decision is arbitrary and capricious or otherwise warrants review.

(2) The owners and operators of the source or unit involved shall have the burden of persuasion that an Acid Rain permit $NO_X$ Budget permit, or other federally enforceable permit was properly issued or should be issued.

(b) On appeal of a decision of the Administrator not covered by paragraph (a) of this section, the Administrator shall have the burden of going forward to show the rational basis for the decision. The petitioner shall have the burden of persuasion to show that a finding of fact or conclusion of law underlying the decision is clearly erroneous or that an exercise of discretion or policy determination underlying the decision is arbitrary and capricious or otherwise warrants review.

[58 FR 3760, Jan. 11, 1993, as amended at 62 FR 55488, Oct. 24, 1997; 66 FR 12978, Mar. 1, 2001; 69 FR 21645, Apr. 21, 2004]

### §78.13 Scheduling orders and prehearing conferences.

(a) If a request for an evidentiary hearing is granted, the Presiding Officer will issue an order scheduling the following:

(1) The filing by each party of a narrative statement of position on each factual issue in controversy.

(2) The identification of any witness that a party expects to call and of any written testimony, documents, papers, exhibits, or other materials that a party expects to introduce into evidence. At the request of the Presiding Officer, the party shall include a brief narrative summary of any witness' expected testimony and of any such materials.

(3) The filing of written testimony, in accordance with §78.14(b) of this part, and other evidence in support of a narrative statement.

(4) The filing of any motions by any party, including motions for the production of documentation, data, or other information material to the disputed facts to be addressed at the hearing.

(b) The Presiding Officer may also, on motion or *sua sponte*, schedule one or more pre-hearing conferences on the record to address any of the following:

(1) Simplification, clarification, amplification, or limitation of the issues.

(2) Admissions and stipulations of facts and determinations of the genuineness of documents.

(3) Objections to the introduction into evidence at the hearing of any written testimony or other submissions proposed by a party; *provided* that at any time before the end of the hearing, any party may make, and the Presiding Officer may consider and rule upon, a motion to strike testimony or other evidence (other than evidence included in the administrative record (if any) under §72.63 of this chapter) on the grounds of relevance, competency, or materiality.

(4) Taking official notice of any matters.

(5) Grouping of parties with substantially similar interests to eliminate redundant evidence, motions, objections, and briefs.

(6) Such other matters that may expedite the hearing or aid in the disposition of matters in dispute.

(c) The Presiding Officer will issue an order (which may be in the form of a transcript) reciting the actions taken at any pre-hearing conferences, setting the schedule for any hearing, and stating any areas of factual and legal agreement and disagreement and the methods and procedures to be used in developing any evidence.

### §78.14 Evidentiary hearing procedure.

(a) If a request for an evidentiary hearing is granted, the Presiding Officer will conduct a fair and impartial hearing on the record, take action to avoid unnecessary delay in the disposition of the proceedings, and maintain order. For these purposes, the Presiding Officer may:

(1) Administer oaths and affirmations.

(2) Regulate the course of the hearings and prehearing conferences and govern the conduct of participants.

(3) Examine witnesses.

(4) Identify and refer issues for interlocutory decision under §78.19 of this part.

(5) Rule on, admit, exclude, or limit evidence.

(6) Establish the time for filing motions, testimony and other written evidence, and briefs and making other filings.

(7) Rule on motions and other pending procedural matters, including but not limited to motions for summary disposition in accordance with § 78.15 of this part.

(8) Order that the hearing be conducted in stages whenever the number of parties is large or the issues are numerous and complex.

(9) Allow direct and cross-examination of witnesses only to the extent the Presiding Officer determines that such direct and cross-examination may be necessary to resolve disputed issues of material fact; *provided* that no direct or cross-examination shall be allowed on questions of law or policy or regarding matters that are not subject to challenge in the evidentiary hearing.

(10) Limit public access to the hearing where necessary to protect confidential business information. The Presiding Officer will provide written notice of the hearing to the parties, and where the hearing will be open to the public, notice in the FEDERAL REGISTER no later than 15 days (or other shorter, reasonable period established by the Presiding Officer) prior to commencement of the hearings.

(11) Take any other action not inconsistent with the provisions of this part for the maintenance of order at the hearing and for the expeditious, fair and impartial conduct of the proceeding.

(b) All direct and rebuttal testimony at an evidentiary hearing shall be filed in written form, unless, upon motion and good cause shown, the Presiding Officer, in his or her discretion, determines that oral presentation of such evidence on any particular factual issue will materially assist in the efficient resolution of the issue.

(c)(1) The Presiding Officer will admit all evidence that is not irrelevant, immaterial, unduly repetitious, or otherwise unreliable or of little probative value. Evidence relating to settlement that would be excluded in the Federal courts under the Federal Rules of Evidence shall not be admissible.

(2) Whenever any evidence or testimony is excluded by the Presiding Officer as inadmissible, all such evidence will remain a part of the record as an offer of proof. The party seeking the admission of oral testimony may make an offer of proof by means of a brief statement on the record describing the testimony excluded.

(3) When two or more parties have substantially similar interests and positions, the Presiding Officer may limit the number of attorneys or authorized representatives who will be permitted to examine witnesses and to make and argue motions and objections on behalf of those parties.

(4) Rulings of the Presiding Officer on the admissibility of evidence or testimony, the propriety of direct and cross-examination, and other procedural matters will appear in the record of the hearing and control further proceedings unless reversed by the Presiding Officer or as a result of an interlocutory appeal taken under § 78.19 of this part.

(5) All objections shall be made promptly or be deemed waived; *provided* that parties shall be presumed to have taken exception to an adverse ruling. No objection shall be deemed waived by further participation in the hearing.

[58 FR 3760, Jan. 11, 1993, as amended at 62 FR 55488, Oct. 24, 1997]

### § 78.15 Motions in evidentiary hearings.

(a) Any party may make a motion to the Presiding Officer on any matter relating to the evidentiary hearing in accordance with the scheduling orders issued under § 78.13 of this part. All motions shall be in writing and served as provided in § 78.4 of this part, except those made on the record during an oral hearing before the Presiding Officer.

(b) Any party may make a motion for a summary disposition in its favor on any factual issue on the basis that there is no genuine issue of material fact. When a motion for summary disposition is made and supported, any party opposing the motion may not rest upon mere allegations or denials, but must show, by affidavit or by other materials subject to consideration by the Presiding Officer, that there is a genuine issue of material fact.