

## Environmental Protection Agency

## § 164.51

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.

(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 substantial 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

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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 Administrative Law Judge or the Environmental Appeals Board deems it necessary.

[38 FR 19371, July 20, 1973, as amended at 57 FR 5343, Feb. 13, 1992]

## 40 CFR Ch. I (7-1-06 Edition)

### SUBPOENAS AND WITNESS FEES

#### § 164.70 Subpoenas.

(a) The attendance of witnesses or the production of documentary evidence may, by subpoena, be required at any designated place of hearing or place of discovery. Subpoenas may be issued by the Administrative Law Judge sua sponte or upon a showing by an applicant that evidence sought for hearing is relevant and material to the issues involved in the hearing or that the sought discovery pursuant to § 164.51 meets the standards set forth therein. The Administrative Law Judge shall be guided by the principles of the Federal Rules of Civil Procedure in making any order for the protection of a witness or the content of the documents produced.

(b) *Motion for subpoena duces tecum.* Subpoenas for the production of documentary evidence, unless issued by the Administrative Law Judge sua sponte, shall be issued only upon a written motion. Such motion shall specify, as exactly as possible, the documents desired.

(c) *Service of subpoenas.* Subpoenas shall be served as provided by the Federal Rules of Civil Procedure.

#### § 164.71 Fees of witnesses.

Witnesses summoned before the Administrative Law Judge shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and persons whose depositions are taken, and the persons taking the same, shall be entitled to the same fees as are paid for like services in the courts of the United States. Fees shall be paid by the party at whose instance the witness appears or the deposition is taken.

### THE HEARINGS

#### § 164.80 Order of proceeding and burden of proof.

(a) At the hearing, the proponent of cancellation or change in classification has the burden of going forward to present an affirmative case for the cancellation or change in classification of the registration. In the case of the denial of an application for registration, the applicant shall have the burden of