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Title 40 —Protection of Environment
Chapter I —Environmental Protection Agency
Subchapter E —Pesticide Programs

Part 164 Rules of Practice Governing Hearings, Under the Federal Insecticide,
Fungicide, and Rodenticide Act, Arising from Refusals to Register,
Cancellations of Registrations, Changes of Classifications, Suspensions
of Registrations and Other Hearings Called Pursuant to Section 6 of the
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PART 164—RULES OF PRACTICE GOVERNING HEARINGS, UNDER THE FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT, ARISING FROM REFUSALS TO REGISTER, CANCELLATIONS OF REGISTRATIONS, CHANGES OF CLASSIFICATIONS, SUSPENSIONS OF REGISTRATIONS AND OTHER HEARINGS CALLED PURSUANT TO SECTION 6 OF THE ACT

Authority: 7 U.S.C. 136d.

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Subpart A—General

§ 164.1 Number of words.

As used in this part, a word in the singular form shall be deemed to import the plural, and vice versa, as the case may require.

§ 164.2 Definitions.

For the purposes of this part, the following terms shall be defined, as listed below:

- (a) The term *Act* means the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (86 Stat. 973) and other legislation supplementary thereto and amendatory thereof.
- (b) The term *Administrative Law Judge* means an Administrative Law Judge appointed pursuant to 5 U.S.C. 3105 (see also 5 CFR part 930, as amended), and such term is synonymous with the term “Hearing Examiner” as used in the Act or in the United States Code.
- (c) The term *Administrator* means the Administrator of the United States Environmental Protection Agency.
- (d) The term *Agency*, unless otherwise specified, means the United States Environmental Protection Agency.
- (e) The term *Applicant* means any person who has made application to have a pesticide registered or classified pursuant to the provisions of the Act.
- (f) The term *Committee* means a group of qualified scientists designated by the National Academy of Sciences according to agreement under the Act to submit an independent report to the Administrative Law Judge on questions of scientific fact referred from a hearing under subpart B of this part.
- (g) ***Environmental Appeals Board*** shall mean the Board within the Agency described in § 1.25 of this title. The Administrator delegates authority to the Environmental Appeals Board to issue final decisions in appeals filed under subparts B and C of this part. An appeal directed to the Administrator, rather than to the Environmental Appeals Board, will not be considered. This delegation does not preclude the Environmental Appeals Board from referring an appeal or a motion under subparts B and C to the Administrator when the Environmental Appeals Board, in its discretion, deems it appropriate to do so. When an appeal or motion is referred to the Administrator, all of the parties shall be so notified and the rules in subparts B and C referring to the Environmental Appeals Board shall be interpreted as referring to the Administrator.
- (h) The term *Expedited Hearing* means a hearing commenced as the result of the issuance of a notice of intention to suspend or the suspension of a registration of a pesticide by an emergency order, and is limited to a consideration as to whether a pesticide presents an imminent hazard which justifies such suspension.
- (i) The term *Hearing* means a public hearing which is conducted pursuant to the provisions of chapter 5, subchapter II of title 5 of the United States Code and the regulations of this part.
- (j) The term *Hearing Clerk* means the Hearing Clerk, Environmental Protection Agency, Washington, DC 20460.

- (k) The term *Initial Decision* means the decision of the Administrative Law Judge supported by findings of fact and conclusions regarding all material issues of law, fact, or discretion, as well as reasons therefor. Such decision shall become the final decision and order of the Administrator without further proceedings unless an appeal therefrom is taken or the Administrator orders review thereof as herein provided.
- (l) The term *Judicial Officer* means an officer or employee of the Agency designated as a judicial officer, pursuant to these rules, who shall meet the qualifications and perform functions as herein provided.
 - (1) **Office.** There may be designated for the Agency one or more judicial officers, one of whom may be Chief Judicial Officer. As work requires, there may be a judicial officer designated to act for the purpose of a particular case. All prior designations of judicial officer shall stay in force until further notice.
 - (2) **Qualification.** A judicial officer shall be a permanent or temporary employee or officer of the Agency who may perform other duties for the Agency. Such judicial officer shall not be employed by the Office of Chemical Safety and Pollution Prevention or have any connection with the preparation or presentation of evidence for a hearing.
 - (3) **Functions.** The Administrator may delegate any or part of his authority to act in a given case under subparts B and C of this part to a judicial officer. The Administrator can separately delegate his authority to rule on interlocutory orders and motions, and may also delegate his authority to make findings of fact and draw conclusions of law in a particular proceeding, providing that this delegation shall not preclude the Judicial Officer from referring any motion or case to the Administrator when the Judicial Officer determines such referral to be appropriate. The Administrator, in deciding a case himself, may consult with and assign the preliminary drafting of conclusions of law and findings of fact to any judicial officer.
- (m) The term *Party* means any person, group, organization, or Federal agency or department that participates in a hearing.
- (n) The term *Person* includes any individual, partnership, association, corporation, and any organized group of persons, whether incorporated or not.
- (o) The term *Petitioner* means any person adversely affected by a notice of the Administrator who requests a public hearing.
- (p) The term *Presiding Officer* means any person designated by the Administrator to conduct an expedited hearing.
- (q) The term *Recommended Decision* means the recommended findings and conclusions of the Presiding Officer in an expedited hearing.
- (r) The term *Registrant* means any person who has registered a pesticide pursuant to the provisions of the Act.
- (s) The term *Respondent* means the Assistant Administrator of the Office of Chemical Safety and Pollution Prevention.

Terms defined in the act and not explicitly defined herein are used herein with the meanings given in the act.

[38 FR 19371, July 20, 1973, as amended at 57 FR 5342, Feb. 13, 1992; 57 FR 30657, July 10, 1992; 73 FR 75597, Dec. 12, 2008; 77 FR 46292, Aug. 3, 2012]

§ 164.3 Scope and applicability of this part.

The provisions of subpart B of this part shall govern proceedings, conducted pursuant to the provisions of the Act, concerning refusals to register, cancellations of registration, changes of classifications or hearings called by the Administrator; the provisions of subpart C of this part shall govern suspension proceedings conducted pursuant to the provisions of the Act.

§ 164.4 Arrangements for examining Agency records, transcripts, orders, and decisions.

- (a) **Reporting of orders, decisions, and other signed documents.** All orders, decisions, or other signed documents required by the rules in this part, whether issued by the Environmental Appeals Board or the Presiding Officer shall be made available to the public.
- (b) **Establishment of an Agency repository.** In addition, all transcripts and docket entries shall become part of the official docket and shall be retained by the hearing clerk. At least two copies of all final orders, decisions and a notification of any appeals taken therefrom shall be retained by the hearing clerk and filed chronologically and shall be periodically bound and indexed. All the above documents shall be made available to the public for reasonable inspections during Agency business hours.
- (c) Whenever any information or data is required to be produced or examined and any party to the proceeding claims that such information is a trade secret or commercial or financial information, other than information relating to the formulas of a pesticide, the Administrative Law Judge, the Presiding Officer, or the Environmental Appeals Board may require production or testimony *in camera* and sealed to all but the parties.
- (d) All orders, decisions, or other documents made or signed by the Administrative Law Judge, the Presiding Officer, or the Environmental Appeals Board shall be filed with the hearing clerk. The hearing clerk shall immediately serve all parties with a copy of such order, decision, or other document.

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

§ 164.5 Filing and service.

- (a) All documents or papers required or authorized to be filed, shall be filed with the hearing clerk, except as provided otherwise in this part. At the same time that a party files documents or papers with the clerk, it shall serve upon all other parties copies thereof, with a certificate of service on each document or paper, including those filed with the hearing clerk. If filing is accomplished by mail addressed to the clerk, filing shall be deemed timely if the papers are postmarked on the due date except as to initial filings requesting a public hearing or responding to a notice of intent to hold a hearing, in which case such filings must be received by the hearing clerk either within the time required by statute or by the notice of intent to hold a hearing.
- (b) Each document filed, other than papers commencing a proceeding, shall contain the FIFRA docket number and, if the document affects less than all of the registrations included under that docket number, the registration number or file symbol of each product which is the subject of the document.
- (c) In addition to copies served on all other parties, each party shall file an original and two copies of all papers with the hearing clerk.

§ 164.6 Time.

- (a) **Computation.** In computing any period of time prescribed or allowed by these rules, except as otherwise provided, the day of the act, event, or default from which the designated period of time begins to run shall not be included. Saturdays, Sundays, and legal holidays shall be included in computing the time allowed for the filing of any document or paper, except that when such time expires on a Saturday, Sunday, or legal holiday, such period shall be extended to include the next following business day.
- (b) **Enlargement.** When by these rules or by order of the Administrative Law Judge, the Presiding Officer, or the Environmental Appeals Board, an act is required or allowed to be done at or within a specified time, the Administrative Law Judge (before his initial decision is filed), or the Presiding Officer (before his recommended decision is filed), or the Environmental Appeals Board (after the Administrative Law Judge's initial decision or the presiding officer's recommended decision is filed), for cause shown may at any time in their discretion: with or without motion or notice, order the period enlarged if request therefor, which may be made ex parte, is made before the expiration of the period originally prescribed or as extended by a previous order; or on motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect. In this connection, consideration shall be given to the fact that, under the provisions of the act, the Administrator must issue his order not later than 90 days after the completion of the hearing, unless all parties agree by stipulation to extend this period of time pursuant to § 164.103.
- (c) **Additional time after service by mail.** A prescribed period of time within which a party is required or permitted to do an act shall be computed from the time of service, except that when the service is made by mail, 3 days shall be added to the prescribed period. Such addition for service by mail shall not apply in the case of filing initial requests for hearings or responding to a notice of intent to hold a hearing, in which cases statutory filing times will run from the date of the return receipt pursuant to § 164.8.

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

§ 164.7 Ex parte discussion of proceeding.

At no stage of a proceeding shall the Administrator, the members of the Environmental Appeals Board, the Presiding Officer, or the Administrative Law Judge discuss *ex parte* the merits of the proceeding with any party or with any person who has been connected with the preparation or presentation of the proceeding as an advocate, or in an investigative or expert capacity, or with any representative of such person, *Provided*, That the Environmental Appeals Board, the Presiding Officer, or the Administrative Law Judge may discuss the merits of the case with any such person if all parties to the proceeding, or their representatives, have been given reasonable notice and opportunity to be present. Any memorandum or other communication addressed to the Administrator, the Environmental Appeals Board, the Presiding Officer, or the Administrative Law Judge during the pendency of the proceeding, and relating to the merits thereof, by or on behalf of any party, shall be regarded as an argument made in the proceeding. The Administrator, the Environmental Appeals Board, the Presiding Officer, or the Administrative Law Judge shall cause any such communication to be filed with the hearing clerk and served upon all other parties to the proceeding who will be given the opportunity to file an answer thereto.

[57 FR 5342, Feb. 13, 1992]

§ 164.8 Publication.

All notices of intention to cancel a registration, all notices of intention to change a classification, and all denials of registrations, all together with the reasons (including the factual basis therefor), and all notices of intention by the Administrator to hold a hearing, together with the statement of issues as provided by § 164.20(b) shall be sent to the registrant or applicant by registered or certified mail (return receipt requested), and published by appropriate announcement in the FEDERAL REGISTER by the Administrator. The Administrative Law Judge shall cause to be published in the FEDERAL REGISTER by appropriate announcement, a notice of the filing of any objections, pursuant to § 164.20(b) or responses pursuant to § 164.24, and a notice of the public hearing as provided by § 164.80 *et seq.* Said notice of public hearing shall designate the place where the hearing will be held and specify the time when the hearing will commence. The hearing shall convene at the place and time announced in the notice, unless amended by subsequent notice published in the FEDERAL REGISTER, but thereafter it may be moved to a different place and may be continued from day to day or recessed to a later day without other notice than announcement thereof at the hearing.

Subpart B—General Rules of Practice Concerning Proceedings (Other Than Expedited Hearings)

COMMENCEMENT OF PROCEEDING

§ 164.20 Commencement of proceeding.

- (a) A proceeding shall be commenced whenever a hearing is requested by any person adversely affected by a notice of the Administrator of his refusal to register or of his intent to cancel the registration or to change the classification of a pesticide. A proceeding shall likewise be commenced whenever the Administrator decides to call a hearing to determine whether or not the registration of a pesticide should be canceled or its classification changed. Such request or notice of intent to hold a hearing shall be timely filed with the hearing clerk, and the matter shall be docketed and assigned a FIFRA docket number.
- (b) If a request for a hearing is filed, the person filing the request shall, at the same time, file a document stating his objections to the Administrator's refusal to register or his intent to cancel the registration or to change the classification of a pesticide. If a notice of intent to hold a hearing is filed by the Administrator, he shall, at the same time, file a statement of issues.
- (c) Upon the filing of any objections or notice of intent to hold a hearing, the proceeding shall be referred to the Chief Administrative Law Judge by the hearing clerk. The Chief Administrative Law Judge shall refer the proceeding to himself or another Administrative Law Judge who shall thereafter be in charge of all further matters concerning the proceedings, except as otherwise provided for by order of 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]

§ 164.21 Contents of a denial of registration, notice of intent to cancel a registration, or notice of intent to change a classification.

- (a) **Contents.** The denial of registration or a notice of intent to cancel a registration or to change a classification shall be accompanied by the reasons (including the factual basis) for the action.

- (b) **Amendments to contents of denials and notices.** Such documents under this section may be amended or enlarged by the Administrator at any time prior to the commencement of the public hearing. If the Administrative Law Judge determines that additional time is necessary to permit a party to prepare for matters raised by such amendments, the commencement of the hearing shall be delayed for an appropriate period.

§ 164.22 Contents of document setting forth objections.

- (a) **Concise statement required.** Any document containing objections to an order of the Administrator of his refusal to register, or his intent to cancel the registration, or change the classification of a pesticide, shall clearly and concisely set forth such objections and the basis for each objection, including relevant allegations of fact concerning the pesticide under consideration. The document shall indicate the registration number of the pesticide, if applicable, a copy of the currently accepted and/or proposed labeling and a list of the currently registered or proposed uses of said pesticide.
- (b) **Amendments to objections by leave.** Objections may be amended at any time prior to the commencement of the public hearing by leave of the Administrative Law Judge or by written consent of all parties. The Administrative Law Judge shall freely grant such leave when justice so requires. If the Administrative Law Judge determines that additional time is necessary to permit a party to prepare for matters raised by amendments to objections, the commencement of the hearing shall be delayed for an appropriate period. This subsection shall not permit the addition, beyond the statutory deadline, of registered pesticides which are not included in the objections filed pursuant to paragraph (a) of this section.
- (c) **Amendments to objections as a matter of right.** Objections may be amended as a matter of right within 30 days, or in such time as the Administrator shall designate, after the Administrator amends his notice of intent to cancel a registration, change a classification, or his refusal to register a pesticide.

§ 164.23 Contents of the statement of issues to accompany notice of intent to hold a hearing.

- (a) **Concise statement required.** The statement of issues by the Administrator shall set a time in which any person wishing to participate in the hearing shall file a written response to the statement of issues as provided by § 164.24. The statement of issues shall include questions as to which evidence shall be taken at the hearing. Those questions may include questions concerning whether a pesticide's registration should be canceled or its classification changed, whether its composition is such as to warrant the claims for it, whether its labeling and other material submitted comply with the requirements of the Act, whether it will perform its intended function without unreasonable adverse effects on the environment, and whether, when used in accordance with widespread and commonly recognized practice, it will or will not generally cause unreasonable adverse effects on the environment.
- (b) **Amendment to statement of issues.** The statement of issues may be amended or enlarged by the Administrator at any time prior to the commencement of the public hearing. If the Administrative Law Judge determines that additional time is necessary to permit a party to prepare for matters raised by amendments or enlargements to the statement of issues, the commencement of the hearing shall be delayed for an appropriate period.

§ 164.24 Response to the Administrator's notice of intention to hold a hearing.

Any person wishing to participate in any proceeding commenced pursuant to any notice by the Administrator of intention to hold a hearing, shall file with the hearing clerk, within the time set by the Administrator in the notice (in no case less than 30 days from the date of the notice), a written response to the statement of issues which shall include the position and interest of such person with respect thereto. If any such person is a registrant or an

applicant for registration, he shall also file the registration number of the pesticide, if applicable, a copy of the currently accepted and/or proposed labeling and a list of the currently registered or proposed uses of said pesticide.

§ 164.25 Filing copies of notification of intent to cancel registration or change classification or refusal to register, and statement of issues.

After a copy of the document setting forth the objections and requesting a public hearing is filed with the hearing clerk or a response to the statement of issues is filed, the hearing clerk shall serve a copy of the document upon Respondent and the Office of the General Counsel of the Agency, Respondent shall, by counsel, thereupon file with the hearing clerk a copy of the appropriate notice of intention to cancel, the notice of intention to change the classification or the registration refusal order.

APPEARANCES, INTERVENTION, AND CONSOLIDATION

§ 164.30 Appearances.

Representatives. Parties may appear in person or by counsel or other representative. Persons who appear as counsel or in a representative capacity must conform to the standards of ethical conduct required of practitioners before the courts of the United States.

§ 164.31 Intervention.

- (a) **Motion.** Any person may file a motion for leave to intervene in a hearing conducted under this subpart. A motion must set forth the grounds for the proposed intervention, the position and interest of the movant in the proceeding and the documents proposed to be filed pursuant to either § 164.22 or § 164.24.
- (b) **When filed.** A motion for leave to intervene in a hearing must ordinarily be filed prior to the commencement of the first prehearing conference. Any motion filed after that time must contain, in addition to the information set forth in paragraph (a) of this section, a statement of good cause for the failure to file the motion prior to the commencement of the first prehearing conference, and shall be granted only upon a finding
 - (1) that extraordinary circumstances justify the granting of the motion, or
 - (2) that the intervenor shall be bound by agreements, arrangements, and other matters previously made in the proceeding.
- (c) **Disposition.** Leave to intervene will be freely granted but only insofar as such leave raises matters which are pertinent to and do not unreasonably broaden the issues already presented. If leave is granted, the movant shall thereby become a party with the full status of the original parties to the proceedings. If leave is denied, the movant may request that the ruling be certified to the Environmental Appeals Board, pursuant to § 164.100 for a speedy appeal.
- (d) **Amicus curiae.** Persons not parties to the proceedings wishing to file briefs may do so by leave of the Administrative Law Judge granted on motion. A motion for leave shall identify the interest of the applicant and shall state the reasons why the proposed amicus 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 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;
 - (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 conference 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.
- (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 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]

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 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 Administrative Law Judge's ruling in excluding the evidence was erroneous and prejudicial, the hearings may be reopened to permit the taking of such evidence, or where appropriate, the Environmental Appeals Board may evaluate the evidence and proceed to a final decision.
- (g) **Verified statements.** With the approval of the Administrative Law Judge, a witness may insert into the record, as his testimony, statements of fact or opinion prepared by him or written answers to interrogatories of counsel, or may submit as an exhibit his prepared statement, provided that such statements or answers must not include legal argument. Before any such statement or answer is read or admitted into evidence the witness shall deliver to the Administrative Law Judge, the reporter, and opposing counsel a copy of such. The admissibility of the evidence contained in such statement shall be subject to the same rules as if such testimony were produced in the usual manner and the witness shall be subject to oral cross-examination on the contents of such statements. Approval for such a procedure may be denied when it appears to the Administrative Law Judge that the memory or the demeanor of the witness is of importance.

[38 FR 19371, July 20, 1973, as amended at 40 FR 25815, June 19, 1975; 57 FR 5343, Feb. 13, 1992]

§ 164.82 Transcripts.

- (a) **Filing and certification.** Hearings shall be stenographically reported, transcribed and made available to the public as required by statute or Agency regulations. As soon as practicable after the taking of the last evidence, the Administrative Law Judge shall certify
 - (1) that the original transcript is a true transcript of the testimony offered or received at the hearing, except in such particulars as he shall specify and

- (2) that the exhibits accompanying the transcript are all the exhibits introduced at the hearing, with such exceptions as he shall specify. A copy of such certificate shall be attached to each of the copies of the transcript.

(b) [Reserved]

INITIAL OR ACCELERATED DECISION

§ 164.90 Initial decision.

- (a) **Proposed findings of fact, conclusions, and order.** Within 20 days after the last evidence is taken in a hearing, each party may file with the hearing clerk proposed orders, findings of fact, and conclusions of law based solely on the record, and a brief in support thereof. Within 10 days thereafter, each party may file a reply brief. The Administrative Law Judge may, in his discretion, extend the total time period for filing any proposed findings, conclusions, orders or briefs for an additional 30 days. In such instances, briefs and replies shall be due at such time as the Administrative Law Judge may fix by order. The hearing shall be deemed closed at the conclusion of the briefing period.
- (b) **Initial decision.** The Administrative Law Judge, within 25 days after the close of the hearing, shall evaluate the record before him, and prepare and file his initial decision with the hearing clerk. A copy of the initial decision shall be served upon each of the parties, and the hearing clerk shall immediately transmit a copy to the Environmental Appeals Board. The initial decision shall become the decision of the Environmental Appeals Board without further proceedings unless an appeal is taken from it or the Environmental Appeals Board orders review of it, pursuant to § 164.101.

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

§ 164.91 Accelerated decision.

- (a) **General.** The Administrative Law Judge, in his discretion, may at any time render an accelerated decision in favor of Respondent as to all or any portion of the proceeding, including dismissal without further hearing or upon such limited additional evidence such as affidavits as he may receive, under any of the following conditions:
 - (1) Untimely or insufficient objections filed pursuant to § 164.20;
 - (2) Failure to comply with discovery orders;
 - (3) Failure to comply with prehearing orders;
 - (4) Failure to appear or to proceed at prehearing conferences;
 - (5) Failure to appear at the hearing;
 - (6) Failure to state a claim upon which relief can be granted, or direct or collateral estoppel.
 - (7) That there is no genuine issue of any material fact and that the respondent is entitled to judgment as a matter of law; or
 - (8) Such other and further reasons as are just.
- (b) **Effect.** A decision rendered under this section shall have the same force and effect as an initial decision entered under § 164.90.

APPEALS

§ 164.100 Appeals from or review of interlocutory orders or rulings.

Except as provided herein, appeals as a matter of right shall lie to the Environmental Appeals Board only from an initial or accelerated decision of the Administrative Law Judge. Appeals from other orders or rulings shall, except as provided in this section, lie only if the Administrative Law Judge certifies such orders or rulings for appeal, or otherwise as provided. The Administrative Law Judge may certify an order or ruling for appeal to the Environmental Appeals Board when: (a) The order or ruling involves an important question of law or policy about which there is substantial ground for difference of opinion; and (b) either (1) an immediate appeal from the order and ruling will materially advance the ultimate termination of the proceeding or (2) review after the final judgment is issued will be inadequate or ineffective. The Administrative Law Judge shall certify orders or rulings for appeal only upon the request of a party. If the Environmental Appeals Board determines that certification was improvidently granted, or takes no action within thirty (30) days of the certification, the appeal shall be deemed dismissed. When an order or ruling is not certified by the Administrative Law Judge, it shall be reviewed by the Environmental Appeals Board only upon appeal from the initial or accelerated decision except when the Environmental Appeals Board determines, upon request of a party and in exceptional circumstances, that delaying review would be deleterious to vital public or private interests. Except in extraordinary circumstances proceedings will not be stayed pending an interlocutory appeal; where a stay is granted, a stay of more than 30 days must be approved by the Environmental Appeals Board. Ordinarily, the interlocutory appeal will be decided on the basis of the submission made to the Administrative Law Judge, but the Environmental Appeals Board may allow further briefs and oral argument.

[57 FR 5343, Feb. 13, 1992]

§ 164.101 Appeals from or review of initial decisions.

(a) *Exceptions and request for oral argument.*

- (1) Within 20 days after the filing of the Administrative Law Judge's initial decision, each party may take exception to any matter set forth in such decision or to any adverse order or ruling to which he objected during the hearing and may appeal such exceptions to the Environmental Appeals Board for decision by filing them in writing with the hearing clerk, including a section containing proposed findings of fact, conclusions, orders, or rulings. Within the same period of time each party filing exceptions and amicus curiae shall file with the hearing clerk a brief concerning each of the exceptions being appealed. The party shall include, in its brief, page references to the relevant portions of the record and to the Administrative Law Judge's initial decision.
- (2) Within 7 days of the service of exceptions, and of a brief under paragraph (a)(1) of this section, any other party or amicus curiae may file and serve a brief responding to exceptions or arguments raised by any other party. Such brief shall include references to the relevant portions of the record. Such brief shall not, however, raise additional exceptions.
- (3) Five copies of all material filed under this section shall be filed with the hearing clerk.

(b) *Review by Administrator when no exceptions are filed.* If no exceptions are filed within the time provided, the hearing clerk shall notify the Administrator 30 days from the date of filing of the Administrative Law Judge's initial decision. Within 10 days after said notification, the Environmental Appeals Board shall issue an order either declining review of the initial decision or expressing its intent to review said initial

decision. Such order may include a statement of issues to be briefed by the parties and a time schedule concerning service and filing of briefs adequate to allow the Environmental Appeals Board to issue a final order within 90 days from the close of the hearing.

(c) Argument before the Environmental Appeals Board.

- (1)** A party, if he files exceptions and a brief, shall state in writing whether he desires to make an oral argument thereon before the Environmental Appeals Board; otherwise, he shall be deemed to have waived such oral argument. The Environmental Appeals Board shall, however, on its own initiative, have the right to set an appeal for oral argument.
- (2)** If the Environmental Appeals Board determines that additional exceptions should be argued, counsel for the parties shall be given reasonable written notice of such determination so as to permit preparation of adequate argument on all of the exceptions to be argued.

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

§ 164.102 Appeals from accelerated decisions.

- (a)** Within 20 days after filing of an accelerated decision by the Administrative Law Judge, any party may file exceptions and a supporting brief with the hearing clerk, stating with particularity the grounds upon which he asserts that the decision is incorrect. The party shall include in its brief page references to the relevant portions of the record, if applicable.
- (b)** Within 7 days of the service of exceptions and brief under paragraph (a) of this section, any other party or amicus curiae may file and serve a brief responding thereto, with appropriate page references to the relevant portions of the record, if applicable.
- (c)** Ordinarily, the appeal from an accelerated decision will be decided on the basis of the submission of briefs, but the Environmental Appeals Board may allow additional briefs and oral argument.

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

§ 164.103 Final decision or order on appeal or review.

Within 90 days after the close of the hearing or within 90 days from the filing of an accelerated decision, unless otherwise stipulated by the parties, the Environmental Appeals Board shall, on appeal or review from an initial or accelerated order of the Administrative Law Judge, issue its final decision and order, including its rulings on any exceptions filed by the parties; such final order may accept or reject all or part of the initial or accelerated decision of the Administrative Law Judge even if acceptable to the parties.

[57 FR 5343, Feb. 13, 1992]

§ 164.110 Motion for reopening hearings; for rehearing; for reargument of any proceeding; or for reconsideration of order.

- (a) Filing; service.** A motion for reopening the hearing to take further evidence, or for rehearing or reargument of any proceeding or for reconsideration of the order, must be made by motion to the Environmental Appeals Board filed with the hearing clerk. Every such motion must state specifically the grounds relied upon.

- (b) **Motion to reopen hearings.** A motion to reopen a hearing to take further evidence may be filed at any time prior to the issuance of the Administrator's final order. Every such motion shall state briefly the nature and purpose of the evidence to be adduced, shall show that such evidence is not merely cumulative, and shall set forth good reason why such evidence was not adduced at a hearing.
- (c) **Motions to rehear or reargue proceedings, or to reconsider final orders.** A motion to rehear or reargue the proceeding or to reconsider the final order shall be filed within 10 days after the date of service of the final order. Every such motion must state specifically the matters claimed to have been erroneously decided, and alleged errors must be briefly stated. Motions to rehear or reargue proceedings or to reconsider final orders shall be directed to, and heard by, the Environmental Appeals Board. Motions under this section directed to the Administrator will not be considered, except in cases that the Environmental Appeals Board has referred to the Administrator pursuant to § 164.2(g) and in which the Administrator has issued the final order. A motion for reconsideration shall not stay the effective date of the final order unless specifically so ordered by the Environmental Appeals Board.

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

§ 164.111 Procedure for disposition of motions.

Within 7 days following the service of any motion provided for in § 164.110, any other party to the proceeding may file with the hearing clerk an answer thereto. As soon as practicable thereafter, the Environmental Appeals Board shall announce its decision whether to grant or to deny the motion. Unless the Environmental Appeals Board shall determine otherwise, operation of the order shall not be stayed pending the decision to grant or to deny the motion. In the event that any such motion is granted by the Environmental Appeals Board, the applicable rules of practice, as set out elsewhere herein, shall be followed.

[38 FR 19371, July 20, 1973, as amended at 57 FR 5344, Feb. 13, 1992]

Subpart C—General Rules of Practice for Expedited Hearings

§ 164.120 Notification.

- (a) Whenever the Administrator determines that action is necessary to prevent an imminent hazard during the time required for cancellation or change in classification proceedings, but that the hazard does not constitute an emergency, he shall notify the registrant of his intention to suspend registration of the pesticide at issue.
- (b) Such notice shall include findings pertaining to the question of imminent hazard and shall either be personally served on the registrant or be sent to the registrant by registered or certified mail, return receipt requested, and filed with the hearing clerk.

§ 164.121 Expedited hearing.

- (a) **Request.**
 - (1) An expedited hearing shall be held whenever the Administrator has received from the registrant a timely request for such hearing in response to the Administrator's notice of intention to suspend.
 - (2) A request for an expedited hearing is timely if made in writing or by telegram and filed with the office of the hearing clerk within 5 days of the registrant's receipt of the notice of intention to suspend.

(3) At the time of filing a request for an expedited hearing, the registrant shall also file a document setting forth objections to the Administrator's notice of intention to suspend and its findings pertaining to the question of imminent hazard. Such objections shall conform to the requirements of § 164.21.

(b) ***Presiding officer.***

(1) An expedited hearing shall be conducted by a presiding officer appointed by the Administrator, and such officer need not be an Administrative Law Judge.

(2) The presiding officer shall not have the authority to make an initial decision on the merits but shall make a recommended decision only.

(c) ***The issue.*** The expedited hearing shall address only the issue of whether an imminent hazard exists.

(d) ***Time of hearing.*** The hearing shall commence within 5 days after the filing of the request with the office of the hearing clerk unless the registrant and respondent agree that it shall commence at a later time. As soon as possible, the presiding officer shall publish in the FEDERAL REGISTER notice of such hearing.

(e) ***Intervention.*** Any person adversely affected by the Administrator's notice may move to intervene within 5 days after the receipt by the registrant of said notice or at any time prior to the conclusion of the presentation of the evidence, upon good cause found, except

(1) Leave to intervene will be granted only if the motion to intervene meets the standards of § 164.31 and, in addition, indicates that the movant would raise matters or introduce evidence pertinent to the issue of imminent hazard which would substantially assist in its resolution.

(2) A movant denied permission to intervene under this section but who otherwise meets the standards of § 164.31 and who is adversely affected may file proposed findings and conclusions and briefs in support thereof pursuant to paragraph (j) of this section. Any person filing under this subsection shall be deemed to have been a party to the proceeding, for all purposes of its further review.

(3) When an "emergency order" is issued pursuant to § 164.123, no person other than the respondent and the registrant shall participate in the hearing except that any person adversely affected may file proposed findings and conclusions and briefs in support thereof pursuant to paragraph (j) of this section. Any person filing under this subsection shall be deemed to have been a party to the proceeding for all purposes of its further review.

(f) ***Appearances and consolidation.*** The provisions of §§ 164.30 and 164.32 apply to an expedited hearing insofar as may be practicable.

(g) ***Order of proceeding and burden of proof.*** At the hearing, the proponent of suspension shall have the burden of going forward to present an affirmative case for the suspension. However, the ultimate burden of persuasion shall rest with the proponent of the registration.

(h) ***Evidence.*** The provisions of § 164.81, where applicable, apply to an expedited hearing.

(i) ***Transcripts.*** The presiding officer shall make provision for daily transcripts and otherwise comply with the provisions of § 164.82.

(j) ***Proposed findings or conclusions; recommended decision.***

(1) Within 4 days of the conclusion of the presentation of evidence, the parties may propose findings and conclusions to the Presiding Officer. Such proposed findings and conclusions shall be accompanied by a brief with supporting reasons.

- (2) Within 8 days of the conclusion of the presentation of evidence, the Presiding Officer shall submit to the parties his proposed recommended findings and conclusions and a statement of the reasons on which they are based.
- (3) Within 10 days of the conclusion of the presentation of evidence the Presiding Officer shall submit to the Environmental Appeals Board his recommended findings and conclusions, together with the record.
- (4) Within 12 days of the conclusion of the presentation of evidence the parties shall submit to the Environmental Appeals Board their objections to the Presiding Officer's recommended findings and conclusions and written briefs in support thereof.

[38 FR 19371, July 20, 1973, as amended at 57 FR 5344, Feb. 13, 1992]

§ 164.122 Final order and order of suspension.

- (a) **Final order.** Within 7 days of receipt of the record and of the Presiding Officer's recommended findings and conclusions, the Environmental Appeals Board shall issue a final decision and order. Such final order may accept or reject in whole or in part the recommendations of the Presiding Officer.
- (b) **Order of suspension.** No final order of suspension shall be issued unless the Environmental Appeals Board has issued or at the same time issues a notice of its intention to cancel the registration or change the classification of the pesticide. Such notice shall be given as provided in § 164.8.

[38 FR 19371, July 20, 1973, as amended at 57 FR 5344, Feb. 13, 1992]

§ 164.123 Emergency order.

- (a) Whenever the Environmental Appeals Board determines that an emergency exists that does not permit him to hold a hearing before suspension, the Environmental Appeals Board may issue a suspension order in advance of notification to the registrant.
- (b) The Environmental Appeals Board shall immediately notify the registrant of the suspension order. The registrant may then request a hearing in accordance with §§ 164.121 and 164.122, but the suspension order shall remain in effect during the hearing pending the issuance of a final order on suspension.

[38 FR 19371, July 20, 1973, as amended at 57 FR 5344, Feb. 13, 1992]

Subpart D—Rules of Practice for Applications Under Sections 3 and 18 To Modify Previous Cancellation or Suspension Orders

Authority: Sec. 25(a) and 6 of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended by the Federal Environmental Pesticide Control Act of 1972 (86 Stat. 997).

Source: 40 FR 12265, Mar. 18, 1975, unless otherwise noted.

§ 164.130 General.

EPA has determined that any application under section 3 or section 18 of the Act to allow use of a pesticide at a site and on a pest for which registration has been finally cancelled or suspended by the Administrator constitutes a petition for reconsideration of such order. Because of the extensive notice and hearing opportunities mandated by FIFRA and the Administrative Procedures Act before a final cancellation or suspension order may be issued, EPA has determined that such orders may not be reversed or modified without affording interested parties—who may in fact have participated in lengthy cancellation proceedings—similar notice and hearing opportunities. The procedures set forth in this subpart D shall govern all such applications.

§ 164.131 Review by Administrator.

- (a) The Administrator will review applications subject to this subpart D and supporting data submitted by the applicant to determine whether reconsideration of the Administrator's prior cancellation or suspension order is warranted. The Administrator shall determine that such reconsideration is warranted when he finds that:
 - (1) The applicant has presented substantial new evidence which may materially affect the prior cancellation or suspension order and which was not available to the Administrator at the time he made his final cancellation or suspension determination and
 - (2) such evidence could not, through the exercise of due diligence, have been discovered by the parties to the cancellation or suspension proceeding prior to the issuance of the final order.
- (b) If after review of the application and other supporting data submitted by the applicant, the Administrator determines, in accordance with paragraph (a) of this section, that reconsideration of his prior order is not warranted, then the application will be denied without requirement for an administrative hearing. The Administrator shall publish notice in the FEDERAL REGISTER of the denial briefly describing the basis for his determination as soon as practicable. Such denial shall constitute final agency action.
- (c) If after review of the application and other supporting data submitted by the applicant, the Administrator determines, in accordance with paragraph (a) of this section, that reconsideration of his prior order is warranted, he will then publish notice in the FEDERAL REGISTER setting forth his determination and briefly describing the basis for the determination. Such notice shall announce that a formal public hearing will be held in accordance with 5 U.S.C. section 554. The notice shall specify:
 - (1) The date on which the hearing will begin and end,
 - (2) the issues of fact and law to be adjudicated at the hearing,
 - (3) the date on which the presiding officer shall submit his recommendations, including findings of fact and conclusions, to the Administrator, and
 - (4) the date on which a decision by the Administrator is anticipated.

§ 164.132 Procedures governing hearing.

- (a) The burden of proof in the hearing convened pursuant to § 164.131 shall be on the applicant and he shall proceed first. The issues in the hearing shall be whether:
 - (1) Substantial new evidence exists and

- (2) such substantial new evidence requires reversal or modification of the existing cancellation or suspension order. The determination of these issues shall be made taking into account the human and environmental risks found by the Administrator in his cancellation or suspension determination and the cumulative effect of all past and present uses, including the requested use, and uses which may reasonably be anticipated to occur in the future as a result of granting the requested reversal or modification. The granting of a particular petition for use may not in itself pose a significant risk to man or the environment, but the cumulative impact of each additional use of the cancelled or suspended pesticide may re-establish, or serve to maintain, the significant risks previously found by the Administrator.
- (b) The presiding officer shall make recommendations, including findings of fact and conclusions and to the extent feasible, as determined by the presiding officer, the procedures at the hearing shall follow the Rules of Practice, set forth in subparts A and B of this part 164.

§ 164.133 Emergency waiver of hearing.

- (a) In the case of an application subject to this subpart D which is filed under section 18 of FIFRA, and regulations thereunder, and for which a hearing is required pursuant to § 164.131, the Administrator may dispense with the requirement of convening such a hearing in any case in which he determines:
 - (1) That the application presents a situation involving need to use the pesticide to prevent an unacceptable risk:
 - (i) To human health, or
 - (ii) to fish or wildlife populations when such use would not pose a human health hazard; and
 - (2) That there is no other feasible solution to such risk; and
 - (3) That the time available to avert the risk to human health or fish and wildlife is insufficient to permit convening a hearing as required by § 164.131; and
 - (4) That the public interest requires the granting of the requested use as soon as possible.
- (b) Notice of any determination made by the Administrator pursuant to paragraph (a) of this section shall be published in the FEDERAL REGISTER as soon as practicable after granting the requested use and shall set forth the basis for the Administrator's determination.