

§ 78.16

(c) Within 10 days (or other shorter, reasonable period established by the Presiding Officer) after a motion made on the record or service of any written motion, any party may file a response to the motion.

(d) The Presiding Officer may schedule an oral argument and call for the filing of briefs on any motion. The Presiding Officer will rule on the motion within a reasonable time after the date that responses to the motion may be filed under paragraph (c) of this section and that any oral argument or filing of briefs is completed.

(e) If all factual issues are decided by summary disposition prior to the hearing, no hearing will be held and the Presiding Officer will issue a proposed decision under § 78.18 of this part. If a summary disposition is denied or if partial summary disposition is granted, the hearing shall proceed on the remaining issues.

[58 FR 3760, Jan. 11, 1993, as amended at 62 FR 55488, Oct. 24, 1997]

§ 78.16 Record of appeal proceeding.

(a) The proposed decision issued by the Presiding Officer, transcripts of oral hearings or oral arguments, written direct and rebuttal testimony, and any other written materials of any kind filed in the proceeding will be part of the record and will be available to the public in the office of the Hearing Clerk, subject to the requirements of part 2 of this chapter.

(b) Hearings and oral arguments shall be recorded as specified by the Presiding Officer, and thereupon transcribed. After the hearing or oral argument, the reporter will certify and file with the Hearing Clerk.

(1) The original transcript; and

(2) Any exhibits received or offered into evidence at the hearing.

(c) The Hearing Clerk will promptly give written notice to the parties when any transcript is available. Any party that desires a copy of the transcript may obtain a copy upon payment of costs.

(d) The Presiding Officer will allow witnesses, parties, and their counsel or representatives:

(1) Up to 7 days (or other shorter, reasonable period established by the Presiding Officer) from issuance of the no-

40 CFR Ch. I (7-1-07 Edition)

tice under paragraph (c) of this section in order to file written proposed corrections of the transcript necessary to correct errors made in the transcribing; and

(2) Up to 7 days (or other shorter, reasonable period established by the Presiding Officer) from the submission of the corrections in order to file objections to the proposed corrections.

(e) The Presiding Officer will determine which, if any, corrections should be made to the transcript and incorporate them into the record.

[58 FR 3760, Jan. 11, 1993, as amended at 62 FR 55488, Oct. 24, 1997]

§ 78.17 Proposed findings and conclusions and supporting brief.

Within 45 days (or other shorter, reasonable period established by the Presiding Officer) after issuance of a notice under § 78.16(c) of this part that the complete transcript of the evidentiary hearing is available, any party may file with the Hearing Clerk proposed findings and conclusions on the issues referred to the Presiding Officer and a brief in support thereof. Briefs shall contain appropriate references to the record. The Presiding Officer may allow reply briefs.

[58 FR 3760, Jan. 11, 1993, as amended at 62 FR 55488, Oct. 24, 1997]

§ 78.18 Proposed decision.

(a) The Presiding Officer will review and evaluate the record, including the proposed findings and conclusions and any briefs filed by the parties, and issue a proposed decision on the factual, policy, and legal issues referred by the Environmental Appeals Board for decision under § 78.6(b)(2)(ii) of this part, accompanied by findings of fact and proposed conclusions of law, as appropriate, within a reasonable time after the evidentiary hearing is completed. The Hearing Clerk will promptly serve copies of the proposed decision on all parties and on the Environmental Appeals Board.

(b) The proposed decision of the Presiding Officer shall become the final agency action under section 307 of the Act unless:

Environmental Protection Agency

§ 78.20

(1) A party files objections with the Environmental Appeals Board pursuant to § 78.20(a) of this part, or

(2) The Environmental Appeals Board *sua sponte* files a notice that it will review the decision under § 78.20(b) of this part.

[58 FR 3760, Jan. 11, 1993, as amended at 62 FR 55488, Oct. 24, 1997]

§ 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

(B) A review after the proceeding is completed will be inadequate or ineffective.

(2) If the Presiding Officer takes no action within 15 days of the filing of a request for interlocutory appeal, the request shall be automatically dismissed without prejudice.

(c) If the Presiding Officer grants certification, the Environmental Appeals Board may accept or decline the interlocutory appeal within 30 days of certification. If the Environmental Appeals Board decides that certification was improperly granted, it will decline to hear the interlocutory appeal. If the Environmental Appeals Board takes no action within 30 days of certification, the interlocutory appeal shall be automatically dismissed without prejudice.

(d) If the Presiding Officer declines to certify an order or ruling for an inter-

locutory appeal, the order or ruling may be reviewed by the Environmental Appeals Board only upon an appeal of the proposed decision following completion of the proceedings before the Presiding Officer, except when the Environmental Appeals Board determines, upon motion of a party and in exceptional circumstances, that to delay review would not be in the public interest. Such motion shall be filed with Environmental Appeals Board within 5 days after the earlier of automatic dismissal of the request for interlocutory appeal or receipt by the party of notification that the Presiding Officer declines to certify an order or ruling for interlocutory appeal.

(e) The failure of a party to request an interlocutory appeal shall not prevent an appeal of an order or ruling as part of an appeal of a proposed decision under § 78.20 of this part.

§ 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