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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

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going forward. In the case of a hearing called by the Administrator, the Respondent has the burden of going forward to present an affirmative case as to the statement of issues. The party having the burden of going forward shall have the opportunity to submit evidence on rebuttal.

(b) On all issues arising in connection with the hearing, the ultimate burden of persuasion shall rest with the proponent of the registration.

(c) If any party, other than Respondent, after being duly notified, fails to appear at the hearing, he shall be deemed to have authorized the Administrative Law Judge to dismiss the proceeding with or without prejudice, as the Administrative Law Judge may determine, unless a motion excusing the failure to appear has been made and granted. In the event that a party appears at the hearing and no representative of the Agency appears, the Administrative Law Judge shall proceed *ex parte* to hear the evidence of the party: *Provided*, That failure on the part of Respondent to appear at a hearing shall not be deemed to be a waiver of Respondent's right to file proposed findings of fact, conclusions of law and orders, to be served with a copy of the Administrative Law Judge's initial or accelerated decision, and to file exceptions with and to submit argument before the Administrator with respect thereto.

### § 164.81 Evidence.

(a) *General*. The Administrative Law Judge shall admit all relevant, competent and material evidence, except evidence that is unduly repetitious. Relevant, competent and material evidence may be received at any hearing even though inadmissible under the rules of evidence applicable to judicial proceedings. The weight to be given evidence shall be determined by its reliability and probative value. In all hearings the testimony of witnesses shall be taken orally, except as otherwise provided by these rules or by the Administrative Law Judge. Parties, however, shall have the right to cross-examine a witness who appears at the hearing, provided that such cross-examination is not unduly repetitious.

(b) *Report of a committee of the National Academy of Sciences*. If questions have been submitted to a committee designated by the National Academy pursuant to § 164.50(e), the report of the committee, other material that may be required by the Administrator and a list of witnesses and evidence relied upon shall be received into evidence and made part of the record of the hearing. Objections to the report may also be made part of the record and go to the weight of its evidentiary value.

(c) *Objections*. If a party objects to the admission or rejection of any evidence or the limitation of the scope of any examination or cross-examination, he shall state briefly the grounds for such objection. The transcript shall include any argument or debate thereon, unless the Administrative Law Judge, with the consent of all parties, orders that such argument not be transcribed. The ruling and the reasons given therefor by the Administrative Law Judge on any objection shall be a part of the transcript. An automatic exception to that ruling will follow.

(d) *Exhibits*. Except where the Administrative Law Judge finds that the furnishing of copies is impracticable, a copy of each exhibit filed with the Administrative Law Judge shall be furnished to each other party. A true copy of an exhibit may, in the discretion of the Administrative Law Judge, be substituted for the original.

(e) *Official Notice*. Official notice may be taken of Agency proceedings, any matter judicially noticed in the Federal courts, and of other facts within the specialized knowledge and experience of the Agency. Any active party shall be given adequate opportunity to show that such facts are erroneously noticed by presenting evidence to the contrary.

(f) *Offer of proof*. Whenever evidence is deemed inadmissible, the party offering such evidence may make an offer of proof, which shall be included in the transcript. The offer of proof for excluded oral testimony shall consist of a brief statement describing the nature of the evidence excluded. If the evidence consists of a document or exhibit, it shall be inserted in the record in total. In the event the Environmental Appeals Board decides that the