided for at the top of each page.
- Each page of each document should have a number at the bottom of the page.
- Documents should be double spaced, with at least 12 point, Times New Roman type font, including the footnotes.
- Briefs and legal memoranda longer than 20 pages must include a table of contents and table of authorities with page references.
- The first document filed by a party must contain the name, address, and telephone number of the party or his attorney or other person authorized to represent the party. It should also include a fax number and email address, if any.
- **Each and every document filed must be signed by the party or his attorney submitting it.**
- **Each and every document filed must include a “Certificate of Service” as the last page, placed after any attachments or exhibits (see “How do I file and serve a document?” below).**

How do I file and serve a document?⁹

- Every document that a party wishes the Judge to consider must be both “filed” (sent to the Hearing Clerk) and “served” (that is, sent to the Judge and to each opposing party or its attorney).
- Each document filed and served must include a “certificate of service” which states when the document was sent, a list of addresses to which it was sent, the method by which it was sent (by overnight mail, hand delivery, certified or first class mail) and a signature and name of the person who sent the document. An example of a certificate of service is included among the templates in this Manual.
- To file a document, send (mail, courier, commercial delivery service, or hand delivery), the original document plus one copy to the Hearing Clerk in sufficient time before it is due so that the Hearing Clerk will receive it on or before the due date. A document is “filed” ***when it is received*** and stamped by the Hearing Clerk.
- On the same date, send (by mail, courier, commercial delivery service, or hand delivery) a copy of the document to the Judge and to all the other parties.

⁹ Rule 22.5

How can I avoid problems with the Complaint, and amending the Complaint?¹⁰

In its identification of the Respondent in the Complaint, the Agency (and more specifically the representative thereof signing the Complaint) is making an affirmative representation, ostensibly in good faith and based upon specific knowledge, as to who it believes is responsible for the violations it alleges occurred in the Complaint and thus, the specific individual or entity it wishes to have a judgment entered against in regard thereto. Therefore, the Complaint and the caption thereon should be very carefully drafted to reflect the Respondent's current, full correct name. The caption need only include the Respondent's name and need not provide the Respondent's address or any further information regarding the Respondent. Moreover, the Respondent's name as indicated in the caption should match the allegations in the Complaint referring to the Respondent and the identification of the Respondent in all other documents filed in the case, *including any CAFO*. Agency counsel is strongly encouraged to undertake to confirm the correct legal name of any corporate Respondent with the applicable State Corporation Commission prior to filing the Complaint so as to avoid the need for amendment at a later date.

- If either party wishes to change the name of the Respondent as identified in the Complaint for any reason, a "Motion to Amend the Complaint" (*bearing the original caption*) must be filed and granted *before* any change is made. Thus, for example, if the parties wish to change the named Respondent in connection with a settlement, they must file a Motion to Amend the Complaint and have it granted *before* they file a CAFO utilizing a new identification for the Respondent named therein. **Parties may not unilaterally change the identification of the parties to the case.**
- The docket number indicated on the Complaint shall only be that four segment number which is provided to the parties by the Hearing Clerk in the following format: statute abbreviation(s) (*e.g., TSCA, RCRA, CWA, CAA, MM*), followed by Region number (using 2 digits, *i.e.* "03"), then the fiscal year (in four digits), ending with the individual case number). For example: RCRA-04-2005-0001.
- Each numbered paragraph of the Complaint should state either (an) allegation(s) of fact or a conclusion of law, not both. Individualized simple, separate statements of fact or law in serially numbered paragraphs will facilitate all parties determining exactly what is, and is not, in dispute in the proceeding. There is no limit on the number of paragraphs and limitations which may be contained in a Complaint.
- Alleged violations of different regulatory or statutory provisions, or the same provisions over several years constituting separate units of violation should be separated into individual consecutively numbered "Counts" so that the Complaint continues to state an actionable claim even if selected counts are struck there from based, for example, on a valid statute of limitations defense.
- If after filing, an error or inaccuracy is noticed in the Complaint, a motion can be made to amend the Complaint or withdraw part thereof, as appropriate, should be filed immediately to provide ample time of the notice and changes to the other side.

¹⁰ Rule 22.14

- A signed copy of the [proposed] Amended Complaint should be attached to the motion to amend. Such an attachment allows the Amended Complaint to be deemed “filed” if and when an order is issued granting the amendment.
- If the motion to amend is granted, the EPA must serve the Amended Complaint upon the Respondent(s).¹¹ However, if you attach a fully executed [proposed] Amended Complaint to the motion to amend, and the amendment is not substantive, *i.e.* it merely decreases the proposed penalty, or is concurred with by Respondent(s), you may include in your motion to amend the Complaint a request that the Amended Complaint be deemed filed and served on the Respondent on the date of the order granting the motion if the Respondent agrees to such request and you state such agreement in your motion. This saves time particularly if the parties are settling.

If the Complaint is amended, must I answer the Amended Complaint?¹²

You must file and serve an Answer to the Amended Complaint within 20 days of the date the return receipt or commercial delivery receipt was signed for, indicating service of the amended complaint, except:

- If the Judge’s order granted a request for the Amended Complaint to be deemed filed and served on the date of the order, then you have 20 days from the date of that Order to file and serve an Answer.
- If there were only minor technical amendments to the Complaint, the penalty was decreased, or you agree with the amendments, you need not file an Answer. However, if in the order granting the request to amend the Complaint, the ALJ did not excuse you from submitting an Answer, you should file and serve a statement which incorporates by reference your original Answer to the complaint.
- If only a certain portion of the Complaint was amended, you may file an Answer indicating your admission, denial, or explanation only to the amended portion, and any defenses to the amended portion, rather than answer the entire Amended Complaint. You should include a statement that the answer to the amendment of the Complaint incorporates by reference all of, or stated portions of, your original Answer to the Complaint.

How do I file or amend an answer?¹³

- In your Answer to the Complaint, you must admit, deny or explain each numbered paragraph in the Complaint which alleges a fact or facts. Your answer should list each paragraph and number of the Complaint, and state for each such paragraph that it is either “admitted,” “denied,” “denied for lack of knowledge,” or, if none of those apply, otherwise provide an explanation. If you deny only a portion of the paragraph, specify that portion that you are denying and the portion that you are admitting or as to which you have no knowledge.

¹¹ Rule 22.5(b)(1)

¹² Rule 22.14(c)

¹³ Rule 22.15

- Also in your answer, list your defenses, which are any facts or legal arguments which you believe indicate that you did not commit the violations alleged in the Complaint or would otherwise prevent EPA from assessing a penalty against you or from assessing a penalty in the full amount requested by EPA.
- If you wish to present evidence and/or witnesses to a Judge, and/or cross examine EPA's witnesses, then clearly state that you are requesting a hearing.
- If you wish to request that the Complaint be dismissed, you must file a separate document entitled "motion to dismiss."¹⁴ General requests for dismissal in an Answer usually do not meet such requirements and are thus not generally responded to by either the Complainant or the Judge.
- If you wish to change or add something to your Answer, you must file and serve a "Motion to Amend the Answer" which explains why you want to amend it, and what you propose to add or change.

¹⁴ Rules 22.16(a) and 22.20(a)

- In determining whether to grant a motion to amend an answer, the Judge considers whether there would be prejudice to opposing party, or undue delay of proceedings, and whether the motion is made in bad faith or with dilatory motive.¹⁵
- For further information on amending an answer reference, Order on Complainant's Motion for Accelerated Decision and on Respondent's Cross Motion to Amend Answer and to Dismiss Complaint.¹⁶

What if Respondent requests in his Answer that the Complaint be dismissed?¹⁷

- If the request includes the required elements of a motion, stating the particular reasons for dismissal, and particularly if any documents are attached in support of the request, then you should file a response.
- If grounds for dismissal are not stated with particularity, it does not constitute a motion and therefore does not require any response.

On whom do I serve a motion before the case is assigned to an ALJ?

- If the motion is filed ***before*** an Answer is filed, (*i.e.* a motion to extend time to answer) serve it on the opposing party and the Regional Judicial Officer.
- If the motion is filed ***after*** an Answer is filed, serve it on the opposing party and Susan L. Biro, Chief Administrative Law Judge.
- **Always file motions and all other documents with the Hearing Clerk.**

What if I want to settle or do not want to go to a hearing?¹⁸

At all points in the administrative process, you always have the option to settle the case rather than go to a hearing. However, you must do one or the other in a timely manner - OALJ does not allow cases to continue with no infinite end point in the near future.

- If you want to pursue settlement at the very beginning of the case, when you receive OALJ's initial letter inviting you to participate in Alternate Dispute Resolution (ADR), email, call or fax OALJ to accept ADR ***before the deadline.*** Do not trust the opposing party to remember to timely accept on your behalf.
- If you do not timely accept ADR when it is initially offered and decide later in the proceeding that you wish to try ADR, you may subsequently file with the opposing party a joint motion requesting the appointment of a neutral. You should be aware however, such motions are rarely granted. Therefore, you need to include in the motion requesting ADR compelling circumstances justifying the case being referred to a neutral at that point.

¹⁵ *Lazarus, Inc.*, 7 E.A.D. 318, 1997 EPA App. LEXIS 27 (EAB 1993).

¹⁶ *Isochem North America, LLC*, EPA Docket No. TSCA-02-2006-9143, 2007 EPA ALJ LEXIS 37, *31-43 (ALJ, Dec. 27, 2007)

¹⁷ Rule 22.16(a)

¹⁸ Rules 22.18, 22.22

- If you do not want to settle, or cannot settle, but also do not wish to go through a courtroom hearing, you and the opposing party can consider jointly requesting the ALJ conduct a “paper hearing.” Paper hearings can take place even if the parties’ dispute material issues of fact or law, if the parties do not want or need to present the oral testimony of witnesses at a hearing or to orally cross examine the opposing party’s witnesses. In such cases, the Judge can decide the case based on the documents submitted by the parties. Such documents can include the written testimony of witnesses if the opposing party agrees to waive oral cross-examination, or you agree to written submission of what the witnesses’ testimonies would be on cross-examination, or the witness is unavailable.
- You should always start final settlement attempts weeks in advance of the hearing date. An EPA settlement agreement is called a “Consent Agreement and Final Order” or “CAFO.” *To be complete, a CAFO must be signed by all the parties, and then also reviewed, approved and signed by the EPA’s Regional Administrator (or delegate), and filed with the Hearing Clerk.* It can take several days, or even weeks for a CAFO which is acceptable to all parties to be signed by the Regional Administrator and filed with the Hearing Clerk. If a Supplemental Environmental Project (SEP) is part of the settlement, it may even longer to get all the necessary Agency approvals. Therefore, OALJ encourages the parties to always start their final settlement attempt weeks before hearing is set to begin.
- Please note that if a CAFO is not filed by close of business the Friday before the hearing is scheduled to begin, you are still expected to appear at the hearing. *See, below, “What if we settle just before the hearing but the CAFO won’t be filed in time.”*

What procedures apply to ADR?¹⁹

- If the case is assigned to ADR, an ALJ will serve as a “neutral” and try to assist the parties in reaching an agreement in settlement of the case. Depending upon the wishes of the parties, during the ADR process the neutral Judge can act in as the role of a mediator, facilitator or neutral evaluator. As a mediator, the Judge helps identify and focus issues, enables each party to understand the other’s arguments, and helps parties explore options. As a facilitator, the Judge provides structure and moderates the discussions, in a less active role. As a neutral evaluator, the Judge gives the parties’ the benefit of his informal, non-binding opinion on the case based upon whatever information the Judge has been presented with at that point. Regardless of the role, the neutral may be requested to confidentially evaluate a party’s argument or position, to give the parties an idea of the outcome if they litigated the case, to request parties produce documents in aid of settlement, *etc.*
- ADR conferences are usually conducted by telephone, and, upon request of the parties, in rare instances, in person. The neutral will call both parties in a teleconference to discuss ADR procedures and expectations, may ask them to exchange information, and will usually speak with each party separately and then jointly in teleconferences, as needed.

¹⁹ Rule 22.18(d)

- Documents and information exchanged between the parties and/or Judge during the ADR process are generally not filed or served, and thus do not become part of the record; they are for confidential settlement purposes only.
- If a motion is filed during ADR, and all parties agree with the motion, the neutral may refer it to the Chief Judge for issuance of an order thereon, but such referral does not automatically delay or stay the ADR process. The Judge designated to preside after termination of ADR, or the Chief Judge, will rule on all contested motions.
- If the parties did not both accept ADR when the original ADR offer letter was issued, and decide later that they would like a Judge to serve as mediator in settlement negotiations, they may file a joint motion with the litigation Judge requesting appointment of a neutral. If sufficient compelling circumstances warrant it, the case may then be referred by the litigation Judge to the Chief Judge for the appointment of a neutral.

How do I make sure my document is filed on time and that the Judge knows it?²⁰

- Send all documents by mail, commercial delivery, overnight mail or hand delivery, in enough time to reach the Hearing Clerk's office before the close of business on the date it is due.
 - 1. U.S. Postal Service Mailing Address**
U.S. Environmental Protection Agency
Office of Administrative Law Judges
1200 Pennsylvania Avenue NW, Mail Code 1900L
Washington, D.C. 20460
 - 2. Fed-ex/UPS/Commercial/Hand-Delivery**
U.S. Environmental Protection Agency
Office of Administrative Law Judges
1099 14th Street NW
Franklin Court, Suite 350
Washington, D.C. 20005
 - 3. Hearing Clerk Docket Room**
Monday through Friday
8:30 a.m. to 4:30 p.m.
(202) 564-6281
- The date it is stamped by the Regional Hearing Clerk is the official filing date, which the date the Judge will rely upon in determining timeliness.
- Make sure you include a certificate of service with the filing.
- If you submit a document on or very close to the due date, fax a courtesy copy of it the Judge's office. OALJ's fax number is (202) 565-0044.
- Use a calendar system and mark on your calendar all due dates in the administrative

²⁰ Rule 22.7

proceedings so you do not miss any deadlines. Your failure to adequately plan your time is not good cause for missing a filing deadline.

- The EPA attorney on the case should always personally track the CAFO through the approval process until it is fully executed and filed, and file any necessary motions for extension of time, to avoid dismissal for failure to meet a deadline.
- The CAFO should be faxed to the Judge as soon as it is filed, and this should be reflected on the certificate of service.

What if I need more time to file a document?²¹

- File and serve a motion for an extension of time, *titled as such*, as a separate written document. The request for an extension should not be included in a letter, a status report, or in the text of another motion unless the title of the document states that it includes a request for extension of time (entitled, for example, “Status Report and Motion for Extension of Time” or “Motion to Amend Complaint and Motion for Extension of Time to Respond to Motion to Dismiss”).
- The motion for an extension should state whether the opposing party agrees or does not agree to the request for extension, so that a ruling may be issued quickly. If the motion is unopposed indicate it as such in the title, such as “Unopposed Motion for Extension.”
- The motion should specify the number of days of extension requested, and must give specific reasons for the need for that much time. Indefinite extensions are rarely granted.²²
- If the motion states that the opposing party agrees with the motion, or it is a joint motion (a request by both parties), it should be filed and received by the Judge at least one full day prior to the relevant deadline. To ensure receipt by the Judge, mail it and either fax, hand-deliver or send it to the Judge’s legal staff assistant and staff attorney in PDF form by email by noon on the day prior to the deadline. However, do not assume that the motion will be granted merely because the opposing party does not oppose it.
- If it is not an agreed or joint motion, it should be submitted as soon as possible before the due date you wish to extend, giving enough time for the opposing party to file a response and enough time for the Judge to issue a written order before the deadline expires.
- The motion should also be faxed to the Judge, or emailed in PDF form to the Judge’s legal staff assistant and staff attorney, if submitted less than 2 weeks before the due date.
- If you have not received a ruling by the deadline, you may call the Judge’s legal staff assistant to ask whether the motion has been ruled on yet. Be aware that Judges are often on travel for hearings and may not be able to address pending motions until they return. Such circumstances may delay the issuance of rulings for days or weeks at a time. Therefore, the parties are strongly encouraged to file for an extension of time as soon as they become aware that additional time may be required.

What if a deadline has already passed?

²¹ Rule 22.7(b)

²² *Mark & Dan Johnson*, EPA Docket No. CWA-08-2003-0098, 2004 EPA ALJ LEXIS 15 n. 2 (ALJ, May 11, 2004).

- If you wish the Judge to accept a document past its due date, file and serve it along with a separate document entitled “Motion for Leave to File Out of Time.”
- The Motion for Leave to File Out of Time should state whether the other party agrees with your motion or not.
- It should state specifically why you missed the deadline.
- It may not be granted by the Judge, but the sooner you file it, the more likely it may be granted.

What if we're settling but we need more time to file the CAFO before a deadline?

- File and serve a written joint motion for extension, either stating the opposing party agrees with the extension, or signed by both parties. If you are unable to contact the opposing party in time, state that in a motion for extension. Do not ignore the Judge's deadlines. The case may be dismissed or the respondent held in default if a deadline is missed.
- If, after ADR, an Initial Prehearing Order was issued which sets a due date for a CAFO, and you believe the due date will not be met, and that the delay is due to the opposing party's lack of effort or diligence, you may file a motion to set prehearing exchange requirements. Then the opposing party may be held in a default if neither a CAFO nor that party's prehearing exchange is filed on the due date.

Must I file a prehearing exchange if we are settling the case?

- The Judges understand that parties do not wish to expend time and resources on submitting prehearing exchanges if they are clearly making progress towards settling the case. However, prehearing exchange deadlines help each party to make good faith efforts toward settlement within a reasonable amount of time, deter parties from attempting to delay proceedings, and ensure that the Judges comply with Section 555(b) of the Administrative Procedure Act, which requires each Federal agency to proceed to conclude a matter presented to it within a reasonable time. Pursuant to that provision, OALJ has a policy of completing its cases within 18 months of the date of receipt.
- If significant progress is being made toward settlement, you may file a motion for extension of time to file prehearing exchanges. Before filing, ask the opposing party whether it agrees with your request and state in the motion whether it agrees. Also state the progress made toward settlement (*i.e.*, a draft has been CAFO sent to the opposing party, SEP undergoing review by EPA), time frame(s) or date(s) that actions are expected to be completed, and any unusual circumstances that require more time.) Request a due date based on those time frames.
- If you are finalizing a CAFO and the prehearing exchange date is approaching, file a motion for extension unless you are sure that the CAFO will be fully executed and filed by the due date.
- See “what if I need more time to file a document” and “what if we're settling but we need more time,” above.

How do I contact the Judge's office?²³

- **Do not ever attempt to directly contact a Judge either in person, by e-mail or by telephone unless explicitly directed to do so by a Judge serving as a neutral during ADR.**
- To communicate with the litigation Judge assigned to the case, file and serve a written "Motion."
- Letters to the Judge are not appropriate, except during ADR.
- If you have a question about procedures, you may telephone the Judge's staff attorney or e-mail the Judge's staff attorney with a copy to the opposing party.
- If you have a question on a clerical matter, such as to whether the Judge's office received a document or as to whether the Judge has ruled on a motion, you may contact the Judge's legal staff assistant by telephone or e-mail.
- Neither the Chief Judge nor any other Judge will intervene in the adjudication of case assigned to another Judge except in the rarest of emergencies. Therefore, all contacts in regard to a case should be directed to the Judge assigned to it and no other.
- The Chief Judge does not personally participate in pre-hearing conference calls or speak to parties prior to the hearing; instead, questions related to cases assigned to the Chief Judge and conference calls in such matters are addressed by her staff attorney, Lisa Knight.
- For teleconferences with other Judges, call the Judge's legal staff assistant.
- Attached hereto as an Appendix is a list of the telephone numbers and e-mail addresses of the attorneys and legal staff assistants in OALJ.

May I discuss the case or settlement with the Judge or Judge's staff attorney?²⁴

Generally you may only discuss settlement or arguments in your case when the Judge is acting as a neutral in ADR.

- Once the case is assigned to a Judge for litigation you cannot discuss settlement terms or offers with the Judge or Judge's staff. However, you may report to the Judge or Judge's staff the status of efforts made toward settlement.
- Once the case is assigned to a Judge for litigation, you may not discuss your arguments in the case with the Judge or Judge's staff, unless all parties are present in a conference or teleconference, and the Judge allows the parties to discuss their arguments in the case.
- You must not indicate the dollar amount or range of a settlement offer or settlement agreement in any correspondence, motion, exhibit, attachment or communication with the Judge or Judge's staff. No copy of a settlement agreement or Consent Agreement and Final Order should be submitted to the Judge unless it is fully executed and filed with the Regional Hearing Clerk.
- If another party in the case includes such information in a document submitted to the Judge, you should file a motion to strike that information.
- You should advise the Judge in writing or telephone the Judge's staff if you have reached

²³ Rule 22.8

²⁴ Rules 22.8, 22.19(a) and 22.22(a))

- a settlement in the case.
- You should telephone the Judge's staff immediately if you have reached a settlement within 3 weeks of the hearing date.

What does OALJ advise in regard to consolidation or severance in cases involving the same or related respondent, facility, or event?²⁵

- NEVER file single documents applicable to separate cases, listing the different docket numbers serially in the caption, expecting the Hearing Clerk and Judge to make copies and file them in each of the various case files. Always file and serve separate motions, status reports, and other documents for each case, unless and until a motion for consolidation is granted by the Judge.
- A motion to consolidate cases should be filed as early in the proceedings as possible, especially if the cases are assigned to different Judges.
- File and serve a motion for consolidation in *each* of the cases; do not file one motion with both docket numbers.
- Consolidation is particularly encouraged where there are common parties, and/or violations arising from the same event, same facility, or related facilities.
- Consolidation allows cases to retain separate identities and does not affect any party's substantive rights.²⁶
- A party may file a motion requesting severance of the claims if it is misjoined or in order to prevent delay or prejudice. Such motions should be filed as early in the proceedings as possible.

How do I make a request to the Judge?

- To make a request to the judge create a separate written document entitled "Motion for . . .", formatted, filed and served as stated above. (See "How should I format a document?" and "How do I file and serve a document?")
- State specifically what you are requesting and specific reasons for your request.
- Before filing the motion, contact the opposing party and ask whether he agrees with your request, and include in the motion whether your opponent agrees or not. Such contact need not be confrontational, only informative. Be aware, however, that the consent of the opposing party does not assure that the motion will be granted by the Judge.
- Attach to your motion any documents you relied upon in support thereof and label them numerically or alphabetically (for example: "Attachment 1")
- If you are relying on a document which has already been filed in the case (for example: the Answer or an exhibit in the prehearing exchange), you may refer to the document

²⁵ Rule 22.12

²⁶ *Alyeska Pipeline Service*, EPA Docket No. CAA-1091-10-15-113 *et al.*, 1992 EPA ALJ LEXIS 741 (ALJ, Oct. 16, 1992) (Order Granting Motion to Consolidate).

- rather than attaching another copy to your motion
- The motion and any memorandum of law in support of your motion should be merged into one document with one set of page numbers. This simplifies citations to the motion and/or memorandum.
- Do not bother to submit proposed orders.

How do I respond to a motion with which I disagree?

- You must file and serve a written response to that motion (See “How do I format a document?” and “How do I file and serve a document?”).
- If the motion was sent to you by overnight or same day delivery, your response is due 15 calendar days after the motion was served, shown on the certificate of service.
- If the motion was served by mail, you have 20 calendar days from the date it was mailed (shown on the certificate of service) to file the response, even if you also received the motion by fax or email.
- If the Judge sets a date for the response, the due date set by the Judge is not extended by 5 days.²⁷
- You should file a response even if the opposing party wrote in the motion that you disagree with it.
- Attach any documents you relied on for your response and label them numerically or alphabetically (for example: “Attachment 1”). You need not attach documents that were already filed in the case (for example, an exhibit in the prehearing exchange), just refer to them.

What if a due date for a filing falls on a weekend or federal holiday?²⁸

The document is then due the next business day.

What procedures apply to the Prehearing Exchange?²⁹

- Prehearing exchange documents must be filed and served on or before the date stated in the Prehearing Order unless either:
 - 1) A CAFO has been fully executed and filed with the Regional Hearing Clerk on or before that due date, or
 - 2) A motion for extension of time to file the prehearing exchange has been granted by the presiding Judge. (See “what if I need more time to file” question and answer, above).
- The mere fact that parties have agreed to a settlement or have drafted a CAFO does not cancel prehearing exchange requirements.

²⁷ Rule 22.7(c).

²⁸ Rule 22.7(a)

²⁹ Rules 22.19(a) and 22.22

³⁰ *JHNY, Inc.*, CAA App. No. 04-09, 2005 EPA App. LEXIS 22 *41 (EAB, Sept. 30, 2005).

³¹ 5 U.S.C. § 556(d).

- A decision on default, assessing the EPA's proposed penalty, may be issued even where there is a single failure to submit prehearing exchange information on time.³⁰
- Prehearing exchanges must be served not only on all parties, but also must be filed with the Hearing Clerk and served on the Judge.
- Include in your prehearing exchange:
 1. Copies of all documents you wish the Judge to consider
 2. A list all witnesses whose testimony you wish to present at the hearing, and with regard to each witness, provide a summary of testimony and state whether the witness is a "fact witness" or an "expert witness." Expert witnesses may give opinions regarding a subject that they have specialized knowledge in, based on education, training or experience. Fact witnesses testify as to what they personally observed. A witness may testify as both a fact and expert witness.
 3. for each expert witness, a copy of his/her resume or curriculum vitae.
- A Judge may choose not to consider (admit into the record) any document or witness testimony that you did not include in the prehearing exchange.

What does OALJ expect regarding Prehearing Exchanges?

- Submit a "Prehearing Exchange Statement" with a list and summary of testimony of your proposed fact and expert witnesses, a list describing briefly each exhibit you wish to offer to the Judge as evidence at hearing, a statement of the city or county in which you would prefer the hearing be held, and respond to any specific questions addressed to you in the Prehearing Order.
- The respondent may present only witness testimony, or only documents, or both. They may also choose only to cross examine EPA's witnesses to defend against the charges in the complaint.³¹ If you wish only to conduct cross examination, state that in your prehearing exchange statement.
- Number the pages of individual exhibits if not already numbered.
- If the case involves any state, county, or local government laws, codes or rules, EPA should include in its prehearing exchange copies of such laws, because they are cumbersome to access and print from computers.
- If your prehearing exchange documents would fill up at least one large three ring binder, submit them in (a) binder(s).
- Separate exhibits with dividers with tabs marking the exhibit numbers.
- Summaries of testimony should include with respect to each witness: what his job title is, what his relationship to the case is, which issues he will address, and all the subjects that the witness will be testifying about (i.e., which facts he will testify to, and with respect to each expert witness, which subject(s) of expertise he will testify to and what opinions he will provide.)
- The Rules do not set a standard for the degree of specificity of the summary of testimony, so there is no authority for precluding testimony at the hearing on the basis of failure to provide a sufficiently specific summary of testimony. The remedy for a deficient summary is a motion to compel discovery.³² However, a witness may not be allowed to

³² Rule 22.19(e). *Strong Steel Products, LLC*, EPA Docket No. RCRA-5-2001-0016 et al., 2003 EPA ALJ LEXIS

testify beyond the reasonable scope of the summary of testimony provided for the witness in the Prehearing Exchange.

- Witnesses who testify as to calculation of the penalty are akin to expert witnesses, and the prehearing exchange should include a resume or curriculum vitae for such witnesses.³³
- Expert witnesses are not required under the Rules to submit an expert report as evidence or in the prehearing exchange. However, submitting an expert report in the prehearing exchange, or as a supplement to the prehearing exchange, is strongly encouraged.
- Documents that an expert witness relied on for his testimony or report may be submitted in the prehearing exchange, or may be used merely to refresh his memory at the hearing.

What if some of my information is confidential and I do not want the public to have access to it?³⁴

- If any document that you intend to submit in your prehearing exchange or in response to a discovery request includes trade secrets, proprietary information, or any business information for which you claim a legal right to confidentiality, you may submit the document “under seal.”
- Generally, information may be considered as confidential business information if the business has taken steps to protect the confidentiality of the information, the information is not required by statute to be disclosed, and it is likely to cause substantial harm to the business’s competitive position.
- A document containing confidential business information is filed “under seal” when a copy of it is sent to the Regional Hearing Clerk, the Judge, and opposing counsel in a separate sealed envelope, marked “confidential business information,” attached to the outside of which is:
 - (1) a cover letter stating that you are requesting that enclosed information be treated as confidential business information, and requesting EPA to refer it to the appropriate EPA legal office for determination under 40 C.F.R. part 2 subpart B; and
 - (2) A copy of the document with the confidential information deleted (“redacted”). You may delete the confidential information either by making a copy with the confidential information stricken out, or by deleting the confidential information and inserting the words “confidential information deleted” in brackets in the areas where the confidential information occurs in the sealed document.
- Filing your document under seal does not mean that it is entitled to be treated as confidential, but means that unless and until a determination is made that it is not entitled to confidential treatment, the sealed document will be kept in a locked cabinet and protected from public disclosure and will be reviewed by the Judge “in camera,” which

191 *41 (ALJ, Oct. 27, 2003)(Order on Motion for Leave to File Amended Complaint and Strike Defenses and Motion in Limine).

³³ *Strong Steel Products, LLC*, EPA Docket No. RCRA-5-2001-0016 et al., 2003 EPA ALJ LEXIS 191 *53-54; *Rhee Bros., Inc.* EPA Docket No. FIFRA-03-2005-0028, 2006 EPA ALJ LEXIS 32 *92 (ALJ, Sept. 19, 2006) (penalty expert witness on behalf of respondent)

³⁴ Rules 22.5(d), 22.19(g) and 22.22(b), and 40 C.F.R. part 2 subpart B

means in the Judge's chambers, accessed only by the Judge and OALJ staff, as necessary.

- The “redacted” document will be available to the public, as are all filed documents except those filed under seal.
- If confidential business information may be addressed at the hearing, you may file a motion for a protective order, requesting that parts of the hearing be closed to the public and that those parts of the record be protected from unauthorized disclosure.
- Documents which include personal information such as social security numbers or personal income tax returns may also be submitted “under seal” as confidential information, if submitted with a redacted version, as described above.

What if, after I filed my prehearing exchange, I find new information or another witness that I want the Judge to consider?³⁵

- If, after you filed your prehearing exchange, you find another document or witnesses you wish to have the Judge consider, then promptly file and serve a motion to supplement the prehearing exchange along with a copy of the document and/or name and summary of witness' testimony. The motion should describe the additional information and explain why the information was not submitted earlier.
- If it is submitted less than 15 days before the hearing date, you must not only explain why it was not submitted earlier, but also state either (1) that you provided the witness name and testimony summary and/or document to the opposing party as soon as you knew about it, or (2) why you did not do so.
- You should ask the opposing party, and state in the motion, whether or not he objects to it.
- The Rules do not require you to submit a motion to amend your prehearing exchange if it is filed more than 15 days prior to the hearing. However, if the opposing party believes that your supplement is prejudicial to his case, and particularly if you did not explain in a motion why you did not submit it earlier, he may file a motion to strike the supplement.
- Where the supplement is not prompt or where the existing information is not incomplete, outdated or inaccurate, and particularly where there is evidence of bad faith, delay tactics, or undue prejudice, supplements to prehearing exchanges may be denied.³⁶

What if I find that something in my prehearing exchange, or in my response to discovery, is outdated, inaccurate or incomplete?³⁷

- After you have filed your prehearing exchange, and in the event that you find that some information is incomplete, inaccurate or outdated, you must promptly file and serve a supplement to the prehearing exchange, providing the correction and/or complete updated information.
- If the information is favorable to your case, you should file a motion to supplement the prehearing exchange, stating when you discovered that the information was incomplete,

³⁵ Rule 22.19(a) and 22.22(a) (1)

³⁶ *Strong Steel Products, LLC*, EPA Docket No. CAA-5--2003-0009, 2005 EPA ALJ LEXIS 10 *12 (ALJ, Feb. 18, 2005).

³⁷ Rule 22.19(f) and 22.22(a) (1)

inaccurate or outdated, and that you provided the supplemental information immediately after such discovery, or why you did not.

- The Rules do not require you to submit such a motion. However, if the opposing party believes that your supplement is prejudicial to his case, and particularly if you did not explain in a motion why you did not submit it earlier, he may file a motion to exclude the supplemental information.

What can I do if I receive an Order to Show Cause or a Motion for Default?³⁸

- An order to show cause may be issued by the Judge when a party fails to file its prehearing exchange or another document by its due date.
- Similarly, a motion for default may be filed by a party when the opposing party does not file a prehearing exchange or other required document by its due date.
- If you receive an Order to show cause or motion for default, file and serve a written response thereto, explaining why your prehearing exchange or other document was not timely filed.
- **Include with your response the prehearing exchange or other required document(s).**
- **The response must be received by the Hearing Clerk, opposing counsel and the Judge on or before the date set by the order to show cause, or, if a motion for default was filed, within 15 days from of the date on the certificate of service of the motion if it was served by overnight or same day delivery service, or within 20 days from the date on the certificate of service of the motion if it was served by mail.**
- Failure to respond by the due date for a response likely will result in the Judge issuing a default order which requires the respondent to pay the full amount of the penalty proposed by EPA within 30 days.
- A lack of willful intent is not by itself a sufficient excuse for failure to file a required document.³⁹
- The Judge is not bound by the standard for default under Federal Rules of Civil Procedure in EPA administrative proceedings.⁴⁰

What if I receive a Default Order?⁴¹

- You may file and serve a motion to set aside the default order, explaining “good cause” for why you did not submit the prehearing exchange or other required document in a timely manner.
- Include in such motion the reasons why you believe you may win the case or why the penalty should be significantly reduced.
- Such motion must be filed within 45 calendar days after the default order was served (date on the certificate of service). After 45 days, it becomes a final order of the EPA.

³⁸ Rule 22.17

³⁹ *Jiffy Builders, Inc.*, 8 E.A.D. 315, 319, 1999 EPA App. LEXIS 15 *15 (EAB 1999); *JHNY, Inc.*, 12 E.A.D. 372, 2005 EPA App. LEXIS 22 (EAB 2005)

⁴⁰ *Pyramid Chem. Co.*, 11 E.A.D. 657 n. 9, 2004 EPA App. LEXIS 32 *15 (EAB 2004).

⁴¹ Rule 22.17(c)

How can I get information from the opposing party or its witnesses that may help my case?⁴²

- First, try courteously asking the opposing party to provide it to you.
- If the opposing party refuses to voluntarily provide the requested information, and after the prehearing exchange is complete, but before any deadline for motions set by the Judge, you may file and serve a motion to compel discovery.
- A motion to compel discovery requests the Judge to order a party to provide certain documents to the other party (called a “request for production of documents”), to answer a list of questions (called “interrogatories”), or admit facts (called “requests for admission”), or to allow a party to have an opposing party’s witness answer questions under oath, recorded by a court reporter, either in person or by telephone (“take a deposition of a witness”).
- Your motion must include a statement of what type of discovery you seek (for example, request for production of documents), and (1) a detailed description of the documents you are requesting, (2) a list of interrogatories, (3) a list of facts you want the opposing party to admit, and/or (4) if you are requesting a deposition, state the date, time and place that you wish to take the deposition in person or the date and time you wish to take a deposition by telephone.
- You should state in your motion: (1) why your requested discovery will not unreasonably delay the proceeding nor unreasonably burden the opposing party, (2) that the opposing party has refused to provide you the information voluntarily, and why the information is most reasonably obtained from the opposing party, and (3) which disputed fact(s) the information is intended to help you prove.
- If you wish to take a deposition, you must also explain (1) why interrogatories, requests for admission and/or request for production of documents would not be a satisfactory alternative or (2) that the witness you wish to depose would provide relevant and probative evidence and why it may not be presented at a hearing. The Rules are not hospitable to discovery by deposition, but it may be needed to probe issues of veracity and credibility.⁴³ Motions to take depositions are more likely to be granted where the opposing party is not forthcoming with information by other discovery methods such as interrogatories.⁴⁴
- Subpoenas for discovery purposes are rarely requested.
- The standard for discovery under the Rules is more restrictive than that under the Federal

⁴² Rule 22.19(e)

⁴³ *Frank Acierno*, EPA Docket No. CWA-03-2005-0376, 2008 EPA ALJ LEXIS 6 *110, *116 (ALJ, Feb. 15, 2008) (Order on Motions).

⁴⁴ *Isochem North America, LLC*, EPA Docket No. TSCA-02-2006-9143, 2008 EPA ALJ LEXIS 8 (March 6, 2008) (Order on Complainant’s Motion to Compel Discovery).

Rules of Civil Procedure.⁴⁵

- You may also request information from EPA by submitting a written request under the Freedom of Information Act (FOIA) to the EPA FOIA office. You may do so online at www.epa.gov/foia.

If I receive a Request for Discovery (for Admissions, Production of Documents, Answers to Interrogatories), what are my obligations and options?⁴⁶

- If you receive a discovery request prior to any due date for your prehearing exchange, you may file a response opposing it on the basis that it is premature.⁴⁷
- If you receive such a discovery request after you have submitted your prehearing exchange, you should fully and fairly respond to each particular request (*i.e.*, each admission, each document request (“request for production”), and each interrogatory).
- If you have no knowledge about a particular admission or an interrogatory, or a document requested does not exist, state that in your response.
- If there is any request for documents or interrogatories that seek information that you believe is confidential business information, trade secrets or proprietary information, state that in your response and submit any responses or documents under seal (See question and answer above, “What if some of my evidence is confidential and I don’t want the public to access it?”).
- If you object to a particular admission, interrogatory or document request on the basis that it is irrelevant or immaterial to the case, state that in your response.
- Information regarding the credibility of a party or key witness may be relevant and subject to discovery.⁴⁸
- If you object to a particular document request on the basis that it is overly burdensome to obtain or submit the documents (for example, if the request is overly broad, seeking box-loads of documents), state that in your response along with an explanation of why it is overly burdensome.
- If you cannot submit the response within the time requested by the opposing party, send the opposing party a written request for additional time to respond, explaining the need for additional time, and setting a date on which you will mail the response.
- If the opposing party is not satisfied with your response, or if you do not timely respond to it, the opposing party may file a motion to compel discovery or a motion for additional discovery. If you receive such a motion, you should file and serve a response to the motion within 15 days (or within 20 days if it was sent to you by regular mail) after the date on the certificate of service. It should include an explanation of your objection to or explanation of why you did not respond to, each admission, interrogatory and document request for which you did not provide a response. Once the Judge grants a motion to compel discovery (or motion for additional discovery), you are obligated to provide all information requested that

⁴⁵ *Motiva Enterprises, LLC*, EPA Docket No. RCRA-03-2000-0004, 2001 EPA ALJ LEXIS 159 *6-7 (ALJ, Aug. 17, 2001) (Order on Motion for Limited Additional Discovery).

⁴⁶ Rule 22.19(e)

⁴⁷ Rule 22.19(e) (1)

⁴⁸ *Isochem North America, LLC*, EPA Docket No. TSCA-02-2006-9143, 2008 EPA ALJ LEXIS 14 *12 (ALJ, April 10, 2008)(Order on Complainant’s Third Motion for Discovery).

the Judge approves.⁴⁹

- Incomplete and/or untimely submission of information ordered by the Judge to be filed may result in a decision on default, or it may result in an adverse inference against the party.^{50,51}

How do I respond if EPA files a motion for accelerated decision? (See Rule 22.20)

- EPA may file a motion for “accelerated decision” as to liability or penalty, or both. Such motions are analogous to motions for summary judgment.
- A motion for accelerated decision on liability requests that the Judge find that the Respondent committed the violation(s) charged in the complaint on the basis that the Respondent has not shown that any of the facts upon which the violation is based are genuinely in dispute, and did not show any adequate legal reason why it should not be held responsible (*i.e.* “liable”) for the violation.
- If you admit that the violation occurred and that you are responsible for it, but you dispute whether a penalty should be assessed or the amount of the proposed penalty, then simply state that in your response.
- If you oppose the motion for accelerated decision on liability, you must file and serve a response within the required time period (see “How do I respond to a motion I disagree with?”)
- Your response must specifically state any facts in the complaint that you believe are not true. It must also explain in detail why you believe that there was no violation, or why you believe you are not responsible for the violation(s).
- If EPA also requests accelerated decision as to the penalty, then your response should state in detail all of the facts which you believe should reduce or eliminate the penalty.
- You should refer to any documents in the prehearing exchange, and/or attach to your response any other documents that support your reasoning.
- Mere assertions, conclusory allegations or suspicions are not sufficient to defeat a motion for accelerated decision.⁵²

How do I request that the complaint be dismissed?⁵³

- There are essentially two types of request for dismissal:
 - (1) A motion for judgment on the pleadings, in which no documents other than the complaint and answer are relied upon to decide whether dismissal is warranted

⁴⁹ *Isochem North America, LLC*, EPA Docket No. TSCA-02-2006-9143, 2008 EPA ALJ LEXIS 14 *8-9 (ALJ, April 10, 2008) (Order on Complainant’s Third Motion for Discovery) (“opportunity to object to discovery requests occurs in response to the *motion* for discovery under 40 C.F.R. § 22.19(e) (1), unlike voluntary discovery in Federal court proceedings under Federal Rule of Civil Procedure 33”).

⁵⁰ *Ag-Air Flying Services, Inc.*, FIFRA-10-2005-0065, 2006 EPA ALJ LEXIS 36 (ALJ, Jan. 27, 2006)(Order Granting Complainant’s Motion for Default for Failure to Submit Additional Discovery), *aff’d*, FIFRA App. No. 06-01, 2006 EPA App. LEXIS 40 (Sept. 1, 2006)

⁵¹ *William E. Comely, Inc.*, 11 E.A.D. 247 (EAB 2004).

⁵² *Martex Farms, Inc.*, EPA Docket No. FIFRA-02-2005-5301, 2005 EPA ALJ LEXIS 56 *10 (ALJ, Oct. 4, 2005) (Order on Complainant’s Motion for Findings of Fact, etc.)(citing *Jones v. Chieffo*, 833 F. Supp. 498, 503 (E.D. Pa. 1993).

⁵³ Rules 22.20 and 22.24(a)

based upon failure to state a case, like a motion under Federal Rule of Civil Procedure 12(b) or 12(c)

(2) A motion for accelerated decision under 40 C.F.R. § 22.20, which is the same as motion for summary judgment under Federal Rule of Civil Procedure 56, which essentially asks for a favorable ruling based upon uncontested facts.

- See “How should I format a document” and “How do I file and serve a document?”
- Note that bankruptcy, insolvency, lack of knowledge of the legal requirement, or lack of intent to violate a statute or rule, are not adequate reasons to dismiss a complaint.

What if I disagree with the Judge's decision on a motion?⁵⁴

- You may file a motion to certify the order for interlocutory appeal to the EAB, indicating: 1) why there are substantial grounds for difference of opinion as to an important question of law or policy arising from the order; and 2) why that an immediate appeal will materially advance the ultimate disposition of the case, or that EAB's review after the initial decision is issued would be inadequate or ineffective.
- There is no provision in the Rules for reconsideration of a Judge's order or decision. You may file a motion for reconsideration if you think the order or decision relies on a material mistake of fact or law. It will be denied if you merely attempt to reargue your position.

What does the Judge expect regarding stipulations?

- Judges encourage parties to file stipulations before the hearing, to make the hearing more efficient and focused on the facts that are actually in dispute.
- Prior to hearing, stipulate with the opposing party to as many facts as possible, and submit them in a writing signed by both parties, entitled Joint Stipulations of Fact.
- Stipulations as to exhibits may be:
 1. only as to the authenticity of an exhibit (an agreement that the exhibit is a genuine copy, and there are no questions as to what it is, who wrote it, when or where it was written, and whether it has been altered), and/or
 2. as to admissibility (an agreement that the exhibit is relevant to an issue in the case and may be admitted into evidence).
- A party may present written direct testimony of a witness who will be at the hearing and available for cross examination.⁵⁵ The opposing party may stipulate to this testimony. This is especially useful for expert testimony.
- If the Judge orders the parties to file stipulations by a certain date, the parties should file whatever stipulations of fact and/or stipulations as to exhibits that they have agreed to by such point; however few or many they may be.
- If the parties cannot stipulate to any facts or exhibits, the parties should file a statement to that effect by the due date.
- If the parties agree to more stipulations after the due date, anytime before the hearing, they may be filed and served on the Judge, or offered at the hearing.

⁵⁴ Rules 22.29 and 22.32

⁵⁵ Rule 22.22(c).

When and where will a hearing be held?⁵⁶

- Each party is usually asked to state in its prehearing exchange the county or city where it prefers to have the hearing held. If you have a preference, you should definitely respond to such inquiry as failure to do so will be taken as an indication that you have no preference.
- Generally, the Judge decides to hold the hearing in a federal or state courthouse located in the county where the respondent resides or conducts the business which is the subject of the complaint, or in another county requested by respondent, considering the location of both parties' witnesses and counsel.
- The hearing will be scheduled after the prehearing exchange, and the parties will be given at least 30 days after notice of the hearing.

What if I need a witness to testify at the hearing who does not agree to appear voluntarily, or who cannot come to the hearing?⁵⁷

- You may request the Judge to issue a subpoena to compel a witness to testify at the hearing, if the case is brought under CWA, CAA, TSCA, RCRA, EPCRA or CERCLA, but not if it is a FIFRA case.
- You should submit a motion requesting issuance of the subpoena and attach to you motion a subpoena form ready for the Judge's signature.
- If the Judge grants the Motion, the subpoena form will be returned to you so that you can serve it on the witness.
- You must pay the same fees and mileage for the witness to appear at the hearing as those paid to witnesses in Federal court.
- The motion should be filed as soon as you have notice that the witness will not attend voluntarily, and at least 3 weeks before the hearing, so there is time for the Judge to grant the motion, send the subpoena to you, and for you to serve it on the witness.
- Alternatively, you may ask opposing counsel whether he would agree to submitting written interrogatories to the witness instead of cross examining him at the hearing. If so, then each party submits interrogatories to the witness and you may file a motion to supplement your prehearing exchange with the answers to the interrogatories as an exhibit.
- You may also ask opposing counsel whether he would agree to participating in a deposition of the witness instead of cross examining him at the hearing. If so, then you may file a motion to supplement your prehearing exchange with the transcript of the deposition as an exhibit, and if you wish, a videotape of the deposition.
- If it is a key witness who cannot come to the hearing on the date scheduled, you may file a motion to reschedule the hearing.
- If there are medical reasons why the witness is hesitant to attend the hearing, the witness may be given appropriate accommodation, such as taking testimony in brief spurts or out of turn, ensuring wheelchair access, a sign translator, or providing testimony via videoconferencing.
- You may file a motion to have the witness' testimony taken by videoconferencing, after

⁵⁶ Rules 22.21(c) and (d)

⁵⁷ Rules 22.19(e)(4) and (5), 22.21(b), and 22.22(d)

you establish that such technology is feasible for the witness and available in the courtroom.

- You may file a motion to have the witness' testimony taken by telephone transmission instead of his personal attendance at the hearing. This is not generally favored, as the demeanor of the witness cannot be observed and may affect the weight which can be given to the testimony.
- You may file an affidavit of the witness as evidence, along with a motion to supplement your prehearing exchange to include the affidavit, and motion requesting admission of the affidavit on the basis that the witness is unavailable. You must establish that the witness is "unavailable" within the meaning of rule 804(a) of the Federal Rule of Evidence. Under such Rule, a witness is considered unavailable if, for example, the witness is prevented from testifying in person at hearing by privilege, physical or mental infirmity, lack of memory, death, or persists in refusing to appear despite order of the court to do so.

What if a witness has limited time available during the hearing, may I present his testimony out of order?

You may request permission from the Judge to present a witness out of order at the hearing. The opposing party may state any objections to it.

What if we settle just before the hearing but the CAFO cannot be filed in time?

If the CAFO will not be fully executed and filed with the Hearing Clerk by close of business on the Friday preceding the date the hearing is scheduled to begin, then you should immediately inform the Judge's legal staff assistant and/or staff attorney by telephone and/or email, and in addition:

- (1) You may file a joint motion to cancel the hearing, stating that the parties have settled the case *and* that both parties waive their rights to a hearing.
- (2) You may file a joint motion to postpone the hearing, which should be filed as soon as possible, no more than one week before the hearing commences. Do not assume that the motion will be granted; considering, among other things, required changes to travel and courtroom arrangements, and to witnesses', Judge's and parties' schedules, the Judge may instead ask the parties to submit the first and signature pages of a signed CAFO, or to waive their rights to a hearing, and then cancel the hearing.
- (3) You may go to the hearing and state on the record that the parties have settled the case, and do not wish to proceed with the hearing. The Judges generally encourage this option to be avoided due to the waste of travel expenses.

What if I have a motion to file just before the hearing?

- If the conditions for a motion arise after the due date for motions, file along with the motion a "motion to file out of time" explaining why you are filing after the due date.
- Immediately inform the opposing party of the motion and state in the motion whether the opposing party objects to or agrees with it.

- Ensure that the Judge and opposing counsel receive it as soon as possible before the hearing, including by fax and/or email to the Judge's legal staff assistant and staff attorney.

What does the Judge expect regarding exhibits at the hearing?⁵⁸

- In addition to copies for your own use at hearing, you should bring to the hearing four (4) more complete sets of your exhibits: one for the Judge, one for the opposing party, one for witnesses use during testimony, and one for the court reporter who will transmit it to the Hearing Clerk to be retained in the official case file. Carefully review each set of the exhibits prior to hearing to confirm that each set and every document therein is complete and legible.
- Label each exhibit numerically, for example Respondent's Exhibit 1 may be labeled as "RX 1."
- Exhibits which both parties intend to use as evidence may be labeled as Joint Exhibits," for example, "JX 1."
- If there are enough documents in your prehearing exchange to fill up a large three-ring binder, put each set in a binder properly labeled with the case name and identifying whose exhibits are contained therein.
- Each exhibit should have a tab or tabbed divider marked with the exhibit number.
- Each exhibit should also be marked on the first page with the exhibit number.
- Ensure that each page is numbered, of each exhibit which is more than one page.

If I do not intend to introduce into evidence all exhibits in my prehearing exchange at the hearing, should I renumber the hearing exhibits consecutively or keep the same numbers as in the prehearing exchange?

Because the Judge, witnesses and opposing counsel may have become familiar with the exhibits as numbered in the prehearing exchange, it is generally best to keep the same numbers on the exhibits as the documents had in the prehearing exchange, even if it results in gaps in the exhibit numbers.

Can I present a video, slides, and enlargements of exhibits (such as maps), PowerPoint, or items on overhead projector?

- Yes, if you submit the video, un-enlarged exhibit, or photo prints with your prehearing exchange, or as a supplement to your prehearing exchange.
- PowerPoint may not be presented unless the Judge grants your motion either stating that the opposing party does not object, or submitting paper copies of the PowerPoint frames and reasons why it should be presented.

Can I request that the Judge personally view the respondent's facility or site?

- Site visits are possible, but are usually granted only when the Judges finds that witness testimony along with photographs, diagrams, maps and/or videos are insufficient to

⁵⁸ Rule 22.22(e)

adequately convey the pertinent visual information to the Judge.

- If you wish to file a motion for the Judge to take a site view, such motion must be filed in sufficient time for the Judge to rule on it and for all logistical arrangements to be made for the site view, including travel.
- The motion must state whether the opposing party agrees.
- The motion should state whether the purpose of the site view is: (1) for evidence, or (2) to familiarize the Judge with the site so the Judge may better understand and weigh the testimony and evidence presented at the hearing. If it is for evidence, then you should state what issues the site view is relevant to and why photographs or other forms of evidence are inadequate. If it is for familiarizing the Judge with the site, then you should describe any complexities in the evidence or testimony and how it may be clarified, simplified or made more efficient by a site view.
- The motion should suggest a time for the site view (*e.g.*, the morning of the first day of hearing) and should state the estimated distance from the courtroom.

What are the protocols and Judge's general expectations at the hearing?

- Hearings are generally open to the public and held in a courtroom setting in a federal facility.
- You will be required to pass through a security screening prior to hearing and you should take that into account in determining what you bring with you to the courthouse. You may need to obtain special permission in advance from the courthouse clerk or marshals to bring computers, cell phones, cameras, or other such equipment into the courthouse.
- EPA hearings are serious, formal litigation proceedings conducted in an orderly and efficient manner. You are expected to have thoroughly organized your case, witnesses and exhibits prior to hearing.
- Appropriate civility and decorum is expected to be maintained by all hearing participants. Inappropriate language, outbursts, threats will not be tolerated.
- Business dress attire is appropriate.
- You are expected to be present in the courtroom every day at least a half hour before the hearing is scheduled to begin so that any preliminary matters which arise may be dealt with expeditiously so the hearing can start on time.
- You are responsible for arranging for any visual or audio equipment (ex: easels, overhead projectors, videoconference equipment, video monitors) you wish to use prior to hearing and setting up such equipment each day before the hearing is scheduled to commence.
- Hearing hours are set by the Judge and the Judge may request that the hearing continue after 5:00 p.m. and/or start before 9:00 a.m. for convenience of parties, witnesses, or to ensure the hearing finishes before the courtroom reservation terminates. Lunch and other breaks may be severely limited. Parties may request that witnesses be sequestered which means prevented from hearing the testimony of other witnesses prior to giving theirs. Parties, corporate party representatives, and expert witnesses are generally allowed to remain in the courtroom, however.
- Each party may make an opening statement, either at the beginning of the hearing or Respondent may do so at the beginning of its direct case.
- Remember to stand when questioning a witness, making objections or otherwise addressing

the Judge.

- Objections are directed to the Judge; do not argue with your opponent. Do not overdo or offer meritless objections; it may be considered prejudicial to the opposing party.
- Advise the Judge's staff before the hearing, or in a prehearing conference, of any hearing accommodations needed for persons with disabilities.
- Make the best use of time at hearing, because courtroom reservations are limited and are usually not available for the next week.
- It may be simplest to present the facts of the case in chronological order, and check to make sure that you established in the testimony who, what, where, when, and how as to each event.
- Closing statements may be made, but post-hearing briefs sufficiently serve the purpose of a closing statement.
- Each party should contact the Regional Hearing Clerk after the hearing to ensure she received a complete set of exhibits from the court reporter.

What if hearsay is presented at the hearing?⁵⁹

- Hearsay is admissible in administrative hearings.

What if I find new evidence after the hearing?⁶⁰

- You may file a motion to reopen the hearing as soon as possible after the hearing concluded and before 20 days after service of the Judge's decision.
- The motion should describe the evidence, what the purpose of the evidence is, state why it is not repetitive of other evidence in the record, and state why the evidence was not presented at the hearing.

What does the Judge expect regarding post-hearing briefs?

- The Judge sets the post-hearing briefing schedule, either both parties filing simultaneous briefs and replies, or EPA filing its brief, then Respondent's brief, then EPA's reply. The briefs will not be due until at least 30 days after the parties receive the transcript.
- Briefs should include citations to the transcript and to exhibits.
- It is not necessary to include proposed findings of fact or conclusions of law.

What is the Appeals Process and EAB?

The Appeals Board is the final Agency decision maker on administrative appeals under all major environmental statutes that the Agency administers. It is an impartial body independent of all Agency components outside the immediate Office of the Administrator. The Board typically sits in panels of three judges and makes decisions by majority vote. Currently, nine experienced attorneys serve as counsel to the Board. *The Board has issued, "A Citizens' Guide to EPA's*

⁵⁹ Rule 22.22(a)

⁶⁰ Rule 22.28

Environmental Appeals Board.” which is a plain language guide for members of the public participating in matters before the Board.

- The EAB is a four member body established March 1, 1992.⁶¹
- EAB affirms the power to permit appeals and reverse decisions made by the OALJ.⁶²
- Former appeals were granted by the Chief Justice or Judicial Officer⁶³
- The current EAB is a solitary board sovereign from that of the OALJ.⁶⁴
- The EAB has a established the office of the Clerk of the Board, primarily to answer litigant and general public appeals questions regarding appeals.⁶⁵
- EAB has delegated authority from the EPA Administrator (the Administrator is appointed by the president)

⁶¹ EPA Board Manual – Introduction Page 1, Lines 5-8

⁶² EPA Board Manual – Page 2, Lines 20-21

⁶³ EPA Board Manual – Page 2, Lines 8-11

⁶⁴ EPA Board Manual – Introduction Page 1, Lines 10-14

Appendix 1:

Pleading Templates

The Office of Administrative Law Judges has developed templates for filings. These templates are solely for the guidance of participants in these proceedings. The OALJ will accept documents that do not conform to these templates, provided that all applicable regulatory requirements have been satisfied.

The templates, which are set forth below, are as follows:

1. Caption
2. Answer
3. Certificate of Service
4. Motion for Extension
5. Motion - Other
6. Prehearing Exchange
7. Subpoena

Template 1: Caption

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

In the Matter of:

[RESPONDENT'S NAME]

Respondent.

)
)
)
)
)

Docket No. [INSERT NUMBER]

[PLEADING TITLE]

Template 2: Answer

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

In the Matter of:)
)
[RESPONDENT'S NAME]) Docket No. [INSERT NUMBER]
)
Respondent.)

ANSWER

Comes now Respondent [insert name], [by and through its counsel], and in Answer to the Administrative Complaint states as follows:

1. Respondent [admits/denies/has no knowledge] the truth of the allegations made in Paragraph 1 of the Complaint.

[INSERT HERE INDIVIDUAL RESPONSES TO EACH AND EVERY OTHER NUMBERED PARAGRAPH OF THE COMPLAINT]

Affirmative Defenses

[INSERT HERE IN SEPARATELY NUMBERED PARAGRAPHS RESPONDENT'S DEFENSES TO THE CLAIMS RAISED IN THE COMPLAINT]

Request for Hearing

Respondent hereby requests a hearing on this matter.

Signature of Respondent

Title

Date

Template 3: Certificate of Service

CERTIFICATE OF SERVICE

I certify that the foregoing [INSERT TITLE OF PLEADING HERE], dated, _____, was sent this day in the following manner to the addressees listed below:

Original by Regular Mail to: Regional Hearing Clerk
 U.S. EPA - Region _
 [INSERT ADDRESS HERE]

Copy by Regular Mail and facsimile to:

Attorney for Complainant: [INSERT NAME AND ADDRESS HERE]

Presiding Judge: The Honorable _____
 U.S. Environmental Protection Agency
 Office of Administrative Law Judges
 1200 Pennsylvania Ave., N.W.
 Mail Code 1900L
 Washington, DC 20005

[INSERT YOUR NAME AND ADDRESS HERE]

Dated: [INSERT DATE HERE]

Template 4: Motion for Extension of Time

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

In the Matter of:)
)
[RESPONDENT'S NAME]) Docket No. [INSERT NUMBER]
)
Respondent.)

MOTION FOR EXTENSION OF TIME

Comes now [Complainant/Respondent [insert name], [by and through its counsel], pursuant to Rule 22.7(b) of the Consolidated Rules of Practice (40 C.F.R. § 22.7(b)) and respectfully requests a _____ day extension of time to file its [INSERT NAME OF PLEADING HERE] and as good cause therefore states as follows:

[INSERT HERE PARAGRAPH EXPLAINING
WHY YOU REQUIRE AN EXTENSION]

Prior to filing this Motion, the undersigned contacted the opposing party as to the extension requested herein and said opponent indicated that it [does/does not] oppose the Motion.

Signature of Movant

Date

[ATTACH CERTIFICATE OF SERVICE HERE]

Template 5: Motion - Other

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

In the Matter of:)
)
[RESPONDENT'S NAME]) Docket No. [INSERT NUMBER]
)
Respondent.)

MOTION FOR [INSERT DESCRIPTION OF RELIEF SOUGHT HERE]

Comes now [Complainant/Respondent [insert name], [by and through its counsel], pursuant to Rule 22.16(a) of the Consolidated Rules of Practice (40 C.F.R. § 22.16(a)) [OR OTHER RULE AS APPLICABLE] and respectfully requests **[INSERT DESCRIPTION OF RELIEF SOUGHT HERE]** and as grounds therefore states as follows:

**[INSERT HERE PARAGRAPH EXPLAINING
WHY YOU ARE ENTITLED TO THE RELIEF YOU SEEK]**

Prior to filing this Motion, the undersigned contacted the opposing party as to the relief requested herein and said opponent indicated that it [does/does not] oppose the Motion.

Signature of Movant

Date

[ATTACH CERTIFICATE OF SERVICE HERE]

Template 5: Prehearing Exchange

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

In the Matter of:)
)
[RESPONDENT'S NAME]) Docket No. [INSERT NUMBER]
)
Respondent.)

[COMPLAINANT'S/RESPONDENT'S] PREHEARING EXCHANGE]

Comes now [Complainant/Respondent [insert name], [by and through its counsel], and in response to the Prehearing Order issued in this matter, respectfully submits its Prehearing Exchange, stating as follows:

(A) The names of all expert and other witnesses intended to be called at hearing with a brief narrative summary of their expected testimony, or a statement that no witnesses will be called:

[INSERT LIST AND SUMMARIES HERE]

(B) List of all documents and exhibits intended to be introduced into evidence:

**[INSERT NUMBERED LIST HERE AND
ATTACH COPY OF EACH DOCUMENT LISTED]**

(C) Statement of part's views on the appropriate place of hearing and an estimate of the time needed to present its direct case:

The undersigned respectfully suggests that the hearing of this matter be held in: [INSERT NAME OF PLACE HERE] and anticipates that presentation of its case will take ___ hours/days. Translation services [ARE/ARE NOT] necessary for testimony and language to be translated is _____..

(D) Response to other specific requests for information or documents made in the Prehearing Order:

**[INSERT EACH REQUEST AND
RESPONSE THERETO HERE]**

Signature of Movant

Date

[ATTACH CERTIFICATE OF SERVICE HERE]

Template 5: Subpoena

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

In the Matter of:)
)
[RESPONDENT'S NAME]) Docket No. [INSERT NUMBER]
)
Respondent.)

SUBPOENA/SUBPOENA DUCES TECUM

TO: [INSERT HERE NAME, TITLE AND ADDRESS OF
PERSON TO WHOM THE SUBPOENA IS ADDRESSED]

YOU ARE HEREBY COMMANDED, pursuant to [INSERT APPLICABLE
STATUTORY PROVISION AUTHORIZING SUBPOENA *i.e.* Section 307(a) of the Clean
Air Act, 42 U.S.C. Section 7607(a)], and Section 22.43(c) of the Consolidated Rules of Practice,
40 C.F.R. Part 22, TO APPEAR IN PERSON at the following place and times:

DATE AND TIMES: [INSERT DATES/TIMES]

PLACE: [INSERT ADDRESS]

YOU ARE FURTHER COMMANDED:

TO APPEAR IN PERSON before the Administrative Law Judge at the above dates, time
and place;

TO TESTIFY then and there under oath, and make truthful response to all lawful inquiries
and questions put to you by the Parties to the proceedings; and

TO REMAIN IN ATTENDANCE until expressly excused by the Administrative Law
Judge.

YOU ARE FURTHER COMMANDED TO BRING WITH YOU AND PRODUCE at said the earliest time and place identified above the following books, papers, letters or other documentary evidence:

1) [INSERT LIST OF DOCUMENTS HERE]

PURSUANT TO THE AUTHORITY OF [INSERT APPLICABLE STATUTORY PROVISION AUTHORIZING SUBPOENA, *i.e.*, Section 307(a) of the Clean Air Act, 42 U.S.C. Section 7607(a)], FAILURE TO COMPLY WITH THIS SUBPOENA MAY RESULT IN INITIATION OF COURT PROCEEDINGS IN A UNITED STATES DISTRICT COURT AGAINST THE RECIPIENT OF THE SUBPOENA TO COMPEL COMPLIANCE WITH THE SUBPOENA AND ANY FAILURE TO OBEY SUCH ORDER OF THE COURT MAY BE PUNISHED BY SUCH COURT AS CONTEMPT THEREOF.

ISSUED in Washington, D.C., this ____ day of _____, _____. [LEAVE DATE BLANK FOR COMPLETION BY ADMINISTRATIVE LAW JUDGE UPON ISSUANCE].

[NAME]
Administrative Law Judge
Office of Administrative Law Judges
Mail Code 1900L
U.S. Environmental Protection Agency
1200 Pennsylvania Ave. N.W.
Washington, D.C. 20460

Witness Fees and expenses in the same amounts as are paid to witnesses in the courts of the United States shall be paid by the party upon whose request the subpoena is issued.

This subpoena is to be served in accordance with Section 22.05(b) (1) (i) of the Consolidated Rules of Practice, 40 C.F.R. § 22.05(b) (1) (i).

Person at whose request this Subpoena was issued:

[INSERT YOU NAME, ADDRESS
AND TELEPHONE NUMBER HERE]