

Environmental Protection Agency

§ 78.12

(b) The Environmental Appeals Board or Presiding Officer has the discretion to sever issues or parties from a proceeding under this part whenever it appears that separate proceedings will be in the interest of justice, will expedite or simplify consideration of the issues, and will not prejudice any party.

§ 78.9 Notice of the filing of petition for administrative review.

The Administrator will publish in the FEDERAL REGISTER a notice stating that a petition for administrative review of a decision of the Administrator has been filed and specifying any request in the petition for an evidentiary hearing.

§ 78.10 *Ex parte* communications during pendency of a hearing.

(a)(1) No party or interested person outside EPA, representative of a party or interested person, or member of the EPA trial staff shall make, or knowingly cause to be made, to any member of the decisional body an *ex parte* communication on the merits of a proceeding under this part.

(2) No member of the decisional body shall make, or knowingly cause to be made, to any party or interested person outside EPA, representative of a party or interested person, or member of the EPA trial staff, an *ex parte* communication on the merits of any proceeding under this part.

(3) A member of the decisional body who receives, makes, or knowingly causes to be made an *ex parte* communication prohibited by this paragraph shall file with the Environmental Appeals Board (or, if the proceeding is pending before an Administrative Law Judge, with the Hearing Clerk) for inclusion in the record of the proceeding under this part any such written *ex parte* communications and memoranda stating the substance of any such oral *ex parte* communication.

(b) Whenever any member of the decisional body receives an *ex parte* communication made, or knowingly caused to be made by a party or representative of a party to a proceeding under this part, the person presiding over the proceedings then in progress may, to the extent consistent with justice, require the party to show good

cause why its claim or interest in the proceedings should not be dismissed, denied, disregarded, or otherwise adversely affected on account of these *ex parte* communications.

(c) The prohibitions of paragraph (a) of this section shall begin to apply upon publication by the Administrator of the notice of the filing of a petition under § 78.9 of this part. This prohibition terminates on the date of final agency action.

§ 78.11 Intervenor.

(a) Within 30 days (or other shorter, reasonable period established by the Administrator when giving notice) after notice is given under § 78.9 of this part that the petition for administrative review has been filed, any person listed in § 78.3(a) of this part may file a motion for leave to intervene in the proceeding. A motion for leave to intervene under this section shall set forth the grounds for the proposed intervention and may respond to the petition for administrative review. Late motions to intervene may be granted only for good cause shown.

(b) The Environmental Appeals Board of Presiding Officer will grant a motion to intervene only upon an express finding that:

(1) The motion to intervene raises matters relevant to the factual or legal issues to be reviewed;

(2) The intervenor consented to be bound by all stipulations previously entered into by the existing parties, and all orders previously issued, in the proceeding; and

(3) The intervention will promote the interests of justice and will not cause undue delay or prejudice to the rights of the existing parties.

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

§ 78.12 Standard of review.

(a) On appeal of a decision of the Administrator prior to which there was an opportunity for public comment:

(1) Except as provided under paragraph (a)(2) of this section, the petitioner shall have the burden of going forward and 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

§ 78.13

40 CFR Ch. I (7–1–08 Edition)

or policy determination underlying the 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, CAIR 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; 70 FR 25339, May 12, 2005]

§ 78.13 Scheduling orders and pre-hearing 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, 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.

[58 FR 3760, Jan. 11, 1993, as amended at 70 FR 25339, May 12, 2005]

§ 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.