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§ 78.1 Purpose and scope.

(a)(1) This part shall govern appeals of any final decision of the Administrator under parts 72, 73, 74, 75, 76, and 77 of this chapter; provided that matters listed §78.3(d) and preliminary, procedural, or intermediate decisions, such as draft Acid Rain permits, may not be appealed.

(2) Filing an appeal, and exhausting administrative remedies, under this part shall be a prerequisite to seeking judicial review. For purposes of judicial review, final agency action occurs only when a decision appealable under this part is issued and the procedures under this part for appealing the decision are exhausted.

(b) The decisions of the Administrator that may be appealed include but are not limited to:

(1) Under part 72 of this chapter:

(i) The determination of completeness of an Acid Rain permit application;

(ii) The issuance or denial of an Acid Rain permit and approval or disapproval of a compliance option by the Administrator;

(iii) The approval or disapproval of an early ranking application for Phase I extension under §72.42 of this chapter;

(iv) The final determination of whether a technology is a qualified repowering technology under §72.44 of this chapter;

(v) The issuance or denial of an exemption under §72.14 of this chapter;

(vi) The approval or disapproval of a permit revision;

(vii) The decision on the deduction or return of allowances under §§72.41, 72.42, 72.43, 72.44, 72.91(b), and 72.92(a) and (c) of this chapter; and

(viii) The failure to issue an Acid Rain permit in accordance with the deadline under §72.74(b) of this chapter.

(2) Under part 73 of this chapter:

(i) The decision on a claim of error in a transfer recordation;

(ii) The decision on the allocation of allowances from the Conservation and Renewal Energy Reserve;

(iii) The decision on the allocation of allowances under regulations implementing sections 404(e), 405(g)(4), 405(l)(2), and 410(h) of the Act;

(iv) The decision on the allocation of allowances under part 73, subpart F of this chapter;

(v) The decision on the sale or return of allowances and transfer of proceeds under part 73, subpart E; and
§ 78.2 General.

Part 72 of this chapter, including §§ 72.2 (definitions), 72.3 (measurements, abbreviations, and acronyms), 72.4 (Federal authority), 72.5 (State authority), 72.6 (applicability), 72.7 (new units exemption), 72.8 (retired units exemption), 72.9 (standard requirements), 72.10 (availability of information), and 72.11 (computation of time), shall apply to this part.

§ 78.3 Petition for administrative review and request for evidentiary hearing.

(a)(1) The following persons may petition for administrative review of a decision of the Administrator that is made under parts 72, 74, 75, 76, and 77 of this chapter and that is appealable under § 78.1(a) of this part:

(i) The designated representative for the unit covered by the decision;
(ii) The authorized account representative for an account covered by the decision; and
(iii) Any interested person.

(2) The following persons may petition for administrative review of a decision of the Administrator that is made under part 73 of this chapter and that is appealable under § 78.1(a):

(i) The authorized account representative for any Allowance Tracking System account covered by the decision; and
(ii) With regard to the decision on the allocation of allowances from the Conservation and Renewable Energy Reserve, the certifying official whose application is covered by the decision.

(b)(1) Within 30 days following issuance of a decision under § 78.1 of this part by the Administrator, any
person under paragraph (a) of this section may file a petition with the Environmental Appeals Board for administrative review of the decision. If no petition for administrative review of a decision under §78.1 of this part is filed within such period, the decision shall become final agency action and shall not meet the prerequisite for judicial review under §78.1(a)(2).

(2) The petition may include a request for an evidentiary hearing to resolve any disputed issue of material fact concerning the decision.

(3) At the same time that the petition for administrative review is filed, the petitioner shall:
   (i) Serve a copy of the petition on the designated representative or authorized account representative under paragraph (a)(1) and (2) of this section (unless the designated representative or authorized account representative is the petitioner) and the Administrator; and
   (ii) Mail a notice of the petition to the air pollution control agencies of affected States and any interested person.

(c) The petition for administrative review under this part shall state with specificity:
   (1) Each material factual and legal issue alleged to be in dispute and any such factual issue for which an evidentiary hearing is sought;
   (2) A clear and concise statement of the nature and scope of the interest of the petitioner;
   (3) A clear and concise brief in support of the petition, explaining why the factual or legal issues are material and, if an evidentiary hearing is requested, why direct and cross-examination of witnesses is necessary to resolve such factual issues;
   (4) If an evidentiary hearing is requested, the time estimated to be necessary for an evidentiary hearing;
   (5) If an evidentiary hearing is requested, a certified statement that, in the event of an evidentiary hearing, and without cost or expense to any other party, any of the following persons shall be available to appear and testify:
      (i) The petitioner; and
      (ii) Any officer, director, employee, consultant, or agent of the petitioner.
   (6) Specific references to the contested portions of the decision; and
   (7) Any revised or alternative action of the Administrator sought by the petitioner as necessary to implement the requirements, purposes, or policies of title IV of the Act.

(d) In no event shall a petition for administrative review be filed, or review be available under this part, with regard to:
   (1) Any provision or requirement of part 72, 73, 74, 75, 76, or 77 of this chapter, including any standard requirement under §72.9 of this chapter and any emissions monitoring or reporting requirements under part 75 of this chapter;
   (2) The reliance by the Administrator on a certificate of representation submitted by a designated representative or a certification statement submitted by an authorized account representative under the Acid Rain Program; and
   (3) Actions of the Administrator under sections 112(r), 113, 114, 120, 301, and 303 of the Act.


§ 78.4 Filings.

(a) All original filings made under this part shall be signed by the person making the filing or by an attorney or authorized representative. Any filings on behalf of owners and operators of an affected unit or affected source shall be signed by the designated representative. Any filings on behalf of persons with an interest in allowances in a general account shall be signed by the authorized account representative. The name, address, telephone number, and facsimile number of the person making the filing shall be provided with the filing.

(b)(1) All data and information referred to, or in any way relied upon, in any filings made under this part shall be included in full and may not be incorporated by reference, unless the data or information is contained in the administrative record for the decision being appealed.

(2) Notwithstanding paragraph (b)(1) of this section, State or Federal statutes, regulations, and judicial decisions
§ 78.5 Limitation on filing or presenting new evidence and raising new issues.

(a) Where there was an opportunity for public comment, or a claim of error notification was submitted, prior to the decision that is subject to appeal, no evidence shall be filed or presented, and no issues raised, in a proceeding under this part that were not filed, presented, or raised during the public comment period or in the claim of error notification. Good cause shall include any instance where the party seeking to file or present new evidence or raise a new issue shows that the evidence could not have reasonably been ascertained, filed, or presented, the issue could not have reasonably been ascertained or filed with the Environmental Appeals Board unless a proceeding is pending before a Presiding Officer, in which case they shall be filed with the Hearing Clerk (except as provided under §78.19(d)) of this part.

(e)(1) The party making any filing in a proceeding under this part shall also serve a copy of the filing on each party to the proceeding, or, with regard to a petition for administrative review, on the persons specified in §78.3(b)(3) of this part.

(2) Every filing made under this part shall be accompanied by a certificate of service citing the date, place, time, and manner of service and the names of the persons served.

(f) The Hearing Clerk will maintain and furnish, to any person upon request, the official service list containing the name, service address, telephone, and facsimile numbers of each party to a proceeding under this part and his or her attorney or duly authorized representative.

(g) Affidavits filed under this part shall be made on personal knowledge and belief, set forth only those facts that are admissible into evidence under §78.5 of this part, and show affirmatively that the affiant is competent to testify to the matters stated therein.

§ 78.5 Limitation on filing or presenting new evidence and raising new issues.

(a) Where there was an opportunity for public comment, or a claim of error notification was submitted, prior to the decision that is subject to appeal, no evidence shall be filed or presented, and no issues raised, in a proceeding under this part that were not filed, presented, or raised during the public comment period or in the claim of error notification. Good cause shall include any instance where the party seeking to file or present new evidence or raise a new issue shows that the evidence could not have reasonably been ascertained, filed, or presented, the issue could not have reasonably been ascertained or
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§ 78.11 Intervenors.

(a) Within 30 days (or other shorter, reasonable period established by the Administrator when giving notice) after notice is given under § 78.9 of this part that the petition for administrative review has been filed, any person listed in § 78.3(a) of this part may file a motion for leave to intervene in the proceeding. A motion for leave to intervene under this section shall set forth the grounds for the proposed intervention and may respond to the petition for administrative review. Late motions to intervene may be granted only for good cause shown.

(b) The Environmental Appeals Board of Presiding Officer will grant a motion to intervene only upon an express finding that:

(1) The motion to intervene raises matters relevant to the factual or legal issues to be reviewed;

(2) The intervenor consented to be bound by all stipulations previously entered into by the existing parties, and all orders previously issued, in the proceeding; and

(3) The intervention will promote the interests of justice and will not cause undue delay or prejudice to the rights of the existing parties.


§ 78.12 Standard of review.

(a) On appeal of a decision of the Administrator prior to which there was an opportunity for public comment, or to submit a claim of error notification:

(1) Except as provided under paragraph (a)(2) of this section, the petitioner shall have the burden of going forward and of persuasion to show that a finding of fact or conclusion of law underlying the decision is clearly erroneous or that an exercise of discretion or policy determination underlying the decision is arbitrary and capricious or otherwise warrants review.

(2) The owners and operators of the source or unit involved shall have the burden of persuasion that an Acid Rain permit or an exemption under § 72.14 of this chapter was properly issued or should be issued.

(b) On appeal of a decision of the Administrator not covered by paragraph (a) of this section, the Administrator shall have the burden of going forward to show the rational basis for the decision. The petitioner shall have the burden of persuasion to show that a finding of fact or conclusion of law underlying the decision is clearly erroneous or that an exercise of discretion or policy determination underlying the decision is arbitrary and capricious or otherwise warrants review.


§ 78.13 Scheduling orders and prehearing conferences.

(a) If a request for an evidentiary hearing is granted, the Presiding Officer will issue an order scheduling the following:
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§ 78.14

(1) The filing by each party of a narrative statement of position on each factual issue in controversy.

(2) The identification of any witness that a party expects to call and of any written testimony, documents, papers, exhibits, or other materials that a party expects to introduce into evidence. At the request of the Presiding Officer, the party shall include a brief narrative summary of any witness' expected testimony and of any such materials.

(3) The filing of written testimony, in accordance with §78.14(b) of this part, and other evidence in support of a narrative statement.

(4) The filing of any motions by any party, including motions for the production of documentation, data, or other information material to the disputed facts to be addressed at the hearing.

(b) The Presiding Officer may also, on motion or sua sponte, schedule one or more pre-hearing conferences on the record to address any of the following:

(1) Simplification, clarification, amplification, or limitation of the issues.

(2) Admissions and stipulations of facts and determinations of the genuineness of documents.

(3) Objections to the introduction into evidence at the hearing of any written testimony or other submissions proposed by a party; provided that at any time before the end of the hearing, any party may make, and the Presiding Officer may consider and rule upon, a motion to strike testimony or other evidence (other than evidence included in the administrative record (if any) under §72.63 of this chapter) on the grounds of relevance, competency, or materiality.

(4) Taking official notice of any matters.

(5) Grouping of parties with substantially similar interests to eliminate redundant evidence, motions, objections, and briefs.

(6) Such other matters that may expedite the hearing or aid in the disposition of matters in dispute.

(c) The Presiding Officer will issue an order (which may be in the form of a transcript) reciting the actions taken at any pre-hearing conferences, setting the schedule for any hearing, and stating any areas of factual and legal agreement and disagreement and the methods and procedures to be used in developing any evidence.

§ 78.14 Evidentiary hearing procedure.

(a) If a request for an evidentiary hearing is granted, the Presiding Officer will conduct a fair and impartial hearing on the record, take action to avoid unnecessary delay in the disposition of the proceedings, and maintain order. For these purposes, the Presiding Officer may:

(1) Administer oaths and affirmations.

(2) Regulate the course of the hearings and prehearing conferences and govern the conduct of participants.

(3) Examine witnesses.

(4) Identify and refer issues for interlocutory decision under §78.19 of this part.

(5) Rule on, admit, exclude, or limit evidence.

(6) Establish the time for filing motions, testimony and other written evidence, and briefs and making other filings.

(7) Rule on motions and other pending procedural matters, including but not limited to motions for summary disposition in accordance with §78.15 of this part.

(8) Order that the hearing be conducted in stages whenever the number of parties is large or the issues are numerous and complex.

(9) Allow direct and cross-examination of witnesses only to the extent the Presiding Officer determines that such direct and cross-examination may be necessary to resolve disputed issues of material fact; provided that no direct or cross-examination shall be allowed on questions of law or policy or regarding matters that are not subject to challenge in the evidentiary hearing.

(10) Limit public access to the hearing where necessary to protect confidential business information. The Presiding Officer will provide written notice of the hearing to the parties, and where the hearing will be open to the public, notice in the Federal Register no later than 15 days (or other shorter, reasonable period established by the Presiding Officer) prior to commencement of the hearings.
§ 78.15 Motions in evidentiary hearings.

(a) Any party may make a motion to the Presiding Officer on any matter relating to the evidentiary hearing in accordance with the scheduling orders issued under §78.13 of this part. All motions shall be in writing and served as provided in §78.4 of this part, except those made on the record during an oral hearing before the Presiding Officer.

(b) Any party may make a motion for a summary disposition in its favor on any factual issue on the basis that there is no genuine issue of material fact. When a motion for summary disposition is made and supported, any party opposing the motion may not rest upon mere allegations or denials, but must show, by affidavit or by other materials subject to consideration by the Presiding Officer, that there is a genuine issue of material fact.

(c)(1) The Presiding Officer will admit all evidence that is not irrelevant, immaterial, unduly repetitious, or otherwise unreliable or of little probative value. Evidence relating to settlement that would be excluded in the Federal courts under the Federal Rules of Evidence shall not be admissible.

(2) Whenever any evidence or testimony is excluded by the Presiding Officer as inadmissible, all such evidence will remain a part of the record as an offer of proof. The party seeking the admission of oral testimony may make an offer of proof by means of a brief statement on the record describing the testimony excluded.

(3) When two or more parties have substantially similar interests and positions, the Presiding Officer may limit the number of attorneys or authorized representatives who will be permitted to examine witnesses and to make and argue motions and objections on behalf of those parties.

(4) Rulings of the Presiding Officer on the admissibility of evidence or testimony, the propriety of direct and cross-examination, and other procedural matters will appear in the record of the hearing and control further proceedings unless reversed by the Presiding Officer or as a result of an interlocutory appeal taken under §78.19 of this part.

(5) All objections shall be made promptly or be deemed waived; provided that parties shall be presumed to have taken exception to an adverse ruling. No objection shall be deemed waived by further participation in the hearing.

§ 78.19 Interlocutory appeal.

(a) Interlocutory appeal from orders or rulings of the Presiding Officer made during the course of a proceeding may be taken if the Presiding Officer certifies those orders or rulings to the Environmental Appeals Board for interlocutory appeal on the record. Any requests to the Presiding Officer to certify an interlocutory appeal shall be filed within 10 days of notice of the order or ruling and shall state briefly the grounds for the request.

(b)(1) Within 15 days of the filing of any request for interlocutory appeal, the Presiding Officer may certify an order or ruling for interlocutory appeal to the Environmental Appeals Board if:

(i) The order or ruling involves an important question on which there is substantial ground for difference of opinion, and

(ii) Either:

(A) An immediate appeal of the order or ruling will materially advance the ultimate completion of the proceeding, or

§ 78.20 Appeal of decision of Administrator or proposed decision to the Environmental Appeals Board.

(a) Within 30 days after the issuance of a proposed decision by a Presiding Officer under this part, any party may appeal any matter set forth in the proposed decision, or any other order or ruling made during the proceeding to which the party objected during the proceeding before the Presiding Officer, by filing an objection with the Environmental Appeals Board. On appeal of an order, ruling, or proposed decision of a Presiding Officer:

(1) The party filing the objection shall have the burden of going forward to show that the order, ruling, or proposed decision is based on a finding of fact or conclusion of law that is clearly erroneous; or a policy determination or exercise of discretion that is arbitrary and capricious or otherwise warrants review; and

(2) The petitioner or the owners and operators shall have the burden of persuasion, as set forth in §78.12(a) (1) and (2) of this part.

(b) Within 45 days (or other shorter, reasonable period established by the Environmental Appeals Board) after issuance of a proposed decision of a Presiding Officer, the Environmental Appeals Board may issue sua sponte in its discretion a notice of intent to review such proposed decision. The Environmental Appeals Board will serve such notice upon all parties to the proceeding.

(c) Within a reasonable time following the filing of a petition for administrative review of a decision of the Administrator under §78.3 of this part, or, if any issues raised by such petition are referred to the Presiding Officer, the filing of objections under paragraph (a) of this section or the issuance of a notice of intent to review under paragraph (b) of this section, the Environmental Appeals Board will issue an order affirming, reversing, modifying, or remanding the decision or proposed decision, as appropriate. Prior to issuing this order, the Environmental Appeals Board may provide an opportunity for parties to file additional briefs.

(d) If the Environmental Appeals Board issues an order affirming, reversing, or modifying the decision of the Administrator, then the decision as supplemented or changed by the order shall be final agency action.

(e) If the Environmental Appeals Board issues an order affirming, reversing, or modifying the proposed decision, the proposed decision, as supplemented or changed by the order, shall be final agency action.

(f) If the Environmental Appeals Board issues an order remanding the proceeding, then final agency action
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§ 79.2 Occurs upon completion of the remanded proceeding, including any appeals to the Environmental Appeals Board in the remanded proceeding.


PART 79—REGISTRATION OF FUELS AND FUEL ADDITIVES

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AUTHORITY: 42 U.S.C. 7414, 7524, 7545 and 7601.

SOURCE: 40 FR 52011, Nov. 7, 1975, unless otherwise noted.

Subpart A—General Provisions

§ 79.1 Applicability.

The regulations of this part apply to the registration of fuels and fuel additives designated by the Administrator, pursuant to section 211 of the Clean Air Act (42 U.S.C. 1857f–6c, as amended by section 9, Pub. L. 91–604).

§ 79.2 Definitions.

As used in this part, all terms not defined herein shall have the meaning given them in the Act:
(b) Administrator means the Administrator of the Environmental Protection Agency.
(c) Fuel means any material which is capable of releasing energy or power by combustion or other chemical or physical reaction.
(d) Fuel manufacturer means any person who, for sale or introduction into commerce, produces, manufactures, or imports a fuel or causes or directs the alteration of the chemical composition of a bulk fuel, or the mixture of chemical compounds in a bulk fuel, by adding to it an additive, except:
(1) A party (other than a fuel refiner or importer) who adds a quantity of additive(s) amounting to less than 1.0 percent by volume of the resultant additive(s)/fuel mixture is not thereby considered a fuel manufacturer.