

§ 164.132

40 CFR Ch. I (7-1-03 Edition)

made his final cancellation or suspension determination and (2) such evidence could not, through the exercise of due diligence, have been discovered by the parties to the cancellation or suspension proceeding prior to the issuance of the final order.

(b) If after review of the application and other supporting data submitted by the applicant, the Administrator determines, in accordance with paragraph (a) of this section, that reconsideration of his prior order is not warranted, then the application will be denied without requirement for an administrative hearing. The Administrator shall publish notice in the FEDERAL REGISTER of the denial briefly describing the basis for his determination as soon as practicable. Such denial shall constitute final agency action.

(c) If after review of the application and other supporting data submitted by the applicant, the Administrator determines, in accordance with paragraph (a) of this section, that reconsideration of his prior order is warranted, he will then publish notice in the FEDERAL REGISTER setting forth his determination and briefly describing the basis for the determination. Such notice shall announce that a formal public hearing will be held in accordance with 5 U.S.C. section 554. The notice shall specify: (1) The date on which the hearing will begin and end, (2) the issues of fact and law to be adjudicated at the hearing, (3) the date on which the presiding officer shall submit his recommendations, including findings of fact and conclusions, to the Administrator, and (4) the date on which a decision by the Administrator is anticipated.

§ 164.132 Procedures governing hearing.

(a) The burden of proof in the hearing convened pursuant to §164.131 shall be on the applicant and he shall proceed first. The issues in the hearing shall be whether: (1) Substantial new evidence exists and (2) such substantial new evidence requires reversal or modification of the existing cancellation or suspension order. The determination of these issues shall be made taking into account the human and environmental risks found by the Administrator in his

cancellation or suspension determination and the cumulative effect of all past and present uses, including the requested use, and uses which may reasonably be anticipated to occur in the future as a result of granting the requested reversal or modification. The granting of a particular petition for use may not in itself pose a significant risk to man or the environment, but the cumulative impact of each additional use of the cancelled or suspended pesticide may re-establish, or serve to maintain, the significant risks previously found by the Administrator.

(b) The presiding officer shall make recommendations, including findings of fact and conclusions and to the extent feasible, as determined by the presiding officer, the procedures at the hearing shall follow the Rules of Practice, set forth in subparts A and B of this part 164.

§ 164.133 Emergency waiver of hearing.

(a) In the case of an application subject to this subpart D which is filed under section 18 of FIFRA, and regulations thereunder, and for which a hearing is required pursuant to §164.131, the Administrator may dispense with the requirement of convening such a hearing in any case in which he determines:

(1) That the application presents a situation involving need to use the pesticide to prevent an unacceptable risk: (i) To human health, or (ii) to fish or wildlife populations when such use would not pose a human health hazard; and

(2) That there is no other feasible solution to such risk; and

(3) That the time available to avert the risk to human health or fish and wildlife is insufficient to permit convening a hearing as required by §164.131; and

(4) That the public interest requires the granting of the requested use as soon as possible.

(b) Notice of any determination made by the Administrator pursuant to paragraph (a) of this section shall be published in the FEDERAL REGISTER as soon as practicable after granting the requested use and shall set forth the basis for the Administrator's determination.