



**DIRECTIVE NUMBER:** 9936.2

**TITLE:** Final Administrative Hearing Procedures for  
RCRA Section 3008(h) Orders

**APPROVAL DATE:**

**EFFECTIVE DATE:**

**ORIGINATING OFFICE:**

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**A — Signed by AA or DAA**

**B — Signed by Office Director**


**C — Review & Comment**

**REFERENCE (other documents):**

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**SWER            OSWER            OSWER**  
**DIRECTIVE    DIRECTIVE    DI**

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		United States Environmental Protection Agency Washington, D.C. 20460		1. Directive Number 9936.2	
<b>OSWER Directive Initiation Request</b>					
2. Originator Information					
Name of Contact Person Steiner, Virginia		Mail Code WH-527	Office OWPE		Telephone Number 475-9329
J. Title Final administrative hearing procedures for RCRA section 3008(h) orders					
4. Summary of Directive (Include brief statement of purpose) administrative hearing procedures for orders requiring corrective action under RCRA section 3008(h)					
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7. Draft Level <input checked="" type="checkbox"/> A — Signed by AA/DAA <input type="checkbox"/> B — Signed by Office Director <input type="checkbox"/> C — For Review & Comment <input type="checkbox"/> In Development					
This Request Meets OSWER Directives System Format					
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9. Name and Title of Approving Official				Date	

**OSWER            OSWER            OSWER**  
**DIRECTIVE      DIRECTIVE      L**



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

FEB 19 1987

9936.2

MEMORANDUM

SUBJECT: Final Administrative Hearing Procedures for RCRA  
Section 3008(h) Orders

FROM: Thomas L. Adams, Jr. *Thomas L. Adams*  
Assistant Administrator  
for Enforcement and Compliance Monitoring

*J. Winston Porter*  
J. Winston Porter  
Assistant Administrator  
for Solid Waste and Emergency Response

TO: Regional Administrators  
Regional Counsels  
Regional Waste Management  
Division Directors  
Office of General Counsel

We are hereby transmitting to you the final version of the Administrative Hearing Procedures for RCRA Section 3008(h) Orders (and related General Guidance). These procedures reflect the input of a number of commenters from the Regions and other Headquarters offices to whom we extend our thanks.

In response to suggestions made on the draft procedures circulated for comment on November 21, 1986, we have made several changes in the procedures. These include: (1) allowing the Presiding Officer and Regional Administrator to engage in ex parte contacts, while insuring that any new and relevant information gleaned from such contacts is served on opposing parties, who will have an opportunity to respond to same; (2) adopting alternative language in the draft of the "study order" procedures which will permit respondents to ask questions during the hearing only when the Presiding Officer in his discretion deems it appropriate; (3) returning to earlier "remedy order" procedure language which requires that the Agency respond to written questions in 14 (rather than 30) days, so as to insure that Agency responses are available before the hearing; (4) allowing use of the study order procedures for orders directing that limited interim measures in conjunction with studies be undertaken; and (5) restricting

respondent's ability to make major evidentiary submissions at the hearing rather than during prehearing procedures while insuring that the Agency may seek leave to respond after the hearing to late submissions. We have also included in the "General Guidance" which accompanies the Administrative Hearing Procedures a requirement that the public be afforded an opportunity to comment on the Agency's proposed remedy and be given notice of the final remedy before it is implemented.

Please also note that these procedures require that initial corrective action orders be issued by a Regional official other than the Regional Administrator. This requirement insures that the Regional Administrator, who will issue the final Agency decision affirming, modifying, or withdrawing the initial order, is not "tainted" as a decisionmaker by reason of having earlier performed a prosecutorial function in the same proceeding. Accordingly, it will be necessary for Regional Administrators, who have not already done so, to redelegate authority to issue initial (and final) <sup>1</sup>corrective action orders.

Several commenters have asked whether a request for a hearing under these procedures would prevent an order from becoming effective, or, stated differently, whether an initial corrective action order may be enforced after a request for hearing, but before issuance of the Regional Administrator's final decision. The Office of General Counsel has determined that, in light of the language of RCRA Section 3008(b) which indicates that an order becomes final unless the respondent requests a hearing, the order may not be enforced once a hearing is requested until a final Agency decision on the matter is issued.

In developing these administrative hearing procedures it has become clear that the regulations in 40 CFR Part 22 governing adjudicatory hearings on RCRA Section 3008(a) orders for injunctive relief and/or penalties, may in certain respects exceed minimum due process requirements. Accordingly, we have decided to re-evaluate these regulations to determine whether, as they apply to certain RCRA Section 3008(a) and similar proceedings, they are unnecessarily cumbersome or burdensome. Your thoughts on these questions will be invited at a later date.

#### Attachment

cc: Lisa Friedman  
Bruce Weddle  
RCRA Enforcement Branch Chiefs, Regions I-X

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<sup>1</sup> The procedures contemplate that final orders would be signed by the same official who issued the initial order.

GENERAL GUIDANCE ON ISSUANCE OF RCRA SECTION 3008(h) ORDERS

1. To satisfy the public hearing requirement of Section 3008(b), unilateral RCRA administrative orders issued pursuant to Section 3008(h) must provide the named person or persons with the opportunity for a hearing. This guidance document and the attached hearing procedures set forth the procedures for issuing an administrative order for corrective action and conducting a hearing, except for hearings for the following types of orders: (1) Section 3008(h) orders that are combined in one order with claims under Section 3008(a); (2) Section 3008(h) orders that include a suspension or revocation of authorization to operate under Section 3005(e); and (3) orders issued under Section 3008(h) seeking penalties under Section 3008(h)(2) for noncompliance with a Section 3008(h) order. Hearings for the three above-outlined categories of orders must be held under 40 CFR Part 22. The procedures in 40 CFR Part 22 do not apply to other orders issued under Section 3008(h).

2. Except in unusual circumstances, for orders not issued on consent, separate orders will be issued for distinct phases of work rather than a single, multiple phase order. Consent orders may also be issued in a similar fashion.

Accordingly, when a particular corrective action is likely ultimately to involve studies, interim measures, and remedy, the first order should address the studies (including both the RCRA Facility Investigation, during which the nature and extent of any releases are characterized, and the Corrective Measures

Study, during which proposals for remediation are developed) and any known interim measures. A subsequent order(s) should address additional actions to be undertaken. A copy of the "Administrative Hearing Procedures for RCRA Section 3008(h) Orders" (not to include the "General Guidance on Issuance of RCRA Section 3008(h) Orders") should accompany each initial administrative order. A hearing under these procedures may be requested by a respondent whenever a new order is issued.

3. Prior to the issuance of an initial administrative order or a final administrative order on consent, the EPA office issuing the order shall prepare an administrative record supporting the findings of fact, determinations of law and relief in the initial order or final order on consent. The administrative record must have an index and be available for review during normal business hours, after issuance of an order. The order must state when and where the record is available for review.

4. The record shall include, subject to applicable law restricting the public disclosure of confidential information and deliberative material, all relevant documents and oral information (which has been reduced to writing) which the Agency considered in the process of issuing the order, including: (1) EPA records on conditions at the facility, such as inspection reports, sampling and analytical data, business records, and photographs; (2) other reports and internal Agency documents used in generating or supporting the enforcement action; (3) copies of all relevant correspondence between EPA and the respondent; (4) written records

of relevant conferences and telephone conversations between EPA and the respondent; (5) copies of correspondence between EPA and State or other federal agencies pertaining to the enforcement action; and (6) comments submitted by the public during the public comment period on the RCRA Facility Investigation/Corrective Measures Study results and proposed remedy, EPA's responses to significant comments, and any statement of the basis and purpose of the proposed corrective measures prepared by EPA.

5. Following the respondent's submission of its report on the RCRA Facility Investigation and Corrective Measures Study the Agency shall develop a proposed plan for corrective measures. The Agency shall prepare a document that summarizes the data relating to releases, outlines the recommendations contained in the Corrective Measures Study, and indicates briefly why EPA has adopted the proposed plan for corrective measures.

The Agency shall then (1) publish a notice and brief analysis of the proposed plan for corrective measures and make such plan available to the public, and (2) provide a reasonable opportunity (ordinarily 30-45 days) for submission of written comments and (in the event the Regional Administrator deems it appropriate) a public meeting on the plan. If the Regional Administrator denies a request for a public meeting, he shall explain his decision in writing.

The Agency shall, as necessary, modify its proposed plan for corrective measures on the basis of written and oral comments received. Prior to issuance of the initial order for corrective

measures the Agency shall prepare a responsiveness summary indicating whether and why it has accepted or rejected any significant comments. Following finalization of the order for corrective measures but before implementation of corrective measures, notice of the final plan for corrective measures shall be published and the plan shall be made available to the public.

Where, in the interest of protecting human health and the environment, it is important that interim corrective measures be implemented quickly, no advance opportunity for written or oral comments will have to be afforded to the public. Here, EPA will simply provide substantially contemporaneous notice to the public of interim measures implemented. It is further contemplated that, where the Agency has directed the owner/operator to undertake certain remedial investigations but later determines that no corrective measures are required, the public shall have an opportunity to comment on this determination to the same extent as it may comment on a proposed plan for corrective measures.

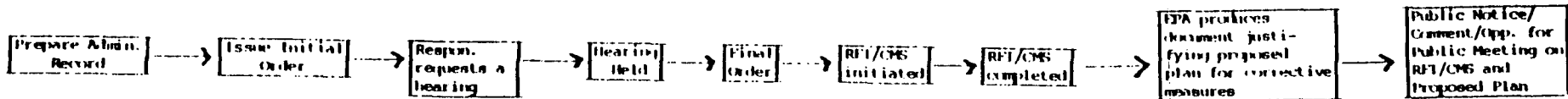
Public involvement beyond that provided for herein is allowable at the discretion of the Regional Administrator. If a facility is on the National Priorities List, those additional procedures for public participation contained in the National Contingency Plan at 40 C.F.R. 300 et seq. must be followed.

6. A flow chart of the 3008(h) corrective action process indicating the points at which opportunities for public involvement or notice will normally occur is attached.

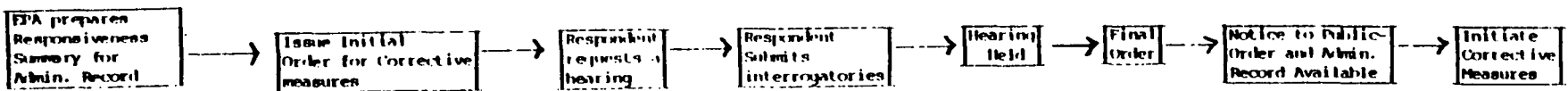


§ 100(b)

I. Orders for Studies/Investigations/Interim Measures



II. Orders for Full Replies



ADMINISTRATIVE HEARING PROCEDURES FOR RCRA SECTION 3008(h) ORDERS

## I.

1. An administrative action under Section 3008(h) of the Resource Conservation and Recovery Act (RCRA) shall be commenced by issuance of an administrative order. When the order is issued unilaterally, the order shall be referred to as an initial administrative order and may be referenced as a proceeding under Section 3008(h). When the order has become effective, either after issuance of a final order following a final decision by the Regional Administrator or after thirty days from issuance if no hearing is requested, the order shall be referred to as a final administrative order. Where the order is agreed to by the parties, the order shall be denominated as a final administrative order on consent.

2. The initial administrative order shall be executed by an authorized official of EPA (petitioner), other than the Regional Administrator or the Assistant Administrator for the Office of Solid Waste and Emergency Response. For orders issued by EPA Headquarters, rather than by a Regional office, all references in these procedures to the Regional Administrator shall be understood to be to the Assistant Administrator for the Office of Solid Waste and Emergency Response or his delegatee.

3. A Clerk shall be designated by the Regional Administrator to receive all initial orders, final orders, responses, memoranda, and documents regarding the order and to maintain the official record and docket.

4. The original and one copy of the initial administrative order, the final decision and the final administrative order, and one copy of the administrative record and an index thereto must be filed with the Clerk designated for Section 3008(h) orders. In addition, all memoranda and documents submitted in the proceeding shall be filed with the Clerk.

5. The Clerk (or some other designated EPA employee) shall arrange for the effectuation of service of the initial administrative order, the final decision, and final administrative order. Service of a copy of the initial administrative order together with a copy of these procedures, the final decision, or a final administrative order, shall be made personally or by certified mail, return receipt requested, or, if personal service can not be effectuated or certified mail is returned refused or unsigned, by regular mail, on the respondent or his representative. The Clerk shall serve other documents from the Presiding Officer by regular mail.

6. Service of all documents, filed by the parties, shall be made by the parties or their representatives on other parties or their representatives and may be made by regular mail, with the original filed with the Clerk.

7. Service of the initial administrative order and final administrative order is complete upon receipt by respondent (or the respondent's agent, attorney, representative or other person employed by respondent and receiving such service), personally or by certified mail, or upon mailing by regular mail if personal service or certified mail can not be accomplished, in accordance with Paragraph 5. Service of all other

pleadings and documents is complete upon mailing, except as provided in Paragraphs 15 and 25.

8. The initial administrative order becomes a final administrative order thirty (30) days after service of the order, unless the respondent files with the Clerk within thirty (30) days after service of the order, a response to the initial order and requests a hearing.

9. The response to the initial order and request for a hearing must be in writing and mailed to, or personally served on, the Clerk of the Region which issued the order.

10. The response to the initial order shall specify each factual, or legal determination, or relief provision in the initial order the respondent disputes.

11. Upon receipt of a request for a hearing, the Regional Administrator shall designate a Presiding Officer to conduct the hearing and preside over the proceedings.

12. The respondent may request an informal settlement conference at any time by contacting the appropriate EPA employee, as specified in the initial administrative order. A request for an informal conference will not affect the respondent's obligation to timely request a hearing.

Whether or not the respondent requests a hearing, the parties may confer informally concerning any aspect of the order. The respondent and respondent's representatives shall generally be allowed the opportunity at an informal conference to discuss with the appropriate Agency technical and legal personnel all aspects

of the order, in particular the basis for the determination that a release has occurred and the appropriateness of the ordered corrective action.

13. If the initial order directs the respondent (a) to undertake only a RCRA Facility Investigation and/or Corrective Measures Study, which may include monitoring, surveys, testing, information gathering, analyses, and/or studies (including studies designed to develop recommendations for appropriate corrective measures), or (b) to undertake such investigations and/or studies and interim measures, which are neither costly nor technically complex and are necessary to protect human health and the environment prior to development of a permanent remedy, the hearing procedures set forth in Section II, A., Paragraphs 14 through 19, shall be employed for any requested hearing. If the respondent seeks a hearing on an order directing that corrective measures or such corrective measures together with studies be undertaken, the hearing procedures set forth in Section II, B., Paragraphs 20 through 30, shall be employed. The procedures contained in Section I, Paragraphs 1 through 13 and Section III, Paragraphs 31 through 33 shall be followed regardless of whether the initial order directs respondent to undertake an investigation or implement corrective measures.

## II.

### A. Hearings on Orders Requiring Investigations or Studies

14. The Presiding Officer shall be any employee of the Agency designated by the Regional Administrator other than a person

who drafted or participated in drafting the order in question.

If, after issuance of the initial order and prior to issuance of the final order, the Regional Administrator, Presiding Officer, or any person who will advise these officials in the decision on the case receives from or on behalf of any party in an ex parte communication information which is relevant to the decision on the case and to which other parties have not had an opportunity to respond, a summary of such information shall be served on all other parties, who shall have an opportunity to reply to same within ten (10) days of service of the summary.

15. The Presiding Officer shall establish the date and time for the requested public hearing. Subject to Paragraph 16, the hearing shall be scheduled and held within thirty (30) days of the Agency's receipt of the request for a public hearing.

At any time up to five (5) business days before the hearing respondent may, but is not required to, submit for inclusion in the administrative record information and argument supporting respondent's positions on the facts, law, and relief, as each relates to the order in question. All factual representations made by respondent must be in writing by affidavit. A copy of any information or argument submitted by respondent shall be served such that the Clerk and petitioner receive same at least five (5) business days before hearing.

16. The Presiding Officer may grant an extension of time for the conduct of the hearing, upon written request of either party, for good cause shown, and after consideration of any

prejudice to other parties. The Presiding Officer may not extend the date by which the request for hearing is due under paragraph 8.

17. The hearing shall be held in the city in which the relevant EPA Regional Office is located, unless the Presiding Officer determines that there is good cause to hold it in another location.

18. The Presiding Officer shall establish the agenda for the hearing and conduct the hearing in a fair and impartial way, taking action as needed to avoid unnecessary delay, exclude redundant material, and maintain order during the proceedings. Representatives of EPA shall introduce the administrative record and be prepared to summarize the basis for the order. The respondent shall have a reasonable opportunity to address relevant issues and present its views through legal counsel or technical advisors. The Presiding Officer may also allow technical and legal discussions and interchanges between the parties, including responses to questions to the extent deemed appropriate. It is not the Agency's intent to provide EPA or respondent an opportunity to engage in direct or cross examination of witnesses. Where respondent can demonstrate that, through no fault of its own, certain documents supportive of its position could not have been submitted before hearing in accordance with the requirements of Paragraph 15, it may submit such documents at hearing. Otherwise no new documentary support may be submitted at hearing. Unless otherwise directed by the Presiding Officer, factual

representations made by respondent shall be in writing by affidavit. The Presiding Officer may upon request grant petitioner leave to respond to submissions made by respondent pursuant to this paragraph or Paragraph 15.

19. As soon as practicable after the conclusion of the hearing a written summary of the proceeding shall be prepared. This summary shall, at a minimum, identify (a) the dates of and known attendees at the hearing, and (b) the bases upon which the respondent contested the terms of the order. The summary must be signed by the Presiding Officer.

The Presiding Officer will evaluate the entire administrative record and, on the basis of that review and the representations of EPA and respondent at the hearing, shall prepare and file a statement recommending to the Regional Administrator that the initial order be modified, withdrawn, or issued without modification. The statement must address all significant arguments raised by respondent and provide support, through citation to material contained in the record or adduced at the hearing, for any decision to modify a term of the order, withdraw the order, or issue the order without change.

The statement shall be based on the administrative record, including the hearing and supplemental submissions. If the Presiding Officer finds that there is not adequate support in the record for the initial order, the Presiding Officer may recommend that the order be modified and issued on terms that are supported by the record, or withdrawn.



B. Hearings on Orders Requiring Corrective Measures

20. The Presiding Officer shall be either the Regional Judicial Officer, or another attorney employed by the Agency who has had no prior connection to the Section 3008(h) initial order that is the subject of the proceeding.

If, after issuance of the initial order and prior to issuance of the final order, the Regional Administrator, Presiding Officer, or any person who will advise these officials in the decision on the case receives from or on behalf of any party in an ex parte communication information which is relevant to the decision on the case and to which other parties have not had an opportunity to respond, a summary of such information shall be served on all other parties, who shall have an opportunity to reply to same within ten (10) days of service of the summary.

21. The Presiding Officer shall establish an expeditious schedule for: (a) the submission by respondent of a memorandum, with appropriate affidavits and exhibits, stating and supporting respondent's position on the facts, law and relief, specifying the bases upon and manner in which such determinations or relief provisions, if erroneous, require modification or withdrawal of the order; (b) submission of a response by EPA; and (c) a public hearing. Subject to paragraph 22., a hearing shall be scheduled within 45 days of the order setting the schedule.

22. The Presiding Officer, as appropriate, may grant an extension of time for the filing of any document, other than a request for a hearing under paragraph 8, or may grant an extension of

time for the conduct of the hearing, upon written request of either party, for good cause shown and after consideration of any prejudice to other parties.

23. In accordance with the schedule set by the Presiding Officer, the respondent shall file a memorandum stating and supporting respondent's position on the facts, law and relief. The memorandum must identify each factual allegation and all issues regarding appropriateness of the terms of the relief in the initial order that respondent contests and for which respondent requests a hearing. The memorandum must clearly state respondent's position with respect to each such issue. Respondent must also include any proposals for modification of the order. Respondent must submit affidavits and exhibits which support any of its factual contentions on relief and defenses. The memorandum shall also present any arguments on the legal conclusions contained in the order.

24. The respondent may file a request with the Presiding Officer for permission to submit written questions to the EPA Regional Office issuing the order concerning issues of material fact in the order. Requests shall be accompanied by the proposed questions. In most instances, no more than twenty-five (25) questions, including subquestions and subparts, may be posed. The request and questions must be submitted to the Presiding Officer at least twenty-one (21) days before the hearing.

The Presiding Officer may direct EPA to respond to such questions as he designates, if he determines that such questions

are required for full disclosure and adequate resolution of the facts. No questions shall be allowed regarding matters of policy or privileged internal communications relating to the deliberative process. The Presiding Officer shall grant, deny, or modify such requests expeditiously. If a request is granted, the Presiding Officer may revise questions and may limit the number and scope of questions. Questions may be deleted or revised in the discretion of the Presiding Officer for reasons, which may include the fact that he finds the questions to be irrelevant, redundant, unnecessary, or an undue burden on the Agency. The Presiding Officer shall transmit the questions as submitted or as modified to EPA. EPA shall respond to the questions within fourteen (14) calendar days of service of the questions by the Presiding Officer, unless an extension is granted.

25. The Presiding Officer shall have the discretion to order either party to submit additional information in whatever form he deems appropriate. The Presiding Officer may issue subpoenas for the attendance and testimony of persons and the production of relevant papers, books, and documents. Since these hearing procedures provide elsewhere that the parties are not to engage in direct or cross examination of witnesses and must make any factual representations in writing by affidavit, the subpoena power is to serve only as an adjunct to the Presiding Officer's authority to ask questions and otherwise take steps to clarify factual matters which are in dispute. Upon request of the respondent, the Presiding Officer may, in his discretion, allow

submittal by the respondent of additional information in support of its claim, if it is received by the Clerk and petitioner at least five (5) business days before the hearing.

26. The hearing shall be held in the city in which the relevant EPA Regional Office is located, unless the Presiding Officer determines that there is good cause to hold it in another location.

27. The Presiding Officer shall conduct the hearing. The Presiding Officer shall conduct a fair and impartial hearing, take action to avoid unnecessary delay in the disposition of the proceedings, and maintain order. The Presiding Officer shall permit oral statements on behalf of the respondent and EPA. The Presiding Officer may address questions to the respondent or the EPA representative during the hearing. Although oral statements will be permitted at the hearing, unless otherwise directed by the Presiding Officer, all factual matters to be presented by respondent must be in writing by affidavit. Apart from questions by the Presiding Officer, no direct examination or cross-examination shall be allowed.

Upon commencement of the hearing, a representative of EPA shall introduce the order and the record supporting issuance of the order, and summarize the basis for the order. The respondent may respond to the administrative record and offer any facts, statements, explanations or documents which bear on any issue for which the hearing has been requested. Any such presentation by respondent may include new documents only to the extent that

respondent can demonstrate that, through no fault of its own, such documents could not have been submitted before hearing in accordance with the requirements of Paragraphs 23 and 25. The Agency may then present matters solely in rebuttal to matters previously presented by the respondent. The Presiding Officer may allow the respondent to respond to any such rebuttal submitted. The Presiding Officer may exclude repetitive or irrelevant matter. The Presiding Officer may upon request grant petitioner leave to respond to submissions made by respondent pursuant to this paragraph or Paragraph 25.

28. The hearing shall be either transcribed stenographically or tape recorded. Upon written request, such transcript or tape recording shall be made available for inspection or copying.

29. The transcript or recording of the hearing and all written submittals filed with the Clerk by the parties subsequent to initial issuance of the order including post-hearing submissions will become part of the administrative record for the proceeding, for consideration by the Presiding Officer and Regional Administrator.

30. The Presiding Officer will, as soon as practicable after the conclusion of the hearing, evaluate the entire administrative record and, on the basis of the administrative record, prepare and file a recommended decision with the Regional Administrator.

The recommended decision must address all material issues of fact or law properly raised by respondent, and must recommend that the order be modified, withdrawn or issued without modification.

The recommended decision must provide an explanation, with citation to material contained in the record, for any decision to modify a term of the order, to issue the order without change or to withdraw the order.

The recommended decision shall be based on the administrative record. If the Presiding Officer finds that there is not adequate support in the record for any contested required action, the Presiding Officer may recommend that the order be modified and issued on terms that are supported by the record, or withdrawn.

### III

31. As soon as practicable after receipt of either the summary and statement or the recommended decision, the Regional Administrator will either sign, or modify such statement or recommended decision, and issue it as a final decision. The Regional Administrator's decision shall be based on the administrative record.

32. If the Regional Administrator does not adopt portions of the initial order, or finds that modification of the order is necessary, the signatory official on the initial administrative order shall modify the order in accordance with the terms of the final decision and file and serve a copy of the final administrative order. If the Regional Administrator finds the initial order appropriate as originally issued, the final decision shall declare the initial administrative order to be a final order, effective upon service of the final decision. If the Regional Administrator declares that the initial order must be withdrawn,

the signatory official on the initial administrative order will file and serve a withdrawal of the initial administrative order. This may be done without prejudice.

33. The final decision and the final administrative order are final agency actions that are effective on filing and service. These actions are not appealable to the Administrator.