

§ 209.24

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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.

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(c) Rulings of the administrative law judge on the admissibility of evidence, the propriety of examination and cross-examination and other procedural matters shall appear in the record.

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

§ 209.27 Interlocutory appeal.

(a) An interlocutory appeal may be taken to the Environmental Appeals Board either (1) with the consent of the administrative law judge where he or she 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 (2) absent the consent of the administrative law judge, by permission of the Environmental Appeals Board.

(b) Applications for interlocutory appeal of any ruling or order of the administrative law judge may be filed with the administrative law judge within 5 days of the issuance of the ruling or order being appealed. Answers by other parties may be filed within 5 days of the service of such applications.

(c) Applications to file such appeals absent consent of the administrative law judge shall be filed with the Environmental Appeals Board within 5 days of the denial of any appeal by the administrative law judge.

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

(e) Except under extraordinary circumstances as determined by the administrative law judge, the taking of an interlocutory appeal will not stay the hearing.

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

§ 209.28 Record.

(a) Hearings shall be reported and transcribed verbatim, stenographically or otherwise, and the original transcript shall be part of the record and the sole official transcript. Copies of the record shall be filed with the hear-

ing clerk and made available during Agency business hours for public inspection. Any person who desires a copy of the record of the hearing or any part of it shall be entitled to it upon payment of the cost.

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

§ 209.29 Proposed findings, conclusions.

(a) Within 20 days of the filing of the record with the hearing clerk as provided in § 209.28, or within such longer time as may be fixed by the administrative law judge, any party may submit for the consideration of the administrative law judge proposed findings of fact, conclusions of law, and a proposed rule or order, together with briefs in support of it. Such proposals shall be in writing, shall be served upon all parties, and shall contain adequate references to the record and authorities relied on.

(b) The record shall show the administrative law judge's ruling on the proposed findings and conclusions except when the administrative law judge's order disposing of the proceedings otherwise informs the parties of the action taken by him or her thereon.

§ 209.30 Decision of the administrative law judge.

(a) The administrative law judge shall issue and file with the hearing clerk his or her decision as soon as practicable after the period for filing proposed findings as provided for in § 209.29 has expired.

(b) The administrative law judge's decision shall become the decision of the Environmental Appeals Board (1) when no notice of intention to appeal as described in § 209.31 is filed, 30 days after its issuance, unless in the interim the Environmental Appeals Board shall have taken action to review or stay the effective date of the decision; or (2) when a notice of intention to appeal is filed but the appeal is not perfected as required by § 209.31, 5 days after the period allowed for perfection of an appeal has expired unless within that 5 day period, the Environmental Appeals Board