

Environmental Protection Agency

§ 209.23

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

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

(b) The results of any conference including all stipulations shall, if not transcribed, be summarized in writing by the administrative law judge and made part of the record.

(c) The administrative law judge, on motion or sua sponte, may request correspondence from the parties for any of the objectives set forth in this section. Copies of the administrative law judge's request and the parties' correspondence shall be served upon all parties. The administrative law judge shall include such correspondence in the record and a written summary of any stipulation or agreement reached by means of such correspondence as provided in paragraph (b) of this section.

§ 209.21 Primary discovery (exchange of witness lists and documents).

(a) At a prehearing conference or within some reasonable time set by the administrative law judge 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 copies 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.

(b) The administrative law judge, may, upon motion by a party or other person, and for good cause shown, by order (1) 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 (2) prescribe other appropriate measures to protect a witness. Any party affected by any such action shall have an adequate opportunity, once he or she learns the name of a witness and obtains the narrative summary of the witness' expected testimony, to prepare for the presentation of his or her case.

§ 209.22 Other discovery.

(a) Further discovery under this section shall be undertaken only upon order of the administrative law judge or upon agreement of the parties, except as provided in § 209.21. The administrative law judge shall order further discovery only after determining:

(1) That such discovery will not delay the proceeding unreasonably;

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

(3) That such information is relevant to the subject matter of the hearing.

(b) The administrative law judge shall order depositions upon oral questions only upon a showing of good cause and a finding that:

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

(2) 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.

(c) Any party to the proceeding may make a motion or motions for an order of discovery. The motion shall set forth:

(1) The circumstances which require the discovery;

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

(3) The proposed time and place where it will be taken. If the administrative law judge determines the motion should be granted, he or she shall issue an order for the taking of such discovery together with the conditions and terms thereof.

(d) A person's or party's failure to comply with a discovery order may lead to the inference that the information to be discovered is adverse to the person or party who failed to provide it.

§ 209.23 Trade secrets and privileged information.

In the presentation, admission, disposition, and use of evidence, the administrative law judge shall preserve the confidentiality of trade secrets and other privileged commercial and financial information. The confidential or trade secret status of any information shall not, however, preclude its being

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introduced into evidence. The administrative law judge may make such orders as may be necessary to consider such evidence in camera. This may include a supplemental initial decision to consider questions of fact and conclusions regarding material issues of law, fact or discretion which arise out of that portion of the evidence which is confidential or which includes trade secrets.

§ 209.24 Default order.

(a) *Default.* Respondent may be found to be in default upon failure to comply with a prehearing or hearing ruling of the Administrator or the administrative law judge. A respondent's default shall constitute an admission of all facts alleged in the complaint and a waiver of respondent's right to a hearing on such factual allegations. The remedial order proposed is binding on respondent without further proceedings upon the issuance by the Environmental Appeals Board of a final order issued upon default.

(b) *Proposed default order.* Where the administrative law judge finds a default has occurred after a request for a hearing has been filed, the administrative law judge may render a proposed default order to be issued against the defaulting party. For the purpose of appeal pursuant to § 209.31 this order shall be deemed to be the initial decision of the administrative law judge.

(c) *Contents of a final order issued upon default.* A final order issued upon default shall include findings of fact, conclusions regarding all material issues of law, fact, or discretion, and the remedial order which is issued. An order issued by the Environmental Appeals Board upon default of respondent shall constitute a final order in accordance with the terms of § 209.33.

[43 FR 34132, Aug. 3, 1978, as amended at 57 FR 5345, Feb. 13, 1992]

§ 209.25 Accelerated decision; dismissal.

(a) The administrative law judge, upon motion of any party or sua sponte, may at any time render an accelerated decision in favor of the Agency or the respondent as to all or any part of the proceeding, without further hearing or upon such limited addi-

tional evidence such as affidavits as he or she may require, or dismiss any party with prejudice, under any of the following conditions:

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

(2) No genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of a proceeding; or

(3) Such other reasons as are just, including failure to obey a procedural order of the administrative law judge.

(b) If under this section an accelerated decision is issued as to all the issues and claims joined in the proceedings, the decision shall be treated as the decision of the administrative law judge as provided in § 209.30.

(c) If under this section, judgment is rendered on less than all issues or claims in the proceeding, the administrative law judge shall determine what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. The administrative law judge shall thereupon issue an order specifying the facts which appear without substantial controversy, and the issues and claims upon which the hearing will proceed.

§ 209.26 Evidence.

(a) The official transcripts and exhibits, together with all papers and requests filed in the proceeding, shall constitute the record. Evidence may be received at the hearing even though inadmissible under the rules of evidence applicable to judicial proceedings, provided it is relevant, competent and material and not unduly repetitious. Immaterial or irrelevant parts of an admissible document shall be segregated and excluded so far as practicable. The weight to be given evidence shall be determined by its reliability and probative value.

(b) Witnesses shall be examined orally, under oath or affirmation, except as otherwise provided in these rules of practice or by the administrative law judge. Parties shall have the right to cross-examine a witness who appears at the hearing provided that such cross-examination is not unduly repetitious.