and the taxpayer, at the time the installment agreement is entered into, may enter into a written agreement to extend the period of limitations on collection to a date certain. A written extension agreement entered into under this paragraph shall extend the period of limitations on collection until the 89th day after the date agreed upon in the written agreement.

(2) *Extension agreement entered into in connection with the release of a levy under section 6343.* If the Secretary has levied on any part of the taxpayer's property prior to the expiration of the period of limitations on collection and the levy is subsequently released pursuant to section 6343 after the expiration of the period of limitations on collection, the Secretary and the taxpayer, prior to the release of the levy, may enter into a written agreement to extend the period of limitations on collection to a date certain. A written extension agreement entered into under this paragraph shall extend the period of limitations on collection until the date agreed upon in the extension agreement.

(c) *Continued effectiveness of agreements to extend the period of limitations on collection entered into on or before December 31, 1999*—(1) *In general.* Except as provided in paragraph (c)(2) of this section, if, on or before December 31, 1999, the Secretary and the taxpayer entered into a written agreement to extend the period of limitations on collection for a tax liability to a date after December 31, 2002, then, unless the written agreement expires by its terms prior to December 31, 2002, the period of limitations on collection expires on the later of—

(i) The last day of the original 10-year statutory period; or

(ii) December 31, 2002.

(2) *Written agreements entered into in connection with installment agreements.* If, on or before December 31, 1999, the Secretary and the taxpayer, in connection with an installment agreement, entered into a written agreement to extend the period of limitations on collection for a tax liability, the written agreement extends the period of limitations on collection until the 90th day after the date agreed upon in the written agreement.

(d) *Proceeding in court for the collection of the tax.* If a proceeding in court for the collection of a tax is begun within the period provided in paragraph (a) of this section (or within any extended period as provided in paragraphs (b) and (c) of this section), the period during which the tax may be collected by levy is extended until the liability for the tax or a judgment against the taxpayer arising from the liability is satisfied or becomes unenforceable.

(e) *Effect of statutory suspensions of the period of limitations on collection if executed collection extension agreement is in effect*—(1) Any statutory suspension of the period of limitations on collection tolls the running of the period of limitations on collection, as extended pursuant to an executed extension agreement under paragraph (b) or (c) of this section, for the amount of time set forth in the relevant statute.

(2) The following example illustrates the principle set forth in this paragraph (e):

Example. In June of 2003, the Internal Revenue Service (IRS) enters into an installment agreement with the taxpayer to provide for periodic payments of the taxpayer's timely assessed tax liabilities. At the time the installment agreement is entered into, the taxpayer and the IRS execute a written agreement to extend the period of limitations on collection. The extension agreement executed in connection with the installment agreement operates to extend the period of limitations on collection to the date agreed upon in the extension agreement, plus 89 days. Subsequently, and prior to the expiration of the extended period of limitations on collection, the taxpayer files a bankruptcy petition under chapter 7 of the Bankruptcy Code and receives a discharge from bankruptcy a few months later. Section 6503(h) of the Internal Revenue Code operates to suspend the running of the previously extended period of limitations on collection for the period of time the IRS is prohibited from collecting due to the bankruptcy proceeding, and for 6 months thereafter. The new expiration date for the IRS to collect the tax is the date agreed upon in the previously executed extension agreement, plus 89 days, plus the period during which the IRS is prohibited from collecting due to the bankruptcy proceeding, plus 6 months.

(f) *Date when levy is considered made.* The date on which a levy on property or rights to property is considered made is the date on which the notice of seizure required under section 6335(a) is given.

(g) *Effective date.* This section is applicable on the date final regulations are published in the **Federal Register**.

Mark E. Matthews,

Deputy Commissioner of Services and Enforcement.

[FR Doc. 05–4280 Filed 3–3–05; 8:45 am]

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OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

29 CFR Parts 2200 and 2204

Revisions to Procedural Rules Governing Practice Before the Occupational Safety and Health Review Commission

AGENCY: Occupational Safety and Health Review Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes several revisions to the procedural rules governing practice before the Occupational Safety and Health Review Commission.

DATES: Comments must be received by April 4, 2005.

FOR FURTHER INFORMATION CONTACT: Patrick Moran, Deputy General Counsel, (202) 606–5410, 1120 20th St., NW., Ninth Floor, Washington, DC 20036–3457.

SUPPLEMENTARY INFORMATION: On June 17, 2004 the Commission published an Advanced Notice of Proposed Rulemaking (ANPR), 69 FR 33878. In that notice the Commission announced that it was considering revisions to its rules concerning electronic filing, the expansion of the range of cases eligible for E–Z Trial, and the Settlement Part, the availability of sanctions for rules violations and expanding the authority of administrative law judges to impose such sanctions, the grounds for obtaining Commission review of interlocutory orders issued by its judges, and the restriction of practice before the Commission of lawyers and in-house company and union representatives. The Commission solicited public comments regarding these areas and invited the public to suggest other changes. The Commission thanks those who responded to the ANPR. The comments were helpful and played a large part in aiding the Commission to formulate these proposed rule changes. Now, the Commission asks for comments on these proposed rule changes, especially from those who practice before it.

Having considered the comments filed in response to the ANPR, this document proposes several revisions governing practice before the Occupational Safety and Health Review Commission. Although a few of the revisions are technical and clarifying in nature, this proposal also contains several significant changes to Commission practice and procedure. For example, the Commission is proposing new rules to allow and facilitate electronic service and filing of

pleadings, briefs and other documents. The Commission is also proposing restrictions on when non-attorneys may represent employers in Commission proceedings, modifications to its settlement and discovery rules, and changes to the eligibility limits on E–Z Trial.

Several rule changes are minor in nature. This document proposes several technical changes, including a correction to the Commission's nine-digit zip code in Rules 7 and 8. Several rules, such as Rule 11 and 41, have been moved. Accordingly, several rules have been renumbered, and cross-references updated. The Commission proposes revising Rule 5 to give its judges the discretion to require a party to respond to a motion or order filed shortly before the hearing where the normal response time would not expire until after the hearing has commenced. The Commission also proposes to amend Rule 8(f)(3) to eliminate the 3-day grace period for mailing documents after they have been faxed. The Commission believes that when a document has been faxed, there is no reason to delay mailing the original. A modification and reordering of the rule on privilege is also proposed. Specifically, the Commission proposes to abolish Rule 11 and move those parts that the Commission deems relevant to the Commission's rule on discovery, Rule 52. The Commission's experience has been that privilege issues generally arise in discovery, are generally resolved by the parties and if not resolved by the parties, are generally handled in the context of discovery disputes. Accordingly, the following portions of Rule 11 will be inserted in Rule 52:

(1) The assertion of a privilege must be accompanied by specific allegations and supporting affidavits, depositions, or testimony. It is believed that these requirements reduce the unwarranted assertion of privileges;

(2) Claimed privilege material may be examined in camera or *ex parte*;

(3) The judge is given wide latitude to fashion an appropriate protective order;

(4) A party unsuccessfully asserting a privilege may, as a matter of right, have the material sealed until review.

(5) The portion of the rule governing protective orders would be moved to Rule 52(e).

The Commission also proposes that, except for Simplified Proceedings, only attorneys in good standing be permitted to represent a party before the Commission or its judges. This restriction would not limit the right to appear before the Commission of any party, affected employee, or owner, partner, officer, or employee of a party when the party is a labor organization, or business entity. This proposal generated more public comment than any other mentioned in the ANPR. While the reaction was generally negative, we note that most of the comments came from practitioners who would be most affected by the proposal and from small employers and industry groups who were concerned about the increased costs necessitated by hiring an attorney. After we carefully considered the matter, we think the best course is limit in part non-attorney representation before the Commission. While we recognize the desire for economical access to the Commission's adjudicatory process, we also are concerned about accountability and the quality of representation. It has been the Commission's experience that lay representatives generally do not serve their clients well before the Commission. In particular, lay representatives have displayed difficulty in navigating the federal rules of evidence and procedure. On occasion lay representatives may represent more than one employer cited at a particular worksite and not fully comprehend the potential conflicts of interest such a situation can present. The Commission does believe, however, that non-legal representation can be effective for cases tried under the less demanding requirements of Simplified Proceedings and proposes to continue to permit lay representations in such cases.

The Commission proposes to redesignate the general rule on sanctions (currently Rule 41) without substantive change to Rule 101. Another relatively minor modification involves Rule 51 on Scheduling Conferences. The Commission would make such conferences discretionary with the judge. We believe that the current rule is beneficial in large and complex cases, but may be a hindrance in small to mid-sized cases.

The Commission proposes several changes to Rule 52, its Discovery Rule. The Commission believes that its procedures are unnecessarily complicated by the application of the extensive requirements for initial disclosures contained in Federal Rule of Civil Procedure (FRCP) 26(a). It is the view of the Commission that application of FRCP 26(a) is unworkable with *pro se* employers and results in needless additional expense to employers represented by counsel. Accordingly, the Commission would add a clause to Rule 52(a)(1) making Federal Rule 26(a) inapplicable to Commission proceedings. Also, as mentioned earlier, the Commission proposes to add a paragraph to Rule 52 setting forth its rule addressing claims of privilege.

The current Commission rule on oral arguments provides only that arguments before the Commission be electronically recorded. In the past, the Commissioners have found that a written transcript would aid them in reviewing the argument. Therefore, the Commission would amend Rule, 95(i)(1) to allow for a written transcription of oral arguments. Parties wishing to order a transcript would be able to purchase one at their own expense. The Commission would also require that any party who files a motion for oral argument indicate why oral argument would assist the Commission in deciding the case.

The Commission's Voluntary Settlement rule, Rule 101, predates the Mandatory Settlement rule, Rule 120. The Commission finds it redundant to have a separate voluntary and mandatory settlement rule. Therefore, the Commission proposes eliminating Rule 101 and includes a provision in Rule 120 expressly allowing a party to voluntarily enter the settlement process, at which time the requirements of Rule 120 would apply. The mandatory settlement rules are intended to deal with large, complex cases. It is the Commission's view that, before discovery is completed, the parties are generally not sufficiently familiar with the details of such cases to warrant entry into the mandatory settlement process. Thus, the Commission proposes to change the timing for entry into the mandatory settlement process until discovery is completed. In contrast, since cases involved in the voluntary settlement process may, in some cases, be relatively simple, parties will be allowed to enter the voluntary settlement process at any time.

Several additional changes to the Mandatory Settlement Rules are also proposed. The Commission proposes giving the settlement judge the authority to hold a ''mini-trial'' in order to narrow the issues remaining between the parties. It is the opinion of the Commission and its judges that such ''mini-trials'' would make clear to the parties both the strength and weaknesses of their case and, therefore, facilitate settlement. the mandatory settlement rule has generally proven successful, and the Commission believes that the procedure should be expanded for greater judicial economy and reduced cost to litigants. Accordingly, the Commission recommends lowering the eligibility limits from cases with an aggregate penalty of $200,000 to those with an aggregate penalty of $100,000.

Currently, there is no provision in the rules allowing the settlement judge to continue as the trial judge. The Commission believes that such a provision would be of benefit in those few large and complex cases that would require a significant amount of time for a new judge to become familiar with the case. If all parties, the settlement judge, and the Chief Administrative Law Judge agree to the settlement judge's continued participation as trial judge, we believe that judicial economies and reduced litigant expense would result. This new consent provision is predicated on the consent of the parties, the settlement judge, and the Chief Administrative Law Judge in order to ensure that the settlement judge's impartiality was not compromised by his or her participation in the settlement process. Therefore, the Commission would also add a provision that would allow settlement judge to remain as the trial judge upon the consent of the judge and all parties.

The Commission proposes several changes to its E–Z Trial Rules. First, it proposes changing the name from E–Z Trial to Simplified Proceedings. The Commission believes that the name ''E–Z Trial'' conveys a heightened sense of informality and that the name change more accurately represents the nature of these proceedings. Because these procedures have been a success, the Commission believes that the eligibility requirements should be loosened. Therefore, it proposes to expand eligibility by increasing the aggregate penalty limits to $20,000 for Rule 202(a) and $30,000 for Rule 202(b).

The Commission also proposes to amend its rules to permit and facilitate the electronic filing and service of documents. Objections to making electronic filing mandatory were received by several practitioners and the Secretary of Labor. These commentators pointed out that many small, pro se employers who appear before the Commission may not be able to file or receive documents electronically. While the Commission expects the number to dwindle in time, it agrees with the commentators that it would be premature to make electronic filing mandatory at this time. According, the Commission proposes tomake electronic filing optional. Among the highlights of the proposal:

(1) Electronic service of documents among the parties may be had only when all parties must participate.

(2) Electronic filing of a document with the Commission may be accomplished at any time by any party with the consent of the other parties and contingent upon the parties agreeing to electronic service.

(3) Service is effective upon receipt. The 3-day mailing presumption will not be included in the response time when a party is served electronically.

(4) Filing is effective upon receipt. Documents will be accompanied by a certificate of service.

(5) Only electronic signatures will be required.

(6) The rule will direct parties to the Commission's Web site for directions and technical specifications.

(7) Sensitive information will be given special treatment. (*See* Proposed Rule 8(g)(5) that will be set out in the rule and not on the Web site.)

Finally, the Commission proposes to amend its EAJA Rule 302 (29 CFR 2204.302) regarding when an EAJA application may be filed and the Commission's aggregation EAJA Rule 105(f), 29 CFR 2204.105(f). The current Rule 302, which requires an EAJA application to be filed within 30 days of a Commission order, is in tension with section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. 660 and the Federal Rules of Appellate Procedure (FRAP), which allow a party 60 days to appeal to the Circuit Court of Appeals, and developing case law. *See e.g. Scafar Contracting Inc.* v. *SOL*, 325 F.3d 422 (3d Cir. 2003). The Commission proposes to bring its rule in line with the Act, FRAP and developing case law and allow a party 30 days after the Commission decision becomes unreviewable in a Federal Circuit Court to file an EAJA application. Similarly, the Commission's current aggregation rule, which requires the net worth and number of employees of an EAJA applicant to be aggregated with that of affiliated companies, is at odds with the growing body of case law that disfavors such presumption of aggregation. *See e.g. National Association of Mfrs.* v. *DOL*, 159 F.3d 597 (D.C. Cir. 1998); *Caremore, Inc.* v. *NLRB*, 150 F.3d 628 (6th Cir. 1998). Rescinding its rule on aggregation will free the Commission to conform its aggregation requirements to this changing case law.

The Commission received several suggestions for additional charges to its rules. Generally, these suggestions involved among other things, pleading matters, such as the time for raising affirmative defenses; discovery issues, including the swearing of response to requests for admissions, the taking of depositions as of right; and the availability of subpoenas. While the Commission values these suggestions, they do not, in its view, represent serious problems and are generally best handled through the proper exercise of the judge's discretion in accordance with Commission rules. However, the Commission will monitor these areas and may consider these suggestions in future rules changes.

List of Subjects in 29 CFR Parts 2200 and 2204

Hearings and appeal procedures, Administrative practice and procedure.

Text of Amendment

For the reasons set forth in the preamble, the Occupational Safety and Health Review Commission proposes to amend title 29, chapter XX, parts 2200 and 2204 of the Code of Federal Regulations as follows:

PART 2200—[AMENDED]

1. The authority citation for part 2200 continues to read as follows:

Authority: 29 U.S.C. 661(g).

2. Section 2200.5 is revised to read as follows:

§ 2200.5 Extension of time.

Upon motion of a party, for good cause shown, the Commission or Judge may enlarge or shorten any time prescribed by these rules or prescribed by an order. All such motions shall be in writing but, in exigent circumstances in a case pending before a Judge, an oral request may be made and thereafter shall be followed by written motion filed with the Judge within 3 working days. A request for an extension of time should be received in advance of the date on which the pleading or document is due to be filed. However, in exigent circumstances, an extension of time may be granted even though the request was filed after the designated time for filing has expired. In such circumstances, the party requesting the extension must show, in writing, the reasons for the party's failure to make the request before the time prescribed for the filing had expired. The motion may be acted upon before the time for response has expired.

3. In § 2200.7, paragraphs (c) and (g) are revised to read as follows:

§ 2200.7 Service and notice.

* * * * *

(c) *How accomplished.* Unless otherwise ordered, service may be accomplished by postage pre-paid first class mail at the last known address, by electronic transmission, or by personal delivery. Service is deemed effected at the time of mailing (if by mail), at the time of receipt (if by electronic transmission), or at the time of personal delivery (if by personal delivery). Facsimile transmission of documents

and documents sent by an overnight delivery service shall be considered personal delivery. Legibility of documents served by facsimile transmission is the responsibility of the serving party. Documents may be served by electronic transmission only when all parties consent in writing and the certificate of service of the electronic transmission states such consent and the method of transmission. All parties must be electronically served. Electronic service must be accomplished by following the requirements set forth on the Commission's Web site (*http://www.OSHRC.gov.*).

* * * * *

(g) *Service on unrepresented employees.* In the event that there are any affected employees who are not represented by an authorized employee representative, the employer shall, immediately upon receipt of notice of the docketing of the notice of consent or petition for modification of the abatement period, post, where the citation is required to be posted, a copy of the notice of contest and a notice informing such affected employees of their right to party status and of the availability of all pleadings for inspection and copying at reasonable times. A notice in the following form shall be deemed to comply with this paragraph:

(Name of employer)

Your employer has been cited by the Secretary of Labor for violation of the Occupational Safety and Health Act of 1970. The citation has been contested and will be the subject of a hearing before the OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION. Affected employees are entitled to participate in this hearing or parties under terms and conditions established by the OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION in its Rules of Procedure. Notice of intent to participate must be filed no later than 10 days before the hearing. Any notice of intent to participate should be sent to: Occupational Safety and Health Review Commission, Office of the Executive Secretary, One Lafayette Centre, 1120 20th Street, NW., Suite 980, Washington, DC 20036–3457.

All pleadings relevant to this matter may be inspected at: (Place reasonably convenient to employees, preferably at or near workplace.)

Where appropriate, the second sentence of the above notice will be deleted and the following sentence will be substituted:

The reasonableness of the period prescribed by the Secretary of Labor for abatement of the violation has been contested and will be the subject of a hearing before the OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION.

* * * * *

4. Section 2200.8 is revised to read as follows:

§ 2200.8 Filing.

(a) *What to file.* All papers required to be served on a party or intervenor, except for those papers associated with part of a discovery request under Rules 52 through 56, shall be filed either before service or within a reasonable time thereafter.

(b) *Where to file.* Prior to assignment of a case to a Judge, all papers shall be filed with the Executive Secretary at One Lafayette Centre, 1120 20th Street, NW., Suite 980, Washington, DC 20036–3457. Subsequent to the assignment of the case to a Judge, all papers shall be filed with the Judge at the address given in the notice informing of such assignment. Subsequent to the docketing of the Judge's report, all papers shall be filed with the Executive Secretary, except as provided in § 2200.90(b)(3).

(c) *How to file.* Unless otherwise ordered, filings may be accomplished by postage-prepaid first class mail, personal delivery, or electronic transmission or facsimile transmission.

(d) *Number of copies.* Unless otherwise ordered or stated in this part:

(1) If a case is before a Judge or if it has not yet been assigned to a Judge, only the original of a document shall be filed.

(2) If a case is before the Commission for review, the original and eight copies of a document shall be filed.

(e) *Filing date.* (1) Filing date. Except for the documents listed in paragraph (e)(2) of this section, filing is effective upon mailing, if by mail, upon receipt by the Commission, if filing is by personal delivery, overnight delivery service, facsimile transmission or electronic transmission.

(2) Filing is effective upon receipt for requests for interlocutory reviews (§ 2200.73(b)), petitions for discretionary reviews (§ 2200.91), and EAJA applications (§ 2204.301).

(3) Counsel and the parties shall have sole responsibility for insuring that the document is timely received by the Commission.

(f) *Facsimile transmission.* (1) Any document may be filed with the Commission or its Judges by facsimile transmission. Filing shall be deemed completed at the time that the facsimile transmission is received by the Commission or the Judge. The filed facsimile shall have the same force and effect as the original.

(2) All facsimile transmissions shall include a facsimile of the appropriate certificate of service.

(3) It is the responsibility of parties desiring to file documents by the use of facsimile transmission equipment to utilize equipment that is compatible with facsimile transmission equipment operated by the Commission. Legibility of the transmitted documents is the responsibility of the serving party.

(g) *Electronic filing.* (1) Where all parties consent to electronic service and electronic filing, a document may be filed by electronic transmission with the Commission and its judges. The certificate of service accompanying the document must state that the other parties consent to filing by electronic transmission. The electronic transmission shall be in the manner specified by the Commission's Web site (*http://www.OSHRC.gov*).

(2) A document filed in conformance with these rules constitutes a written document for the purpose of applying these rules, and a copy printed by the Commission and placed in the case file shall have the same force and effect as the original.

(3) A certificate of service shall accompany each document electronically filed. The certificate shall set forth the dates and manner of both filing and service. It is the responsibility of the transmitting party to retain records showing the date of transmission, including receipts.

(4) A party that files a document by an electronic transmission shall utilize equipment and software that is compatible with equipment operated by the Commission and shall be responsible for the legibility of the document.

(5) Information that is sensitive but not privileged shall be filed as follows:

(i) If Social Security numbers must be included in a document, only the last four digits of that number shall be used;

(ii) If names of minor children must be mentioned, only the initials of that child shall be used;

(iii) If dates of birth must be included, only the year shall be used;

(iv) If financial account numbers must be filed, only the last four digits of these numbers shall be used;

(v) If a personal identifying number, such as a driver's license number must be filed, only the last four digits shall be used. Parties shall exercise caution when filing medical records, medical treatment records, medical diagnosis records, employment history, and individual financial information, and

shall redact or exclude certain materials unnecessary to a disposition of the case.

(6) A transmittal letter shall not be filed electronically or by other means when a document is transmitted noting:

(i) The transmittal of a document;

(ii) The inclusion of an attachment;

(iii) A request for a return receipt; or

(iv) A request for additional information concerning the filing.

(7) The signature line of any document shall include the notation ''/s/'' followed by the typewritten name or graphical duplicate of the hand-written signature of the party representative filing the document. Such representation of the signature shall be deemed to be the original signature of the representative for all purposes unless the party representative shows that such representation of the signature was unauthorized.

(8) Privileged information shall not be filed electronically. Privileged information or information that is asserted by any party to be privileged shall not be filed electronically.

§ 2200.11 [Removed and Reserved]

5. Section 2200.11 is removed and reserved.

6. In § 2200.22, paragraph (a) is revised to read as follows:

§ 2200.22 Representation of parties and intervenors.

(a)(1) *Representation.* Any party or intervenor may appear in person, through an attorney or, when a case is heard in simplified proceedings, through another representative who is not an attorney.

(2) *Attorneys.* Attorneys admitted to practice before the highest court of any State, Territory, District, Commonwealth, or possession of the United States, and in good standing, are permitted to practice before the Commission.

(3) *Other persons.* A person who is not authorized to practice before the Commission as an attorney under paragraph (a)(1) of this section may practice before the Commission as a representative of a party if he is:

(i) A party;

(ii) An affected employee;

(iii) An owner, partner, officer, or employee of a party when the party is a labor organization, a partnership, a corporation, or other business entity.

(4) A representative must file an appearance in accordance with § 2200.23. In the absence of an appearance by a representative, a party or intervenor will be deemed to appear for him or herself.

* * * * *

7. Section 2200.32 is revised to read as follows:

§ 2200.32 Signing of pleadings and motions.

Pleadings and motions shall be signed by the filing party or by the party's representative. The signature of a representative constitutes a representation by him that he is authorized to represent the party or parties on whose behalf the pleading is filed. The signature of a representative or party also constitutes a certificate by him that he has read the pleading, motion, or other paper, that to the best of his knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion or other paper is signed in violation of this rule, such signing party or its representative shall be subject tot he sanctions set forth in § 2200.101 or § 2200.104. A signature by a party representative constitutes a representation by him that he understands that the rules and orders of the Commission and its judges apply equally to attorney and non-attorney representatives.

§ 2200.41 [Removed and Reserved]

8. Section 2200.41 is removed and reserved.

9. In § 2200.51, paragraph (a)(1) is revised to read as follows:

§ 2200.51 Prehearing conferences and orders.

(a) *Scheduling conference.* (1) The Judge may, upon his or her discretion, consult with all attorneys and any unrepresented parties, by a scheduling conference, telephone, mail, or other suitable means, and within 30 days after the filing of the answer, enter a scheduling order that limits the time:

(i) To join other parties and to amend the pleadings;

(ii) To file and hear motions; and

(iii) To complete discovery.

* * * * *

10. In § 2200.52, paragraphs (a)(1) and (d) through (1) are revised and a new paragraph (m) is added to read as follows:

§ 2200.52 General provisions governing discovery.

(a) *General.* (1) *Methods and limitations.* In conformity with these rules, any party may, without leave of the Commission or Judge, obtain discovery by one or more of the following methods: production of documents or things or permission to enter upon land or other property for inspection and other purposes (§ 2200.53); requests for admission to the extent provided in § 2200.54; and interrogatories to the extent provided in § 2200.55. Discovery is not available under these rules through depositions except to the extent provided in § 2200.56. In the absence of a specific provision, procedure shall be in accordance with the Federal Rules of Civil Procedure, except that the provisions of Rule 26(a) of the Federal Rules of Civil Procedure do not apply to Commission proceedings.

* * * * *

(d) *Privilege.* (1) *Claims of privilege.* A person claiming that information is privileged shall claim the privilege in writing or, if during a hearing, on the record. The claim shall: Identify the information that would be disclosed; set forth the privilege that is claimed; and allege the facts showing that the information is privileged. The claim shall be supported by affidavits, depositions, or testimony and shall specify the relief sought. The claim may be accompanied by a motion for a protective order or by a motion that the allegedly privileged information be received and the claim ruled upon in camera, that is with the record and hearing room closed to the public, or *ex parte,* that is, without the participation of parties and their representatives. The judge may enter an order and impose terms and conditions on his or her examination of the claim as justice may require, including an order designed to ensure that the alleged privileged information not be disclosed until after the examination is completed.

(2) *Deliberative process privilege.* A claim that the information sought is privileged because it is part of the ''deliberative process'' is subject to the same conditions as other claims of privilege as set out in paragraph (d)(1) of this section.

(3) *Upholding or rejecting claims of privilege.* If the judge upholds the claim of privilege, the judge may order and impose terms and conditions as justice may require, including a protective order. If the judge overrules the claim, the person claiming the privilege may obtain as of right an order sealing from the public those portions of the record containing the allegedly privileged information pending interlocutory or final review of the ruling, or final disposition of the case, by the Commission. Interlocutory review of such an order shall be given priority consideration by the Commission.

(e) *Protective orders.* In connection with any discovery procedures and where a showing of good cause has been made, the Commission or Judge may make any order including, but not limited to, one or more of the following:

(1) That the discovery not be had;

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(5) That discovery be conducted with no one present except persons designated by the Commission or Judge;

(6) That a deposition after being sealed be opened only by order of the Commission or Judge;

(7) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(8) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the Commission or Judge.

(f) *Failure to cooperate; Sanctions.* A party may apply for an order compelling discovery when another party refuses or obstructs discovery. For purposes of this paragraph, an evasive or incomplete answer is to be treated as a failure to answer. If a Judge enters an order compelling discovery and there is a failure to comply with that order, the Judge may make such orders with regard to the failure as are just. The orders may issue upon the initiative of a Judge, after affording an opportunity to show cause why the order should not be entered, or upon the motion of a party. The orders may include any sanction stated in Fed.R.Civ.P.37, including the following:

(1) An order that designated facts shall be taken to be established for purposes of the case in accordance with the claim of the party obtaining that order;

(2) An order refusing to permit the disobedient party to support or to oppose designated claims or defenses, or prohibiting it from introducing designated matters in evidence;

(3) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed; and

(4) An order dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

(g) *Unreasonable delays.* None of the discovery procedures set forth in these rules shall be sued in a manner or at a time which shall delay or impede the progress of the case toward hearing status or the hearing of the case on the date for which it is scheduled, unless, in the interests of justice the Judge shall order otherwise. Unreasonable delays in utilizing discovery procedures may result in termination of the party's right to conduct discovery.

(h) *Show cause orders.* All show cause orders issued by the Commission or Judge under paragraph (e) of this section shall be served upon the affected party by certified mail, return receipt requested.

(i) *Supplementation of responses.* A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement the response with respect to any question directly addressed to:

(i) The identity and location of persons having knowledge of discoverable matters; and

(ii) The identity of each person expected to be called as an expert witness at the hearing, the subject matter on which the person is expected to testify, and the substance of the person's testimony.

(2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which:

(i) The party knows that the response was incorrect when made; or

(ii) The party knows that the response through correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to the hearing through new requests for supplementation of prior responses.

(j) *Filing of discovery.* Requests for production or inspection under Rule 53, requests for admission under Rule 54 and responses thereto, interrogatories under Rule 55 and the answers thereto, and depositions under Rule 56 shall be served upon other counsel or parties, but shall not be filed with the Commission or the Judge. The party responsible for service of the discovery material shall retain the original and become the custodian.

(k) *Relief from discovery requests.* If relief is sought under Rules 101 or 52(e), (f), or (g) concerning any interrogatories, requests for production or inspection, requests for admissions, answers to interrogatories, or responses to request for admissions, copies of the portions of the interrogatories, requests, answers, or responses in dispute shall be filed with the Judge or Commission contemporaneously with any motion filed under Rules 101 or 52(e), (f), or (g).

(l) *Use at hearing.* If interrogatories, requests, answers, responses, or depositions are to be used at the hearing or are necessary to a prehearing motion which might result in a final order on any claim, the portions to be used shall be filed with the Judge or the Commission at the outset of the hearing or at the filing of the motion insofar as their use can be reasonably anticipated.

(m) *Use on review or appeal.* When documentation of discovery not previously in the record is needed for review or appeal purposes, upon an application and order of the Judge or Commission the necessary discovery papers shall be filed with the Executive Secretary of the Commission.

11. In § 2200.90, paragraph (b)(3) is revised to read as follows:

§ 2200.90 Decisions of Judges.

* * * * *

(b) * * *

(3) *Correction of errors; Relief from default.* Until the Judge's report has been directed for review or, in the absence of a direction for review, until the decision has become a final order, the Judge may correct clerical errors and errors arising through oversight or inadvertence in decisions, orders or other parts of the record. If a Judge's report has been directed for review, the decision may be corrected during the pendency of reviews with leave of the Commission. Until the Judge's report has been docketed by the Executive Secretary, the Judge may relieve a party of default or grant reinstatement under §§ 2200.101(b), 2200.52(f) or 2200.64(b).

* * * * *

12. In § 2200.95, paragraphs (a) and (i) are revised to read as follows:

§ 2200.95 Oral argument before the Commission.

(a) *When ordered.* Upon motion of any party, or upon its own motion, the Commission may order oral argument. Parties requesting oral argument must demonstrate why oral argument would facilitate resolutions of the issues before the Commission. Normally, motions for oral argument shall not be considered until after all briefs have been filed.

* * * * *

(i) *Recording oral argument.* (1) Unless the Commission directs otherwise, oral arguments shall be

electronically recorded and made part of the record. Any other sound recording in the hearing room is prohibited. Oral arguments shall also be transcribed verbatim. A copy of the transcript of the oral argument taken by a qualified court reporter, shall be filed with the Commission. The Commission shall bear all expenses for court reporters' fees and for copies of the hearing transcript received by it.

(2) Persons desiring to listen to the recordings shall make appropriate arrangements with the Executive Secretary. Any party desiring a written copy of the transcript is responsible for securing and paying for its coy.

(3) Error in the transcript of the oral argument may be corrected by the Commission on its own motion, or joint motion by the parties, or on motion by any party. The motion shall state the error in the transcript and the correction to be made. Corrections will be made by hand with pen and ink and by the appending of an errata sheet.

* * * * *

13. Section 2200.101 is revised to read as follows:

§ 2200.101 Failure to obey rules.

(a) *Sanctions.* When any party has failed to plead or otherwise proceed as provided by these rules or as required by the Commission or Judge, he may be declared to be in default either: On the initiative of the Commission or Judge, after having been afforded an opportunity to show cause why he should not be declared to be in default; or on the motion of a party. Thereafter, the Commission or Judge, in their discretion, may enter a decision against the defaulting party or strike any pleading or document not file din accordance with these rules.

(b) *Motion to set aside sanctions.* For reasons deemed sufficient by the Commission or Judge and upon motion expeditiously made, the Commission or Judge may set aside a sanction imposed under paragraph (a) of this section. See § 2200.90(b)(3).

(c) *Discovery sanctions.* This section does not apply to sanctions for failure to comply with orders compelling discovery, which are governed by § 2200.52(b).

(d) *Show cause orders.* All show cause orders issued by the Commission or Judge under paragraph (a) of this section shall be served upon the affected party by certified mail, return receipt requested.

14. In § 2200.120, paragraphs (a), (b), (d)(2) and (d)(3) and (g) are revised and a new paragraph (c)(6) is added to read as follows:

§ 2200.120 Settlement part.

(a) *Applicability.* (1) This section applies to:

(i) Notices of contest by employers in which the aggregate amount of the penalties sought by the Secretary is $100,000 or greater and notices of contest by employers which are determined to be suitable for assignment under this section for reasons deemed appropriate by the Chief Administrative Law Judge; (ii) Upon motion of any party following the docketing of the notice of contest, or otherwise with the consent of the parties at any time in the proceedings, the Chief Administrative Law Judge may assign a case to a Settlement Judge for processing under this section whenever it is determined that there is a reasonable prospect of substantial settlement with the assistance of mediation by a Settlement Judge.

(2) In the event either the Secretary or the employer objects to the use of a Settlement Judge procedure, such procedure shall not be imposed. This clause applies only to notices of contest by employers and to applications for fees under the Equal Access to Justice Act and 29 CFR Part 2204.

(b) *Proceedings under this part.* Notwithstanding any other provisions of these rules, upon completion of discovery the Chief Administrative Law Judge shall assign to the Settlement Part any case which satisfies the criteria set forth in paragraph (a)(1)(i) of this section. The Chief Administrative Law Judge may also assign to the Settlement Part, at any time during the proceeding, any case that satisfied the criteria set forth in paragraph (a)(1)(ii) of this section. The Chief Administrative Law Judge shall either act as or appoint a Settlement Part Judge, who shall be a Judge other than the one assigned to hear and decide the case (except as provided in paragraph (f)(2) of this section), to conduct proceedings under the Settlement Part as set forth in this section.

* * * * *

(c) * * *

(6) *Mini-Hearing.* Where the Settlement Judge finds that it may help narrow the issues, he or she may order the parties to participate in a mini-hearing. The confidentiality rules of paragraph (d)(3) of this section shall apply to the mini-hearing.

(d) * * *

(2) *Participation in conference.* The Settlement Part Judge may require that any attorney or other representative who is expected to try the case for each party by present. The Settlement Part Judge may also require that the party's representative be accompanied by an official of the party having full settlement authority on behalf of the party. The parties and their representatives or attorneys are expected to be completely candid with the Settlement Part Judge so that he may properly guide settlement discussions. The failure to be present at a settlement conference or otherwise to comply with the orders of the Settlement Part Judge or the refusal to cooperate fully within the spirit of this rule may result in the imposition of sanctions under § 2200.101.

(3) *Confidentiality.* All statements made, and all information presented, during the course of proceedings under this section shall be regarded as confidential and shall not be divulged outside of these proceedings except with the consent of the parties. The Settlement Part Judge shall if necessary issue appropriate orders in accordance with § 2200.52(e) to protect confidentiality. The Settlement Part Judge shall not divulge any statements or information presented during private negotiations with a party or his representative except with the consent of that party. No evidence of statements or conduct in proceedings under this section within the scope of Federal Rule of Evidence 408, no notes or other material prepared by or maintained by the Settlement Part Judge, and no communications between the Settlement Part Judge and the Chief Administrative Law Judge including the report of the Settlement Part Judge under paragraph (f) of this section, will be admissible in any subsequent hearing except by stipulation of the parties. Documents disclosed in the settlement process may not be used in litigation unless obtained through appropriate discovery or subpoena. The Settlement Part Judge shall not discuss the merits of the case with any other person, nor appear as a witness in any hearing of the case.

* * * * *

(g) *Report of Settlement Part Judge.* (1) The Settlement Part Judge shall promptly notify the Chief Administrative Law Judge in writing of the status of the case at such time that he determines further negotiations would be fruitless. If the Settlement Part Judge has not made such a determination and a settlement agreement is not achieved within 120 days following assignment of the case to the Settlement Part Judge, the Settlement Part Judge shall then advise the Chief Administrative Law Judge in writing of his assessment of the likelihood that the parties could come to

a settlement agreement if they were afforded additional time for settlement discussions and negotiations. The Chief Administrative Law Judge may then in his discretion allow an additional period of time, not to exceed 30 days, for further proceedings under this section. If at the expiration of the period allotted under this paragraph the Settlement Part Judge has not approved a full settlement pursuant to § 2200.100, he shall furnish to the Chief Administrative Law Judge copies of any written stipulations and orders embodying the terms of any partial settlement the parties have reached.

(2) At the termination of the settlement period without a full settlement, the Chief Administrative Law Judge shall promptly assign the case to an Administrative Law Judge other than the Settlement Part Judge or Chief Administrative Law Judge for appropriate action on the remaining issues. If all the parties, the Settlement Judge and the Chief Administrative Law Judge agree, the Settlement Part Judge may be retained as the hearing judge.

Subpart M—Amended

15. In Subpart M all references to ''E–Z Trial'' are revise to read ''Simplified Proceedings''

16. In § 2200.202, paragraphs (a)(2) and (b) are revised to read as follows:

§ 2200.202 Eligibility for Simplified Proceedings.

(a) * * *

(2) an aggregate proposed penalty of not more than $20,000,

* * * * *

(b) Those cases with an aggregate proposed penalty of more than $20,000, but not more than $30,000, if otherwise appropriate, may be selected for Simplified Proceedings at the discretion of the Chief Administrative Law Judge.

PART 2204—[AMENDED]

17. The authority citation for part 2204 continues to read as follows:

Authority: Sec. 203(a)(1), Pub. L. 96–481, 94 Stat. 2325 (5 U.S.C. 504(c)(1)); Pub. L. 99–80, 99 Stat. 183.

§ 2204.105 [Amended]

18. In § 2204.105, paragraph (f) is removed.

19. Section 2204.302 is amended by revising paragraph (a) and removing paragraph (d):

§ 2204.302 When an application may be filed.

(a) An application may be filed whenever an applicant has prevailed in a proceeding or in a discrete substantive portion of the proceeding, but in no case later than thirty days after the period for seeking review in a court of appeals expires.

* * * * *

Dated: March 1, 2005.

Patrick Moran,

Deputy General Counsel.

[FR Doc. 05–4257 Filed 3–3–05; 8:45 am]

BILLING CODE 7600–01–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 62

[R03–OAR–2005–PA–0001; FRL–7880–5]

Approval and Promulgation of State Air Quality Plans for Designated Facilities and Pollutants, Commonwealth of Pennsylvania; Delegation of Authority

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve delegation of the Federal plan for commercial and industrial solid waste incinerator (CISWI) units to both the Pennsylvania Department of Environmental Protection (PADEP) and the Allegheny County Health Department (ACHD). In the ''Rules and Regulations'' section of the **Federal Register**, EPA is announcing its approval of the requests for delegation of the Federal plan without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If EPA receives adverse comments, EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule did not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. The EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

DATES: Comments must be received in writing by April 4, 2005.

ADDRESSES: Submit your comments, identified by Regional Material in EDocket (RME) ID Number R03–OAR–2005–PA–0001 by one of the following methods:

A. Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.

B. Agency Web site: *http://www.docket.epa.gov/rmepub/* RME, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Follow the on-line instructions for submitting comments.

C. E-mail: *http://wilkie.walter@epa.gov*.

D. Mail: R03–OAR–2005–PA–0001, Walter Wilkie, Chief, Air Quality Analysis, Mailcode 3AP22, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

E. Hand Delivery: At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to RME ID No. R03–OAR–2005–PA–0001. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *http://www.docket.epa.gov/rmepub/*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through RME, regulations.gov or e-mail. The EPA RME and the Federal regulations.gov Web sites are an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through RME or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.