

United States  
Environmental Protection  
Agency

Office of Administrative  
Law Judges

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# EPA

## Office of Administrative Law Judges

# Practice Manual

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**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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- *How do I respond if EPA files a motion for accelerated decision?*
- *How do I request that the complaint be dismissed?*
- *What if I disagree with the judge's decision on a motion?*
- *What does the judge expect regarding stipulations?*
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### **III. APPENDIX**

#### Pleading Templates













agreement in your motion. This saves time particularly if the parties are settling.

**If the Complaint is amended, must I answer the Amended Complaint? (See Rule 22.14(c))**

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? (See Rule 22.15)**

- 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 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.
- 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" in accordance with Rules 22.16(a) and 22.20(a). 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.
- 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. *Lazarus, Inc.*, 7 E.A.D. 318, 1997 EPA App. LEXIS 27 (EAB 1993).

- For further information on amending an answer, see *Isochem North America, LLC*, EPA Docket No. TSCA-02-2006-9143, 2007 EPA ALJ LEXIS 37 \*31-43 (ALJ, Dec. 27, 2007)(Order on Complainant's Motion for Accelerated Decision and on Respondent's Cross Motion to Amend Answer and to Dismiss Complaint).

**What if Respondent requests in his Answer that the Complaint be dismissed? (See Rule 22.16(a))**

- 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? (See Rules 22.18, 22.22)**

- 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 finite 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 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 that 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.
- 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' testimony would be on cross-examination, or the witness is unavailable. However, be aware that paper hearings are not common in ALJ proceedings.

- 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 the 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 may nevertheless be 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? (See Rule 22.18(d))**

- 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 the role of either 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.
- 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.



- 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.
  - It 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?**

- 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 exchange. 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? (See Rule 22.8)**

- **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? (See Rules 22.8, 22.19(a) and 22.22(a))**

- 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 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? (See Rule 22.12)**

- NEVER file a single document 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. *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).
- 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? (See Rule 22.16)**

- By 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 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; they are generally not used by the Judges.

**How do I respond to a motion that I disagree with? (See Rules 22.16(b), 22.7(c))**

- You must file and serve a written response (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 under Rule 22.7(c).
- 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? (See Rule 22.7(a))**

The document is then due the next business day.

**What procedures apply to the Prehearing Exchange? (See Rules 22.19(a) and 22.22)**

- 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.
- 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. *JHNY, Inc.*,

- CAA App. No. 04-09, 2005 EPA App. LEXIS 22 \*41 (EAB, Sept. 30, 2005).
- 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:
    - Copies of all documents you wish the Judge to consider
    - 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.
    - 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, or may choose only to cross examine EPA’s witnesses to defend against the charges in the complaint. 5 U.S.C. § 556(d). 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 under Rule 22.19(e). *Strong Steel Products, LLC*, EPA Docket No. RCRA-5-2001-0016 et al., 2003 EPA ALJ LEXIS 191 \*41 (ALJ, Oct. 27, 2003)(Order on Motion for Leave to File Amended Complaint and Strike Defenses and Motion in Limine). However, a witness may not be allowed to 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. *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).
- 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? (See Rules 22.5(d), 22.19(g) and 22.22(b), and 40 C.F.R. part 2 subpart B)**

- 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 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? (See Rule 22.19(a) and 22.22(a)(1))**

- If, after you filed your prehearing exchange, you find another document or witness 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. *Strong Steel Products, LLC*, EPA Docket No. CAA-5--2003-0009, 2005 EPA ALJ LEXIS 10 \*12 (ALJ, Feb. 18, 2005).

**What if I find that something in my prehearing exchange, or in my response to discovery, is outdated, inaccurate or incomplete? (See Rule 22.19(f) and 22.22(a)(1))**

- If, after you filed your prehearing exchange, 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, 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? (See Rule 22.17)**

- 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. *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)
- The Judge is not bound by the standard for default under Federal Rules of Civil Procedure in EPA administrative proceedings. *Pyramid Chem. Co.*, 11 E.A.D. 657 n. 9, 2004 EPA App. LEXIS 32 \*15 (EAB 2004).

**What if I receive a Default Order? (See Rule 22.17(c))**

- 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.

**How can I get information from the opposing party or its witnesses that may help my case? (See Rule 22.19(e))**

- 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. *Frank Acierno*, EPA Docket No. CWA-03-2005-0376, 2008 EPA ALJ LEXIS 6 \*110, \*116 (ALJ, Feb. 15, 2008)(Order on Motions). 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. *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).
- Subpoenas for discovery purposes are rarely requested.
- The standard for discovery under the Rules is more restrictive than that under the Federal Rules of Civil Procedure. *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).
- 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](http://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? (See Rule 22.19(e))**

- 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 under Rule 22.19(e)(1).
- 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"), 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. *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).
- 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 boxloads 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 the Judge approves. *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”).
- Incomplete and/or untimely submission of information ordered by the Judge to be filed may result in a decision on default (*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)), or it may result in an adverse inference against the party. *William E. Comely, Inc.*, 11 E.A.D. 247 (EAB 2004).

#### **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. *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).

#### **How do I request that the complaint be dismissed? (See Rules 22.20 and 22.24(a))**

- 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 based upon failure to state a case, like a motion under Federal Rule of Civil Procedure 12(b) or 12(c); and
  - (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? (See Rules 22.29 and 22.32)**

- 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:
  - 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
  - as to the content of an exhibit (an agreement that what appears on or is written in the document is true and accurate), or
  - 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, under Rule 22.22(c). 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.

### **When and where will a hearing be held? (See Rules 22.21(c) and (d))**

- 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? (See Rules 22.19(e)(4) and (5), 22.21(b), and 22.22(d))**

- 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





### **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, enlargements of exhibits (such as maps), powerpoint, or items on overhead projector?**

- Yes, if you submit the video, unenlarged 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 Judge finds that witness testimony along with photographs, diagrams, maps and/or videos are insufficient to 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 organize your case, witnesses and exhibits prior to hearing.
- Appropriate civility and decorum is expected to be maintained by all hearing participants.



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.

# **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] ) **Docket No. [INSERT NUMBER]**  
 )  
Respondent. )

**[PLEADING TITLE]**





## 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 therefor 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 therefor 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]**



(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.

