

**§ 164.32**

brief is desirable. Unless all parties otherwise consent, an amicus curiae shall file its brief within the time allowed the party whose position the brief will support. Upon a showing of good cause, the Administrator or Administrative Law Judge may grant permission for later filing.

[38 FR 19371, July 20, 1973, as amended at 57 FR 5342, Feb. 13, 1992]

**§ 164.32 Consolidation.**

The Chief Administrative Law Judge, by motion or sua sponte, may consolidate two or more proceedings whenever it appears that this will expedite or simplify consideration of the issues. Consolidation shall not affect the right of any party to raise issues that could have been raised if consolidation had not occurred. At the conclusion of proceedings consolidated under this section, the Administrative Law Judge shall issue one decision under §164.90 unless one or more of the consolidated proceedings have been dismissed pursuant to § 164.91.

ADMINISTRATIVE LAW JUDGE

**§ 164.40 Qualifications and duties of Administrative Law Judge.**

(a) *Qualifications.* The Administrative Law Judge shall have the qualifications required by statute. He shall not decide any matter in connection with a proceeding where he has a financial interest in any of the parties or a relationship with a party that would make it otherwise inappropriate for him to act.

(b) *Disqualification of the Administrative Law Judge.* (1) Any party may, by motion made to the Administrative Law Judge, as soon as practicable, request that he disqualify himself and withdraw from the proceeding. The Administrative Law Judge shall then rule upon the motion and, upon request of the movant, shall certify an adverse ruling for appeal.

(2) *Withdrawal sua sponte.* The Administrative Law Judge may at any time withdraw from any proceedings in which he deems himself disqualified for any reason.

(c) *Conduct.* The Administrative Law Judge shall conduct the proceeding in a fair and impartial manner subject to

**40 CFR Ch. I (7-1-05 Edition)**

the precepts of the Canons of Judicial Ethics of the American Bar Association.

(d) *Power.* Subject to review, as provided elsewhere in this part, the Administrative Law Judge shall have power to take actions and decisions in conformity with statute or in the interests of justice. The Administrative Law Judge shall not interrupt the recording of the proceedings on the record over the objection of any party.

(e) *Absence or change of the Administrative Law Judge.* In the case of the absence or unavailability of the Administrative Law Judge, or his inability to act, or his removal by disqualification or withdrawal, the powers and duties to be performed by him under this part in connection with a hearing assigned to him may, unless otherwise directed by the Administrator, be assigned to another Administrative Law Judge so designated to act by the Chief Administrative Law Judge, the Administrator or the Environmental Appeals Board.

[38 FR 19371, July 20, 1973, as amended at 38 FR 34117, Dec. 11, 1973; 57 FR 5342, Feb. 13, 1992]

PREHEARING PROCEDURES AND DISCOVERY

**§ 164.50 Prehearing conference and primary discovery.**

(a) *Purpose of the prehearing conference.* Except as otherwise provided in paragraph (d) of this section, the Administrative Law Judge shall, prior to the commencement of the hearing and for the purpose of expediting the hearing, file with the hearing clerk an order for a prehearing conference. More than one such conference may be held. Such order or orders shall direct the parties or their counsel to appear at a specified time and place to consider:

(1) The simplification of issues including listing of specific uses to be contested;

(2) The necessity or desirability of amendments to the objections or statement of issues, or any document filed in response thereto;

(3) The possibility of obtaining stipulations of fact and documents which will avoid unnecessary delay;

(4) Matters of which official notice may be taken;

## Environmental Protection Agency

## § 164.50

(5) The limitation of the number of expert and other witnesses;

(6) Procedure at the hearing except as so provided in §164.80(a);

(7) The use of verified written statements in lieu of oral direct testimony;

(8) The intent of any party to request a scientific advisory committee as defined in §164.2(f);

(9) The issuance of subpoenas and subpoenas duces tecum for discovery and hearing purposes;

(10) A setting of a time and place for the public hearing, after giving careful consideration to the convenience of all the parties, the witnesses, the public interest and the necessity for notice in the FEDERAL REGISTER as provided by §164.8; and

(11) Any other matter that may expedite the hearing or aid in the disposition of the proceeding.

(b) *Primary discovery (Exchange of witness lists and documents)*. 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 narrative summary of their expected testimony and a list of all documents and exhibits which the party expects to introduce into evidence. Thereafter, witnesses, documents, or exhibits may be added and narrative summaries of expected testimony amended upon motion by a party.

(c) *Record of the prehearing conference*. No transcript of any prehearing conference shall be made unless a request therefor by one of the parties is granted by the Administrative Law Judge. Such party shall bear the cost of the taking of the transcript unless otherwise ordered by the Administrative Law Judge. The Administrative Law Judge shall prepare and file for the record a written report of the action taken at each conference, which shall incorporate any stipulations or agreements made by the parties at or as a result of such conference, all rulings upon matters considered at such conference and appropriate orders.

(d) *Unavailability of a prehearing conference*. Upon a finding that circumstances render a prehearing con-

ference unnecessary, or impracticable, or upon a finding that a prehearing conference would serve primarily to delay the proceedings rather than to expedite them, the Administrative Law Judge, on motion or sua sponte, may order that the prehearing conference not be held. In these circumstances he may request the parties to correspond with him for the purpose of accomplishing any of the objectives set forth in this section. Such correspondence shall not be made a part of the record, but the Administrative Law Judge shall submit a written summary for the record if any action is taken.

(e) *Submission of questions to an advisory committee*—(1) *General*. At any prehearing conference, or if none is held prior to the public hearing, except as herein provided, the Administrative Law Judge shall determine whether any party desires that questions of scientific fact be referred to a committee designated by the National Academy of Sciences.

(2) *Preparation of questions*. On determining an affirmative intent, the Administrative Law Judge shall direct all parties to file and serve, within a time period subject to his discretion, proposed questions of scientific fact accompanied by reasons supporting their submission to said committee. Within 10 days of the service of such proposed questions, together with their supporting reasons, any party may respond in writing to the proposed submission of the questions to the said committee. The Administrative Law Judge shall determine whether or not a reference of questions of scientific fact to said committee is necessary or desirable. In the event he decides such reference is necessary or desirable, he shall so inform the National Academy in writing, and shall prepare in his discretion appropriate questions. If any of the questions prepared are not in substance based upon the submissions of the parties, the Administrative Law Judge shall permit any party 10 days after their preparation to respond in writing to the proposed submission of said question or questions. He shall then determine whether such questions should be referred to the committee.

§ 164.51

40 CFR Ch. I (7-1-05 Edition)

(3) *Reference and report.* Not less than 30 days after he has informed the National Academy that questions of scientific fact will be referred to it, the Administrative Law Judge shall refer the questions of scientific fact as prepared. The committee shall report in writing to the Administrative Law Judge within 60 days after such referral on these questions of scientific fact and the report, its record and any other matter transmitted as provided for by the Administrator's agreement with the National Academy of Sciences shall be made public and considered as part of the hearing record.

(4) *Request and submission subsequent to prehearing conference.* At any time before the hearing is closed, the Administrative Law Judge or a party by motion may request that questions of scientific fact not previously referred be referred, or that questions previously referred be amended or expanded. The Administrative Law Judge may refer such questions if he finds that good cause exists and that reference of such questions is necessary or desirable.

[38 FR 19371, July 20, 1973, as amended at 39 FR 11884, Apr. 1, 1974]

§ 164.51 **Other discovery.**

(a) *General.* Except as so provided by § 164.50(b) *supra*, further discovery, under this subpart, shall be permitted only upon determination by the Administrative Law Judge (1) that such discovery shall not in any way unreasonably delay the proceeding, (2) that the information to be obtained is not otherwise obtainable and (3) that such information has significant probative value. The Administrative Law Judge shall be guided by the procedures set forth in the Federal Rules of Civil Procedure, where practicable, and the precedents thereunder, except that no discovery shall be undertaken except upon order of the Administrative Law Judge or upon agreement of the parties.

(b) *Depositions upon oral questions.* The Administrative Law Judge shall order depositions upon oral questions only upon a showing of good cause and upon a finding that (1) the information sought cannot be obtained by alternative methods, or (2) there is a sub-

stantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.

(c) *Procedure.* (1) Any party to the proceeding desiring discovery shall make a motion or motions therefor. Such a motion shall set forth (i) the circumstances warranting the taking of the discovery, (ii) the nature of the information expected to be discovered and (iii) the proposed time and place where it will be taken.

(2) If the Administrative Law Judge determines the motion should be granted, he shall issue an order and appropriate subpoenas, if necessary, for the taking of such discovery together with the conditions and terms thereof.

MOTIONS

§ 164.60 **Motions.**

(a) *General.* All motions, except those made orally during the course of a public hearing or as otherwise provided by this part, shall be in writing and shall state with particularity the grounds therefor, shall set forth the relief or order sought, and shall be filed with the hearing clerk and served on all parties.

(b) *Response to motions.* Within 10 days after service of any motion filed pursuant to this part, or within such other time as may be fixed by the Administrator, his designee, or the Administrative Law Judge, any party may serve and file an answer to the motion. The movant shall, if requested by the Administrator, his designee, or the Administrative Law Judge, serve and file reply papers within the time set by the request.

(c) *Decision.* The Administrative Law Judge shall rule upon all motions filed or made prior to the filing of his initial or accelerated decision at the time of filing on *ex parte* motions or where the movant has stated that no party objects to the granting of such motion. Otherwise, such decision shall await the answering papers and reply papers if permitted. The Environmental Appeals Board shall rule upon all motions filed after the filing of the initial or accelerated decision. Oral argument of motions will be permitted only if the