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## 40 CFR Ch. I (7-1-02 Edition)

and age of the acquired test locomotive. Documentation of all maintenance and adjustments shall be maintained and retained.

(c) Results of one valid emission test using the test procedure outlined in subpart B of this part is required for each in-use locomotive.

(d) If in-use testing results show that an in-use locomotive fails to comply with any applicable emission standards, the manufacturer or remanufacturer shall determine the reason for noncompliance. The manufacturer or remanufacturer must report all determinations for noncompliance in its quarterly in-use test result report pursuant to § 92.607(a)(11).

EFFECTIVE DATE NOTE: At 63 FR 19066, Apr. 16, 1998, § 92.606 was added. This section contains information collection and record-keeping requirements and will not become effective until approval has been given by the Office of Management and Budget.

### § 92.607 In-use test program reporting requirements.

(a) The manufacturer or remanufacturer shall submit to the Administrator within three (3) months of completion of testing all emission testing results generated from the in-use testing program. The following information must be reported for each locomotive tested:

- (1) Engine family, and configuration;
- (2) Locomotive and engine models;
- (3) Locomotive and engine serial numbers;
- (4) Date of manufacture and/or re-manufacture(s), as applicable;
- (5) Megawatt-hours of use (or miles, as applicable);
- (6) Date and time of each test attempt;
- (7) Results (if any) of each test attempt;
- (8) Results of all emission testing;
- (9) Summary of all maintenance and/or adjustments performed;
- (10) Summary of all modifications and/or repairs;
- (11) Determinations of noncompliance; and
- (12) The following signed statement and endorsement by an authorized representative of the manufacturer or remanufacturer:

This report is submitted pursuant to Sections 213 and 208 of the Clean Air Act. This in-use testing program was conducted in complete conformance with all applicable regulations under 40 CFR part 92. All data and information reported herein is, to the best of (Company Name) knowledge, true and accurate. I am aware of the penalties associated with violations of the Clean Air Act and the regulations thereunder. (Authorized Company Representative.)

(b) The manufacturer or remanufacturer shall report to the Administrator within three (3) months of completion of testing the following information for each engine family tested:

(1) The serial numbers of all locomotive that were excluded from the test sample because they did not meet the maintenance requirements of § 92.606;

(2) The owner of each locomotive identified in paragraph (b)(1) of this section (or other entity responsible for the maintenance of the locomotive); and

(3) The specific reasons why the locomotives were excluded from the test sample.

(c) The manufacturer or remanufacturer must submit, via floppy disk, the information outlined in paragraphs (a) and (b) of this section using a pre-approved information heading. The Administrator may exempt manufacturers or remanufacturers from this requirement upon written request with supporting justification.

(d) All testing reports and requests for approvals made under this subpart shall be addressed to: Group Manager, Engine Compliance Programs Group, Engine Programs and Compliance Division, U.S. Environmental Protection Agency, 6403-J, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

## Subpart H—Recall Regulations

### § 92.701 Applicability.

The requirements of subpart H of this part are applicable to all manufacturers and remanufacturers of locomotives and locomotive engines subject to the provisions of subpart A of this part.

### § 92.702 Definitions.

The definitions of subpart A of this part apply to this subpart.

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### § 92.703 Voluntary emissions recall.

(a) Prior to an EPA ordered recall, a manufacturer or remanufacturer may perform (without petition) a voluntary emissions recall pursuant to regulations in subpart E of this part. Such manufacturer or remanufacturer is subject to the reporting requirements in subpart E of this part.

(b) If a determination of nonconformity with the requirements of section 213 of the Act is made (i.e. if EPA orders a recall under the provisions of section 207(c)), the manufacturer(s) or remanufacturer(s) will not have the option of an alternate remedial action and an actual recall would be required.

### § 92.704 Notice to manufacturer or remanufacturer of nonconformity; submission of remedial plan.

(a) The manufacturer or remanufacturer will be notified whenever the Administrator has determined that a substantial number of a class or category of locomotives or locomotive engines produced by that manufacturer or remanufacturer, although properly maintained and used, do not conform to the regulations prescribed under the Act in effect during, and applicable to the model year of such locomotives or locomotive engines. The notification will include a description of each class or category of locomotives or locomotive engines encompassed by the determination of nonconformity, will give the factual basis for the determination of nonconformity (except information previously provided the manufacturer or remanufacturer by the Agency), and will designate a date, no sooner than 45 days from the date of receipt of such notification, by which the manufacturer or remanufacturer shall have submitted a plan to remedy the nonconformity.

(b) Unless a hearing is requested pursuant to § 92.709, the remedial plan shall be submitted to the Administrator within the time limit specified in the Administrator's notification, provided that the Administrator may grant a manufacturer or remanufacturer an extension upon good cause shown.

(c) If a manufacturer or remanufacturer requests a public hearing pursuant to § 92.709, unless as a result of such

hearing the Administrator withdraws his determination of nonconformity, the manufacturer or remanufacturer shall submit the remedial plan within 30 days of the end of such hearing.

### § 92.705 Remedial plan.

(a) When any manufacturer or remanufacturer is notified by the Administrator that a substantial number of any class or category of locomotives or locomotive engines, although properly maintained and used, do not conform to the applicable regulations of this part (including emission standards or family emission limits), the manufacturer or remanufacturer shall submit a plan to the Administrator to remedy such nonconformity. The plan shall contain the following:

(1) A description of each class or category of locomotive or locomotive engine to be recalled including the year(s) of manufacture or remanufacture, the make, the model, the calendar year and such other information as may be required to identify the locomotives or locomotive engines to be recalled.

(2) A description of the specific modifications, alterations, repairs, corrections, adjustments or other changes to be made to bring the locomotives or locomotive engines into conformity, including a brief summary of the data and technical studies which support the manufacturer's or remanufacturer's decision as to the particular remedial changes to be used in correcting the nonconformity.

(3) A description of the method by which the manufacturer or remanufacturer will determine the names and addresses of locomotive or locomotive engine owners.

(4) A description of the proper maintenance or use, if any, upon which the manufacturer or remanufacturer conditions eligibility for repair under the remedial plan, an explanation of the manufacturer's or remanufacturer's reasons for imposing any such condition, and a description of the proof to be required of a locomotive or locomotive engine owner to demonstrate compliance with any such condition. Eligibility may not be denied solely on the basis that the locomotive or locomotive engine owner used parts not

manufactured or remanufactured by the original locomotive or locomotive engine manufacturer or remanufacturer, or had repairs not performed by such manufacturer or remanufacturer. No maintenance or use condition may be imposed unless it is, in the judgment of the Administrator, demonstrably related to preventing the nonconformity.

(5) A description of the procedure to be followed by locomotive or locomotive engine owners to obtain correction of the nonconformity. This shall include designation of the date on or after which the owner can have the nonconformity remedied, the time reasonably necessary to perform the labor required to correct the nonconformity, and the designation of facilities at which the nonconformity can be remedied: *Provided*, That repair shall be completed within a reasonable time designated by the Administrator from the date the owner first tenders his locomotive or locomotive engine after the date designated by the manufacturer or remanufacturer as the date on or after which the owner can have the nonconformity remedied.

(6) If some or all of the nonconforming locomotives or locomotive engines are to be remedied by persons other than authorized warranty agents of the manufacturer or remanufacturer, a description of the class of persons other than authorized warranty agents of the manufacturer or remanufacturer who will remedy the nonconformity, and a statement indicating that the participating members of the class will be properly equipped to perform such remedial action.

(7) Three copies of the letters of notification to be sent to locomotive or locomotive engine owners.

(8) A description of the system by which the manufacturer or remanufacturer will assure that an adequate supply of parts will be available to perform the repair under the remedial plan including the date by which an adequate supply of parts will be available to initiate the repair campaign, the percentage of the total parts requirement of each person who is to perform the repair under the remedial plan to be shipped to initiate the campaign, and the method to be used to as-

sure the supply remains both adequate and responsive to owner demand.

(9) Three copies of all necessary instructions to be sent to those persons who are to perform the repair under the remedial plan.

(10) A description of the impact of the changes on fuel consumption, operability, and safety of each class or category of locomotives or locomotive engines to be recalled and a brief summary of the data, technical studies, or engineering evaluations which support these conclusions.

(11) Any other information, reports or data which the Administrator may reasonably determine is necessary to evaluate the remedial plan.

(b)(1) Notification to locomotive or locomotive engine owners shall be made by first class mail or by such means as approved by the Administrator.

(2) The manufacturer or remanufacturer shall use all reasonable means necessary to locate locomotive or locomotive engine owners.

(3) The Administrator reserves the right to require the manufacturer or remanufacturer to send by certified mail or other reasonable means subsequent notification to locomotive or locomotive engine owners.

(c)(1) The manufacturer or remanufacturer shall require those who perform the repair under the remedial plan to affix a label to each locomotive or locomotive engine repaired or, when required, inspected under the remedial plan.

(2) The label shall be placed in such location as approved by the Administrator consistent with Federal Railroad Administration regulations and shall be fabricated of a material suitable for the location in which it is installed and which is not readily removable intact.

(3) The label shall contain:

(i) The recall campaign number; and  
(ii) A code designating the campaign facility at which the repair, or inspection for repair was performed.

(4) The Administrator reserves the right to waive any or all of the requirements of this paragraph (c) if he/she determines that they constitute an unwarranted burden to the manufacturer or remanufacturer.

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(d) The Administrator may require the manufacturer or remanufacturer to conduct tests on components and locomotives or locomotive engines incorporating a change, repair, or modification reasonably designed and necessary to demonstrate the effectiveness of the change, repair, or modification.

NOTE TO § 92.705: An interpretive ruling regarding § 92.705 is published in Appendix II to this part.

### § 92.706 Approval of plan: Implementation.

(a) If the Administrator finds that the remedial plan is designed and effective to correct the nonconformity, he/she will so notify the manufacturer or remanufacturer in writing. If the remedial plan is not approved, the Administrator will provide the manufacturer or remanufacturer notice of the disapproval and the reasons for the disapproval in writing.

(b) Upon receipt of notice from the Administrator that the remedial plan has been approved, the manufacturer or remanufacturer shall commence implementation of the approved plan. Notification of locomotive or locomotive engine owners shall be in accordance with requirements of this subpart and shall proceed as follows:

(1) When no public hearing as described in § 92.709 is requested by the manufacturer or remanufacturer, notification of locomotive or locomotive engine owners shall commence within 15 working days of the receipt by the manufacturer or remanufacturer of the Administrator's approval unless otherwise specified by the Administrator.

(2) When a public hearing as described in § 92.709 is held, unless as a result of such hearing the Administrator withdraws the determination of nonconformity, the Administrator shall, within 60 days after the completion of such hearing, order the manufacturer or remanufacturer to provide prompt notification of such nonconformity.

### § 92.707 Notification to locomotive or locomotive engine owners.

(a) The notification of locomotive or locomotive engine owners shall contain the following:

(1) The statement: "The Administrator of the U.S. Environmental Protection

Agency has determined that your locomotive or locomotive engine may be emitting pollutants in excess of the federal emission standards or family emission limits, as defined in 40 CFR part 92. These standards or family emission limits, as defined in 40 CFR part 92 were established to protect the public health or welfare from the dangers of air pollution."

(2) A statement that the nonconformity of any such locomotives or locomotive engines which have been, if required by the remedial plan, properly maintained and used, will be remedied at the expense of the manufacturer or remanufacturer.

(3) A description of the proper maintenance or use, if any, upon which the manufacturer or remanufacturer conditions eligibility for repair under the remedial plan and a description of the proof to be required of a locomotive or locomotive engine owner to demonstrate compliance with such condition. Eligibility may not be denied solely on the basis that the locomotive or locomotive engine owner used parts not manufactured or remanufactured by the manufacturer or remanufacturer, or had repairs not performed by the manufacturer or remanufacturer.

(4) A clear description of the components which will be affected by the remedy and a general statement of the measures to be taken to correct the nonconformity.

(5) A description of the adverse effects, if any, that an uncorrected nonconformity would have on the performance or operability of the locomotive or locomotive engine.

(6) A description of the adverse effects, if any, that such nonconformity would have on the performance or operability of the locomotive or locomotive engine.

(7) A description of the average effects, if any, that such nonconformity would have on the functions of other locomotive or locomotive engine components.

(8) A description of the procedure which the locomotive or locomotive engine owner should follow to obtain correction of the nonconformity. This shall include designation of the date on or after which the owner can have the

nonconformity remedied, the time reasonably necessary to perform the labor required to correct the nonconformity, and the designation of facilities at which the nonconformity can be remedied.

(9) A telephone number provided by the manufacturer or remanufacturer, which may be used to report difficulty in obtaining recall repairs.

(10) The statement: "In order to ensure your full protection under the emission warranty made applicable to your (locomotive or locomotive engine) by federal law, and your right to participate in future recalls, it is recommended that you have (locomotive or locomotive engine) serviced as soon as possible. Failure to do so could legally be determined to be a lack of proper maintenance of your (locomotive or locomotive engine)."

(b) No notice sent pursuant to paragraph (a) of this section nor any other contemporaneous communication sent to locomotive or locomotive engine owners or dealers shall contain any statement or implication that the nonconformity does not exist or that the nonconformity will not degrade air quality.

(c) The manufacturer or remanufacturer shall be informed of any other requirements pertaining to the notification under this section which the Administrator has determined are reasonable and necessary to ensure the effectiveness of the recall campaign.

#### § 92.708 Records and reports.

(a) The manufacturer or remanufacturer shall provide to the Administrator a copy of all communications which relate to the remedial plan directed to persons who are to perform the repair under the remedial plan. Such copies shall be mailed to the Administrator contemporaneously with their transmission to persons who are to perform the repair under the remedial plan.

(b) The manufacturer or remanufacturer shall provide for the establishment and maintenance of records to enable the Administrator to conduct a continuing analysis of the adequacy of the recall campaign. The records shall include, for each class or category of

locomotive or locomotive engine, but need not be limited to, the following:

(1) Recall campaign number as designated by the manufacturer or remanufacturer.

(2) Date owner notification was begun, and date completed.

(3) Number of locomotives or locomotive engines involved in the recall campaign.

(4) Number of locomotives or locomotive engines known or estimated to be affected by the nonconformity.

(5) Number of locomotives or locomotive engines inspected pursuant to the remedial plan.

(6) Number of inspected locomotives or locomotive engines found to be affected by the nonconformity.

(7) Number of locomotives or locomotive engines actually receiving repair under the remedial plan.

(8) Number of locomotives or locomotive engines determined to be unavailable for inspection or repair under the remedial plan due to exportation, scrapping or for other reasons (specify).

(9) Number of locomotives or locomotive engines determined to be ineligible for remedial action due to a failure to properly maintain or use such locomotives or locomotive engines.

(c) If the manufacturer or remanufacturer determines that the original answers for paragraphs (b)(3) and (b)(4) of this section are incorrect, revised figures and an explanatory note shall be submitted. Answers to paragraphs (b)(5), (b)(6), (b)(7), (b)(8), and (b)(9) of this section shall be cumulative totals.

(d) Unless otherwise directed by the Administrator, the information specified in paragraph (b) of this section shall be included in quarterly reports, with respect to each recall campaign, for six consecutive quarters beginning with the quarter in which the notification of owners was initiated, or until all nonconforming locomotives or locomotive engines involved in the campaign have been remedied, whichever occurs sooner. Such reports shall be submitted no later than 25 working days after the close of each calendar quarter.

(e) The manufacturer or remanufacturer shall maintain in a form suitable for inspection, such as computer information storage devices or card files,

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lists of the names and addresses of locomotive or locomotive engine owners:

- (1) To whom notification was given;
- (2) Who received remedial repair or inspection under the remedial plan; and
- (3) When eligibility for repair is conditioned on proper maintenance or use, that were determined not to qualify for such remedial action.

(f) The records described in paragraph (e) of this section shall be made available to the Administrator upon request.

(g) The records and reports required by this section shall be retained for not less than eight (8) years.

EFFECTIVE DATE NOTE: At 63 FR 19069, Apr. 16, 1998, §92.708 was added. This section contains information collection and record-keeping requirements and will not become effective until approval has been given by the Office of Management and Budget.

### § 92.709 Public hearings.

(a) *Definitions.* The following definitions shall be applicable to this section:

(1) *Hearing Clerk* shall mean the Hearing Clerk of the Environmental Protection Agency.

(2) *Intervenor* shall mean a person who files a petition to be made an intervenor pursuant to paragraph (g) of this section and whose petition is approved.

(3) *Manufacturer or remanufacturer* refers to a manufacturer or remanufacturer contesting a recall order directed at that manufacturer or remanufacturer.

(4) *Party* shall include the Environmental Protection Agency, the manufacturer or remanufacturer, and any intervenors.

(5) *Presiding Officer* shall mean an Administrative Law Judge appointed pursuant to 5 U.S.C. 3105 (see also 5 CFR part 930).

(6) *Environmental Appeals Board* shall mean the Board within the Agency described in §1.25 of this chapter. The Administrator delegates authority to the Environmental Appeals Board to issue final decisions in appeals filed under this subpart. Appeals directed to the Administrator, rather than to the Environmental Appeals Board, will not be considered. This delegation of author-

ity to the Environmental Appeals Board does not preclude the Environmental Appeals Board from referring an appeal or a motion filed under this subpart to the Administrator for decision when the Environmental Appeals Board, in its discretion, deems it appropriate to do so. When an appeal or motion is referred to the Administrator, all parties shall be so notified and the rules in this part referring to the Environmental Appeals Board shall be interpreted as referring to the Administrator.

(b) *Request for public hearing.* (1)(i) If the manufacturer or remanufacturer disagrees with the Administrator's finding of nonconformity he may request a public hearing as described in this section. Requests for such a hearing shall be filed with the Administrator not later than 45 days after the receipt of the Administrator's notification of nonconformity unless otherwise specified by the Administrator. Two copies of such request shall simultaneously be served upon the Director of the Engine Programs and Compliance Division and two copies filed with the Hearing Clerk. Failure of the manufacturer or remanufacturer to request a hearing within the time provided shall constitute a waiver of his right to such a hearing. In such a case, the manufacturer or remanufacturer shall carry out the recall order as required by §92.705.

(ii) Subsequent to the expiration of the period for requesting a hearing as of right, the Administrator may, in his discretion and for good cause shown, grant the manufacturer or remanufacturer a hearing to contest the nonconformity.

(2) The request for a public hearing shall contain:

(i) A statement as to which classes or categories of locomotives or locomotive engines are to be the subject of the hearing;

(ii) A concise statement of the issues to be raised by the manufacturer or remanufacturer at the hearing for each class or category of locomotive or locomotive engine for which the manufacturer or remanufacturer has requested the hearing; and

(iii) A statement as to reasons the manufacturer or remanufacturer believes it will prevail on the merits on each of the issues so raised.

(3) A copy of all requests for public hearings shall be kept on file in the Office of the Hearing Clerk and shall be made available to the public during Agency business hours.

(c) *Filing and service.* (1) An original and two copies of all documents or papers required or permitted to be filed pursuant to this section shall be filed with the Hearing Clerk. Filing shall be deemed timely if mailed, as determined by the postmark, to the Hearing Clerk within the time allowed by this section. If filing is to be accomplished by mailing, the documents shall be sent to the address set forth in the notice of public hearing as described in paragraph (f) of this section.

(2) Except for requests to commence a hearing, at the same time a party files with the Hearing Clerk any additional issues for consideration at the hearing or any written testimony, documents, papers, exhibits, or materials, to be introduced into evidence or papers filed in connection with any appeal, it shall serve upon all other parties copies thereof. A certificate of service shall be provided on or accompany each document or paper filed with the Hearing Clerk. Documents to be served upon the Director of the Engine Programs and Compliance Division shall be mailed to: Director, Engine Programs and Compliance Division 6403-J, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Service by mail is complete upon mailing.

(d) *Time.* (1) In computing any period of time prescribed or allowed by this section, except as otherwise provided, the day of the act or event from which the designated period of time begins to run shall not be included. Saturdays, Sundays, and Federal legal holidays shall be included in computing any such period allowed for the filing of any document or paper, except that when such period expires on a Saturday, Sunday, or Federal legal holiday, such period shall be extended to include the next following business day.

(2) A prescribed period of time within which a party is required or permitted

to do an act shall be computed from the time of service, except that when service is accomplished by mail, three days shall be added to the prescribed period.

(e) *Consolidation.* The Administrator or the Presiding Officer in his discretion may consolidate two or more proceedings to be held under this section for the purpose of resolving one or more issues whenever it appears that such consolidation will expedite or simplify consideration of such issues. Consolidation shall not affect the right of any party to raise issues that could have been raised if consolidation had not occurred.

(f) *Notice of public hearings.* (1) Notice of a public hearing under this section shall be given by publication in the FEDERAL REGISTER. Notice will be given at least 30 days prior to the commencement of such hearings.

(2) The notice of a public hearing shall include the following information:

(i) The purpose of the hearing and the legal authority under which the hearing is to be held;

(ii) A brief summary of the Administrator's determination of nonconformity;

(iii) A brief summary of the manufacturer's or remanufacturer's basis for contesting the Administrator's determination of nonconformity;

(iv) Information regarding the time and location of the hearing and the address to which all documents required or permitted to be filed should be sent;

(v) The address of the Hearing Clerk to whom all inquiries should be directed and with whom documents are required to be filed;

(vi) A statement that all petitions to be made an intervenor must be filed with the Hearing Clerk within 25 days from the date of the notice of public hearing and must conform to the requirements of paragraph (g) of this section.

(3) The notice of public hearing shall be issued by the General Counsel.

(g) *Intervenors.* (1) Any person desiring to intervene in a hearing to be held under section 207(c)(1) of the Act shall file a petition setting forth the facts and reasons why he/she thinks he/she should be permitted to intervene.

(2) In passing upon a petition to intervene, the following factors, among other things, shall be considered by the Presiding Officer:

(i) The nature of the petitioner's interest including the nature and the extent of the property, financial, environmental protection, or other interest of the petitioner;

(ii) The effect of the order which may be entered in the proceeding on petitioner's interest;

(iii) The extent to which the petitioner's interest will be represented by existing parties or may be protected by other means;

(iv) The extent to which petitioner's participation may reasonably be expected to assist materially in the development of a complete record;

(v) The effect of the intervention on the Agency's statutory mandate.

(3) A petition to intervene must be filed within 25 days following the notice of public hearing under section 207(c)(1) of the Act and shall be served on all parties. Any opposition to such petition must be filed within five days of such service.

(4) All petitions to be made an intervenor shall be reviewed by the Presiding Officer using the criteria set forth in paragraph (g)(2) of this section and considering any oppositions to such petition. Where the petition demonstrates that the petitioner's interest is limited to particular issues, the Presiding Officer may, in granting such petition, limit petitioner's participation to those particular issues only.

(5) If the Presiding Officer grants the petition with respect to any or all issues, he/she shall so notify, or direct the Hearing Clerk to notify, the petitioner and all parties. If the Presiding Officer denies the petition he/she shall so notify, or direct the Hearing Clerk to notify, the petitioner and all parties and shall briefly state the reasons why the petition was denied.

(6) All petitions to be made an intervenor shall include an agreement by the petitioner, and any person represented by the petitioner, to be subject to examination and cross-examination and to make any supporting and relevant records available at its own expense upon the request of the Presiding Officer, on his/her own motion or

the motion of any party or other intervenor. If the intervenor fails to comply with any such request, the Presiding Officer may in his/her discretion, terminate his/her status as an intervenor.

(h) *Intervention by motion.* Following the expiration of the time prescribed in paragraph (g) of this section for the submission of petitions to intervene in a hearing, any person may file a motion with the Presiding Officer to intervene in a hearing. Such a motion must contain the information and commitments required by paragraphs (g)(2) and (g)(6) of this section, and, in addition, must show that there is good cause for granting the motion and must contain a statement that the intervenor shall be bound by agreements, arrangements, and other determinations which may have been made in the proceeding.

(i) *Amicus Curiae.* Persons not parties to the proceedings wishing to file briefs may do so by leave of the Presiding Officer granted on motion. A motion for leave shall identify the interest of the applicant and shall state the reasons why the amicus brief is desirable.

(j) *Presiding Officer.* The Presiding Officer shall have the duty to conduct a fair and impartial hearing in accordance with 5 U.S.C. 554, 556 and 557, to take all necessary action to avoid delay in the disposition of the proceedings and to maintain order. He/she shall have all power consistent with Agency rule and with the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) necessary to this end, including the following:

(1) To administer oaths and affirmations;

(2) To rule upon offers of proof and receive relevant evidence;

(3) To regulate the course of the hearings and the conduct of the parties and their counsel therein;

(4) To hold conferences for simplification of the issues or any other proper purpose;

(5) To consider and rule upon all procedural and other motions appropriate in such proceedings;

(6) To require the submission of direct testimony in written form with or without affidavit whenever, in the opinion of the Presiding Officer, oral testimony is not necessary for full and

true disclosure of the facts. Testimony concerning the conduct and results of tests and inspections may be submitted in written form;

(7) To enforce agreements and orders requiring access as authorized by law;

(8) To require the filing of briefs on any matter on which he/she is required to rule;

(9) To require any party or any witness, during the course of the hearing, to state his/her position on any issue;

(10) To take or cause depositions to be taken whenever the ends of justice would be served thereby;

(11) To make decisions or recommend decisions to resolve the disputed issues of the record of the hearing;

(12) To issue, upon good cause shown, protective orders as described in paragraph (n) of this section.

(k) *Conferences.* (1) At the discretion of the Presiding Officer, conferences may be held prior to or during any hearing. The Presiding Officer shall direct the Hearing Clerk to notify all parties and intervenors of the time and location of any such conference. At the discretion of the Presiding Officer, persons other than parties may attend. At a conference the Presiding Officer may:

(i) Obtain stipulations and admissions, receive requests and order depositions to be taken, identify disputed issues of fact and law, and require or allow the submission of written testimony from any witness or party;

(ii) Set a hearing schedule for as many of the following as are deemed necessary by the Presiding Officer:

(A) Oral and written statements;

(B) Submission of written direct testimony as required or authorized by the Presiding Officer;

(C) Oral direct and cross-examination of a witness where necessary as prescribed in paragraph (p) of this section;

(D) Oral argument, if appropriate;

(iii) Identify matters of which official notice may be taken;

(iv) Consider limitation of the number of expert and other witnesses;

(v) Consider the procedure to be followed at the hearing; and

(vi) Consider any other matter that may expedite the hearing or aid in the disposition of the issue.

(2) The results of any conference including all stipulations shall, if not

transcribed, be summarized in writing by the Presiding Officer and made part of the record.

(1) *Primary discovery (exchange of witness lists and documents).* (1) At a pre-hearing conference or within some reasonable time set by the Presiding Officer prior to the hearing, each party shall make available to the other parties the names of the expert and other witnesses the party expects to call, together with a brief summary of their expected testimony and a list of all documents and exhibits which the party expects to introduce into evidence. Thereafter, witnesses, documents, or exhibits may be added and summaries of expected testimony amended upon motion by a party.

(2)(i) The Presiding Officer, may, upon motion by a party or other person, and for good cause shown, by order:

(A) Restrict or defer disclosure by a party of the name of a witness or a narrative summary of the expected testimony of a witness; and

(B) Prescribe other appropriate measures to protect a witness.

(ii) Any party affected by any such action shall have an adequate opportunity, once he learns the name of a witness and obtains the narrative summary of his expected testimony, to prepare for the presentation of his case.

(m) *Other discovery.* (1) Except as so provided by paragraph (1) of this section, further discovery, under this paragraph (m), shall be permitted only upon determination by the Presiding Officer:

(i) That such discovery will not in any way unreasonably delay the proceeding;

(ii) That the information to be obtained is not obtainable voluntarily; and

(iii) That such information has significant probative value. The Presiding Officer shall be guided by the procedures set forth in the Federal Rules of Civil Procedure (28 U.S.C.), where practicable, and the precedents thereunder, except that no discovery shall be undertaken except upon order of the Presiding Officer or upon agreement of the parties.

(2) The Presiding Officer shall order depositions upon oral questions only

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upon a showing of good cause and upon a finding that:

(i) The information sought cannot be obtained by alternative methods; or

(ii) 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 or motions therefor. Such a motion shall set forth:

(i) The circumstances warranting the taking of the discovery;

(ii) The nature of the information expected to be discovered; and

(iii) The time and place where it will be taken. If the Presiding Officer determines the motion should be granted, he shall issue an order for the taking of such discovery together with the conditions and terms thereof.

(4) Failure to comply with an order issued pursuant to this paragraph (m) may lead to the inference that the information to be discovered would be adverse to the person or party from whom the information was sought.

(n) *Protective orders: in camera proceedings.* (1) Upon motion by a party or by the person from whom discovery is sought, and upon a showing by the movant that the disclosure of the information to be discovered, or a particular part thereof, (other than emission data) would result in methods or processes entitled to protection as trade secrets of such person being divulged, the Presiding Officer may enter a protective order with respect to such material. Any protective order shall contain such terms governing the treatment of the information as may be appropriate under the circumstances to prevent disclosure outside the hearing: *Provided*, That the order shall state that the material shall be filed separately from other evidence and exhibits in the hearing. Disclosure shall be limited to parties to the hearing, their counsel and relevant technical consultants, and authorized representatives of the United States concerned with carrying out the Act. Except in the case of the government, disclosure may be limited to counsel to parties who shall not disclose such information to the parties themselves. Except

in the case of the government, disclosure to a party or his counsel shall be conditioned on execution of a sworn statement that no disclosure of the information will be made to persons not entitled to receive it under the terms of the protective order. (No such provision is necessary where government employees are concerned because disclosure by them is subject to the terms of 18 U.S.C. 1905.)

(2)(i) A party or person seeking a protective order may be permitted to make all or part of the required showing in camera. A record shall be made of such in camera proceedings. If the Presiding Officer enters a protective order following a showing in camera, the record of such showing shall be sealed and preserved and made available to the Agency or court in the event of appeal.

(ii) Attendance at any in camera proceeding may be limited to the Presiding Officer, the Agency, and the person or party seeking the protective order.

(3) Any party, subject to the terms and conditions of any protective order issued pursuant to paragraph (n)(1) of this section, desiring for the presentation of his/her case to make use of any in camera documents or testimony shall make application to the Presiding Officer by motion setting forth the justification therefor. The Presiding Officer, in granting any such motion, shall enter an order protecting the rights of the affected persons and parties and preventing unnecessary disclosure of such information, including the presentation of such information and oral testimony and cross-examination concerning it in executive session, as in his/her discretion is necessary and practicable.

(4) In the submittal of findings, briefs, or other papers, counsel for all parties shall make a good faith attempt to refrain from disclosing the specific details of in camera documents and testimony. This shall not preclude references in such findings, briefs, or other papers to such documents or testimony including generalized statements based on their contents. To the extent that counsel consider it necessary to include specific details in their presentations, such data shall be

incorporated in separate findings, briefs, or other papers marked "confidential", which shall become part of the in camera record.

(o) *Motions.* (1) All motions, except those made orally during the course of the hearing, shall be in writing and shall state with particularity the grounds therefor, shall set forth the relief or order sought, and shall be filed with the Hearing Clerk and served upon all parties.

(2) Within ten days after service of any motion filed pursuant to this section, or within such other time as may be fixed by the Environmental Appeals Board or the Presiding Officer, as appropriate, any party may serve and file an answer to the motion. The movant shall, if requested by the Environmental Appeals Board or the Presiding Officer, as appropriate, serve and file reply papers within the time set by the request.

(3) The Presiding Officer shall rule upon all motions filed or made prior to the filing of his decision or accelerated decision, as appropriate. The Environmental Appeals Board shall rule upon all motions filed prior to the appointment of a Presiding Officer and all motions filed after the filing of the decision of the Presiding Officer or accelerated decision. Oral argument of motions will be permitted only if the Presiding Officer or the Environmental Appeals Board, as appropriate, deems it necessary.

(p) *Evidence.* (1) The official transcripts and exhibits, together with all papers and requests filed in the proceeding, shall constitute the record. Immaterial or irrelevant parts of an admissible document shall be segregated and excluded so far as practicable. Documents or parts thereof subject to a protective order under paragraph (n) of this section shall be segregated. Evidence may be received at the hearing even though inadmissible under the rules of evidence applicable to judicial proceedings. The weight to be given evidence shall be determined by its reliability and probative value.

(2) The Presiding Officer shall allow the parties to examine and to cross-examine a witness to the extent that such examination and cross-examina-

tion is necessary for a full and true disclosure of the facts.

(3) Rulings of the Presiding Officer on the admissibility of evidence, the propriety of examination and cross-examination and other procedural matters shall appear in the record.

(4) Parties shall automatically be presumed to have taken exception to an adverse ruling.

(q) *Interlocutory appeal.* (1) An interlocutory appeal may be taken to the Environmental Appeals Board either:

(i) With the consent of the Presiding Officer and where he certifies on the record or in writing that the allowance of an interlocutory appeal is clearly necessary to prevent exceptional delay, expense or prejudice to any party or substantial detriment to the public interest; or

(ii) Absent the consent of the Presiding Officer, by permission of the Environmental Appeals Board.

(2) Applications for interlocutory appeal of any ruling or order of the Presiding Officer may be filed with the Presiding Officer within 5 days of the issuance of the ruling or order being appealed. Answers thereto by other parties may be filed within 5 days of the service of such applications.

(3) The Presiding Officer shall rule on such applications within 5 days of the filing of such application or answers thereto.

(4) Applications to file such appeals absent consent of the Presiding Officer shall be filed with the Environmental Appeals Board within 5 days of the denial of any appeal by the Presiding Officer.

(5) The Environmental Appeals Board will consider the merits of the appeal on the application and any answers thereto. No oral argument will be heard nor other briefs filed unless the Environmental Appeals Board directs otherwise.

(6) Except under extraordinary circumstances as determined by the Presiding Officer, the taking of an interlocutory appeal will not stay the hearing.

(r) *Record.* (1) Hearings shall be stenographically reported and transcribed, and the original transcript shall be part of the record and the sole official transcript. Copies of the record shall be

filed with the Hearing Clerk and made available during Agency business hours for public inspection. Any person desiring a copy of the record of the hearing or any part thereof shall be entitled to the same upon payment of the cost thereof.

(2) The official transcripts and exhibits, together with all papers and requests filed in the proceeding, shall constitute the record.

(s) *Findings, conclusions.* (1) Within 20 days of the close of the reception of evidence, or within such longer time as may be fixed by the Presiding Officer, any party may submit for the consideration of the Presiding Officer findings of fact, conclusions of law, and a rule or order, together with reasons therefor and briefs in support thereof. Such proposals shall be in writing, shall be served upon all parties, and shall contain adequate references to the record and authorities relied on.

(2) The record shall show the Presiding Officer's ruling on the findings and conclusions except when his/her order disposing of the proceeding otherwise informs the parties of the action taken by him/her thereon.

(t) *Decision of the Presiding Officer.* (1) Unless extended by the Environmental Appeals Board, the Presiding Officer shall issue and file with the Hearing Clerk his decision within 30 days after the period for filing findings as provided for in paragraph (s) of this section has expired.

(2) The Presiding Officer's decision shall become the opinion of the Environmental Appeals Board:

(i) When no notice of intention to appeal as described in paragraph (u) of this section is filed, 30 days after the issuance thereof, unless in the interim the Environmental Appeals Board shall have taken action to review or stay the effective date of the decision; or

(ii) When a notice of intention to appeal is filed but the appeal is not perfected as required by paragraph (u) of this section, 5 days after the period allowed for perfection of an appeal has expired unless within that 5 day period, the Environmental Appeals Board shall have taken action to review or stay the effective date of the decision.

(3) The Presiding Officer's decision shall include a statement of findings

and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact or law presented on the record and an appropriate rule or order. Such decision shall be supported by substantial evidence and based upon a consideration of the whole record.

(4) At any time prior to the issuance of his decision, the Presiding Officer may reopen the proceeding for the reception of further evidence. Except for the correction of clerical errors, the jurisdiction of the Presiding Officer is terminated upon the issuance of his/her decision.

(u) *Appeal from the decision of the Presiding Officer.* (1) Any party to a proceeding may appeal the Presiding Officer's decision to the Environmental Appeals Board, Provided, That within 10 days after issuance of the Presiding Officer's decision such party files a notice of intention to appeal and an appeal brief within 30 days of such decision.

(2) When an appeal is taken from the decision of the Presiding Officer, any party may file a brief with respect to such appeal. The brief shall be filed within 20 days of the date of the filing of the appellant's brief.

(3) Any brief filed pursuant to this paragraph (u) shall contain in the order indicated, the following:

(i) A subject index of the matter in the brief, with page references, and a table of cases (alphabetically arranged), textbooks, statutes, and other material cited, with page references thereto;

(ii) A specification of the issues intended to be urged;

(iii) The argument presenting clearly the points of fact and law relied upon in support of the position taken on each issue, with specific page references to the record and the legal or other material relied upon; and

(iv) A form of rule or order for the Environmental Appeals Board's consideration if different from the rule or order contained in the Presiding Officer's decision.

(4) No brief in excess of 40 pages shall be filed without leave of the Environmental Appeals Board.

(5) Oral argument will be allowed in the discretion of the Environmental Appeals Board.

(v) *Review of the Presiding Officer's decision in absence of appeal.* (1) If, after the expiration of the period for taking an appeal as provided for by paragraph (u) of this section, no notice of intention to appeal the decision of the Presiding Officer has been filed, or if filed, not perfected, the Hearing Clerk shall so notify the Environmental Appeals Board.

(2) The Environmental Appeals Board, upon receipt of notice from the Hearing Clerk that no notice of intention to appeal has been filed, or if filed, not perfected pursuant to paragraph (u) of this section, may, on its own motion, within the time limits specified in paragraph (t)(2) of this section, review the decision of the Presiding Officer. Notice of the intention of the Environmental Appeals Board to review the decision of the Presiding Officer shall be given to all parties and shall set forth the scope of such review and the issue which shall be considered and shall make provision for filing of briefs.

(w) *Decision on appeal or review.* (1) Upon appeal from or review of the Presiding Officer's decision, the Environmental Appeals Board shall consider such parts of the record as are cited or as may be necessary to resolve the issues presented and, in addition shall to the extent necessary or desirable exercise all the powers which it could have exercised if it had presided at the hearing.

(2) In rendering its decision, the Environmental Appeals Board shall adopt, modify, or set aside the findings, conclusions, and rule or order contained in the decision of the Presiding Officer and shall set forth in its decision a statement of the reasons or bases for its action.

(3) In those cases where the Environmental Appeals Board determines that it should have further information or additional views of the parties as to the form and content of the rule or order to be issued, the Environmental Appeals Board, in its discretion, may withhold final action pending the receipt of such additional information or views, or may remand the case to the Presiding Officer.

(x) *Reconsideration.* Within twenty (20) days after issuance of the Environ-

mental Appeals Board's decision, any party may file with the Environmental Appeals Board a petition for reconsideration of such decision, setting forth the relief desired and the grounds in support thereof. Any petition filed under this paragraph (x) must be confined to new questions raised by the decision or the final order and upon which the petitioner had no opportunity to argue before the Presiding Officer or the Environmental Appeals Board. Any party desiring to oppose such a petition shall file and answer thereto within ten (10) days after the filing of the petition. The filing of a petition for reconsideration shall not operate to stay the effective date of the decision or order or to toll the running of any statutory time period affecting such decision or order unless specifically so ordered by the Environmental Appeals Board.

(y) *Accelerated decision: Dismissal.* (1) The Presiding Officer, upon motion of any party or sua sponte, may at any time render an accelerated decision in favor of the Agency or the manufacturer or remanufacturer 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, or dismiss any party with prejudice, under any of the following conditions:

(i) Failure to state a claim upon which relief can be granted, or direct or collateral estoppel;

(ii) There is no genuine issue of material fact and a party is entitled to judgment as a matter of law; or

(iii) Such other and further reasons as are just, including specifically failure to obey a procedural order of the Presiding Officer.

(2) If under this paragraph (y) an accelerated decision is issued as to all the issues and claims joined in the proceeding, the decision shall be treated for the purposes of these procedures as the decision of the Presiding Officer as provided in paragraph (p) of this section.

(3) If under this paragraph (y), judgment 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

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facts are actually and in good faith controverted. He/she shall thereupon issue an order specifying the facts which appear without substantial controversy, and the issues and claims upon which the hearing will proceed.

(z) *Conclusion of hearing.* (1) If, after the expiration of the period for taking an appeal as provided for by paragraph (u) of this section, no appeal has been taken from the Presiding Officer's decision, and, after the expiration of the period for review by the Environmental Appeals Board on its own motion as provided for by paragraph (v) of this section, the Environmental Appeals Board does not move to review such decision, the hearing will be deemed to have ended at the expiration of all periods allowed for such appeal and review.

(2) If an appeal of the Presiding Officer's decision is taken pursuant to paragraph (u) of this section, or if, in the absence of such appeal, the Environmental Appeals Board moves to review the decision of the Presiding Officer pursuant to paragraph (v) of this section, the hearing will be deemed to have ended upon the rendering of a final decision by the Environmental Appeals Board.

(aa) *Judicial review.* (1) The Administrator hereby designates the Deputy General Counsel, Environmental Protection Agency as the officer upon whom copy of any petition for judicial review shall be served. Such officer shall be responsible for filing in the court the record on which the order of the Environmental Appeals Board is based.

(2) Before forwarding the record to the court, the Agency shall advise the petitioner of costs of preparing it and as soon as payment to cover fees is made shall forward the record to the court.

### Subpart I—Importation of Nonconforming Locomotives and Locomotive Engines

#### § 92.801 Applicability.

(a) Except where otherwise indicated, this subpart is applicable to importers of locomotives or locomotive engines for which the Administrator has promulgated regulations under this part prescribing emission standards, that

are offered for importation or imported into the United States, but which locomotives or locomotive engines, at the time of importation or being offered for importation, are not covered by certificates of conformity issued under section 213 and section 206(a) of the Clean Air Act (that is, which are nonconforming locomotives or locomotive engines as defined in § 92.2), and this part. Compliance with regulations under this subpart does not relieve any person or entity from compliance with other applicable provisions of the Clean Air Act.

(b) Regulations prescribing further procedures for the importation of locomotives and locomotive engines into the Customs territory of the United States, as defined in 19 U.S.C. 1202, are set forth in U.S. Customs Service regulations (19 CFR chapter I).

#### § 92.802 Definitions.

The definitions of subpart A of this part apply to this subpart.

#### § 92.803 Admission.

A nonconforming locomotive or locomotive engine offered for importation may be admitted into the United States pursuant to the provisions of this subpart. In order to obtain admission the importer must submit to the Administrator a written request for approval containing the following:

(a) Identification of the importer of the locomotive or locomotive engine and the importer's address, telephone number, and taxpayer identification number;

(b) Identification of the locomotive's or locomotive engine's owner, the owner's address, telephone number, and taxpayer identification number;

(c) Identification of the locomotive and/or locomotive engine including make, model, identification number, and original production year;

(d) Information indicating the provision in this subpart under which the locomotive or locomotive engine is to be imported;

(e) Identification of the place(s) where the locomotive or locomotive engine is to be stored until EPA approval of the importer's application to the Administrator for final admission;