

SUBCHAPTER 12. ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES

§ 1201 Scope of Rules

~~These rules of practice govern all adjudicatory proceedings for the assessment of civil penalties under section 305 of the NNPDES Act. Questions arising at any stage of the proceeding which are not addressed in these rules or the Act shall be resolved at the discretion of the Director or Presiding Officer as appropriate. The provisions of Subpart 3 of the Uniform Regulations shall govern the administrative assessment of civil penalties.~~

§ 1202 Definitions

~~The following definitions apply to subchapter 12:~~

- ~~(a) "Complainant" means any person authorized to issue a complaint on behalf of the Director to persons alleged to be in violation of the NNPDES Act. The complainant shall not be any other person who will participate or advise in the decision.~~
- ~~(b) "Complaint" means a written communication, alleging one or more violations of specific provisions of the NNPDES Act, or regulations or a permit or implementing mechanism issued thereunder, issued by the complainant to a person under §§ 1211 and 1212.~~
- ~~(c) "Consent Agreement" means any written document, signed by the parties, containing stipulations or conclusions of fact or law and a proposed penalty acceptable to both complainant and respondent.~~
- ~~(d) "Decision" means the decision issued by the Presiding Officer based upon the record of the proceedings out of which it arises.~~
- ~~(e) "Hearing" means a hearing on the record open to the public and conducted under these rules of practice.~~
- ~~(f) "Hearing Clerk" means the individual designated by the Director to act as such. The address is Hearing Clerk, Navajo Nation EPA, P.O. Box 339, Window Rock, Arizona 86515.~~
- ~~(g) "Order" means an decision and order, accelerated decision, decision to dismiss, or default order, disposing of a matter in controversy between the parties, issued by the Presiding Officer or Director.~~
- ~~(h) "Party" means any person that participates in a hearing as complainant, respondent, or intervenor.~~
- ~~(i) "Presiding Officer" means the individual designated by the Director to serve as Presiding Officer, or the Director, if no person is designated.~~

§ 1203 Powers and Duties of the Presiding Officer; Disqualification

- ~~(a) **Presiding Officer.** The Presiding Officer shall conduct a fair and impartial proceeding, assure that the facts are fully elicited, adjudicate all issues, and avoid delay. The Presiding Officer shall have authority to:~~
 - ~~(1) Conduct administrative hearings under these rules of practice;~~
 - ~~(2) Rule upon motions, requests, and offers of proof, dispose of procedural requests, and issue all necessary orders;~~
 - ~~(3) Administer oaths and affirmations and take affidavits;~~

- ~~(4) Examine witnesses and receive documentary or other evidence;~~
- ~~(5) For good cause, upon motion or sua sponte, order a party, or an officer or agent thereof, to produce testimony, documents, or other nonprivileged evidence, and failing the production thereof without good cause being shown, draw adverse inferences against that party;~~
- ~~(6) Admit or exclude evidence;~~
- ~~(7) Hear and decide questions of facts, law, or discretion;~~
- ~~(8) Require parties to attend conferences for the settlement or simplification of the issues, or the expedition of the proceedings;~~
- ~~(9) Issue subpoenas authorized by the Act; and~~
- ~~(10) Do all other acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by these rules.~~

~~(b) Disqualification; Withdrawal~~

- ~~(1) The Director or the Presiding Officer may not perform functions provided for in these rules of practice regarding any matter in which they:
 - ~~A. have a financial interest; or~~
 - ~~B. have any relationship with a party or with the subject matter which would make it inappropriate for them to act.~~~~

~~Any party may at any time by motion to the Director request that the Presiding Officer be disqualified or request that the Director disqualify himself or herself from the proceeding. The Director or the Presiding Officer may at any time withdraw from any proceeding in which they deem themselves disqualified or unable to act for any reason.~~

- ~~(2) If the Director or the Presiding Officer is disqualified or withdraws from the proceeding, a qualified individual who has none of the infirmities listed in paragraph (b) (1) of this section shall be assigned to replace him/her. The Deputy Director shall act as the Director, should the Director withdraw or disqualify himself or herself. If the Deputy Director is unable to act, the Director shall assign a senior program manager who is not disqualified to replace him or her. The Director shall assign a new Presiding Officer if the original Presiding Officer is disqualified or withdraws.~~

~~§ 1204 Filing, Service, and Form of Pleadings and Documents~~

~~(a) Filing of Pleadings and Documents~~

- ~~(1) Except as otherwise provided, the original and one copy of the complaint, and the original of the answer and of all other documents served in the proceeding shall be filed with the Hearing Clerk.~~
- ~~(2) A certificate of service shall accompany each document filed or served. Except as otherwise provided, a party filing documents with the Hearing Clerk, after the filing of the answer, shall serve copies thereof upon all other parties and the Presiding Officer. The Presiding Officer shall maintain a duplicate file during the course of the proceeding.~~
- ~~(3) When the Presiding Officer corresponds directly with the parties, the original of the correspondence shall be sent to the Hearing Clerk, a copy shall be maintained by the Presiding Officer in the duplicate file, and a copy~~

~~shall be sent to all parties. Parties who correspond directly with the Presiding Officer shall in addition to serving all other parties send a copy of all such correspondence to the Hearing Clerk. A certificate of service shall accompany each document served under this subsection.~~

~~**(b) Service of Pleadings and Documents**~~

~~**(1) Service of Complaint**~~

~~**A.** Service of a copy of the signed original of the complaint, together with a copy of these rules of practice, may be made personally or by certified mail, return receipt requested, on the respondent (or representative).~~

~~**B.** Service upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name shall be made by personal service or certified mail, as prescribed by paragraph (b) (1) (A) of this section, directed to an officer, partner, a managing or general agent, or to any other person authorized by appointment or by Navajo Nation, Federal or State law to receive service of process.~~

~~**C.** Service upon an officer or agency of the United States shall be made by delivering a copy of the complaint to the officer or agency, or in any manner prescribed for service by applicable regulations. If the agency is a corporation, the complaint shall be served as prescribed in paragraph (b) (1) (B) of this section.~~

~~**D.** Service upon the Navajo Nation, Tribal, State or local unit of government, including chapters, or a Navajo Nation, Tribal, State, local or chapter officer, agency, department, corporation or other instrumentality shall be made by serving a copy of the complaint in the manner prescribed below:~~

~~**i.** If upon the Navajo Nation, Tribal, State, local or chapter unit of government, or department, agency, corporation or other instrumentality, by delivering a copy of the complaint to the chief executive officer thereof;~~

~~**ii.** If upon a Navajo Nation, Tribal, State, local or chapter officer by delivering a copy to such officer.~~

~~**E.** Proof of service of the complaint shall be made by affidavit of the person making personal service, or by properly executed return receipt. Such proof of service shall be filed with the complaint immediately upon completion of service.~~

~~**(2)** Service of documents other than complaint, rulings, orders, and decisions. All documents other than the complaint, rulings, orders, and decisions, may be served personally or by certified or first class mail.~~

~~**(c) Form of Pleadings and Documents**~~

~~**(1)** Except as provided herein, or by order of the Director or Presiding Officer, there are no specific requirements as to the form of documents.~~

~~**(2)** The first page of every pleading, letter, or other document shall contain a caption identifying the respondent and the docket number which is exhibited on the complaint.~~

~~**(3)** The original of any pleading, letter or other document (other than exhibits) shall be signed by the party filing or by counsel or other representative. The signature constitutes a representation by the signer that he/she has read the pleading, letter or other document, that to the best of his/her knowledge, information and belief, the statements made therein are~~

~~true, and that it is not interposed for delay.~~

~~(4) The initial document filed by any person shall contain his/her name, address and telephone number. Any changes in this information shall be communicated promptly to the Hearing Clerk, Presiding Officer, and all parties to the proceeding. A party who fails to furnish such information and any changes thereto shall be deemed to have waived the right to notice and service under these rules.~~

~~(5) The Director, Presiding Officer, or Hearing Clerk may refuse to file any document which does not comply with this paragraph. Written notice of such refusal, stating the reasons therefor, shall be promptly given to the person submitting the document. Such person may amend and resubmit any document refused for filing upon motion granted by the Director or the Presiding Officer, as appropriate.~~

~~§ 1205 Filing and Service of Rulings, Orders, and Decisions~~

~~All rulings, orders, decisions, and other documents issued by the Director or Presiding Officer, as appropriate, shall be filed with the Hearing Clerk. Copies of such rulings, orders, decisions, or other documents shall be served personally, or by certified mail, return receipt requested, upon all parties by the Director or the Presiding Officer, as appropriate.~~

~~§ 1206 Computation and Extension of Time~~

~~(a) Computation. In computing any period of time prescribed or allowed in these rules of practice, except as otherwise provided, the day of the event from which the designated period begins to run shall not be included. Saturdays, Sundays, and Navajo Nation legal holidays shall be included. When a stated time expires on a Saturday, Sunday or legal holiday, the stated time period shall be extended to include the next business day.~~

~~(b) Extensions of time. The Director or the Presiding Officer, as appropriate, may grant an extension of time for the filing of any pleading, document, or motion:~~

~~(1) upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties; or~~

~~(2) upon his/her own motion.~~

~~Such a motion by a party may only be made after notice to all other parties, unless the movant can show good cause why serving notice is impracticable. The motion shall be filed in advance of the date on which the pleading, document or motion is due to be filed, unless the failure of a party to make timely motion for extension of time was the result of excusable neglect.~~

~~(c) Service by mail. Service of the complaint is complete when the return receipt is signed. Service of all other pleadings and documents is complete upon mailing. Where a pleading or document is served by mail, five (5) days shall be added to the time allowed by these rules for the filing of a responsive pleading or document.~~

~~(d) Personal service. Personal service is complete when the document is delivered.~~

~~§ 1207 Ex Parte Discussion of Proceeding~~

~~At no time after the issuance of the complaint shall the Director, the Presiding Officer, or any other person who is likely to advise these officials in the decision on the case, discuss ex parte the merits of the proceeding~~

~~with any interested person outside Navajo EPA, with any Navajo Nation Executive Branch staff member who performs a prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person. Any ex parte memorandum or other communication addressed to the Director or the Presiding Officer during the pendency of the proceeding and relating to the merits thereof, by or on behalf of any party shall be regarded as argument made in the proceeding and shall be served upon all other parties. The other parties shall be given an opportunity to reply to such memorandum or communication.~~

~~§ 1208 Examination of Documents Filed~~

~~(a) Subject to the provisions of law restricting the public disclosure of confidential information, any person may, during Navajo EPA business hours, inspect and copy any document filed in any proceeding. Such documents shall be made available by the Hearing Clerk.~~

~~(b) The cost of duplicating documents filed in any proceeding shall be borne by the person seeking copies of such documents. Navajo EPA may waive this cost in appropriate cases.~~

~~§ 1209 Appearances~~

~~Any party may appear in person or by counsel or other representative. A partner may appear on behalf of a partnership and an officer may appear on behalf of a corporation. Persons who appear as counsel or other representative must conform to the standards of conduct and ethics required of practitioners before the courts of the Navajo Nation.~~

~~§ 1210 Intervention~~

~~(a) Motion. A motion for leave to intervene in any proceeding conducted under these rules of practice must set forth the grounds for the proposed intervention, the position and interest of the movant. Any resident of the Navajo Nation which has an interest that is or may be adversely affected may intervene as of right in any administrative action brought by the Director under these provisions. Any person already a party to the proceeding may file an answer to a motion to intervene, within ten (10) days after service of the motion for leave to intervene.~~

~~(b) When filed. A motion for leave to intervene in a proceeding must ordinarily be filed before the first prehearing conference or, in the absence of a prehearing conference, before the initiation of correspondence under § 1217(e), or if there is no such correspondence, prior to the setting of a time and place for a hearing. Any motion filed after that time must include, in addition to the information set forth in paragraph (a) of this section, a statement of good cause for the failure to file in a timely manner. The intervenor shall be bound by any agreements, arrangements and other matters previously made in the proceeding.~~

~~(c) Disposition. The Director or Presiding Officer shall decide on the motion to intervene and any answers that are filed in a timely manner. The intervenor shall become a full party to the proceeding upon the granting of leave to intervene.~~

~~(d) Amicus curiae. The motion shall identify the interest of the applicant and shall state the reasons why the proposed amicus brief is desirable. If the motion is granted, the Presiding Officer or Director shall issue an order setting the time for filing such brief.~~

~~§ 1211 Issuance of Complaint~~

~~If the complainant has reason to believe that a person has violated or is in violation of any provision, requirement or prohibition of the NNPDES Act, including, but not limited to, a regulation adopted pursuant to the Act, a permit or order issued pursuant to the Act or a fee assessed under the Act, he/she may institute a proceeding for the assessment of a civil penalty by issuing a complaint under the Act and these rules of practice.~~

~~§ 1212 Content and Amendment of the Complaint~~

~~(a) Complaint for the assessment of a civil penalty. Each complaint for the assessment of a civil penalty shall include:~~

- ~~(1) A statement reciting the section(s) of the Act authorizing the issuance of the complaint;~~
- ~~(2) Specific reference to each provision of the Act and implementing regulations, if applicable, which respondent is alleged to have violated;~~
- ~~(3) A concise statement of the factual basis for alleging the violation;~~
- ~~(4) The amount of the civil penalty which is proposed to be assessed;~~
- ~~(5) A statement explaining the reasoning behind the proposed penalty;~~
- ~~(6) Notice of respondent's right to request a hearing on any material fact contained in the complaint, or on the appropriateness of the amount of the proposed penalty.~~

~~A copy of these rules of practice shall accompany each complaint served.~~

~~(b) Derivation of proposed civil penalty. The dollar amount of the proposed civil penalty shall be determined in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty and with any civil penalty guidelines issued under the Act.~~

~~(c) Amendment of the complaint. The complainant may amend the complaint once as a matter of right at any time before the answer is filed. Otherwise the complainant may amend the complaint only upon motion granted by the Presiding Officer or Director, as appropriate. Respondent shall have twenty (20) additional days from the date of service of the amended complaint to file his/her answer.~~

~~(d) Withdrawal of the complaint. The complainant may withdraw the complaint, or any part thereof, without prejudice one time before the answer has been filed. After one withdrawal before the filing of an answer, or after the filing of an answer, the complainant may withdraw the complaint, or any part thereof, without prejudice, only upon motion granted by the Presiding Officer or Director, as appropriate.~~

~~§ 1213 Answer to the Complaint~~

~~(a) General. Where respondent:~~

- ~~(1) contests any material fact upon which the complaint is based;~~
- ~~(2) contends that the amount of the penalty proposed in the complaint is inappropriate; or~~
- ~~(3) contends that he/she is entitled to judgment as a matter of law, he/she shall file a written answer to the complaint with the Hearing Clerk. Any such answer to the complaint must be filed with the Hearing Clerk within thirty (30) days after service of the complaint.~~

~~(b) Contents of the answer.~~ The answer shall clearly and directly admit, deny or explain each of the factual allegations contained in the complaint with regard to which respondent has any knowledge. Where respondent has no knowledge of a particular factual allegation and so states, the allegation is deemed denied. The answer shall also state:

~~(1) the circumstances or arguments which are alleged to constitute the grounds of defense;~~

~~(2) the facts which respondent intends to place at issue; and~~

~~(3) whether a hearing is requested.~~

~~(c) Request for hearing.~~ A hearing upon the issues raised by the complaint and answer shall be held upon request of respondent in the answer. In addition, a hearing may be held at the discretion of the Presiding Officer, sua sponte, if issues appropriate for adjudication are raised in the answer.

~~(d) Failure to admit, deny, or explain.~~ Failure of respondent to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of the allegation.

~~(e) Amendment of the answer.~~ The respondent may amend the answer to the complaint upon motion granted by the Presiding Officer.

~~§ 1214 Motions~~

~~(a) General.~~ All motions, except those made orally on the record during a hearing, shall:

~~(1) be in writing;~~

~~(2) state the grounds therefor with particularity;~~

~~(3) set forth the relief or order sought; and~~

~~(4) be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon. Such motions shall be served as provided by § 1204(b)(2).~~

~~(b) Response to motions.~~ A party's response to any written motion must be filed within ten (10) days after service of such motion, unless additional time is allowed for such response. The response shall be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon. If no response is filed within the designated period, the parties may be deemed to have waived any objection to the granting of the motion. The Presiding Officer or Director, as appropriate, may set a shorter time for response, or make such orders concerning the disposition of motions as they deem appropriate.

~~(c) Decision.~~ The Presiding Officer or Director, as appropriate, shall rule on all motions. Oral argument on motions will be permitted where the Presiding Officer or the Director considers it necessary or desirable.

~~§ 1215 Default Order~~

~~(a) Default.~~ A party may be found to be in default:

~~(1) after motion, upon failure to file a timely answer to the complaint;~~

~~(2) after motion or sua sponte, upon failure to comply with a prehearing or~~

~~hearing order of the Presiding Officer; or~~

~~(3) after motion or sua sponte, upon failure to appear at a conference or hearing without good cause being shown.~~

~~No finding of default on the basis of a failure to appear at a hearing shall be made against the respondent unless the complainant presents sufficient evidence to the Presiding Officer to establish a prima facie case against the respondent. Any motion for a default order shall include a proposed default order and shall be served upon all parties. The alleged defaulting party shall have twenty (20) days from service to reply to the motion. Default by respondent constitutes, for purposes of the pending action only, an admission of all facts alleged in the complaint and a waiver of respondent's right to a hearing on such factual allegations. The penalty proposed in the complaint shall become due and payable by respondent without further proceedings thirty (30) days after a final order issued upon default. Default by the complainant shall result in the dismissal of the complaint with prejudice.~~

~~(b) Procedures upon default.~~ When the Director or Presiding Officer finds a default has occurred, he or she shall issue a default order against the defaulting party. This order shall constitute the decision, and shall be filed with the Hearing Clerk.

~~(c) Contents of a default order.~~ A default order shall include findings of fact showing the grounds for the order, conclusions regarding all material issues of law or discretion, and the penalty which is to be assessed.

~~(d) For good cause shown the Director or the Presiding Officer, as appropriate, may set aside a default order.~~

~~§ 1216 Informal Settlement; Consent Agreement and Order~~

~~(a) Settlement policy.~~ The Navajo EPA encourages settlement of a proceeding at any time if the settlement is consistent with the provisions and objectives of the Act and applicable regulations. The respondent may confer with complainant concerning settlement whether or not the respondent requests a hearing. Settlement conferences shall not affect the respondent's obligation to file a timely answer under § 1213.

~~(b) Consent agreement.~~ The parties shall forward a written consent agreement and a proposed consent order to the Director or Presiding Officer whenever settlement or compromise is proposed. The consent agreement shall state that, for the purpose of this proceeding, respondent:

~~(1) admits or does not contest the jurisdictional allegations of the complaint;~~

~~(2) admits the facts stipulated in the consent agreement or neither admits nor denies specific factual allegations contained in the complaint; and~~

~~(3) consents to the assessment of a stated civil penalty.~~

~~The consent agreement shall include any and all terms of the agreement, and shall be signed by all parties or their counsel or representatives.~~

~~(c) Consent order.~~ No settlement or consent agreement shall dispose of any proceeding under these rules of practice without a consent order from the Director or Presiding Officer. In preparing such an order, the Director or Presiding Officer may require that the parties to the settlement appear before him or her to answer inquiries relating to the consent agreement or order.

~~§ 1217 Prehearing Conference~~

~~(a) Purpose of prehearing conference.~~ Unless a conference appears unnecessary, the Presiding Officer, at any time before the hearing begins, shall direct the parties and their counsel or other representatives to appear at a conference before him or her to consider:

- ~~(1) The settlement of the case;~~
- ~~(2) The simplification of issues and stipulation of facts not in dispute;~~
- ~~(3) The necessity or desirability of amendments to pleadings;~~
- ~~(4) The exchange of exhibits, documents, prepared testimony, and admissions or stipulations of fact which will avoid unnecessary proof;~~
- ~~(5) The limitation of the number of expert or other witnesses;~~
- ~~(6) Setting a time and place for the hearing; and~~
- ~~(7) Any other matters which may expedite the disposition of the proceeding.~~

~~(b) Exchange of witness lists and documents.~~ Unless otherwise ordered by the Presiding Officer, each party at the prehearing conference shall make available to all other parties:

- ~~(1) The names of the expert and other witnesses he/she intends to call, together with a brief narrative summary of their expected testimony; and~~
- ~~(2) copies of all documents and exhibits which each party intends to introduce into evidence.~~

~~Documents and exhibits shall be marked for identification as ordered by the Presiding Officer. Documents that have not been exchanged and witnesses whose names have not been exchanged shall not be introduced into evidence or allowed to testify without permission of the Presiding Officer. The Presiding Officer shall allow the parties reasonable opportunity to review new evidence.~~

~~(c) Record of the prehearing conference.~~ No transcript of a prehearing conference relating to settlement shall be made. With respect to other prehearing conferences, no transcript of any prehearing conferences shall be made unless ordered by the Presiding Officer upon motion of a party or sua sponte. The Presiding Officer shall prepare and file for the record a written summary of the action taken at the conference. The summary shall incorporate any written stipulations or agreements of the parties and all rulings and appropriate orders containing directions to the parties.

~~(d) Location of prehearing conference.~~ The prehearing conference shall be held in the chapter where the respondent resides or conducts the business which the hearing concerns, or in Window Rock, unless (1) the Presiding Officer determines that there is good cause to hold it at another location or by telephone.

~~(e) Unavailability of a prehearing conference.~~ If a prehearing conference is unnecessary or impracticable, the Presiding Officer, on motion or sua sponte, may direct the parties to correspond with him/her to accomplish any of the objectives set forth in this section.

~~(f) Other discovery.~~

- ~~(1) Except as provided by paragraph (b) of this section, further discovery, under this section, shall be permitted only upon determination by the Presiding Officer:~~

~~A. That such discovery will not in any way unreasonably delay the proceeding;~~

~~B. That the information to be obtained is not otherwise obtainable; and~~

~~C. That such information has significant probative value.~~

~~(2) The Presiding Officer shall order depositions upon oral questions only upon a showing of good cause and upon a finding that:~~

~~A. The information sought cannot be obtained by alternative methods; or~~

~~B. There is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.~~

~~(3) Any party to the proceeding desiring an order of discovery shall make a motion therefor. Such a motion shall set forth:~~

~~A. The circumstances warranting the taking of the discovery;~~

~~B. The nature of the information expected to be discovered; and~~

~~C. The proposed time and place where it will be taken.~~

~~If the Presiding Officer determines that the motion should be granted, he/she shall issue an order for the taking of such discovery together with the conditions and terms thereof.~~

~~(4) When the information sought to be obtained is within the control of one of the parties, failure to comply with an order issued pursuant to this paragraph may lead to:~~

~~A. the inference that the information to be discovered would be adverse to the party from whom the information was sought; or~~

~~B. the issuance of a default order under § 1215(a).~~

~~§ 1218 Accelerated Decision; Decision to Dismiss~~

~~(a) General. The Presiding Officer, upon motion of any party or sua sponte, may at any time render an accelerated decision in favor of the complainant or the respondent as to all or any part of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he/she may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding. In addition, the Presiding Officer, upon motion of the respondent, may at any time dismiss an action without further hearing or upon such limited additional evidence as he/she requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.~~

~~(b) Effect.~~

~~(1) If an accelerated decision or a decision to dismiss is issued as to all the issues and claims in the proceeding, the decision constitutes an decision of the Presiding Officer, and shall be filed with the Hearing Clerk.~~

~~(2) If an accelerated decision or a decision to dismiss is rendered on less than all issues or claims in the proceeding, the Presiding Officer shall determine what material facts exist without substantial controversy and what material facts remain controverted in good faith. He/she shall thereupon issue an interlocutory order specifying the facts which appear substantially uncontroverted, and the issues and claims upon which the hearing will proceed.~~

~~§ 1219 Scheduling the Hearing~~

~~(a) When an answer is filed, the Hearing Clerk shall forward the complaint, the answer, and any other documents filed thus far in the proceeding to the Director who shall assign a Presiding Officer or indicate that the Director will hold the hearing and act as Presiding Officer. The Presiding Officer shall then obtain the case file from the Director and notify the parties of the assignment.~~

~~(b) Notice of hearing. If the respondent requests a hearing in the answer, or one is ordered by the Presiding Officer under § 1213(c), the Presiding Officer shall serve upon the parties a notice of hearing setting forth a time and place for the hearing. The Presiding Officer may issue the notice of hearing at any appropriate time, but not later than twenty (20) days prior to the date set for the hearing.~~

~~(c) Postponement of hearing. No request for postponement of a hearing shall be granted except upon motion and for good cause shown.~~

~~(d) Location of the hearing. The location of the hearing shall be determined in accordance with the method for determining the location of a prehearing conference under § 1217(d).~~

~~§ 1220 Evidence~~

~~(a) General. The Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, or otherwise unreliable or of little probative value, except that evidence relating to settlement which would be excluded in the Navajo Nation courts as not admissible. In the presentation, admission, disposition, and use of evidence, the Presiding Officer shall preserve the confidentiality of trade secrets and other commercial and financial information, consistent with the requirements of the NNPDES Act. The confidential or trade secret status of any information shall not, however, preclude its being introduced into evidence. The Presiding Officer may make such orders as may be necessary to consider such evidence in camera, including the preparation of a supplemental decision to address questions of law, fact, or discretion which arise out of that portion of the evidence which is confidential or which includes trade secrets.~~

~~(b) Examination of witnesses. Witnesses shall be examined orally, under oath or affirmation, except as otherwise provided in these rules of practice or by the Presiding Officer. Parties shall have the right to cross-examine a witness who appears at the hearing provided that such cross-examination is not unduly repetitious.~~

~~(c) Verified statements. The Presiding Officer may admit an insert into the record as evidence, in lieu of oral testimony, statements of fact or opinion prepared by a witness. The admissibility of the evidence contained in the statement shall be subject to the same rules as if the testimony were produced under oral examination. Before any such statement is read or admitted into evidence, the witness shall deliver a copy of the statement to the Presiding Officer, the reporter, and opposing counsel. The witness presenting the statement shall swear to or affirm the statement and shall be subject to appropriate oral cross-examination upon the contents thereof.~~

~~(d) Admission of affidavits where the witness is unavailable. The Presiding Officer may admit into evidence affidavits of witnesses who are unavailable.~~

~~(e) Exhibits. Where practicable, an original and one copy of each exhibit shall be filed with the Presiding Officer for the record and a copy shall be furnished to each party. A true copy of any exhibit may be substituted for the~~

original.

~~(f) Official notice.~~ Official notice may be taken of any matter judicially noticed in the Navajo Nation courts and of other facts within the specialized knowledge and experience of Navajo EPA. Opposing parties shall be given adequate opportunity to show that such facts are erroneously noticed.

~~§ 1221 Objections and Offers of Proof~~

~~(a) Objection.~~ Any objection concerning the conduct of the hearing may be stated orally or in writing during the hearing. The party raising the objection must supply a short statement of its grounds. The ruling by the Presiding Officer on any objection and the reasons given for it shall be part of the record. An exception to each objection overruled shall be automatic and is not waived by further participation in the hearing.

~~(b) Offer of proof.~~ Whenever evidence is excluded from the record, the party offering the evidence may make an offer of proof, which shall be included in the record. The offer of proof for excluded oral testimony shall consist of a brief statement describing the nature of the evidence excluded. The offer of proof for excluded documents or exhibits shall consist of the insertion in the record of the documents or exhibits excluded.

~~§ 1222 Burden of Presentation; Burden of Persuasion~~

The complainant has the burden of going forward with and of proving that the violation occurred as set forth in the complaint and that the proposed civil penalty is appropriate. Following the establishment of a prima facie case, respondent shall have the burden of presenting and of going forward with any defense to the allegations set forth in the complaint. Each matter of controversy shall be determined by the Presiding Officer upon a preponderance of the evidence.

~~§ 1223 Filing the Transcript~~

The hearing shall be transcribed verbatim. Promptly following the taking of the last evidence, the reporter shall transmit to the Hearing Clerk the original and as many copies of the transcript of testimony as are called for in the reporter's contract with Navajo EPA, and also shall transmit to the Presiding Officer a copy of the transcript. A certificate of service shall accompany each copy of the transcript. The Hearing Clerk shall notify all parties of the availability of the transcript and shall furnish the parties with a copy of the transcript upon payment of the cost of reproduction, unless a party can show that the cost is unduly burdensome. Any person not a party to the proceeding may receive a copy of the transcript upon payment of the reproduction fee, except for those parts of the transcript order to be kept confidential by the Presiding Officer.

~~§ 1224 Findings, Conclusions, and Order~~

Within twenty (20) days after the parties are notified of the availability of the transcript, or within such longer time as may be fixed by the Presiding Officer, any party may submit for the consideration of the Presiding Officer, proposed findings of fact, conclusions of law, and a proposed order, together with briefs in support thereof. The Presiding Officer shall set a time by which reply briefs must be submitted. All submissions shall be in writing, shall be served upon all parties, and shall contain adequate references to the record and authorities relied on.

~~§ 1225 Decision~~

~~(a) Filing and contents.~~ The Presiding Officer shall issue and file with the

~~Hearing Clerk the decision as soon as practicable after the period for filing reply briefs under § 1224 has expired. The Presiding Officer shall retain a copy of the complaint in the duplicate file. The decision shall contain a findings of fact, conclusions regarding all material issues of law or discretion, as well as reasons therefor, a civil penalty assessment, if appropriate, and a final order. Upon receipt of the decision, the Hearing Clerk shall forward a copy to all parties.~~

~~**(b) Amount of civil penalty.** If the Presiding Officer determines that a violation has occurred, the Presiding Officer shall determine the dollar amount of the civil penalty to be assessed in the decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the decision the specific reasons for the increase or decrease. The Presiding Officer shall not raise a penalty from that recommended to be assessed in the complaint if the respondent has defaulted.~~

~~**(c) Effect of decision.** The decision of the Presiding Officer is the final Navajo EPA action.~~

~~**(d) Payment of a civil penalty.** The respondent shall pay the full amount of the civil penalty assessed in the order within thirty (30) days after receipt of the order. Payment shall be made by forwarding to the Hearing Clerk a cashier's check or certified check in the amount of the penalty assessed in the final order, payable to the Navajo Nation.~~

~~§ 1226 Appeal~~

~~**(a)** Any person challenging an administrative civil penalty assessed under section 305 of the NNPDES Act, must follow these procedures as a prerequisite to the seeking of judicial review of the final agency action.~~

~~**(b)** For purposes of judicial review under section 305(D) of the NNPDES Act, final agency action occurs when the Presiding Officer's decision and order is issued and copies served by the Hearing Clerk.~~