

Environmental Protection Agency

§ 78.1

Operations Branch, Acid Rain Excess Emissions Penalties, P.O. Box 952491, St. Louis, MO 63195-2491.

(3) Payments of penalties of \$25,000 or more may be made by wire transfer to the U.S. Treasury at the Federal Reserve Bank of New York.

(e) If the Administrator determines that overpayment has been made, he or she will refund the overpayment without interest, as promptly as administratively possible.

(f) Excess emissions in any year resulting directly from an order issued in that year under section 110(f) of the Act shall not be subject to the penalty payment requirements of this section; *provided* that the designated representative of any source or unit as appropriate subject to such order shall advise the Administrator within 30 days of issuance of the order that the order will result in such excess emissions.

[58 FR 3757, Jan. 11, 1993, as amended at 60 FR 17131, Apr. 4, 1995; 62 FR 55487, Oct. 24, 1997; 70 FR 25337, May 12, 2005]

PART 78—APPEAL PROCEDURES

Sec.

- 78.1 Purpose and scope.
- 78.2 General.
- 78.3 Petition for administrative review and request for evidentiary hearing.
- 78.4 Filings.
- 78.5 Limitation on filing or presenting new evidence and raising new issues.
- 78.6 Action on petition for administrative review.
- 78.7 [Reserved]
- 78.8 Consolidation and severance of appeals proceedings.
- 78.9 Notice of the filing of petition for administrative review.
- 78.10 *Ex parte* communications during pendency of a hearing.
- 78.11 Intervenors.
- 78.12 Standard of review.
- 78.13 Scheduling orders and pre-hearing conferences.
- 78.14 Evidentiary hearing procedure.
- 78.15 Motions in evidentiary hearings.
- 78.16 Record of appeal proceeding.
- 78.17 Proposed findings and conclusions and supporting brief.
- 78.18 Proposed decision.
- 78.19 Interlocutory appeal.
- 78.20 Appeal of decision of Administrator or proposed decision to the Environmental Appeals Board.

AUTHORITY: 42 U.S.C. 7401, 7403, 7410, 7426, 7601, and 7651, *et seq.*

SOURCE: 58 FR 3760, Jan. 11, 1993, unless otherwise noted.

§ 78.1 Purpose and scope.

(a)(1) This part shall govern appeals of any final decision of the Administrator under part 72, 73, 74, 75, 76, or 77 of this chapter, subparts AA through II of part 96 of this chapter, subparts AAA through III of part 96 of this chapter, and subparts AAAA through subparts IIII of part 96 of this chapter, or part 97 of this chapter; *provided* that matters listed § 78.3(d) and preliminary, procedural, or intermediate decisions, such as draft Acid Rain permits, may not be appealed.

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

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

- (1) Under part 72 of this chapter;
 - (i) The determination of incompleteness of an Acid Rain permit application;
 - (ii) The issuance or denial of an Acid Rain permit and approval or disapproval of a compliance option by the Administrator;
 - (iii) The approval or disapproval of an early ranking application for Phase I extension under § 72.42 of this chapter;
 - (iv) The final determination of whether a technology is a qualified repowering technology under § 72.44 of this chapter;
 - (v) [Reserved]
 - (vi) The approval or disapproval of a permit revision;
 - (vii) The decision on the deduction or return of allowances under §§ 72.41, 72.42, 72.43, 72.44, 72.91(b), and 72.92 (a) and (c) of this chapter; and
 - (viii) The failure to issue an Acid Rain permit in accordance with the deadline under § 72.74(b) of this chapter.
- (2) Under part 73 of this chapter,
 - (i) The correction of an error in an Allowance Tracking System account;

§ 78.1

40 CFR Ch. I (7–1–07 Edition)

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

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

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

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

(vi) The decision on the deduction of allowances under § 73.35(b) of this chapter.

(3) Under part 74 of this chapter,

(i) The determination of incompleteness of an opt-in permit application;

(ii) The issuance or denial of an opt-in permit and approval or disapproval of the transfer of allowances for the replacement of thermal energy;

(iii) The approval or disapproval of a permit revision to an opt-in permit;

(iv) The decision on the deduction or return of allowances under subpart E of part 74 of this chapter;

(4) Under part 75 of this chapter,

(i) The decision on a petition for approval of an alternative monitoring system;

(ii) The approval or disapproval of a monitoring system certification or recertification;

(iii) The finalization of annual emissions data, including retroactive adjustment based on audit;

(iv) The determination of the percentage of emissions reduction achieved by qualifying Phase I technology; and

(v) The determination on the acceptability of parametric missing data procedures for a unit equipped with add-on controls for sulfur dioxide and nitrogen oxides in accordance with part 75 of this chapter.

(5) Under part 77 of this chapter, the determination of incompleteness of an offset plan and the approval or disapproval of an offset plan under § 77.4 of this chapter and the deduction of allowances under § 77.5(c) of this chapter.

(6) Under part 97 of this chapter:

(i) The adjustment of the information in a compliance certification or other submission and the deduction or transfer of NO_x allowances based on the in-

formation, as adjusted, under § 97.31 of this chapter;

(ii) The decision on the allocation of NO_x allowances to a NO_x Budget unit under § 97.41(b), (c), (d), or (e) of this chapter;

(iii) The decision on the allocation of NO_x allowances to a NO_x Budget unit from the compliance supplement pool under § 97.43 of this chapter;

(iv) The decision on the deduction of NO_x allowances under § 97.54 of this chapter;

(v) The decision on the transfer of NO_x allowances under § 97.61 of this chapter;

(vi) The decision on a petition for approval of an alternative monitoring system;

(vii) The approval or disapproval of a monitoring system certification or recertification under § 97.71 of this chapter;

(viii) The finalization of control period emissions data, including retroactive adjustment based on audit;

(ix) The approval or disapproval of a petition under § 97.75 of this chapter;

(x) The determination of the sufficiency of the monitoring plan for a NO_x Budget opt-in unit;

(xi) The decision on a request for withdrawal of a NO_x Budget opt-in unit from the NO_x Budget Trading Program under § 97.86 of this chapter;

(xii) The decision on the deduction of NO_x allowances under § 97.87 of this chapter; and

(xiii) The decision on the allocation of NO_x allowances to a NO_x Budget opt-in unit under § 97.88 of this chapter.

(7) Under subparts AA through II of part 96 of this chapter,

(i) The decision on the allocation of CAIR NO_x allowances under § 96.141(b)(2) or (c)(2) of this chapter.

(ii) The decision on the deduction of CAIR NO_x allowances, and the adjustment of the information in a submission and the decision on the deduction or transfer of CAIR NO_x allowances based on the information as adjusted, under § 96.154 of this chapter;

(iii) The correction of an error in a CAIR NO_x Allowance Tracking System account under § 96.156 of this chapter;

(iv) The decision on the transfer of CAIR NO_x allowances under § 96.161 of this chapter;

Environmental Protection Agency

§ 78.1

(v) The finalization of control period emissions data, including retroactive adjustment based on audit;

(vi) The approval or disapproval of a petition under § 96.175 of this chapter.

(8) Under subparts AAA through III of part 96 of this chapter,

(i) The decision on the deduction of CAIR SO₂ allowances, and the adjustment of the information in a submission and the decision on the deduction or transfer of CAIR SO₂ allowances based on the information as adjusted, under § 96.254 of this chapter;

(ii) The correction of an error in a CAIR SO₂ Allowance Tracking System account under § 96.256 of this chapter;

(iii) The decision on the transfer of CAIR SO₂ allowances under § 96.261 of this chapter;

(iv) The finalization of control period emissions data, including retroactive adjustment based on audit;

(v) The approval or disapproval of a petition under § 96.275 of this chapter.

(9) Under subparts AAAA through IIII of part 96 of this chapter,

(i) The decision on the allocation of CAIR NO_x Ozone Season allowances under § 96.341(b)(2) or (c)(2) of this chapter.

(ii) The decision on the deduction of CAIR NO_x Ozone Season allowances, and the adjustment of the information in a submission and the decision on the deduction or transfer of CAIR NO_x Ozone Season allowances based on the information as adjusted, under § 96.354 of this chapter;

(iii) The correction of an error in a CAIR NO_x Ozone Season Allowance Tracking System account under § 96.356 of this chapter;

(iv) The decision on the transfer of CAIR NO_x Ozone Season allowances under § 96.361;

(v) The finalization of control period emissions data, including retroactive adjustment based on audit;

(vi) The approval or disapproval of a petition under § 96.375 of this chapter.

(10) Under subparts AA through II of part 97 of this chapter,

(i) The decision on the allocation of CAIR NO_x allowances under subpart EE of part 97 of this chapter.

(ii) The decision on the deduction of CAIR NO_x allowances, and the adjustment of the information in a submission and the decision on the deduction or transfer of CAIR NO_x allowances based on the information as adjusted, under § 97.154 of this chapter;

(iii) The correction of an error in a CAIR NO_x Allowance Tracking System account under § 97.156 of this chapter;

(iv) The decision on the transfer of CAIR NO_x allowances under § 97.161 of this chapter;

(v) The finalization of control period emissions data, including retroactive adjustment based on audit;

(vi) The approval or disapproval of a petition under § 97.175 of this chapter.

(11) Under subparts AAA through III of part 97 of this chapter,

(i) The decision on the deduction of CAIR SO₂ allowances, and the adjustment of the information in a submission and the decision on the deduction or transfer of CAIR SO₂ allowances based on the information as adjusted, under § 97.254 of this chapter;

(ii) The correction of an error in a CAIR SO₂ Allowance Tracking System account under § 97.256 of this chapter;

(iii) The decision on the transfer of CAIR SO₂ allowances under § 97.261 of this chapter;

(iv) The finalization of control period emissions data, including retroactive adjustment based on audit;

(v) The approval or disapproval of a petition under § 97.275 of this chapter.

(12) Under subparts AAAA through IIII of part 97 of this chapter,

(i) The decision on the allocation of CAIR NO_x Ozone Season allowances under subpart EEEE of part 97 of this chapter.

(ii) The decision on the deduction of CAIR NO_x Ozone Season allowances, and the adjustment of the information in a submission and the decision on the deduction or transfer of CAIR NO_x Ozone Season allowances based on the information as adjusted, under § 97.354 of this chapter;

(iii) The correction of an error in a CAIR NO_x Ozone Season Allowance Tracking System account under § 97.356 of this chapter;

(iv) The decision on the transfer of CAIR NO_x Ozone Season allowances under § 97.361;

(v) The finalization of control period emissions data, including retroactive adjustment based on audit;

§ 78.2

40 CFR Ch. I (7–1–07 Edition)

(vi) The approval or disapproval of a petition under § 97.375 of this chapter.

(c) In order to appeal a decision under paragraph (a) of this section, a person shall file a petition for administrative review with the Environmental Appeals Board under § 78.3. The Environmental Appeals Board will, consistent with § 78.6, either:

(1) Issue an order deciding the appeal; or

(2) Where there is a disputed issue of fact material to the contested portions of the decision, refer the proceeding to the Chief Administrative Law Judge, who will designate an Administrative Law Judge to conduct an evidentiary hearing to decide the disputed issue of fact. If the proposed decision is contested or the Environmental Appeals Board decides to review the proposed decision, the Environmental Appeals Board will issue an order deciding the appeal.

(d) Questions arising at any stage of a proceeding that are not addressed in this part will be resolved at the discretion of the Environmental Appeals Board or the Presiding Officer.

[58 FR 3760, Jan. 11, 1993, as amended at 60 FR 17132, Apr. 4, 1995; 62 FR 55488, Oct. 24, 1997; 66 FR 12978, Mar. 1, 2001; 69 FR 21644, Apr. 21, 2004; 70 FR 25338, May 12, 2005; 71 FR 25379, Apr. 28, 2006]

§ 78.2 General.

Part 72 of this chapter, including §§ 72.2 (definitions), 72.3 (measurements, abbreviations, and acronyms), 72.4 (Federal authority), 72.5 (State authority), 72.6 (applicability), 72.7 (new units exemption), 72.8 (retired units exemption), 72.9 (standard requirements), 72.10 (availability of information), and 72.11 (computation of time), shall apply to appeals of any final decision of the Administrator under parts 72, 73, 74, 75, 76, or 77 of this chapter.

[58 FR 3760, Jan. 11, 1993, as amended at 69 FR 21645, Apr. 21, 2004]

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

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

this chapter and that is appealable under § 78.1(a) of this part:

(i) The designated representative for the unit covered by the decision;

(ii) The authorized account representative for an account covered by the decision; and

(iii) Any interested person.

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

(i) The authorized account representative for any Allowance Tracking System account covered by the decision; and

(ii) With regard to the decision on the allocation of allowances from the Conservation and Renewable Energy Reserve, the certifying official whose application is covered by the decision.

(3) The following persons may petition for administrative review of a decision of the Administrator that is made under part 97 of this chapter and that is appealable under § 78.1(a) of this part:

(i) The NO_x authorized account representative for the unit or any NO_x Allowance Tracking System account covered by the decision; or

(ii) Any interested person.

(4) The following persons may petition for administrative review of a decision of the Administrator that is made under subparts AA through II of part 96 of this chapter and that is appealable under § 78.1(a):

(i) The CAIR designated representative for a unit or source, or the CAIR authorized account representative for any CAIR NO_x Allowance Tracking System account, covered by the decision; or

(ii) Any interested person.

(5) The following persons may petition for administrative review of a decision of the Administrator that is made under subparts AAA through III of part 96 of this chapter and that is appealable under § 78.1(a):

(i) The CAIR designated representative for a unit or source, or the CAIR authorized account representative for any CAIR SO₂ Allowance Tracking System account, covered by the decision; or

(ii) Any interested person.