NPDES ADMINISTRATIVE HEARING MANUAL

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CONTENTS

I. THE FEDERAL ADMINISTRATIVE PROCESS

A. Background I-1
B. Adjudications
1. Generally I-2
2. Constitutional Due Process I-3
3. Applicability of the APA I-3
C. Hearings
1. APA Requirements I-4
2. Fair Hearing I-4
3. Presiding Officers I-5
D. Evidence in Administrative Proceedings
1. Admissibility I-6
2. Discovery I-7
3. Burden of Proof I-9
4. Official Notice I-9
E. Administrative Determinations
1. Generally I-10
2. Decisions of the Presiding Officer I-10
3. Proposed Findings and Conclusions I-10
4. Agency Review of Initial Decisions I-11
5. Statements of Findings and Conclusions ... I-11
F. Judicial Review
1. Reviewable Agency Action I-11
2. Methods of Judicial Review I-12
3. Primary Jurisdiction I-12
4. Exhaustion of Remedies I-13
5. Standing I-13
6. Review of Findings of Fact I-13
7. The Record I-14

II. PRACTICES, PROCEDURES AND TECHNIQUES FOR FORMAL HEARINGS

A. Preliminary Matters
1. Service of Papers II-1
2. Document Filing and Record Management System II-1
3. *Ex Parte* Communications II-2
4. Time Limitations II-3
5. Conduct of Counsel II-3
6. Team Approach II-4
B. Evidentiary Hearings
1. Trial Planning II-4
2. Prehearing Conference II-16
3. Discovery II-21
4. Making the Hearing Record II-29
5. Testimony II-34
6. Objections and Offers of Proof II-52
7. Managing Exhibits II-61
8. Drafting Proposed Findings of Fact, Conclusions of Law and Supporting Brief ... II-75

C. Non-Adversary Panel Hearings
1. Background II-77
2. Techniques for Expediting Panel Hearings II-78

Appendix: Illustrations of Testimony

III. POLICIES AND RECURRING LEGAL ISSUES

IV. FORMS

REFERENCE MATERIALS

- Federal Rules of Evidence
- Bibliography

INDEX

II

PRACTICES, PROCEDURES AND TECHNIQUES FOR FORMAL HEARINGS

This chapter presents appropriate practices and techniques for preparing and presenting the Agency's case in formal hearings under 40 C.F.R. Part 124 on challenges to NPDES permit decisions under Section 402 of the Clean Water Act.

A. Preliminary Matters

1. *Service of Papers*

All papers, which invite or require a response from another party within a prescribed time period or which must be filed or served within a prescribed period, should be transmitted either by personal service or by registered or certified mail, return receipt requested.

Where material is personally served, attach the original of the certificate of service to the official file copy of the papers served. And for material sent by certified or registered mail, tape the signed return receipt ("green card") to the backside of the official file copy (last page for multi-page material) of the papers served.

2. *Document Filing and Record Management System*

a. Errors and Omissions in Submitted Material -

Whenever possible, but consistent with the requirements of §124.73(c)(4), the Regional officials should accommodate telephone requests to alter or amend a document by interlineation, provided that the caller agrees to confirm such a request in writing and to notify all interested persons and, after his assignment to the case, the administrative law judge (ALJ).

b. Docket and Indexing System -

The Regional Hearing Clerk should design and implement a workable system for receiving, organizing, storing and retrieving papers and documents that are part of the administrative record and the hearing record. At a minimum, this system should include date- and time-stamping of papers and documents immediately upon receipt, chronological filing, and a summary sheet, entry log or other index showing at-a-glance

the nature of all papers or documents and their respective filing times.

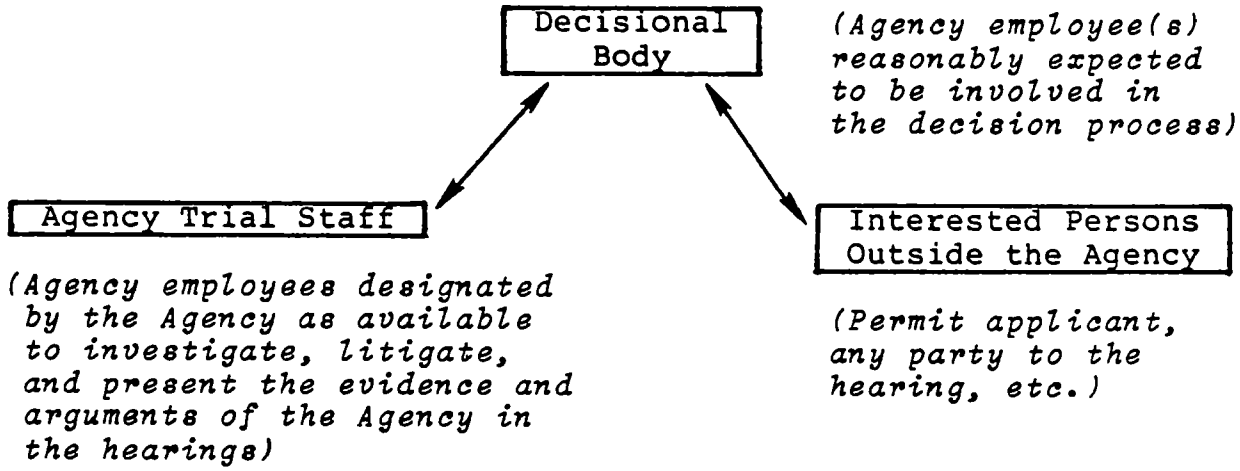
c. Examination of the Record -

Except as provided in §122.19, any person is allowed to inspect and copy, during regular Agency business hours, any document, paper, ruling, order, decision, transcript, information or written material of any kind filed or submitted in a formal proceeding as soon as such matter is received and processed by the Regional Hearing Clerk. The Regional Hearing Clerk may set reasonable restrictions on the availability of all or any part of the administrative record. The charges for duplicating documents, and the circumstances, if any, under which such charges will be reduced or waived altogether, should be stated in writing and posted in the Office of the Regional Hearing Clerk.

3. *Ex Parte Communications*

After public notice of the grant of an evidentiary hearing under §124.77 or of a panel hearing under §124.116, Agency ex parte rules forbid written or oral communications relating to the merits of the proceeding between a member of the decisional body and any interested person outside the Agency or between a member of the decisional body and a member of the Agency trial staff. Such communications are prohibited ex parte communications if (a) they were not originally filed or stated in the administrative record or in the hearing, and (b) all parties did not receive prior written notice of such proposed communication or they were not given the opportunity to be present at and participate in the discussion.

The following diagram illustrates the relationships involved in an ex parte discussion:



Where an opponent makes such an ex parte communication, Agency lawyers should consider filing a motion with the ALJ or the Administrator (depending upon the stage of the proceedings) asking that the party violating the ex parte rules show cause why its claim or interest in the proceeding should not be dismissed, denied, disregarded or otherwise adversely affected. [See §124.78(c)]

4. *Time Limitations*

Although there are formal ways for a party to extend deadlines for filing papers and documents, decision-makers prefer it when the lawyers work out these matters without resort to written motions. Lawyers should show professional courtesy to even the most antagonistic opponent. Remember that everyone occasionally needs an extension of a filing deadline. While it may be inexcusable simply to neglect a deadline, there is nothing wrong with telling an opponent candidly that for good reasons you cannot meet a deadline.

Even when all parties agree verbally on an appropriate extension period, be sure that someone notifies the ALJ, Regional Administrator or Administrator, as the case may be, and files a written stipulation. (An unwritten rule makes the party who wants the extension responsible for the phone calls and the necessary paperwork.)

5. *Conduct of Counsel*

It is the lawyer's duty to make every procedural move and every arguable point that will aid his client's cause. But this does not justify making frivolous, specious or absurd arguments. A lawyer has a duty of candor and fairness. He must not knowingly misstate either law or fact, misquote the contents of a paper, of testimony, or of a decision, nor assert facts not proved.

If tardiness or absence is unavoidable, the lawyer must make every effort to give notice to the ALJ and to opposing counsel. Dilatory tactics are wrong when solely intended to hinder the proper presentation and development of a just cause.

When dealing with an opposing party who has a lawyer, speak only with the lawyer. During a proceeding a lawyer should not communicate or cause another to communicate on the subject of the proceeding with a party he knows to be represented by counsel unless he has the prior consent of the lawyer representing the other party or is otherwise authorized to do so. A lawyer should communicate with the ALJ regarding the merits of a case only (i) during official proceedings, (ii)

in writing, so long as a copy of the writing is sent to all other parties, (iii) orally, when notice is given to other parties, or (iv) as might be authorized by law. Out-of-court communications are generally improper whenever undue advantage for one party would result or appear to result. Thus, a lawyer should not give a memorandum to the judge without giving a copy to counsel for the other parties. Whenever communications are proper (as those with notice or where a copy is provided), the lawyer should be fair and accurate in his statements.

6. *Team Approach*

Successful administrative litigation requires a good working relationship among all professionals whose skills are needed to prepare and defend Agency actions. Key consultants, technical and support staff and lawyers must cooperate closely at all stages of the permit issuance process. This cooperation is especially important where Agency actions will be controversial or likely to result in a challenge to the permit. Individual roles and responsibilities should be worked out within each Region under the guidance of the Division Directors of the affected programs and personnel. In practice, lawyers are usually designated as case managers, i.e., persons through whom all information about the proceedings flows. But a case manager can be any assertive, well-organized member of the Agency trial staff. When a lawyer serves as case manager, a qualified technical staff member (whose field of expertise will vary with the subject matter involved) should direct and coordinate work done by non-lawyer members of the trial staff.

The technical professionals who review applications and prepare draft permits often find that preparing a fact sheet requires contributions from all members of the team, thus assuring that the various limitations, requirements and other conditions in the permit are the result of a conscientious decision-making process.

B. Evidentiary Hearings

1. *Trial Planning*

a. Introduction -

(1) Generally:

A trial can be said to be "finished" even before it begins. Before the lawyer walks into a hearing room, he has spent countless hours preparing every detail of his case. He has organized and arranged the presentation of facts. He has determined the order of witnesses, of

questions to be asked, and of every document to be offered in evidence. He has pre-determined the phrasing of key questions. Having anticipated objections to his evidence, he has answers ready; having foreseen his opponent's evidence, his own objections are ready. (Ideally, one should know his opponent's case as well as or better than the opponent himself knows it. Sometimes a lawyer finishes a trial thinking he could have presented a better case for the opposing side than the job done by opposing counsel.)

(2) Preparation Agenda:

The lawyer must plan his preparation by listing actions in the order they must be accomplished and by setting deadlines for accomplishing them. Finished jobs are checked off the list; new things to do are added. A preparation agenda is an essential trial planning discipline that helps keep the lawyer from neglecting small but important chores. An up-to-date agenda with tasks and responsibilities checked off gives an instant assessment of the status of preparation and allows other persons both to help with the work and to pick up and carry on the work if responsibilities shift.

(3) Using Para-professionals:

Whenever possible, use paralegals and other para-professionals, as well as college and law school students who work as interns. They can be especially valuable in organizing and maintaining files, locating and organizing documents, helping expert witnesses find information and materials, searching out biographical material on and writings of an opponent's expert witnesses, summarizing the contents of documents, assembling proof, and assisting at hearings.

(4) Analysis of Issues:

Begin evaluating the issues by examining the evidentiary hearing request and the Regional Administrator's grant of the request. [§124.74] This analysis should be prepared early in the case. Update the analysis as new issues develop and old issues are resolved.

As a format for the analysis, divide a sheet of paper into three columns. In the first column list the issues of fact and the related contested permit conditions identified by the Regional Administrator. [See §124.74(d)] Record the Agency's response to each such issue in the second column side-by-side with the listed contested permit condition. Note source material (e.g., pre-hearing order, answer to interrogatory, stipulated fact, document reference) in the third column. This kind of analysis forces the

lawyer to transform vague hearing requests and hearing grants into precise issues. It also guides discovery, investigation and further preparation of your own case, while identifying the issues that need to be proved and those that do not. It is the basis for the trial notebook.

b. Trial Notebook -

(1) Generally:

The trial notebook can simplify the lawyer's work during the hearing. If properly prepared with a good index system, it allows the lawyer to quickly find copies of any papers, documents, extracts from depositions, memoranda on the introduction of evidence, or any other reference item.

Regardless of style or manner of organization, the trial notebook must be usefully indexed and arranged. The complexity of each case will determine how much effort is needed. Every case requires documentation, investigation and preparation. Before any trial, however small, some version of the trial outline should be attempted.

(2) Format and Organization:

The complete trial notebook represents the final preparation for the hearing. It should provide a clear, reliable diagram for the trial of the case and safeguard against neglecting areas of evidence or a portion of the case.

The best kind of trial notebook is a three-ring, loose-leaf binder sized for 8-1/2 x 11 inch paper. Use separators or dividers tabbed with the categories needed for preparation and trial of the case. Ordinary manila folders are useful for holding materials generated before trial such as correspondence, documents, memoranda and exhibits. These folders can be stored in large expandable closed-end folders. Make notes or store material in the notebook or in the folders, whichever is more convenient. Whatever the system, be sure to make notations immediately upon finding useful information and be prepared to update and revise all the material constantly. The material is ultimately transformed into the final notebook and quick-access reference files used at the hearing.

A suggested trial notebook outline should contain the following:

Tab I. Administrative Record

Tab A. Permit Application

Tab B. Draft Permit

Tab C. Statement of Basis/Fact Sheet

Tab D. Abstract of Documents Cited in Statement of Basis/Fact Sheet

Tab E. Abstract of Comments Received During Public Comment Period

Tab F. Final Permit

Tab G. Response to Comments

Tab H. Abstract of Other Documents in Permit Supporting File

Tab II. Pleadings and Discovery

Tab A. Abstract of Evidentiary Hearing Request and Grant of Evidentiary Hearing

Tab B. Permittee's Admissions and Answers to EPA Interrogatories

Tab C. EPA Admissions and Answers to Permittee's Interrogatories

Tab D. Deposition Digests (Permittee's Witnesses) with Index

Tab E. Deposition Digests (EPA Witnesses) with Index

Tab III. Facts and Law

Tab A. Witness List

Tab B. Chronology and/or Memorandum of Facts

Tab C. Abstracts of Exhibits and Other Documents

Tab D. Legal Memoranda

Tab IV. Trial

Tab A. Trial Plans or Outline

Tab B. Case in Chief (Outlines of Witnesses' written direct testimony and exhibits)

Tab C. Permittee's Case (Outlines of written direct testimony; outlines of cross-examination from discovery material, exhibits and other sources)

Tab D. EPA Rebuttal (Outlines of testimony)

Tab E. Permittee Rebuttal (Outlines of testimony)

Tab F. Exhibit List (Columns headed "EPA" or "Permittee", "Number", "Description", "Offered", "Received", "Refused", "Reserved")

Tab V. Master Index

(3) Indexing Discovery Material:

Discovery material is routinely used as part of your case-in-chief or in cross-examination. Make a note of what you intend to use and when you intend to use it. Where the material is extensive, the reference should be noted in a special section of the trial notebook. Prepare a key word or topic index to depositions and interrogatories, listing question-and-answer references and the pages where they occur. File the papers themselves separately.

(4) Notes on Law and Evidence:

Be prepared on the general principles of law and evidence that apply to the presentation of your case and on points you anticipate will arise at the hearing, if they are not resolved at a prehearing conference.

Index your general research for ready access to specific memoranda, notes or case abstracts. Prepare separate briefs on specific points of law and evidence and keep them in the storage folder, but list the briefs (by subject) in the trial notebook.

(5) Witness Lists:

Devote a section of the trial book to notes about witnesses: things you have learned or surmised about a witness and his testimony.

Other parts of the file also will contain material about witnesses: witness statements, memoranda about a witness and his testimony, answers to interrogatories. These materials do not constitute the testimony of the witness, but rather are the raw materials for that

testimony. This raw material must be worked into final form for use at trial.

The lawyer must make a number of important decisions about the presentation of the case at trial:

(a) Which witnesses to call.

(b) The order in which to call them.

(c) The organization of the written testimony for each witness so as to present it in a clear and effective way.

(d) The exhibits to be introduced through particular witnesses.

The witness list should have the names of the persons in the order they will be called. Note next to each name the topic on which the witness will testify. Do not forget to list probable opposing witnesses. Thinking about the case from the opponent's perspective is an important part of case preparation.

(6) Outline of Proof:

The outline of proof (trial plan) may be the most important section of the trial notebook. To prepare the outline you must analyze each issue in the case in terms of the component facts to prove that issue, and in turn analyze each component fact in terms of the proof (evidence) and rules of evidence necessary to establish that fact. The outline thus highlights:

(a) Each issue in the case.

(b) Facts necessary to prevail on each issue.

(c) Each item of proof (evidence) available to prove each fact, and any pertinent rule of evidence.

The outline forces you to marshal the evidence and to assess the strengths, weaknesses and gaps in the proof. It helps you decide on the order of proof and prepare the witness sheets and trial agenda. It should be structured as follows:

ISSUE NO. __

[Statement of Issue]

LAW: [Statement of law; case and/or statute and/or regulation reference(s)]

FACT	WITNESS/FOUNDATION	EXHIBIT(S)

(7) Exhibit Lists and Exhibit File:

The documents and exhibits must be organized and indexed before the hearing. Indexing can be done in a variety of ways so long as it (i) identifies the document with an abstract of its contents, (ii) codes the document, if a coding system is used, (iii) tells where to find the document, and (iv) explains how the document will be used at trial.

The easiest way to index documents is by the name of the item. Sometimes it helps to cross-index the document by keying it to the witness sheets. When using documents in litigation:

(a) Do not mark or mutilate originals.

(b) Work with photocopies of important documents.

(c) Do not file original documents in any submission. Stipulate for the substitution of copies.

(d) Safeguard important documents.

(e) Have your opponent produce original documents, not copies.

(f) Indicate the source of each document. An easy way is to write the source on a slip of paper and attach it to the document itself by paper clip, not by stapling.

c. Ensuring Effective Expert Assistance -

(1) Generally:

The importance of the expert in NPDES evidentiary hearings cannot be overemphasized. The expert can serve not only as a witness, but also as a valuable advisor to all members of the trial team in preparing the case and responding to opposing experts. The use of the expert as a participant throughout the litigation process, rather than just at the hearing stage, means that case managers must be able to make quick selections of experts capable of filling a variety of roles.

(2) Preparing the List of Candidates:

Several sources can be consulted in compiling a list of candidate experts. Check first with a contracts officer; the Agency already may be doing business with a consulting firm or an individual expert that has the necessary background and experience. Otherwise, the chairman of the pertinent department of a nearby college or university can furnish the names of alumni or faculty members with the requisite skills. Frequently, the best-informed advice will come from other lawyers who have handled similar cases. Not only can they supply the names of experts, but they also can tell you how the experts performed on the witness stand and how thorough and cooperative they are in trial preparation. Sometimes even people in everyday occupations may possess the kind of specialized knowledge needed to interpret the facts. For example, professional fishermen often can be persuasive witnesses as to the habits of fish populations and the effects of man-made changes in the aquatic environment.

(3) Making a Choice:

In making a final choice, keep in mind these criteria:

(a) <u>Ability of the expert to communicate</u> -

Can he translate complicated technical material into relatively clear, comprehensible terms?

(b) <u>Vulnerability to cross-examination</u> -

Find out whether the expert has written books or articles with a viewpoint different from the position he would be taking in the hearing. If he has published a contrary view and there is no legitimate way to distinguish the current controversy from those described in his books or articles, or if he cannot explain his changing attitude, eliminate him from consideration.

Think about whether the expert might be someone who changes opinions to agree with whoever is questioning him at the time. An expert who can support the Agency's case in his direct testimony, but who ends up agreeing with opposing counsel on cross-examination is worse than no expert at all. Therefore, consultation with the expert must include a friendly but thorough cross-examination before a commitment is made to retain him. In addition, an expert should be sought whose knowledge is up to date and whose preparation for testimony will be thorough.

(c) Experience as a witness -

The seasoned expert witness has learned the art of expressing himself understandably and protecting himself on cross-examination. He can help an inexperienced attorney in planning the presentation of the expert's testimony. For one thing, many veteran expert witnesses have printed forms of questions designed to qualify themselves on the stand as an expert; this is valuable if the expert's field of specialization is esoteric, where information concerning the levels of qualification may be hard to come by.

The experienced expert witness can help determine the most effective way to present his testimony. He may have certain kinds of exhibits or formats that have worked well in past cases and might be adaptable to use in the upcoming hearing. If his testimony will be presented by using a hypothetical question, the witness may assist in drafting the question so that it will be detailed enough to cover the necessary items of proof, but not so intricate as to create a technical fog.

Beware of any expert who is so impressed by his own past accomplishments that he does not feel the need for much preparation in new cases. He may reject suggestions from a young lawyer on the most effective form his testimony can take. If you find yourself working with this type of expert, muster support for finding another expert.

(4) In-house Experts:

The use of in-house experts is highly desirable. Agency employees with the requisite expertise are already on the payroll, know EPA policies and procedures, its filing system and other facts that normally will enable them to proceed with their work more rapidly than a stranger called in from the outside. Equally important, the in-house experts often know and are known by the Agency permit writers and are able to help the lawyer find other knowledgeable persons both inside and outside the Agency, and then develop the facts and relevant expert opinions.

Whenever one or more of the persons selected as in-house experts have been involved in developing the permit or in other enforcement actions against the permittee, it may be wise to "shop" in-house for a "second opinion." Look for a person whose objectivity and judgment may be less affected by a personal and professional stake in the outcome.

Some supervisors and managers are reluctant to release an employee from his normal duties so that he may assist (part-time or full-time) a lawyer preparing for a hearing. They tend to regard these additional responsibilities as an interference with the branch's or division's work. Whenever the re-assignment of an Agency employee for work as an in-house expert is viewed as a necessary evil, then the most expendable employee (who happens to know something about the subject) tends to become the designated in-house expert. If the stakes in the controversy are not high and the expert areas relatively few and not particularly complex, then it may be acceptable to select an expert on that basis.

Where the stakes are high and the case is complex, and where the nature of the case indicates that counsel may need relatively frequent, if not constant, expert assistance prior to and at the trial, a qualified in-house expert should be selected to fulfill that function. He will be able to perform that function effectively if he is in the mainstream of the pre-hearing preparation and discovery. In fact, if the in-house expert has a background broad enough to give him at least a working knowledge in the various expert areas involved in the hearing, and if the lawyer has given him a basic understanding of the legal issues, he can serve as liaison or coordinator among the various trial experts and between those experts and the lawyer.

(5) Using Experts in Prehearing Preparation:

(a) <u>Generally</u> -

The potential uses of an expert in prehearing matters are as numerous and varied as the issues that require expert assistance. While there is no all-purpose checklist for using the expert in preparing for a hearing, there are a number of recurring beneficial uses and potential problems that can be identified.

(b) <u>Mutual aid</u> -

To understand the specific technical points involved in a case, it usually is necessary to have some knowledge of the general area or areas out of which the

specific points arise. So where a case involves only one component of a machine or one portion of a treatment process, a proper handling of the case requires a general understanding of how the machine or process works. The expert's first job is to give the lawyer such working knowledge; since some lawyers find it hard to absorb complex, technical data it is often helpful for the expert to furnish or recommend reading materials for the lawyer to study.

While the expert acquaints the lawyer with the technical areas of the case, the lawyer, in turn, must brief the expert on the facts of the case and the legal theories involved. To assist the lawyer properly, the expert has to know what the case is about and where he fits into it.

(c) Preparation for conferences -

The expert may be able to help the lawyer prepare for meetings with Agency personnel, other outside consultants, and officials of the affected State or local area. Sometimes the expert may be able to identify certain documents or parts of documents that should be reviewed with the help of particular persons. As the scope and complexity of technical areas increase, it may be a good idea to have the expert attend meetings and interviews with potential witnesses.

(d) Document review and analysis -

Working alone or together with the Agency's professional staff, the expert can help review documents, technical reports or other papers. This is an especially good idea where a sizeable number of technical documents and detailed reports are involved. To the extent the expert must handle this chore, he needs a solid understanding of the case as a whole, not merely of the area in which he is involved.

One way to approach the task is to ask the expert to proceed on the basis of categories, e.g., to identify:

(i) key documents,
(ii) documents of lesser relevance,
(iii) documents of doubtful relevance, and
(iv) documents that clearly are not relevant.

The lawyer should review items in the first three categories with help from the expert. The lawyer should make decisions on doubtfully relevant documents after reviewing these documents one-by-one with the expert. Ruling out documents

in the fourth category usually can be left to the competent expert.

(e) Depositions and interrogatories -

To the extent that the ALJ has authorized the parties to use discovery devices, the expert also can suggest interrogatories and evaluate the answers or, when interrogatories are received, in suggesting what information should be furnished in the answers. Similarly, the expert should render advice about the points to be developed if and when the lawyer deposes the opposing party's trial expert and technical witnesses. One well-suited task for the expert is collecting the writings and the testimony of the expert or experts that the opposing party proposes to call. If this material is either technically complex or voluminous, the expert also can be asked to analyze and explain the technical material and to search the voluminous material for helpful items. Depending upon the scope and complexity of the case and other factors, the lawyer should consider having the expert attend depositions to render on-the-scene advice.

(f) Opponent's expert -

It is often possible to obtain testimony helpful to your case from an opponent's expert during prehearing discovery. However, this tactic requires thorough preparation and special familiarity with the material of the expert you are examining. Your first case in a given subject area will involve a substantial effort that may produce only small results. With each successive case of the same type, and with the assistance of your expert, you will expand the scope of your knowledge and sophistication.

In depositions, where you are in control and know in advance the points you want to explore or establish, good understanding of the technical points involved and the presence of our own expert sometimes will allow you to advance the Agency's case through the mouth of your opponent's expert.

(g) Coordinating expert -

In large, complex cases involving a variety of expert disciplines, an expert often can help in establishing and coordinating a team of experts. To serve in this role, the expert should be experienced and have a background of sufficient scope to permit him to move back and forth among the various disciplines, at least on an informal, working basis.

(h) Monitoring the expert -

To be of any real value, your expert must be thorough in the areas entrusted to him. In many instances this means he must review and analyze from his point of view transcripts, an opponent's written direct testimony, and other material you furnish him. Sometimes the most effective division of labor between lawyer and expert makes the expert responsible for reviewing technical documents running into hundreds or even thousands, of pages.

Sometimes the work is tedious; most of it is complex. For that reason, among others, problems can develop: the expert can be heading in the wrong direction or not doing enough of the right thing. When a untried expert is being used, it pays to monitor his progress and to ascertain, by periodic conferences, whether he is doing the job correctly and paying enough attention to detail.

2. *Prehearing Conference*

a. Generally -

Effective litigation strategy includes understanding that significant decisions in a case often are made before the hearing actually begins. Though practices vary, most ALJs use prehearing conferences to make important decisions affecting the course of the hearing. Discussion at a prehearing conference may concern such matters as clarifying the issues, limiting the number of expert witnesses, stipulating facts and the genuineness of documents, and filing written testimony and documentary evidence. [§124.83(c)] Proper use of formal prehearing procedures can increase the speed and orderliness of the hearing by eliminating unnecessary disputes and surprises through agreements and decisions made before the hearing starts.

These agreements and decisions are often embodied in a prehearing order. [§124.83(e)] Since this order governs the subsequent course of the hearing and usually is difficult to change after it is issued, the Agency lawyer should be well-versed in the strategic decisions he will have to make to get a favorable order, or at least one not detrimental to his case.

b. Preparation -

To accurately assess the effect of prehearing stipulations, agreements or ALJ rulings, a lawyer usually must be as nearly prepared for the prehearing conference as for the hearing itself. Ordinarily, discovery should be as far along

as possible. But under Subpart E no discovery may take place unless and until ordered by the judge. [§124.83] Such an order would not likely come until the time of the prehearing conference itself, if ever.

The lawyer who will try the case must himself attend the prehearing conference. In fact, most judges insist on it. A lawyer who has not undergone the intense preparation necessary for the trial of the case may bargain away crucial points unknowingly or, by failing to agree to the obvious, may increase the time and expense of the hearing. Besides knowing the case, counsel should have authority to make agreements. If a lawyer is able to maneuver his opponent into a favorable stipulation, but then cannot consummate the agreement without someone else's approval, the lawyer might find (when he finally gets the authority) that the advantageous moment has passed and agreement is no longer possible.

Failing to prepare for a prehearing conference can lead to a prehearing order that severely jeopardizes the unprepared lawyer's case. For example, limiting witnesses to those listed in a prehearing order may rule out adding witnesses a lawyer later discovers when he finally begins to put his case together. Many cases end up in this kind of strait jacket simply because the lawyer did not know enough about his own case.

Perhaps the greatest offense is not to appear at the conference. When failure to appear is just another event in a series of dilatory tactics by a lawyer, the ALJ probably can impose sanctions against the party that lawyer represents. [Compare 40 C.F.R. §§124.83(a) and 124.85(b)(6) and (13) with 40 C.F.R. §22.17(a)] Lawyers should take advantage of the shortcomings of opposing counsel who fail to raise crucial points at the prehearing conference or who fail to appear at the conference. If an opponent cannot back up an assertion, the conference is an appropriate time to request removal of that contention from the case.

Only by knowing what must be proved and the plan for doing so, and only by studying the probable techniques of an opponent, can an attorney take full advantage of the opportunities offered by prehearing procedures. Sometimes the judge may be willing to include in a prehearing order final or tentative rulings affecting the manner of proof. [§124.83(e)] A lawyer who wants to use an arguably controversial technique of proof can have that method legitimized at the conference.

Another important topic for the prehearing conference is the date of the hearing. Securing a suitable trial date can be accomplished only if opposing counsel come to the prehearing conference as well-informed as possible about the dates their respective witnesses will be available and written

direct testimony and related documents, studies and other exhibits (in preparation) will be completed. Remember that the ALJ usually has his own problems: his docket may be crowded and he may be committed to disposing of a certain number of pending cases each calendar quarter.

Lawyers for all parties should meet, or at least talk, before the conference to reach whatever agreement is possible on items that will be discussed at the conference and to exchange documents (except perhaps for documents that will be used for impeachment purposes) that will be offered in evidence. Whenever possible, the EPA lawyer should take the initiative in preparing a proposed prehearing conference agenda and submitting it to the other parties. Setting the agenda may provide an edge in controlling the discussion at the conference, especially when the judge has a busy docket or where he is unfamiliar with NPDES issues. Plan on sending the final draft agenda to the judge in time for him to review it before the conference. The agenda should contain:

(1) The date of the prehearing conference.

(2) Appearances of counsel, their addresses, etc.

(3) Questions raised by pending motions, including the need for discovery. If discovery is contemplated, propose a schedule for completion.

(4) Summary of ultimate facts claimed by each of the parties.

(5) Stipulations of fact; matters subject to official notice.

(6) Contested issues of fact.

(7) Contested issues of law.

(8) Proposed schedule for submission of written direct testimony and supporting documentary evidence; proposed schedule for submission of rebuttal testimony.

(9) Listing and brief description of exhibits (except documents intended for impeachment only) to be offered in evidence by each party and whether such exhibits have been examined by all counsel; stipulations of authenticity and, if appropriate, of admissibility of exhibits or objections to authenticity.

(10) Proposed date for beginning the hearing.

c. Knowing the Judge -

Counsel should learn about the assigned judge and his attitudes toward prehearing conferences. Different judges look at prehearing conferences differently: some will push hard for settlements; others will dig into the case and work with the lawyers to narrow issues; still others simply will act as a moderator, expecting the lawyers to work out the details; and a few will attempt to keep things flexible.

d. When to Stipulate -

One of the most difficult decisions in preparing for a hearing is deciding which facts and procedures should be part of a prehearing agreement and which should not. Generally, the ALJ cannot force parties to stipulate as to any particular facts. In deciding whether to stipulate to facts essential to your case, or to your opponent's case, an important consideration is the extent to which, if at all, (1) formal proof on the matter would be more persuasive or (2) cross-examination of witnesses would be materially beneficial to your case. Other considerations: how substantial such proof would be and the expense and availability of such proof.

Where proof depends largely on expert testimony, the lawyer must consider whether the available expert can communicate clearly or whether he would leave the judge more confused than before the witness took the stand. An articulate expert obviously would be more persuasive than a dry stipulation; an incoherent expert might be no better (or even worse) than a stipulation.

If Party A has expert testimony strongly refuting a large part of the Party B's claims, and Party B can counteract that evidence only partially and at considerable time and expense, then Party B should consider -- if not conceding that part of the case -- offering to stipulate to some features of Party A's testimony. Where matters can so easily be proved by an opposing party, a stipulation sometimes can make the best of a bad situation by minimizing the importance of the matter. Remember: expert testimony is not only expensive, but one may not always be able to find and use the desirable person.

Ultimately, the decision to stipulate will be influenced greatly by how much the lawyer thinks he can accomplish in a case. The more confident he is in completely defeating the other side, the less inclined he will be to stipulate.

e. Other Agreements -

(1) Witnesses:

Even where the parties do not agree to substitute stipulations for expert testimony, they still can decide to limit the number of experts who testify on each side. Such an agreement is especially desirable where a government agency with limited resources is facing a prosperous corporation. Even where the agreement does not provide for each party's presenting the same number of experts, it still prevents the less affluent party from being inundated by a legion of opposition experts. Whenever the parties are forced to name the witnesses they expect to call and to limit themselves to these named witnesses, a party who is not sure of the identity of all its witnesses should leave a way to add to the list until shortly before the hearing. The following statement in a prehearing order will accomplish this:

> The parties reserve the right to call additional witnesses at the hearing, but only if the names and addresses of such additional witnesses are furnished to opposing counsel at least __ days prior to the hearing.

(2) Authenticity of Documents:

The authenticity of documents also may be agreed upon, but guard against going too far. The mere authenticity of documents says nothing about their relevance. Guard against signing an agreement so broadly worded that it stipulates to both the relevance and authenticity of a document when only the latter is intended. And consider providing that if any party wishes to use exhibits not identified in the prehearing order, then that party must give prompt notice to the other parties stating the reason for failing to identify the exhibits at an earlier time.

f. Court Reporters at Prehearing Conferences -

Section 124.83 does not require transcripts of prehearing conferences, although nothing prevents the ALJ from ordering that one be made. Some judges feel that court reporters "cramp their style" or limit the effectiveness of the prehearing conference. But if prehearing conferences are to become a serious and important part of the hearing process, the reporting of the conferences should be an accepted practice. A transcript of a meaningful conference can be as valuable as a transcript of the hearing itself.

3. *Discovery*

a. Introduction -

If properly executed, discovery performs at least two valuable functions for the trial lawyer: (i) it helps reveal the essential strengths and weaknesses of each party's case, and (ii) it allows the attorneys to be so well-informed on the strengths and weaknesses of each side that they can present their own cases more effectively.

Although available to parties in federal court proceedings, discovery is not readily available to parties appearing before federal agencies in administrative litigation. Where discovery is allowed by agency rule, it can be very helpful in complex cases. [See Tomlinson, "Report of the Committee on Compliance and Enforcement Proceedings in support of Recommendation No. 21," Recommendation and Reports of the Administrative Conference of the United States, Vol. 1, 577, 583]

Limited discovery opportunities have been available as part of the NPDES evidentiary hearing procedures since 1979. [44 Fed. Reg. 32941, June 7, 1979] All of the traditional mechanisms -- depositions, interrogatories, production of documents, admissions of facts -- are contemplated by the Subpart E regulations. [§§124.74(c)(4), 124.76, 124.83(b) and (c), 124.85(b)(2), (13) and (16)]

b. Trial Preparation Material -

The discoverability of trial preparation material involves a conflict between two goals: (i) obtaining discovery so that the trial can be based on the merits rather than on which side surprises the other the most, and (ii) having each side prepare its own case without feeding off the efforts of the other side. Rule 26 of the Federal Rules of Civil Procedure resolves this conflict by:

(1) Requiring that before a party can obtain trial preparation material from another side, it must show (i) that it has substantial need for the material in the preparation of his case, and (ii) it is unable to obtain the substantial equivalent of the materials by other means without undue hardship.

(2) Affording special protection against discovery of the creative aspects of trial preparation, e.g., mental impressions, conclusions and legal theories.

The key to deciding if certain items constitute trial preparation material is not whether mental impressions or conclusions are found in the pertinent documents but whether they were prepared with a litigation purpose in mind. The presence of mental impressions, conclusions, or legal theories in a document is important in determining whether an item that may be trial preparation material also qualifies for the more protected category known as "work product." In safeguarding the more creative type of trial preparation, Rule 26 states that even if there is special need for the information and an inability to otherwise obtain its substantial equivalent, the court still "shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

c. Depositions -

(1) The Decision to Depose:

Depositions should be considered an extraordinary form of discovery in NPDES evidentiary proceedings. Start by assuming that the ALJ will need to be convinced that a deposition of a particular individual is the most efficient way to expedite the hearing or aid the disposition of the case. Don't bother asking leave to take a deposition unless the information is not otherwise obtainable, and unless there is substantial reason to believe that highly relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing with full opportunity for cross-examination.

(2) Deponents Who Represent Organizations:

By analogy to Rule 30(b)(6) of the Federal Rules of Civil Procedure, if the discovering party can designate with some certainty the matters on which examination is requested, the responding party should be obliged to determine who, within its organization, has the desired information and to designate one or more officers, directors, managing agents or other persons to testify on its behalf. Thus, the responding organization can be strategically selective: if several officials have the information sought, the organization can designate the one who will make the best impression and who will not give away more than is requested. The deposition of the individual named by the organization sometimes can lead to knowledge of other deposition targets who may be less circumspect and likely to give more than the minimal amount of information required.

(3) Hints for Taking Depositions:

(a) Questioning technique -

The deponent is interrogated by opposing counsel as though he were under cross-examination at trial. Following the examination, lawyers representing other party litigants have the right to supplement the examination with their own questions. If the deponent is a key witness for the opposing side and he is talkative, deposing counsel should allow him to ramble on; it may lead to his discredit or to some damaging statements.

During examination of the deponent, use precise, unambiguous questions. The deponent's version must be extracted carefully and clearly without the risk of misunderstanding. Not only does the lawyer need to absorb the facts, but the deponent should not be given a chance later on at the hearing to explain away inconsistencies simply because the questions at the deposition were ambiguous or complicated.

(b) Deposing the opponent's expert -

The following checklist is helpful when taking the deposition of any opponent's expert. It is a good way to organize the questioning and ensures that all pertinent matters are covered.

(i) Have the expert identify all documents that he has brought, including all papers he used in preparing his report or analysis (even though he may not be referring to them during the deposition).

(ii) Copy every item that the expert brings with him, even though he does not refer to all items during the deposition. If the witness seems to be withholding any documents, ask if he has "considered, referred to or relied upon" any particular documents, papers or other materials in forming his opinion or in preparing for the deposition.

(iii) Identify specifically, item-by-item, everything he has refused to give up (number of pages, color ink, typed or handwritten, an original or photocopy, etc.). This minimizes the chance that the documents can be altered between the time of the deposition and the time of the hearing. Ask the deponent to describe each so that if you were to refer to it later, he would know what you were talking about. Ask him whether he considers any of the documents (whether or not surrendered) to be any more important than the others, and whether he has relied on any of them more than on the others.

(iv) Qualify the deponent. Does the witness consider himself an expert in any field? Which? Why? Does he have a "curriculum vitae" (i.e., a list of his education, experience, publications, etc.)? Has he published any articles? When? Where? Formal education or any other job training?

(v) When was he first contacted to come into the case? Who referred the case to him? When? Under what circumstances?

(vi) Elicit the information supplied to him by the referring party. (A way to determine whether or not the deponent was told what his opinion should be.) And what physical evidence did he examine?

(vii) What did he personally do? Take any photographs? Perform any tests? Measurements? Did he prepare any reports? (Be sure to copy any that he brought.)

(viii) Does he have any opinions or criticisms of the terms, conditions and other requirements in the permit? If so, what are those opinions or criticisms? What is the basis for those opinions or criticisms? What facts, treatises, tests, etc., were important to him in forming his opinion/criticism? (Attempt to eliminate as many factors as possible, i.e., list all those facts, etc., which were available to him but which he did not consider important in forming his opinion/criticism.) And finally, ask him what he recommends as an alternative to what he criticizes.

(5) Preparing Your Witness for a Deposition to be Taken by Opposing Counsel:

(a) Reviewing testimony before deposition -

Ask your witness to meet with you hours or days (depending on the complexity of the issues) before his deposition. During this meeting, tell the witness the kinds of questions to expect and review his knowledge of the matters at issue. The time necessary for conducting this pre-deposition review may be lengthy, especially where a large number of documents or detailed calculations are involved. Carefully review all such documents and calculations with the witness prior to his deposition.

(b) Technique of answering -

Warn the witness not to give any more information than is absolutely necessary to answer the questions asked. The more he elaborates, the greater the chance that he

will blunder into a statement that can discredit him. Advise him not to answer a question he does not understand, and encourage him to ask that questions be repeated or rephrased.

(6) Objections During the Deposition:

Although the taking of a deposition resembles regular trial court proceedings in many ways, it is markedly different in the manner in which objections are handled. The primary function of the deposition officer (court reporter) is not to make rulings on evidence, but rather to supervise the orderly recording of the deponent's testimony. For this reason, objections are not decided on the spot; they can be reserved for later ruling at the hearing when the deposition is introduced. Because the rulings are postponed, all evidence is taken subject to the objections. The court reporter merely notes these objections within the deposition.

Certain objections are waived unless made during the deposition itself: errors that can be corrected immediately by the lawyer or witness, such as irregularities in the manner of taking the deposition, in the form of the questions or answers, or in the conduct of the parties. Objections relating to the value of the evidence itself, rather than points of form or decorum, are not waived even if no objection is made during the deposition proceedings.

(7) Protective Measures - Terminating or Limiting the Deposition:

Whenever opposing counsel attempts to use the deposition proceedings, not as a legitimate discovery device to gain information, but as attempt to annoy, embarrass or oppress the deponent or party, the wronged party or deponent may move for an order to terminate or limit the examination.

(8) Marking Exhibits During a Deposition:

Lawyers often mishandle the technique of showing a document or other exhibit to the deponent during the taking of his deposition. Questioning the deponent on the exhibit will avoid any unexpected answers by the witness concerning the exhibit during the trial. A lawyer can prepare a more adequate cross-examination when he knows the precise answers of the witness concerning the exhibit.

Hand the exhibit to the court reporter and ask that it be marked as a deposition exhibit for identification. If the witness identifies any part or portion of the exhibit, ask him to place a distinctive marking, such

as a bracket "[]" or an "X", at that part with his initials next to it so that the witness later cannot change the reference point without obvious contradiction.

Illustration

COUNSEL: *(To the Court Reporter)* Please mark this document as Goodman Deposition Exhibit No. 1 for Identification.

(After the Court Reporter has identified the exhibit, Counsel can then ask questions relating to it.)

COUNSEL: I hand you what has been marked as Goodman Deposition Exhibit No. 1 for Identification, consisting of eight pages, and ask if that document truly and correctly portrays *[whatever it purports to portray]*.

THE WITNESS: Yes, it does.

Q: Would you specifically identify what portions of this exhibit most influenced your company's conclusions about what the permit conditions ought to be?

A: It is right here on pages 6 and 7; the items covered under Roman numerals XI and XII.

Q: Please take this red pen and mark or circle the items to which you are referring and place your initials next to the mark or circle that you make.

After the witness has identified the relevant portions of the exhibit, counsel knows what the witness's direct testimony should be at the hearing, and he will be able to prepare cross-examination on the matters to which the witness is committed.

d. Interrogatories -

(1) Generally:

Under most rules of practice, the scope of inquiry for written interrogatories is the same as for the oral deposition. The propriety of written interrogatories

also should be judged, in part, by the extent to which they result in annoyance, expense, harassment or oppression upon the answering party. If your opponent proposes interrogatories that are unduly numerous or wide-ranging, then you should oppose his motion for discovery unless the ALJ imposes reasonable controls on the number and scope of the questions and other appropriate conditions. Interrogatories should be clear and precise. Interrogatories that consist of sweeping demands that the responding party set forth all he knows about a particular matter may be too broad and thus subject to legitimate objection by the respondent.

The amount of work that the responding party must perform to answer is also relevant in determining the legitimacy of interrogatories. What is impermissibly burdensome depends on balancing two goals of discovery: the need to expose information that will be useful for trial preparation and the desire that each side prepare its own case. One of the most important factors is whether the work necessary to supply the information would benefit only the discovering party or would contribute also to the preparation of the respondent's own case. Activity that produces information useful to both the discovering and responding parties advances the cause of informed trial preparation without making one side work for the other. Another key factor in determining the reasonableness of the burden is whether the responding party has made assertions suggesting it either has the information or intends to get it.

(2) Strengths of Interrogatories as a Discovery Tool:

Each case presents a unique tactical problem from start to finish. A list of considerations can best demonstrate some of the problems to be resolved by the trial lawyer. Some of the reasons for submitting written interrogatories are as follows:

(a) Obtain preliminary facts, information to supplement these facts, or information to supplement the oral deposition.

(b) Eliminate issues and avoid time-consuming oral depositions.

(c) Elicit some essential facts needed to obtain additional information such as the names of persons known by the party to have relevant information, business statistics, lists of documents and information about the internal workings of a company.

(d) Obtain precise information in response to questions which might not be possible at oral depositions. Example: detailed facts not readily available to an individual deponent.

(3) Weaknesses of Interrogatories:

Some of the reasons for not using written interrogatories are as follows:

(a) In complex fact issues, written interrogatories can become cumbersome and tedious.

(b) When requesting answers from an opposing party concerning crucial questions of fact, the opponent's lawyer customarily reads and approves the language used by the person answering.

(4) Responses to Interrogatories:

(a) Option to produce business records -

When the information sought can be obtained by a search of the respondent's business records and the burden of deriving or ascertaining the answer is substantially the same for both parties, the responding party may answer such interrogatory merely by specifying the records from which the answer may be derived or ascertained and by affording the asking party reasonable opportunity to examine, audit or inspect such records. [See Rule 33 (c)] However, a respondent may not impose on an interrogating party a mass of records on which research is feasible only for one familiar with the records. Thus, a party with a unique filing system or an unusual and complex computerized data storage and retrieval system probably could not merely point to the records and then walk away without giving the interrogating party some clue to the method of finding the desired information.

(b) What to avoid in drafting answers -

Answers should be responsive, unevasive and complete. Avoid incorporation by reference unless necessary to prevent needlessly long, complex and repetitious answers. When materials outside the answer are incorporated by reference, identify the pertinent parts of such documents. For example, merely referring the interrogating party to a lengthy deposition without pointing out the portions relied on by the answering party is not a sufficient answer.

(c) Objections to interrogatories -

Customary objections to interrogatories are:

(i) Insufficient time to answer.

(ii) Answers sought are readily known to the inquiring party and the request amounts to an undue burden upon the requested party.

(iii) Information sought is in the possession of the party requesting the information.

(iv) Information sought is a matter of public record and equally available to both parties.

(v) Interrogatories are unreasonably burdensome and time-consuming. (This objection must be supported by well-detailed reasons.)

(vi) Material or information is for trial preparation, or relates to non-witness experts, for which (or concerning whom) the necessary showing of need and inability to obtain the equivalent has not been made.

(vii) Interrogatories request a legal opinion.

(viii) Scope of the interrogatories is too broad.

4. *Making the Hearing Record*

a. Significance of the Agency Hearing Record -

Section 402 of the Clean Water Act requires EPA to provide an opportunity for a formal adjudicatory hearing "on the record" to an NPDES permit applicant or any other interested person who, among other things, challenges any of the conditions or requirements in a final permit decision issued by a Regional Administrator. [See, e.g., Seacoast Anti-Pollution League v. Costle, 572 F. 2d 872, (1st Cir.) 1978)] The Regional Administrator does not even attend, much less preside at, this hearing. Thus, his decision in the matter and, ultimately, that of the Administrator must be based on a trustworthy form of second-hand information about what was said and done at the hearing. The mechanism for officially assembling this information

is the preparation of a written account of all the acts and occurrences in the proceeding. The assembled information and material becomes the basis for the final Agency action on the case That action (usually a written decision) is itself yet another part of the compilation known as the "record." Any party who is dissatisfied with all or any part of the Administrator's final permit decision in the matter may ask a federal appeals court to review the propriety and sufficiency of that decision. For its part, the court may look only at the formal hearing record that has been officially sent to it from the Agency. [See Chapter I, p. I-12]

The record, which is assembled and bound into one or more large volumes after the hearing and intra-agency appeals process is completed, will include virtually every significant and insignificant piece of paper that was produced and filed during the permit issuance process: from the permit application to the Administrator's final decision. The record also will contain a verbatim transcript of proceedings and a transcript of any on-the-record prehearing conferences. Attached to the transcript, or somewhere else in the bundle of papers, will be the exhibits that were identified and offered at the hearing, whether or not such exhibits actually were received in evidence.

b. The Court Reporter -

The principal participants at a hearing -- the ALJ and the lawyers -- "make" the record with the help of a court reporter. The reporter's primary responsibility during a hearing is to correctly and completely take down (stenographically or with a recording device) everything said by the participants and witnesses: all testimony, as well as evidentiary objections and arguments by the lawyers and the comments and rulings of the judge. Tangible exhibits are usually tagged or marked by the reporter at offering counsel's request and these exhibits are kept by the reporter when they are not being used during the hearing. At the close of the hearing, the reporter delivers the completed transcript, as well as these exhibits, to the Regional Hearing Clerk for inclusion in the record.

Competent court reporters, together with skillful lawyers and judges, are the keys to complete and accurate hearing records. Making it all work requires sensitivity to the reporter's most difficult task: hearing and understanding everything said by the hearing participants. These suggestions make that job easier:

(1) Even a very competent court reporter cannot make an accurate record when more than one person talks at the same time. In this situation, the reporter will be

unable to hear everything that is said or to remember all of the overlapping statements long enough to sort out and record them while trying to keep up with the continuing testimony or argument.

(2) In hearings involving substantial amounts of technical terminology or jargon, lawyers can contribute to the record's accuracy by supplying the reporter with a glossary of terms likely to be used.

(3) Lawyers are often careless in referring to exhibits. Court reporters are impatient with lawyers who, after diligently getting exhibits properly marked, fail to refer to the exhibit's number or letter. A lawyer's reference to "this report" or "that letter" makes the record confusing. Where an exhibit is marked for identification, make the reference complete: "I hand you what has been marked EPA Exhibit No. 2 for Identification."

(4) A lawyer cannot direct the court reporter to go "off the record" if opposing counsel and, especially, the ALJ have not agreed. Many experienced court reporters simply continue to record. Whenever recording does stop, the reporter makes some kind of notation in the transcript, such as: "(Whereupon discussion off the record was had)". And then there is the question of when recording shall resume. Confusion here might mean that an important concession or stipulation may not get in the record, or it may get in the record in a form that makes it impossible to determine what it relates to. Counsel must clearly state when he wants to "go back on the record." As a rule, the ALJ is responsible for managing the going-on and going-off the record. Remember, though, it is <u>your</u> case, not his!

c. Requesting That a Record be Made -

Many aspects of a litigated matter will not become part of the record unless counsel makes sure that there is a court reporter present and that the reporter is recording the proceedings. For example, there usually will not be a reporter present at a prehearing conference or at other conferences with the ALJ, unless counsel requests and the judge agrees that a record of the conference be kept.

d. Statements for the Record -

Many times it is necessary or appropriate for counsel or the judge to make a statement for the record. Such statements are useful to fill gaps in testimony of witnesses who give inaudible responses. Instead of reminding the witness to answer clearly, examining counsel may turn to the court reporter and say, "Let the record show that the witness, in response to the question, nodded his head in the affirmative."

Statements for the record are appropriate when the circumstances in which an answer is given might affect the weight to be accorded it. For example, on cross-examination, when a witness spends excessive time examining a document or searching for an answer, cross-examining counsel might appropriately state: "Let the record show that the witness has already taken two minutes thinking about his answer."

e. Stipulations -

A lawyer's statement for the record, expressly agreed to by opposing counsel, is a stipulation. An unchallenged statement for the record also might qualify as a stipulation, but probably with less force and effect. Stipulations can be important in simplifying and expediting the hearing and in filling evidentiary gaps. But they must be made part of the trial record.

A stipulation is simply an agreement between lawyers for litigating parties referring to some matter in the proceeding. In the absence of special circumstances that might convince the ALJ or the Administrator to nullify it, a stipulation by lawyers binds the parties they represent. Stipulations entered into by mistake or deception can be set aside. Stipulations can involve matters of procedure or evidence. Typical examples of procedural stipulations appear in Rule 29 of the Federal Rules of Civil Procedure.

An evidentiary stipulation admits or concedes specified facts, and thus obviates full-scale proof. Such a stipulation amounts to a formal admission -- an abandonment of any contention to the contrary -- and the parties who have stipulated cannot offer evidence to dispute the agreed facts.

Complicated stipulations, such as elaborate hypothetical questions for an expert witness, are usually written out by counsel and then edited. The final written product is filed in the case or read into the record, or both. Simple, single-subject stipulations can be stated for the record extemporaneously. But make sure (i) that the court reporter is recording your words, (ii) that the terms of the stipulation are clear and unambiguous, and (iii) that opposing counsel states for the record his unqualified acquiescence.

In cases where deposition exhibits will be used in a hearing, a stipulation for the record might go like this:

> COUNSEL: Let the record show that the parties stipulate that EPA's Paddington Deposition Exhibits Nos. 4, 5, 6 and 7 for Identification will be admissible in evidence at the hearing without further foundation or proof. The same

stipulation is made for Permittee's Gonniff Deposition Exhibits C, D, E, F and G for Identification.

OPPOSING COUNSEL: So stipulated.

At trial, sponsoring counsel will have the court reporter mark the deposition exhibits with new numbers or letters to be used in referring to the exhibits thereafter. When offering the exhibits, the lawyers will tell the judge that the admissibility of the exhibits has been stipulated and will repeat the full stipulation for the record. The exhibits then should be received by the ALJ and admitted into the record without further foundation proof, although witnesses may make use of them in the course of their testimony.

Stipulations are often made during the course of a hearing. As opposing counsel plods through a proper foundation for the introduction of a document, you may decide there is no reason why he must continue these formalities. In such a case, do not hesitate to interrupt and say: "We will stipulate that Permittee's Exhibit 18 for Identification is what it purports to be." If your offer is accepted by opposing counsel, the stipulation will do nothing more than authenticate the document. Stipulating that a writing is "what it purports to be" leaves open the right to object based on evidentiary rules other than those relating to authentication.

An ALJ who is interested in expediting a hearing may require a lawyer for one side to accept his opponent's stipulation that unequivocally concedes everything that could be shown by making full proof. However, where an offered stipulation does not supply everything to which counsel is entitled, he should be allowed to make a complete record on the matter in question. For example, if opposing counsel wants to keep out of the record your expert witness's impressive credentials, he might interrupt the preliminary examination to say, "We will stipulate that Professor Schlemmer is a qualified chemical engineer, your Honor." Such a stipulation does not give examining counsel everything to which he is entitled if the case is essentially a battle of experts. In order to assign comparative weight to the opinions of opposing experts who testify in the case, the judge is entitled to hear and assess the qualifications of each of them. Examining counsel is entitled to make full proof of those qualifications, and may do so in the following way:

COUNSEL: Your Honor, if opposing counsel is ready to stipulate that this witness is a qualified chemical engineer, then I will so stipulate if my opponent will further stipulate that Professor Schlemmer's

curriculum vitae, a sixteen page document that I am now asking the court reporter to mark as EPA Exhibit No. 34 for Identification, is a true and correct statement of his background, experience and other credentials and that such exhibit be admitted into evidence and made part of the record.

If opposing counsel stipulates on the record, then the matter is finished when the exhibit is ordered admitted. If opposing counsel refuses to stipulate, counsel can either "walk" the witness through the "c.v." line-by-line in question-and-answer fashion or have the witness identify the exhibit as a true and correct statement of his background, experience and professional qualifications.

5. *Testimony*

a. Generally -

Making a hearing record largely consists of offering evidence in the form of oral testimony, verified statements of fact or opinion (i.e., written testimony) and tangible exhibits. The usual method for offering oral testimony into evidence is by direct examination or cross-examination of a witness who testifies under oath. For written testimony, the person whose testimony is being offered takes the witness stand, identifies the testimony, and affirms its contents under oath. He is then subject to oral cross-examination upon the substance thereof.

b. Oral Direct Examination -

(1) Objectives:

Direct examination -- the statements of a witness for the party on whose behalf he is called -- should (i) establish or lead to the establishment of a prima facie case on the matters at issue, and (ii) put into evidence all relevant documentary proof.

(2) Guidelines on Direct Examination:

(a) Frame all questions in brief, clear and relatively simple form, commensurate with the sophistication of the witness and the subject matter. Even an experienced witness can be confused or misled by overly technical or drawn-out questions. In particular, avoid compound questions; they tend to leave everyone baffled and usually result in ambiguous or incomplete responses.

(b) Put the questions in chronological or other meaningful, relevant sequence.

(c) Do not repeat the witness's answer, except where you want to emphasize an unusually important point.

(d) If you have a highly intelligent and persuasive witness, give him full reign.

(e) Where you use a chart or diagram, be sure you have conferred with the witness before trial as to the significance of the various markings on the exhibit. Never show a chart or diagram to a witness for the first time at the hearing.

(f) Do not press your witnesses too strongly on direct examination. Where a witness does not grasp your meaning and give the answer you want, do not repeat the question in exactly the same way. When witnesses try to guess what examining counsel wants, their answers can ruin the case. If you must repeat the question, try simplifying it or changing its form.

(g) Avoid leading questions -- a question that suggests its own answer. In the typical leading question, it is the questioner's version of the facts that goes into the record. With some exceptions, this type of question is objectionable on direct examination. [See, e.g., Rule 611(c) of the Federal Rules of Evidence (Fed.R. Evid.)] But situations exist where leading questions on direct examination are allowed:

(i) Preliminary matters not going to the heart of the case.

Q: And you are employed by Potomac Electric Power Company, I believe?

A: Yes.

Q: And have been for about ten years?

A: That is true.

(ii) Undisputed matters where the question connects two areas of inquiry.

Q: You testified earlier, I believe, that you calculated raw waste loads of BOD-5

and COD by excluding any waste load associated with solvents.

A: Yes.

Q: Very well, then let me ask you this,...?

(iii) An adverse or hostile witness can be asked leading questions. There is very little danger that such a witness would accept a false suggestion contained in a leading question.

(iv) Leading questions are allowed during direct examination when a witness gives "surprise" answers. Surprise usually happens where the witness's direct testimony sharply conflicts with his deposition testimony or with a previous statement.

(v) Leading questions can be asked of a witness whose recollection has been exhausted but who apparently possesses additional information of a relevant sort. Refresh a witness's recollection through a leading question in this fashion:

Q: Can you remember the names of any other people who attended this meeting?

A: No, I cannot. I know there were others but I just cannot seem to come up with their names now.

Q: Have you exhausted your recollection of the persons who were present?

A: I am afraid so.

Q: Would it help you remember if I suggested to you that John Jarndyce also attended that meeting?

A: Yes, now I remember. John was there.

<u>OR</u>

Q: Would it help your memory if I showed you a document, which I now ask the court reporter to mark as EPA Exhibit 3 for Identification, being a one-page memorandum that purports to be written by you on

October 1, 1980, relating to a meeting that took place at the offices of Otis B. Driftwood on September 30, 1980?

A: Yes.

Q: Would you please look at this exhibit and tell Judge Draykopf if it refreshes your recollection of the persons who attended the meeting.

A: Oh, yes. I recall writing this memo. The persons mentioned in it were at the meeting.

If the witness needs a document to refresh his recollection, opposing counsel has a right to see it. By allowing opposing counsel to see the document <u>before</u> you hand it to the witness, you avoid opposing counsel's inevitable request that he be allowed to see it.

(3) Direct Examination of the Expert Witness:

(a) <u>Introduction</u> -

Generally, witnesses must testify only about facts of which they have direct knowledge, and they may not express opinions and beliefs about subjects on which a judge could form a conclusion. Experts, however, are allowed to express their opinions and conclusions on relevant matters if four conditions are met:

(i) Specialized knowledge will assist the judge in understanding the evidence or in determining a fact in issue.

(ii) The validity of the opinion or conclusion depends on special knowledge, skill or training.

(iii) The witness is qualified as an expert in the pertinent field by knowledge, skill experience or training.

(iv) The expert possesses a reasonable degree of certainty (probability) about his opinion or conclusion. [Fed.R.Evid. 702]

The expert can express an opinion based on facts personally observed or even by taking into account facts and information

(iii) The expert should use clear, simple language in his testimony. If it is necessary for him to use technical terms, both he and the lawyer should understand their meaning and should develop an effective method of explaining them to the judge.

(c) Presenting the testimony -

Handling direct testimony by an expert is a two-step process: (i) asking a series of questions eliciting his qualifications as an expert, and (ii) making sure the record clearly shows the data, information or other basis for the expert's opinion.

After the direct questions to qualify the witness, but before examining counsel moves into substantive areas, opposing counsel may interrupt the questioning to test the competency of the expert by asking the judge for an opportunity to take the witness on "voir dire," i.e., a preliminary examination of the witness to test his competency, etc. If opposing counsel has a basis for challenging the witness's qualifications to give an "expert" opinion, this is the point at which to make the record.

Lawyers use hypothetical questions whenever an expert witness has no direct knowledge of the facts or evidence on which his opinion is sought. The examining lawyer should draft the hypothetical question (with the expert's help) before the hearing. At the beginning of a hypothetical question the lawyer asks the witness to assume as true all of the facts stated in the body of the question. The question recites, in hypothetical form, the material facts on which the expert's opinion is to express his opinion. (In the federal courts, it is not always necessary to lay out all of the underlying facts.) [See Fed.R.Evid. 705] The conclusion of the question asks whether the witness has an opinion, based upon a reasonable degree of certainty, regarding the assumed facts. Thus, a hypothetical question may end this way:

> Q: Ms. Rittenhouse, assuming all these facts to be true, do you have an opinion, based upon a reasonable degree of certainty, whether the nature of the manufacturing process will cause the effects described earlier?
>
> A: Yes, I do.
>
> Q: What is that opinion?

[At this point opposing counsel makes any objections he has to the question, and the judge then rules upon it. Otherwise, the witness expresses the opinion.]

c. Written Direct Testimony -

The objections and, to a great extent, many of the guidelines in preparing for oral direct examination also apply to preparing written direct testimony. Direct testimony prepared in writing and submitted at the hearing is nothing more or less than a statement of the witness's qualifications, his opinions and conclusions, with supporting facts and information -- in effect, a carefully written and polished "transcript" in narrative form. In theory, the testimony should be substantially equivalent to what would be developed through a standard question-and-answer direct examination format.

In controversial cases and in other situations where the chances are good that an evidentiary hearing will be held, the tentative written testimony of each prospective witness should be prepared in outline form contemporaneously with the preparation of the Fact Sheet. Ordinarily, work on such outlines of testimony can await the Regional Administrator's granting the hearing request when the contested permit provisions and other issues will be identified. A team approach can be especially useful for this kind of direct testimony by first having each potential witness prepare a draft of his testimony and then circulating the draft testimony in-house for comment and criticism.

The testimony should <u>not</u> be the work of a committee, if for no other reason than because the witness himself ultimately must defend it under oath based upon his own personal knowledge and expertise. The purpose of circulating draft testimony is to ensure that the testimony is complete and to coordinate the content of the proposed testimony with that of other witnesses and experts. Preparing written testimony is a difficult task. The case manager or trial staff leader must share responsibility with the witness for the accuracy and thoroughness of the testimony.

Introducing written direct testimony into evidence at a hearing is similar to introducing other kinds of documents into evidence. [See "Managing Exhibits," <u>infra</u>]

Illustration

OFFERING COUNSEL: *(To the court reporter)* I would like marked as EPA Exhibit 8 for Identification the testimony of Stewart Potter, consisting of some 27 pages of text with two attached figures. I also would like marked as EPA Exhibit 9 for Identification the testimony of Lillian Kalman, consisting of some 30 pages of text, one table and one drawing. Finally, I would like marked as EPA Exhibit 10 for Identification the testimony of Richard Bellamy, consisting of some 19 pages of text.

(The court reporter so marks the exhibits.)

OFFERING COUNSEL (Resuming): Your Honor, I would respectfully ask you to confirm on the record that EPA Exhibits 8 thru 10 have been marked as I indicated.

THE COURT: The exhibits you mentioned have been so marked.

OFFERING COUNSEL: At this time EPA would offer to stipulate that if the various persons who I have named during my description of EPA Exhibits 8 thru 10 were called to the stand they would confirm that they were, respectively, the authors of the testimony and attachments attributed to them; that the testimony was true and correct to the best of their knowledge, subject to any corrections they might make at the time they take the stand; and that they wish to adopt such testimony as their testimony in this proceeding.

OPPOSING COUNSEL: So stipulated.

OFFERING COUNSEL: At this time I would offer into evidence EPA Exhibits 8 thru 10 subject to any motions to strike counsel may later have.

THE COURT: The three exhibits -- each of them direct testimony and, in two cases, with related attachments -- will be received as EPA Exhibits 8 through 10 subject to a motion to strike.

d. Redirect Examination -

Despite the care taken in preparing direct testimony or in preparing a witness for cross-examination, some matter may be omitted that should be addressed, or something may surface in cross-examination that requires following up. Whenever necessary, the witness's testimony should be clarified and/or his credibility re-established by means of redirect examination. The questioning should be as brief as possible and directed only toward basic problems in the case. Judges are seldom concerned about minutiae or small inaccuracies. Remember: in contested matters, each side always takes a few hits.

e. Cross-Examination -

(1) Generally:

Cross-examination of an expert is dangerous business. It can give the expert an opportunity to re-emphasize his direct testimony. However, the expert witness's credentials do not insulate him entirely from effective cross-examination. In fact, there are methods of cross-examination that are especially designed for use against the expert. But the advice to all inexperienced lawyers remains: the best cross-examination may be no cross-examination.

(2) Making the Decision to Cross-Examine:

The final decision about cross-examination at the hearing must be made following the direct examination. In complex cases involving multiple parties cross-examination is, for administrative reasons, sometimes postponed for days and even weeks, so there may be time to consider the decision. Whether or not to cross-examine a witness depends on the answers to these questions:

(a) Did the direct testimony really hurt my case?

(b) If it did, realistically can I do anything about it?

(c) How strong was the witness?

(d) Do I have anything concrete to impeach him with?

(e) Can I undercut his testimony by other proof?

(f) Are there other ways to obtain and introduce helpful testimony?

(g) Do the probable benefits sufficiently outweigh the possible dangers?

The decision will be easier to the extent you have analyzed, before trial, whether the purposes of cross-examination would be served. This prehearing analysis -- the notes for possible cross-examination -- should be part of the trial notebook. Typically, you have notes for each witness, which notes include your observations about the witness, the nature and location of impeachment material, helpful new facts to be elicited, etc.

Cross-examination is much more flexible than direct examination and is, for the most part, restricted only by considerations of relevance and whether the questions are ranging too far beyond the direct examination.

Cross-examination may do no more than clarify, supplement or qualify the direct testimony of a not-very-damaging witness. Whenever possible, however, cross-examination should be used in a much more aggressive fashion. The cross-examiner's questions may challenge the sources of the witness's knowledge. (But a witness generally cannot be cross-examined as to any fact that is collateral and irrelevant to the issue merely for the purpose of contradicting him by other evidence.) Cross-examination can be used to extract admissions that undercut the witness's direct testimony and that impeach the witness's veracity, e.g., by revealing prior out-of-court statements made by the witness that are inconsistent with his direct testimony or by revealing deficiencies in this testimony.

Leading questions can be used on cross-examination. [See, e.g., Fed.R.Evid. 611(c)] In fact, it is virtually impossible to conduct an impeaching cross-examination without asking leading questions. This does not mean, however, that the judge will tolerate excessively argumentative questions. It is one thing to inquire, in a leading fashion: "Is it not a fact that you failed to consider variations in the nature of the raw materials being processed at the plant?" It is quite another thing, upon being given an unsatisfying response, to ask: "Do you really expect the judge to believe that?" The second question is argumentative and contributes nothing to the record.

(3) Techniques in Cross-Examining Experts -

(a) Generally -

Whether preparing the direct testimony of your own expert or preparing for cross-examination of an opponent's expert, find out whether the expert has published

articles or books on the subject matter of the upcoming testimony. One of the favorite techniques of a skilled cross-examiner is attempting to show that the opinion of an opponent's expert is inconsistent with the expert's own published work. Such an inconsistency can show that the expert is unstable in his opinions, or it might suggest that he has changed his views in anticipation of being paid for his testimony. For this reason the publications of counsel's own expert should be examined carefully for such inconsistencies. Tell your expert that he will have to explain these inconsistencies. Legitimate reasons for the inconsistencies can disarm the effectiveness of the cross-examination. If the expert has experienced a genuine change of views, he should admit this candidly and mention the things that have influenced this change. In other cases, the facts leading to an earlier opinion may have been significantly different from the facts underpinning the later opinion.

(b) Contradiction by citation to and quotation of learned treatises -

Q: Mr. Cleaver, is there a woman by the name of Seigel who is active in your field?

A: You must mean Carolyn Seigel.

Q: How do you spell her name?

A: S-E-I-G-E-L

Q: What was that first name?

A: Carolyn.

Q: Where does she work?

A: In _____, I believe.

Q: Does she specialize in your field?

A: Yes.

Q: Do you know her?

A: I have met her.

Q: Has she received the *[award of distinction]*?

A: Yes, she has.

Q: Is she with the consulting firm of Mark Edwards & Associates?

A: I believe she is.

Q: Does she teach the subject of your specialty?

A: Yes.

Q: Where does she teach?

A: _____ University.

[Note: If the witness seems to be "holding back", it may be advisable to use more leading questions.]

Q: Does she hold the title of Professor of *[relevant subject]*?

A: I believe so.

Q: Is she the head of that department?

A: I believe so.

Q: Has she written any literature on *[relevant subject]*?

A: Yes.

Q: Used in *[relevant subject]* courses and by members of your profession?

A: Yes.

Q: People in your specialty?

A: Yes.

Q: Has she written articles in publications sponsored by your professional association?

A: Yes, she has.

Q: Has she written any books in the field of *[relevant subject]*?

A: Only one that I know of.

Q: What is the name of the book?

A: *[Name of book.]*

Q: Is the book in general use and circulation among people in your profession?

A: Yes, it probably is.

Q: Is it considered as authoritative?

A: Yes.

Q: Is Carolyn Seigel considered an authority in your field?

A: Yes, she is.

Q: I take it that you have read her book?

A: Some time ago.

Q: You evaluated it at that time?

A: Yes.

Q: Now I have a copy of that book here. I would like to call your attention to page ___, the section on _____, the statement which reads as follows: "_____." Would you agree or disagree with that statement?

A: I guess I would disagree.

(c) <u>Opinion based on insufficient information</u> -

Cross-examining expert witnesses is largely aimed at convincing the judge that the expert's opinion is based on insufficient or wrong information. Among the most effective ways to do this are:

(i) Revealing that the expert did not perform certain tests or calculations commonly used under circumstances such as those involved in the case. It is good practice to have your own expert present during direct examination of an opponent's expert to help detect such deficiencies.

(ii) Exposing that the expert was poorly informed on the background data. For example, a biologist who specializes in fish populations testifies that pollutants from a facility caused large fish kills and a general depression in the local population of certain species; cross-examining counsel then exposes the fact that he was unaware of earlier unrelated events that could have produced the same damage.

(iii) Revealing that the expert's testimony contradicts notations that he made in his research records.

A careful lawyer tries to make sure that his expert has prepared himself to the extent that he will not be vulnerable to such attacks. This often means assuring that the expert obtains a complete set of background data relevant to the controversy and that the expert carefully reviews his own files shortly before the hearing.

(d) General "do's" and "don'ts" of cross-examination -

- Fully master the facts and know the weaknesses of every party's case. Fully research the elements of proof so that you know what you must prove and what the others must prove.

- On a sheet of paper list all points you are certain the witness ordinarily must admit. These items should tend to corroborate elements of your own case. On a second sheet, list the areas in which you expect to discredit the witness or his testimony. A third sheet can be used for exhibits.

- Determine whether the opponent's witness has said anything detrimental to your case. Question only where the witness has information necessary to your case and which you can prove only through that witness.

- Listen carefully to oral direct examination. Avoid searching for papers that should have been arranged for ready reference before the hearing or using the occasion to consult with your witnesses and counsel table advisors. Provide these persons with pen and paper to note any suggestions they might have.

- Keep your objective hidden. Some witnesses will answer "no" any time the cross-examiner indicates by voice, manner or form of question that he is seeking a "yes" answer. This makes it important that the witness not know exactly what the objective of the examiner

is. Sometimes it is helpful to talk and act as though you do not know anything about a certain subject when you actually know a lot about it, or when you do not know, to act as though you do know. The point is that the witness should not know the extent of the lawyer's knowledge of the subject under discussion.

- Ask for and inspect any documents the witness used or referred to in his direct testimony.

- Try to secure one or two major admissions or to make one or two major points and then stop, rather than to chance nullifying the good effect of such cross-examination by continuing.

- Leading questions are permissible. To make a leading question more understandable, state the question followed by the words: "Is that not correct?"

- Cover important subjects early in cross-examination. Otherwise, you may lose the impact of it in a prolonged, boring examination.

- Try to get one witness to contradict another.

- Never ask a question unless you know what the answer will be and that it will be favorable to your case. *(Easier said than done.)*

- Do not let the witness re-tell his direct testimony, unless you can absolutely disprove or discredit the testimony by other witnesses or by some contradictory statement.

- Do not get diverted. Some witnesses deliberately try to divert the cross-examiner from his objective by an apparent admission on another subject. Do not follow the new lead unless your preparation and organization assures your returning to the original subject.

- Do not allow opposing counsel to interrupt. Some lawyers try to interrupt cross-examination as a tip-off to the witness of possible traps or dangers.

- Ask precise, narrow questions. Try framing your questions so that the witness is obliged to answer "yes" or "no." Then object to anything beyond the "yes" or "no" answer as being "volunteered." However, in most cases the judge will allow a witness to explain a simple "yes" or "no" answer.

- Do not always insist upon an answer. Silence may lead to an inference of ignorance or doubt, which can help your case. But press for an answer when you know it will be favorable to your case.

- Be careful not to misstate or distort evidence.

- Stop when you've succeeded. Leave well enough alone. Inexperienced cross-examiners return again and again to the same point in an effort to emphasize it. Dwelling on the point may give the witness a chance to think up a way out of the bind you've put him in.

(4) Impeachment -

(a) Necessity for foundation for impeachment -

As a general rule, lay the foundation for impeachment of a witness on cross-examination to give the witness an opportunity to admit, deny or explain the apparently contradictory or inconsistent statement.

(b) Preliminary foundation questions -

Ask a series of short questions, each question covering a separate phase of the foundation rather than one long question that includes all of the requirements. Keep the witness answering "no" as long as possible. Consider putting the questions in a casual, fumbling manner suggesting that the cross-examiner has no particular knowledge of the impeaching matter. The questions need not be complete or even grammatically correct. Sometimes this method will disarm the witness and, sometimes, opposing counsel may think you are bluffing -- at least for a while.

Questions may take the following form in almost all types of impeachment:

Q: Have you ever made a contrary statement?

A: No.

Q: Any time?

A: No.

Q: Any place?

A: No.

Q: To any person?

A: No.

After asking the preliminary foundation questions, the lawyer should complete the foundation by directing the witness's attention, in a "bit-by-bit" manner, to the specific time, place, persons present and the statement made.

(c) Have proof available unless direct admission made -

When the witness is asked if he has ever made statements contrary to his testimony at the trial and the time, place and language are specified, and he states he "does not recollect," or when the witness says he "does not remember," "do not think I did," "maybe I did," or when he makes any statement falling short of a straightforward admission that he did make such contradictory statement, the other party may and should call witnesses to prove that he did make such statements and it is wrong for a judge to reject such impeaching evidence. Further proof is necessary whenever the foundation for impeachment is laid, except where the witness admits making the contradictory statement.

(d) Types of impeachment -

(i) Former oral statements.

(ii) Former written statements - laying a foundation. Call the attention of the witness to the writing. Ask him whether or not it is his statement. Give him an opportunity to explain. Produce the statement and show it to the witness. Show the document to opposing counsel.

(iii) One of the most effective methods of impeachment is by reference to former contradictory or inconsistent sworn statements and testimony made by the witness at a prior trial or hearing. This includes any sworn statements made at a former trial between the same or other parties, on the same or other issues, provided that the subject matter is material to the issues at the present hearing.

- Foundation:

Have you ever made a contrary statement? Any time? Any place? To any person? You were a witness in the _____ hearing, is that correct? *[Establish time and place.]* You were sworn to tell the truth on that occasion? You did tell the truth? At that time and place did you not testify that _____?

- Impeaching witness -- court reporter:

The impeaching witness can be the court reporter who reported the previous hearing. The court reporter should be requested to bring his original shorthand notes. Counsel should review the notes with the reporter to locate the impeaching testimony and mark the place so that there is no delay in making the reference. If possible, the reporter should transcribe the impeaching testimony so that the lawyer can easily refer to the exact questions and answers.

After properly qualifying the court reporter, have the reporter refer to the contradictory testimony. The reporter should testify that the witness to be impeached had been sworn and testified at the previous hearing.

- Use of transcripts:

Occasionally lawyers object to the use of transcripts by court reporters in proving former inconsistent and contradictory sworn testimony. The objection usually is that the transcript is not the "best evidence," i.e., the testimony should be elicited by using the original shorthand notes. But the best evidence rule does not apply; a court reporter may use a transcript instead of the original shorthand notes. [See Fed.R.Evid. 1001(3)]

f. When the Presiding Officer Asks Questions -

The ALJ has a right to ask questions of the witnesses in an effort to clarify situations and to bring out points overlooked by counsel. He even may ask leading questions. He may participate in the cross-examination to a limited extent, but generally may not take over either the direct or cross-examination of a witness for either or both parties, much less take over the trial of the case. The problem for the lawyer is whether he dares object to questioning from the judge. Psychologically it is a bad idea to object. But if the judge indulges in conduct prejudicial to the lawyer's case, he may have no alternative. Protect the record by making an objection such as:

> "If the Court please, I know your Honor does not intend to prejudice our case but I feel that the record should show that we take exception to your Honor's questions and the witness's answers and ask that they be deleted."

Having taken on the judge, it is probably a good idea to say something friendly to the judge at the next recess -- in the presence of opposing counsel, of course.

6. *Objections and Offers of Proof*

a. Purpose of Objections -

Lawyers make objections to show their disapproval of incidents or happenings in a formal proceeding. Objections can be raised during the taking of depositions, contested motions, the hearing itself, in post-hearing motions, or at any time while the proceedings are pending. The focus here will be on objections during a hearing.

To the extent the rules of evidence apply, they will work only if a party, who believes that opposing counsel's question is improper or that certain evidence should be excluded, promptly advises the ALJ of that contention and the reasons for it. The parties, not the judge, must take the initiative in making evidentiary objections. [See, e.g., Fed.R.Evid. 103] However, it is not unusual to hear a judge exclude evidence to which counsel has not objected, especially where the offered evidence is incompetent, irrelevant or prejudicial.

b. Deciding Whether or Not to Object -

A lawyer should assess the chances of his objection being sustained and the effect of a sustained or overruled objection on his case. An inexperienced trial lawyer often thinks it is desirable to interrupt his opponent's examination of witnesses as often as possible, regardless of the chances of being sustained, so that it will be more difficult for the judge to grasp the points his opponent is trying to make. But a series of frivolous objections, which are consistently overruled, leaves a bad impression of objecting counsel and his case.

There are good reasons for not making every evidentiary objection available. Trial counsel need not complain about every innocuous leading question put by opposing counsel as the use of leading questions in preliminary matters expedites the examination of witnesses, which tends to benefit everybody and poses no real threat. A lawyer also may abandon an available objection because he does not want to give the judge the impression that he is excessively obstructive. Sometimes a lawyer foregoes objecting because the evidence, although arguably inadmissible, in some way actually favors his client's cause.

For one thing, it pays to keep silent whenever an opponent's offer of objectionable evidence might open the

door for more important evidence of the same type that the nonobjecting lawyer hopes to offer. Counsel may be able to argue that if the opponent's evidence is admitted, his own evidence on the same subject also should be admitted. However, such maneuvers should be carefully considered. The risk is in miscalculating the judge's attitude; the judge may think that admitting the opponent's material does not justify admitting that of counsel. It is important to object, of course, whenever your opponent's material may be far more harmful than your own material is beneficial. In this case it makes no difference whether the admissibility of the opponent's material will lead to the admissibility of counsel's evidence.

c. Timeliness of Objections -

Because counsel, and not the judge, is obliged to make legitimate objections in order to "protect the record," the failure to make a timely and proper objection to an offer of evidence amounts to a waiver of any complaint about its receipt. [See §124.85(c)(6)]

A lawyer must make his objection as soon as the basis for it becomes apparent. He cannot keep still and hope that the witness will give a harmless or maybe even a favorable answer, and then object when the answer proves to be damaging. Trial judges usually respond to these belated objections by commenting, "Asked and answered, counsel." The words used in examining counsel's question will themselves signal a call for inadmissible testimony. Opposing counsel must try to inject his objection before the witness answers.

Of course, it is not always possible to insert one's objection between the question and the answer. If the witness responds too quickly, the best that opposing counsel can do is state his objection as soon as possible, adding a request that the witness's answer be stricken. Where an apparently unobjectionable question brings out an inadmissible answer, counsel cannot make an objection until the impropriety of the witness's response becomes apparent. For example, if the answer is unresponsive, then examining counsel is entitled to object:

> Q: Did you make any calculations?
>
> A: Yes, and I also found a number of items that should have been considered but were left out.
>
> BY EXAMINING COUNSEL: I object to everything the witness said after the word "yes" and I ask that it be stricken, Your Honor.

Generally, only examining counsel is entitled to object to an answer for its lack of responsiveness. Accordingly, examining counsel is free to "adopt" an unresponsive but favorable answer either by saying so or by simply not objecting to it. Opposing counsel, not asking the question, lacks standing to object to any unresponsive answer unless it is excludable for reasons besides unresponsiveness (e.g., violates the hearsay rule):

> BY EXAMINING COUNSEL: And at that time and place did you meet with the plant manager?
>
> A: Yes, and we carefully checked all the monitoring data for 1981.
>
> BY OPPOSING COUNSEL: Object, unresponsive.
>
> BY EXAMINING COUNSEL: We adopt the entire answer, Your Honor.
>
> THE COURT: The objection will be overruled.

The result will be different if the witness's answer varies somewhat.

> BY EXAMINING COUNSEL: Did you meet with the plant manager?
>
> A: No, I did not, but my associate did and she said that both of them checked all the monitoring data for 1981.
>
> BY OPPOSING COUNSEL: Object, unresponsive and hearsay, Your Honor.
>
> BY EXAMINING COUNSEL: We adopt the entire answer, Your Honor.
>
> THE COURT: The objection is sustained on the ground of hearsay. Everything after the words "did not" will be stricken.

Occasionally, the inadmissibility of testimony does not become clear until long after it has been received in evidence. This can happen where cross-examination shows that a witness's responses to direct examination seem to have been based on hearsay rather than personal knowledge. Opposing

counsel then would move to strike all of the witness's testimony. And when one side fails to "connect up" conditionally relevant evidence with other evidence that was promised to render the earlier evidence relevant, the court should sustain a renewed objection to the earlier evidence and order that it be stricken.

d. Objecting to Exhibits -

Make your objections to an exhibit at the time your opponent formally offers the exhibit in evidence. Offering counsel is entitled to lay the necessary evidentiary foundation through one or more "sponsoring" witnesses who are capable of identifying and otherwise authenticating the exhibit. Withhold any objections until offering counsel has had a chance to lay this foundation:

> Q: Would you please state your full name, please?
>
> A: Margaret D. Claypool.
>
> Q: Is that Miss or Mrs.?
>
> A: Mrs., if you please.
>
> Q: What is your present occupation, Mrs. Claypool?
>
> A: I am the chief of engineering operations for the Redoubtable Corporation.
>
> Q: As such, do your duties include implementing pollution control measures through the selection of appropriate equipment and the monitoring of that equipment's performance?
>
> A: Yes.
>
> Q: Mrs. Claypool, do you have with you any of the records relating to the performance of the pollution control equipment at Redoubtable's Tinkers Dam facility?
>
> A: I have.
>
> Q: What have you brought?

A: Essentially, it's our file on installation and service and performance for the years 1978 through 1981.

BY OPPOSING COUNSEL: Object, Your Honor.

THE COURT: Overruled. Proceed.

Q: Would you hand those records to me, please? *(Witness hands folder to examining counsel.)*

BY OFFERING COUNSEL: Your Honor, there are some 80 pages or pieces of paper in the folder that the witness has handed to me. We have already marked each separate page, front and back where necessary, as Redoubtable Group Exhibit 18.

Q: Mrs. Claypool, handing you what has been marked Redoubtable's Group Exhibit 18 for Identification, I ask you if you can identify it.

BY OPPOSING COUNSEL: Objection, Your Honor.

BY OFFERING COUNSEL: Your Honor, I have not offered the exhibit yet. I have just barely gotten it marked for identification. May I have an opportunity to lay the proper foundation for its admission? I believe I can do that through this witness. Then I will offer it and opposing counsel can make any objection he has.

THE COURT: The objection is overruled. Counsel, you will wait until the exhibit if offered.

e. Need for Specific Objections -

A successful objection is usually specific. The lawyer who merely says "I object" or who uses the boilerplate recitation of "incompetent, irrelevant and immaterial" for every objection has little chance of persuading the judge that a particular question or answer is improper. Whenever possible, objections should be accompanied by a reasonably specific statement of the grounds for them. [See, e.g., Fed.R.Evid. 103(a)(1)] A judge cannot be expected to recognize instantly the particular evidentiary rules applicable to the testimony and exhibits being offered in a given case. Moreover, the lawyers have had months to prepare the case for trial and to

learn the evidentiary questions. Of course, it is a waste of time to give to the need for reasons for a self-evident objection. The ALJ is likely to rule before counsel can do more than say "I object."

By making specific objections, a trial lawyer shows his sensitivity to the need for making a record. Besides educating the judge on the reason for excluding the evidence, a specific objection noted in the record makes it easier for an appellate court to intelligently evaluate the judge's action in sustaining or overruling the objection.

Among the situations where a specific objection usually is necessary to preserve error are the following:

(1) Argumentative question.

(2) Best evidence rule violated.

(3) Compound question.

(4) Hearsay.

(5) Leading question on direct examination.

(6) Parol evidence rule violated.

(7) Privileged communication.

(8) Unresponsive answer.

(9) Witness incompetent.

(10) Inadequate foundation for the introduction of a writing.

(11) Conclusion of law or fact improperly called for by the question.

(12) Cross-examination exceeding scope of the direction examination.

(13) Facts not in evidence assumed in the question.

An offer of evidence often consists of several elements. If only a portion of the offer is objectionable, opposing counsel should identify these parts to the judge, who may or may not bother sorting out the admissible from the inadmissible. Offering counsel should be prepared to break apart the evidence and to offer the evidence in a segmented fashion so that objections and rulings can be made in an orderly manner. One way to accomplish this is by separately

tagging or marking each page or item of a multi-paged or multi-faceted exhibit.

f. Continuous Objections -

Where similar evidence (that opposing counsel considers inadmissible) is repeatedly offered, the judge usually will permit a single objection to serve as a continuing objection to the line of questioning or type of evidence. If opposing counsel's objection to the first of a string of offers of similar evidence is sustained, he still must object to each subsequent offer. If his initial objection is overruled, however, the judge may allow a continuing objection in order to conserve time. To avoid any confusion, when additional evidence of the same type is later offered, opposing counsel again should mention that his earlier objection still applies. Failing to object to an inadmissible item of evidence does not rule out objecting successfully to later efforts to offer more of the same.

g. Importance of a Ruling -

It is the obligation of objecting counsel to get an definite, on-the-record ruling on an objection. No inferences can be made from the judge's silence. Sometimes, when the lawyers and the judge engage in a lengthy and complex discussion of the merits of an objection, the judge can forget to make a formal ruling. If the judge does forget, objecting counsel should politely remind him of this fact. A formal ruling is necessary in order to preserve the point for appeal.

h. Offer of Proof -

(1) Offer of Evidence vs. Offer of Proof:

The "offer" is the last step in the introduction of evidence. The meaning of the word "offer" and phrase "offer of evidence" is clear when thinking in terms of tangible evidence, such as a document. For example, the proponent of a writing, after first giving the judge and opposing counsel the chance to examine the exhibit (if they are not already familiar with it as a consequence of prehearing procedures), will have it marked for identification. Offering counsel will then hand the exhibit to its sponsoring witness on the stand and pose questions aimed at authenticating the writing. When finished, the lawyer will hand the exhibit to the judge and say: "Your Honor, I now offer in evidence what has been marked EPA Exhibit 1 for Identification."

The so-called "offer of proof" occurs before or during an offer of evidence, with or without a

witness on the stand, and with or without an objection pending. An "offer of proof" is essentially a preview of upcoming testimony or other evidence.

(2) Offer of Proof During Oral Testimony:

The need for an offer of proof usually occurs during the examination of a witness on the stand. The lawyer poses a question to his witness in an effort to elicit testimony; the testimony may be valuable for its own sake or because it lays the foundation for the introduction of tangible evidence. If opposing counsel objects, and the judge sustains the objection, the examining lawyer must make an offer of proof unless he is prepared to concede his opponent's objection.

The offer of proof allows the judge to make a more informed ruling on the objection and, where the ruling may be erroneous, preserves the point for review by the Administrator or by a reviewing court. Without an explicit offer of proof, the Administrator or the court may not have any way of knowing whether the ALJ's ruling was correct. Equally important, there will be no sure way of knowing whether the loss of the excluded evidence was prejudicial to the introducing party's case; one can hardly weigh the importance of rejected evidence without knowing what that evidence would have been. The ALJ cannot refuse counsel an opportunity to make a proper offer of proof. [§124.85 (c)(3)]

Ordinarily, the lawyer should make an offer of proof during a witness's testimony immediately after the adverse ruling that cut off the witness's response. Under Section 124.85(c)(3), the offer of proof for excluded oral testimony is a "brief statement on the record describing the nature of the evidence excluded." The regulation, however, does not say whether the "statement" must be made "through the witness" or by counsel. If the judge rules that the witness must make the statement, examining counsel can examine the witness through the usual question-and-answer method [See Fed.R.Evid. 103(b)] or he can elicit a response in a narrative fashion.

If the judge allows (or prefers) a "lawyer offer," examining counsel's offer of proof may consist of an on-the-record statement to the court showing what the witness's answer would have been. The lawyer's statement should show that the anticipated response from the witness could reasonably be expected to affect the findings of fact in his favor. The "lawyer offer" begins after opposing counsel objects to a question posed to a witness on the stand, and after the judge sustains the objection.

Examining counsel, to make the record, might say to the judge: "Your Honor, through this witness we offer to prove . . . ." Or he may say, "The witness, were he permitted to answer the last question, would have testified that . . . ."

(3) Offer of Proof with No Witness:

This kind of offer covers situations where documentary evidence is offered without a sponsoring witness or where, prior to any testimony by a witness and prior to any explicit objection or ruling, offering counsel has a number of witnesses available (but not at the hearing) to establish a line of facts, but the judge's rulings have strongly suggested that he would exclude their testimony.

(a) Tangible offer -

Any lawyer who knows how to mark, authenticate or identify, and offer into evidence an item of tangible evidence already knows how to make an offer of proof of the exhibit's contents following opposing counsel's successful objection to its admissibility. The proponent of the rejected exhibit need only hand it to the court reporter for inclusion in the trial record. Counsel's only additional task may be to state for the record the purpose of the evidence, if any possibility exists that its function is unclear. He also may want the record to reflect the judge's reasons for rejecting the exhibit.

An offer of tangible proof that commingles admissible with inadmissible matter is not a good offer and should be rejected in its entirety; the inadmissible portions must be omitted from the offer. The obligation to screen out inadmissible matters belongs to the lawyer for the offering party.

Counsel must specify what parts of a writing or group of writings are included in his offer of proof. Ordinarily, it is not enough for a lawyer to make a general representation that all objectionable parts will be deleted. Where an offer of a writing has been rejected, the sponsoring lawyer cannot later insist that he offered only its receivable portions unless he in fact designated them explicitly at the trial. When a writing is offered without such designations, judges usually presume that the entire exhibit is offered.

(b) Waiting witnesses -

Counsel will make an offer of proof when he cannot be sure how the judge will treat his proposed

evidence and when he wants to make a record without first going to the expense and inconvenience of summoning and examining the witnesses involved.

(4) Content of Offer:

The offering party must include in his offer everything necessary to support the admissibility of the proposed evidence. If, for some reason, a lawyer cannot show admissibility until a subsequent time during the trial, the offer should be renewed at that time. Offering counsel then may be faced with showing that the offered evidence would not be cumulative.

An offer of proof must be specific, not merely stating ultimate facts that might be approprate in a pleading. While an offer can be a summary of proposed evidence, it must be cast in terms of evidentiary facts.

(5) Renewing the Offer of Proof:

Sometimes a particular offer of proof must be made more than once. And some offers must be renewed, as when an offer is ruled premature because, for example, some element of its foundation is missing or because it has been made during the wrong stage of the trial. A lawyer must renew his offer after having adduced additional evidence by way of an essential predicate. Otherwise, the judge might treat the earlier offer as having been abandoned.

The need to renew an offer of proof after the taking of additional evidence can be avoided if, in the original offer, counsel is willing to connect up the offered evidence with other testimony that will render the offered evidence material.

7. *Managing Exhibits*

a. Clarifying and Simplifying Documentary Proof -

Some courts and administrative agencies still require individual documents to be introduced into evidence separately, each document being qualified for admissibility by its custodian or its maker or by a certificate. However, the clear trend is to permit the summarizing of large numbers of documents in circumstances where:

(1) Materials are too bulky to transport easily and to keep in the hearing room.

(2) Separate introduction into evidence of individual items might require the testimony of numerous persons who would be taken away from vital jobs in government or business. The swearing in and receipt of testimony from each witness would waste the court's time. Even if the documents are the sort that can be introduced on the authority of certifications alone and without live testimony, obtaining certification of numerous documents can be both costly and expensive to the litigants.

(3) Documents are vital to the case, but cannot be understood unless they are summarized.

(4) Method for summarizing the records is an accurate one. The person who made or supervised the summary would be present to testify on the accuracy of the summarization, subject to cross-examination.

(5) Original documents still will be available at a convenient location if questions are raised about the accuracy and completeness of the summarization.

Rule 1006 of the Federal Rules of Evidence describes the procedure in the Federal courts:

> The contents of voluminous writings, recordings or photographs which cannot be conveniently examined in court may be presented in the form of a chart, summary or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The judge may order that they be produced in court.

Besides using summaries, stipulations on the admissibility of documents can help expedite proof. The prehearing conference is a convenient place to reach an agreement on such a stipulation.

b. Assembling and Charting Documentary Proof -

In preparing for trial, the lawyer should have obtained not only the documents which he ultimately intends to introduce, but also all writings that may have any bearing on the subject. Indeed, it is quite possible that the relevance of some piece of written proof will not become apparent until the hearing has progressed for a certain period.

There are two ways in which documentary data can be assembled: first, by isolating in a single place the proof on each subject which is intended to be introduced and keeping in another folder the documents that, although not contemplated as exhibits, may become important; second, by arranging in chronological order all documents, whether or not intended from the beginning as exhibits. The first system can be used conveniently where there are only a few documents and the issues to be tried are simple. However, some documents may cover several subjects and if they are placed in a folder relating to an individual subject, there may be a mad scramble when it is time to produce them in connection with another matter.

Where the issues are complicated, the documents numerous, and a large mass of written material exists that may not be introduced in evidence, the easiest way to assemble the documents is by date. Place them in a single file (although this file may, because of the bulk of material involved, consist of a number of separate filing envelopes or even an entire filing cabinet) in chronological order. Assembling the materials this way is useful because, if your opponent suddenly calls for the introduction of a document (until then not received in evidence or marked for identification) the document can be readily located. Prepare a chart that briefly states the nature of the document and its date. Assign a number to each document and a leave a blank on the chart for showing whether an individual document is received in evidence or marked for identification. The following format is typical:

DOCUMENTS

Our Number	Exhibit No.	Description

During the hearing, whenever any of the documents are received in evidence or marked for identification, make an appropriate notation in the second column.

After a document has been marked for identification or received in evidence, place it in a separate folder. At the close of each trial day, prepare an additional chart consisting of two columns: one will contain the exhibit

number and the other a description of the document. If the document was furnished by an opponent and returned to him after it was marked, note this fact on this second chart. The original chart of all documents can remain undisturbed during the trial. By looking at the second column of that chart, you can see whether a given document was received in evidence or marked for identification. If it has been so received or marked, you will know that it has been transferred to the exhibit file, or, if the document was furnished by an opponent, that it is in the opponent's hands.

At the close of each hearing day, it is a good idea to check with your opponent to assure that every document received in evidence or marked for identification on that day is accounted for, either in your own exhibit file or in your opponent's possession. If, during the course of any day of the trial, some documents were re-used (for example, during cross-examination) the document check at the end of that day should keep track of them.

c. Steps in Introducing Documents into Evidence -

The significance of writings often depends on who prepared them. If a letter of acceptance was dictated and signed by a corporation's president, it may be a crucial item of evidence; if it was signed by someone without any authority to do so, it won't have any legal significance. Accordingly, it often is necessary to make a record on the question of authorship. Is the writing truly what it purports to be on its face, a letter composed and signed by the company president? A writing, in other words, is not receivable in evidence until it has been authenticated. [See generally, Fed.R.Evid., Arts. IX-X.] The sponsoring lawyer must demonstrate a document's genuineness as a preliminary matter. The process works like this:

STEP 1: HAVE EXHIBITS MARKED FOR IDENTIFICATION

As soon as the lawyer decides to elicit testimony on an exhibit, he should have the exhibit marked for identification. Usually, this can be done at a prehearing conference. Where there is no prehearing conference, the marking of exhibits is done just prior to the presentation of testimony.

<u>Illustration</u>

COUNSEL: *(To the court reporter)*
Please mark this EPA Exhibit 28 for Identification.

(The court reporter so marks the exhibit.)

COUNSEL: *(To the witness)* Mr. Jones, I ask you to look at what has been identified as EPA Exhibit 28 for Identification and to please tell us whether or not you recognize it.

In the alternative, the witness may first mention the exhibit that the lawyer proposes to introduce. If the sponsoring lawyer has the exhibit, he immediately should have it marked for identification and show it to the witness in the manner illustrated above. If the witness has brought the exhibit to the hearing, the lawyer should ask him to produce it, have the court reporter mark it for identification, and then hand it back to the witness for the purpose of laying the foundation.

<u>Illustration</u>

COUNSEL: What did you do then?

WITNESS: I prepared a *[subject document]*.

Q: Do you have that *[subject document]* with you?

A: Yes, I do.

Q: May I have it please?

(Item or document is produced and presented to the attorney.)

Q: *(To the court reporter)* Please mark this *[subject document]* EPA Exhibit 21 for Identification. *(It is so marked.)*

Q: *(To the witness)* I now show you EPA Exhibit 21 for Identification and I ask you whether or not this is the *[subject document]* to which you have just referred?

A: Yes, it is.

Be sure to have the exhibit marked for identification before your witness gives any extended testimony concerning

it. Where there are large numbers of exhibits, they should be marked for identification before trial.

STEP 2: LAY THE FOUNDATION FOR ADMISSION OF EXHIBIT

After being returned to the witness, the exhibit must be properly authenticated by testimony. Testimony used for laying a foundation must meet the same evidentiary scrutiny as ordinary testimony. The exhibit must be shown to be relevant and accurate.

Illustration

COUNSEL: Does EPA Exhibit 21 for Identification truly and correctly portray *[whatever it was intended to portray]*?

WITNESS: Yes, it does.

STEP 3: SHOW EXHIBIT TO OPPOSING COUNSEL

Give the exhibit to opposing counsel so that he may decide if he will object to its introduction into evidence. Some judges require that an attorney show his opponent an exhibit before handing it to the witness, while others allow the exhibit to be shown to opposing counsel after the offer into evidence is made.

Illustration

COUNSEL: *(To opposing counsel)* Ms. Goodman, here is a copy of EPA Exhibit 21 for Identification, which I am going to offer into evidence at this time.

STEP 4: OFFER EXHIBIT INTO EVIDENCE

Ask the judge to admit the exhibit into evidence. Simultaneously, hand the exhibit to him for his inspection.

Illustration

COUNSEL: At this time, if the court please, we offer EPA Exhibit 21 for Identification into evidence as EPA Exhibit 21.

If both sides of an exhibit are important, then be sure to offer both sides of the exhibit into evidence.

Illustration

> COUNSEL: If the court please, at this time I wish to offer both the front and back sides of EPA Exhibit 21 for Identification into evidence as EPA Exhibit 21.

If for any reason, only a portion of an exhibit is offered, the offer should reflect such limitation.

Illustration

> COUNSEL: If the court please, at this time we offer into evidence as EPA Exhibit 21 that part of Exhibit 21 for Identification beginning with the last paragraph on the front of the document and continuing onto the back side through the column of figures that ends halfway down the page.

Finally, if an exhibit is offered for a limited purpose (for evidentiary reasons or otherwise), the offer should reflect this restriction:

Illustration

> COUNSEL: At this time we offer EPA Exhibit 21 for Identification into evidence as EPA Exhibit 21 for the sole and limited purpose of establishing that Redoubtable Corporation was aware of *[whatever]*.

STEP 5: OPPOSING COUNSEL EXAMINES EXHIBIT AND STATES ANY OBJECTIONS

Offer specific objections to exhibits. Opposing counsel will ask for a "voir dire" examination if probing collateral matters is necessary to determine the competency of the exhibit. The "voir dire" examination also may be used to challenge the foundation upon which admissibility is based. This examination takes place before the court rules on admissibility.

Sometimes opposing counsel may doubt that a witness, who is presenting certain records as being "kept in the ordinary course of business," is competent to testify to that fact. In that situation, after the presenting attorney has "laid the foundation" for the introduction of the purported business records and offered them into evidence, opposing counsel may proceed as follows:

Illustration

MR. DANIELS: If the court please, we would like to have Your Honor reserve his decision on the admissibility of Respondent's Exhibit 14 until after we have had an opportunity to conduct a "voir dire" examination of this witness.

THE COURT: Very well, you may proceed.

MR. DANIELS: How long have you worked at Redoubtable Corporation?

WITNESS: Three months.

Q: So that as a matter of fact you really do not know for sure whether these records were made and kept in the ordinary course of business a a year ago, is that correct?

A: I can only say that I feel it is reasonable for me to assume they were. The filing system of the company is very reliable.

Q: If the court please, we object to Respondent's Exhibit 14 being admitted into evidence because this witness cannot testify with any degree of certainty that these records were made and kept as part of the ordinary course of business. Admitting them on the basis of his testimony would violate the hearsay rule.

THE COURT: Objection sustained.

On the other hand, the judge might rule that the lack of foundation affects the weight, but not the admissibility, of the records [§124.85(d)(1)] or that the records are

admissible because of certain "circumstantial guarantees of trustworthiness." [Fed.R.Evid. 803(24)] Counsel also may ask the Court to reserve its ruling on admissibility until after cross-examination.

Illustration

EPA COUNSEL: I offer EPA Exhibit 10 for Identification into evidence as EPA Exhibit 10.

OPPOSING COUNSEL: If the court please, we would like Your Honor to reserve his decision on the admissibility of Exhibit 10 until after we have had an opportunity to cross-examine as to it.

THE COURT: Very well.

If the court takes the admissibility question under advisement, the sponsoring lawyer should specifically request on the record that the court rule on that question. If the judge makes no ruling at all, the point will not be available for consideration on appeal.

STEP 6: OBTAIN RULING ON ADMISSIBILITY

Illustration

COUNSEL: For the record, if the court please, may we have a ruling on the objection?

THE COURT: The objection is overruled.

STEP 7: ASK COURT REPORTER TO STRIKE IDENTIFICATION MARKS FROM EXHIBIT

This will permit immediate identification of exhibits that have been admitted into evidence.

Illustration

COUNSEL: *(To the court reporter)* Please show that EPA Exhibit 21 for Identification has been received into evidence [*or*, please strike the identification symbols].

If your opponent has identified an exhibit but has not offered it into evidence, you may have the exhibit remarked and offered into evidence as your own exhibit.

To avoid any inadvertent failure to offer an exhibit into evidence, some attorneys make it a practice to re-offer all exhibits prior to concluding the presentation of their case.

Illustration

COUNSEL: At this time, if the court please, in order to make sure the record shows all of the exhibits as received in evidence, I wish to re-offer all of EPA's Exhibits, Numbers 1 through 46 inclusive, and ask that they be received in evidence as EPA Exhibits 1 through 46 inclusive.

THE COURT: The record will show that those exhibits are received as marked.

Where documents received in evidence are needed for the current and continuing operation of an organization, its lawyers may ask to substitute copies of such exhibits for the originals.

Illustration

OFFERING ATTORNEY: If the court please, I would like to substitute photostatic copies of the original company records which have been received into evidence as Redoubtable Exhibits 12 through 28. I offer to stipulate that these documents are true and correct copies of the originals.

THE COURT: Is there any objection, Counsel?

OPPOSING ATTORNEY: I've had a chance to compare them, Your Honor. No objection.

THE COURT: All right.

OFFERING ATTORNEY: It is agreed then by counsel that any of the Redoubtable Exhibits 12 through 28 received here in evidence today may be supplanted, for the purpose of the record, by photostatic copies thereof. Is that correct, Suzanne?

OPPOSING ATTORNEY: Agreed, Emily.

Whenever exhibits are withdrawn and photostatic copies are substituted, the photostatic copies should also be marked as exhibits.

Illustration

COUNSEL: Now if the court please, I would like to withdraw EPA Exhibits 1, 2 and 3 and substitute photostatic copies of them. I would also ask that the substituted photostatic copies be given corresponding numbers.

OPPOSING COUNSEL: Alright. Subject to the same objection we made as to the original exhibits.

THE COURT: The substitution will be allowed. And the objection is noted.

d. Business Records -

Rule 803(6) of the Federal Rules of Evidence sets out the well-established business records exception to the hearsay rule. [See "Reference Materials" of this Manual]

The purposes of this rule are to (i) eliminate the requirement that the entrant appear to authenticate the record, (ii) dispense with the necessity of proving each and every book entry by the person, and (iii) bring the realities of business and professional practice into the courtroom in a usable form.

While the rule will be liberally construed, this does not mean any and every business record will be admitted without careful scrutiny of its reliability. Whenever keeping or maintaining the record is not within the assigned duties of the sponsoring witness, the reliability of the business record

is diminished. Lack of certainty as to who prepared the records or exact time of preparation affects only the weight of such evidence, not its admissibility. But a foundation may be inadequate and evidence inadmissible when the witness knows nothing of how the records were kept, except as to what he was told by others.

Rule 803(6) does not deal clearly with the admissibility of records which are prepared by one company and kept by another. To be safe, a proper foundation might require qualified testimony from both firms to vouch for the reliability of the evidence.

Illustration

COUNSEL: State your name in full, please.

THE WITNESS: _____.

Q: What is your occupation or profession?

A: Professional engineer.

Q: How long has that been?

A: Fifteen years.

Q: With what company are you associated?

A: Redoubtable Corporation.

Q: The permit applicant in this case?

A: Yes.

Q: In what capacity are you connected with Redoubtable?

A: Manager of Environmental Affairs.

Q: How long have you been in that position?

A: Five years.

Q: As Manager of Environmental Affairs do you have responsibility for the monitoring of compliance with pollution control laws and the records relating to that function?

A: Yes, sir.

Q: Is it part of the ordinary course of business for Redoubtable to keep these books and records?

A: Yes.

Q: What, if any, of those records kept by Redoubtable have you brought here?

A: *[States nature of records brought to hearing.]*

Q: May I have them, please?

A: Yes.

COUNSEL: *(To the court reporter)* Please mark these records sequentially Redoubtable Exhibits 11 through 20 for Identification. Thank you.

(This is done.)

Q: Are you familiar with the papers which have just been marked Redoubtable Exhibits 11 through 20 for Identification?

A: Yes, I am.

Q: *(To the witness)* Have Redoubtable Exhibits 11 through 20 for Identification been kept in the usual and ordinary course of business?

A: Yes, sir.

Q: Are Redoubtable Exhibits 11 through 20 for Identification maintained in any specific fashion?

A: Yes, they are kept in filing cabinets and under a records management system I designed and now supervise.

COUNSEL: If the Court please, we offer Respondent's Exhibits 11 through 20 for Identification in evidence as Respondent's Exhibits 11 through 20 inclusive.

THE COURT: Any objection, counsel?

OPPOSING COUNSEL: Yes, Your Honor. There has been no showing who made the

entries in these books and records, where that person is, and under whose supervision and direction the entries were made. This witness has not testified to his personal knowledge, if any, of the information contained in these records.

THE COURT: The objection will be overruled. The books and records are received in evidence and may be so marked.

COUNSEL: *(To the court reporter)* Please show these items received in evidence as Respondent's Exhibits 11 through 20 inclusive.

[Note: The foundation for admission of a document as a business record need not be entirely based on someone's testimony. A judge can presume from the document itself that it was prepared in the regular course of business.]

e. Diagrams, Charts and Drawings -

Charts can be used to translate a mass of statistics into relatively comprehensible form, and they are especially helpful in presenting financial information in a comparative manner.

Diagrams, charts, graphs and drawings are admissible into evidence at the discretion of the ALJ when they are shown to be true and correct representations of the things they purport to portray. Of course, the underlying documents and source materials must be admissible in their own right. Such items may be used to demonstrate, illustrate or explain a witness's testimony. Ultimately, they must be designed to help the decision-maker evaluate the evidence.

<u>Illustration</u>

EXAMINING COUNSEL: Where is the plant located?

WITNESS: Baltimore, Maryland, in the harbor area known as Sparrow's Point.

Q: Are you familiar with the plant and its environs?

A: Yes, I am.

Q: How did you become familiar with it?

A: I have visited the plant on at least six occasions within the past couple of years and walked through it with the plant manager as my guide. I've also flown over the plant site in a helicopter two or three times.

Q: *(To the court reporter)* Please mark this item EPA Exhibit 35 for Identification. Mr. Tulkinghorn, I hand you EPA Exhibit 35 for Identification and ask whether you recognize this drawing?

A: Yes, I prepared the drawing.

Q: How accurate is it?

A: Well, it's not absolutely to scale, but it does show everything in the right place.

Q: How did you prepare the drawing?

A: *[Explains facts, information and methods used in preparing the exhibit, as well as his sources of information.]*

COUNSEL: *(To the court)* If the Court please, I offer EPA Exhibit 35 for Identification in evidence as EPA Exhibit 35.

(Shows exhibit to opposing counsel.)

THE COURT: Any objections, counsel?

OPPOSING COUNSEL: No objections, Your Honor, except the record should reflect the diagram is not drawn to scale.

THE COURT: With that limitation noted, it may be received in evidence and marked EPA Exhibit 35.

8. *Drafting Proposed Findings of Fact, Conclusions of Law and Supporting Brief*

a. Findings and Conclusions -

Most state and federal administrative agency procedures require the parties, after the close of the hearing, to submit proposed findings of fact, conclusions of law and a supporting brief. [e.g., 40 C.F.R. §124.88] In this way, the ALJ gets help in preparing the initial decision, which itself will contain findings and conclusions, as well as legal reasoning supporting the decision.

Requiring the ALJ to issue findings of fact and conclusions of law serves several purposes:

(1) It forces the judge to go through a careful analytical process of evaluating the facts in reaching his decision.

(2) It clarifies exactly what was decided in the case, so that the principles of "res judicata" and "estoppel" may be more accurately applied. This function of the findings of fact and conclusions of law has enormous practical consequences for the prevailing side in cases that deal with fact situations likely to produce additional litigation. Accurate and detailed findings of fact and conclusions of law can help prevent wasteful re-litigation of points already decided.

(3) It helps the Administrator and the reviewing court evaluate the sufficiency of the evidentiary support of the initial decision. Lawyers for each party will want to protect the integrity of the favorable decision they hope to receive by submitting proposed findings of fact and conclusions of law that provide sound support for the decision.

Appellate courts usually defer to the ALJ on matters concerning the demeanor of witnesses and other intangible factors that contribute to the overall credibility of witnesses. To the extent findings are based on such credibility factors, they are less vulnerable to attack. Thus, the winning lawyer can help protect the favorable ruling he has received by explicitly mentioning in the proposed findings of fact any reliance he believes the judge should place on the demeanor and credibility of the witnesses.

Neither the Administrator nor the courts, however, are obliged to defer in any way to the ALJ's decision on the law. Because conclusions of law are more susceptible to correction by the Administrator or the reviewing court, a

lawyer who is interested in protecting the initial decision from reversal should urge the ALJ to stress in his decision how firmly based it is in law as well as in fact. Of course, the Administrator is free to make whatever different findings of fact that can be supported by the record.

The findings and conclusions should be drafted so as to allow the judge maximum flexibility to rearrange, add or delete points. This can be done by drafting short paragraphs that are complete in themselves. Some judges like to have each paragraph on a separate sheet of paper, making it easier for them to restructure the findings, i.e., cut and paste up their decision from material submitted by counsel.

Redundant, unnecessarily elaborate findings of fact detract from the force of the findings. Completeness, in the sense of having findings of fact and conclusions of law that cover all the issues, does not require a microscopic examination of every nuance in the evidence. To the extent practicable, annotate the findings of fact with references to the transcript and exhibits.

b. The Brief -

There is no settled format for a brief in support of proposed findings and conclusions. The law brief customarily contains some kind of statement of facts and the issues of law. Divide the brief into logical segments, numbered as counsel prefers (usually with Roman numerals), and be sure to include an index or table of contents.

An excellent way to learn how to write these briefs, not to mention the findings and conclusions, is to dig through Agency files for hearings in which highly competent attorneys participated. Their handiwork can serve as an authoritative guide.

C. Nonadversary Panel Hearings

1. *Background*

The non-adversary panel procedures depart from traditional trial-type adjudications in cases of initial licensing. Instead of EPA and other parties presenting their respective cases before a solitary ALJ, evidence on the permit issues is heard by a panel of three or more EPA employees who have special knowledge or expertise in the subject matter. (In special circumstances, the panel may include persons who are not EPA employees.) Panel members may question any person -- attorney or witness -- who participates in the panel hearing. A presiding officer (who may be either an ALJ or an attorney employed by the Agency) will be responsible for assuring that the hearing is conducted fairly.

Despite its relatively informal nature, the panel procedures have a number of strict requirements. For one thing, the request for a panel hearing must contain most of the substantive items required in an evidentiary hearing request. And the "evidence" in the hearing will consist largely of written comments on the draft permit submitted prior to the hearing itself, unless the presiding officer specifically allows such comments to be submitted orally at the hearing. Cross-examination of witnesses by a party is severely limited.

The purpose of the panel hearing is to allow persons with scientific or technological expertise to obtain relevant facts and opinions in a manner most meaningful to reaching an informed decision. While the panel hearing remains an untested mechanism for resolving NPDES permit issues, commitment to the Agency's fair and efficient disposition of its business means that the nonadversary hearing will be a key instrument for demonstrating new vitality in the administrative process.

2. *Techniques for Expediting Panel Hearings*

a. Importance of a Sound Administrative Record -

A comprehensive administrative record will ensure efficient handling of a nonadversary hearing. The important distinction between more formal (evidentiary) and less formal (nonadversary) is the method for making the record to support final Agency action on a permit. The nonadversary procedure primarily relies upon written or documentary support for the permit; the hearing allows the panel, as well as the presiding officer, to clarify their understanding of the record. Thus, the presence and participation of the Agency trial staff at the nonadversary hearing will be less important to the extent the administrative record has been fully documented so as to explain why the permit contains what it does.

b. Preparation of Staff Witnesses -

Complicated permits are often written by several EPA staff members within their respective areas of expertise. Although each participating staff scientist or engineer should know his own portion of the permit, it helps when each staff witness also knows the full range of issues, i.e., the context of his testimony.

c. Panels of Witnesses -

When all witnesses on a particular issue are assembled at the witness table and sworn in as a group, the panel can get its questions answered easier and quicker than if each such witness is called in turn.

d. Applicability of Evidentiary Hearing Techniques -

Since many of the provisions of Subpart E (Evidentiary Hearings) apply to nonadversary panel procedures, it makes good sense to consult Part B of this Chapter for advice in preparing for a panel hearing.

CHAPTER VII
SUBPART H—EVIDENTIARY HEARING PROCESS

OVERVIEW

An evidentiary hearing provides permittees a mechanism for challenging final individual permits. The hearing is to be conducted by a Presiding Officer, an Administrative Law Judge. Prehearing conferences may be held for the purposes of obtaining stipulations, admissions, identifying matters not in issue, and matters in dispute. Time schedules may also be specified for the hearing and for exchanging documents and data. The Presiding Officer will also have wide authority during the hearing, including the authority to examine witnesses, exclude or limit evidence, and rule on motions and other procedural matters pending before him or her, e.g., motions for summary judgment.

The limited right of cross-examination in evidentiary hearings is also explicitly recognized in the new regulations. There is no automatic right of cross-examination and the proponent of cross-examination has the burden of justifying its use. In addition, all direct and rebuttal testimony must be submitted in written form unless it can be affirmatively shown that the testimony can only be effectively presented orally.

An essential change in the new procedures is the prohibition against raising issues at an evidentiary hearing that were not first raised during the comment period on the draft permit. An exemption from this requirement is provided if good cause can be shown for the failure to raise the issues earlier.

The regulations also provide for an interlocutory appeal process. This process allows a party to appeal an order or ruling prior to the issuance of the

initial decision by the Presiding Officer. It is permitted only if the Presiding Officer, upon motion of a party, certifies the orders or rulings for appeal. Requests for certification must be filed in writing within 10 days of service of notice of the order or ruling and must briefly state the grounds for such request. Certification may be granted only if certain threshold conditions are met.

After the hearing, the parties will have an opportunity to submit proposed findings of fact, conclusions, and a supporting brief. The Presiding Officer may allow reply briefs. The Presiding Officer will then review and evaluate these, together with the hearing record and any interlocutory decisions, in issuing the initial decision. The initial decision will automatically become effective 30 days after its service, unless there is a petition for review, or the Administrator on his or her own motion decides to review the decision.

The decision logic included in this chapter (Figure VII-1) illustrates the key events in the evidentiary hearing process. Helpful hints for expediting the process will also be provided, as well as checklists for evaluating requests for an evidentiary hearing, sample forms for a proposed prehearing conference order and a stipulation. Reference should be made to the section in question for a complete analysis of the procedures.

The former practice of deciding legal issues separately through referral to the Office of General Counsel has been stopped. These issues will now be subject to normal interlocutory appeals (an appeal during the hearing). The interlocutory appeal process allows a party to appeal an order or ruling prior to the issuance of the initial decision by the Presiding Officer. To invoke this procedure, a party must, within 10 days of service of notice of the ruling or order, file a written request to the Presiding Officer for certification of the orders or rulings for appeal on the record. The request must briefly state the grounds relied upon. It should be noted that the Office of General Counsel will continue to play a major role in deciding issues of law.

The Presiding Officer may certify an order or ruling for appeal to the Administrator only if all 3 of the following requirements are satisfied:

(1) The appeal involves an important question on which there is substantial ground for difference of opinion;

(2) The appeal is necessary to prevent exceptional delay, expense, or prejudice to the parties; and

(3) Either an immediate appeal will materially advance the ultimate completion of the proceeding or the review after the final order is issued will be inadequate or ineffective.

The Administrator will decline to hear the appeal if he or she determines that certification was improperly granted.

Within 30 days of their submission, the Administrator will accept or decline all interlocutory appeals. If the Administrator takes no action within this time, the appeal will be considered dismissed.

If the Presiding Officer declines to certify an order or ruling for appeal, it may be reviewed by the Administrator only upon appeal from the initial decision, unless in exceptional circumstances the Administrator determines upon motion of a party that to delay review would not be in the public interest. Such motion must be made within 5 days after notification of the Presiding Officer's refusal to certify.

Only in exceptional circumstances may the Presiding Officer stay the proceeding pending a decision by the Administrator upon the Presiding Officer's grant or denial of certification.

Ordinarily, the interlocutory appeal will be decided on the basis of the submissions made to the Presiding Officer. The Administrator may, however, allow briefs and oral arguments. Issues of law will be referred to the General Counsel for determination, subject to the Administrator's approval.

HELPFUL HINTS FOR EXPEDITING EVIDENTIARY HEARINGS

> "There are no inherently protracted cases, only cases which are unnecessarily protracted by inefficient procedures and management."
>
> (Foreword to Manual for Complex Litigation, Fourth Edition)

This is a brief compilation of some ideas for managing contested cases.

Every participant in litigation has his or her own ideas about how to handle the case, and extensive literature has been produced that discusses the problems of delayed action, particularly in the administrative processes of government. In the final analysis, however, it is attention to the case by all participants, including lawyers, witnesses, technical and para-professional assistants, and staff support people, that is most likely to lead to efficiency.

Checklists serve no function or purpose—in fact, a person's good ideas about how to staff a case are valueless—unless the checklists are used in ways that are suited to the individual case and the objectives of the litigation. Therefore, the following list is nothing more than several ideas that may help participants to plan the management of cases that are likely to be contested.

- THE MULTIDISCIPLINARY TEAM APPROACH to contested cases is essential to a successful NPDES matter.

  This means that technical professionals who review applications and prepare draft permits, consultants, technical and scientific support staff, lawyers, and clerical support and administrative staffs must all be brought together EARLY and OFTEN when a particular permit is identified as controversial or is otherwise likely to lead to a request for hearing. The roles and responsibilities of each member of the team need to be worked out and agreed

upon early in the process. One case manager should be designated as the person through whom all information about the case is filtered. This case manager may be any qualified team member, until the time a request for hearing is granted. From this point on, the lead staff lawyer should ordinarily assume the responsibilities of the case manager. When a lawyer serves as case manager, a qualified technical staff member should be designated to head up the technical/scientific effort and should have the necessary authority to direct and coordinate all work done by the technical members of the team.

- FACT SHEETS/STATEMENTS OF BASIS are useful tools for assuring that all team members have contributed to permit preparation at an early stage.

  Because the Regulations call for a determination as to whether an extensive Fact Sheet or a more simple Statement of Basis will be prepared for every permit, the person responsible for the determination should call in the entire team to participate both in the determination and in the preparation of the appropriate supporting document. Obviously, less time will be required of the team if a Statement of Basis is to be prepared. However, it is no less important that the team participate in and agree upon the determination that the Statement of Basis will be appropriate rather than a more detailed Fact Sheet. Determinations about which document will be prepared for a large number of permits being issued at the same time may be made by a small committee of qualified staff members.

- WRITTEN TESTIMONY of scientific/technical witnesses, which will later be required for cases that go to hearing, can be outlined at the time the Statement of Basis or Fact Sheet is prepared.

  If outlines are prepared early, the team will be able to focus its attention on the issues and on the support necessary for the case to progress efficiently.

- THE ADMINISTRATIVE RECORD, now required for every permit, is a practical and useful vehicle for ensuring that all documentary support for the permit is (a) identified and (b) readily available, before the draft permit is publicly noticed.

  The Administrative Record will be assembled "as-you-go," using a checklist, to ensure that the file contains support or citations for each of the conditions or limitations contained in the permit.

- PREHEARING CONFERENCES are an integral and essential part of the hearing process.

  At the time a request for hearing is granted, agency staff should be prepared to go forward promptly with a request for a prehearing conference addressed to the Presiding Officer. If the agency staff is properly prepared, the early prehearing conference will allow the main issues in the case to become clear and will permit a schedule of work to be arranged to move the case to an early decision. (For additional suggestions, see "Proposed Prehearing Order" on p. VII-20.)

- PREPARED TESTIMONY can be assembled far more easily if (a) it has been outlined early in the process and (b) the entire team is fully conversant with the issues in the case.

  To prepare written testimony for filing before a hearing is one of the most difficult tasks facing a participant in a contested case. There simply are no shortcuts. The task will be simplified if the team has been assembled early and has identified the issues for which testimony needs to be prepared. To circulate draft testimony "for comment" is not a pleasing notion. But not having testimony checked (a) to ensure that the witness has prepared COMPLETE testimony, i.e., without inadvertent gaps or omissions, or (b) to "tie in" the testimony with other dependent witnesses, i.e., as in the case of hypothetical questions or different aspects of a single issue, is unthinkable. It should be the function of the case manager to ensure that prepared testimony is as complete and accurate as possible. NOTE: The point being made here is the importance of the accuracy and completeness of what the witness has to say. The witness and only the witness has the final word in what testimony he or she presents, based upon his or her own personal knowledge, experience, or expertise.

- DOCUMENTATION for the permit conditions and limitations must be identified and cited <u>before</u> the draft permit is issued.

  The regulations no longer allow lately discovered justification for permit conditions. Consequently, any document that will assist in explaining or justifying a permit condition must be identified at the time that the condition is proposed, prepared, or drafted.

[Designation of Trial Staff
and Decisional Body]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION A

402 Permit Street
Discharge, OH 95217

IN THE MATTER OF: NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM EVIDENTIARY HEARING Permit No. _____ Ajax Manufacturing Company Permittee	)	REGIONAL ADMINISTRATOR'S DESIGNATION OF AGENCY TRIAL STAFF AND DECISIONAL BODY

In accordance with the provisions of 40 C.F.R. Sections 124.77 and 124.78, I hereby designate the following persons as members of the Agency Trial Staff and Decisional Body, respectively, for the above identified proceeding:

Agency Trial Staff

[Names
Organizational Affiliations
Addresses]

Decisional Body

[Names
Organizational Affiliations
Addresses]

_____ Dated

_____ Regional Administrator

[RA's Order Granting
Evidentiary Hearing and
Notice of Contested/
Uncontested Conditions]

UNITFD STATES ENVIRONMENTAL PROTECTION AGENCY

REGION A

402 Permit Street
Discharge, OH 95217

Re: Permit No. _____
Regional Administrator's Order [124.75]
Granting Evidentiary Hearing;and
Notice of Contested and Uncontested [124.75(b)]
Permit Terms and Conditions [124.61(e)]

Dear

This will acknowledge your Request for an Evidentiary Hearing dated _____, on the above identified permit.
date

This Order constitutes my decision to _____ _____ your Request in accordance with EPA Rules at
grant/ grant in part/ deny in part
40 C.F.R. 124.75 and will serve as the specification and notice of terms and conditions which are contested (and therefore stayed) and uncontested (and therefore effective) which is required by 40 C.F.R. 124.61(e).

Referring to your Request for Hearing, I have determined to grant your request as to the following issues:

[State issues in language used by requester] [124.75(a)]

I have determined to deny your request as to the following issues for the reasons stated:

[State issues in language used by requester — briefly stating reasons] [124.75(d)]

The following terms and conditions of the above identified permit are contested and the force and effect of these terms and conditions is stayed pending final Agency action in accordance with 40 C.F.R. 124.61(e)(1):

[Specify terms and conditions — referring to the final permit]

The following terms and conditions of the permit are uncontested and therefore are enforceable obligations of the discharger. (40 C.F.R. 124.61(e))

[Specify terms and conditions — referring to the final permit]

Public Notice of this Order granting an Evidentiary Hearing and designation of Agency Trial Staff and members of the decisional body will be issued in the near future. [124.77]

_____
Dated

_____
Regional Administrator

[Referral to Chief ALJ]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION A

402 Permit Street
Discharge, OH 95217

Honorable_____
Chief Administrative Law Judge
U.S. Environmental Protection Agency
Washington, D.C. 20460

Re: Evidentiary Hearing
NPDES Permit No. _____
Ajax Manufacturing Company

Dear Judge_____:

In accordance with the requirements of 40 C.F.R. Section 124.81, I am referring the above identified proceeding to you with the request that you assign an Administrative Law Judge to serve as Presiding Officer.

A copy of the notice of grant of an Evidentiary Hearing is enclosed. The notice was _____ on _____, 19 .

_____ _____

Dated Regional Administrator

[Public Notice of
Evidentiary Hearing]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION A

402 Permit Street
Discharge, OH 95217

PUBLIC NOTICE OF EVIDENTIARY HEARING [124.41(h)] [124.77]

Permit No.
Name of Permittee
Address of Permittee

Date of Notice _____

This is to give notice that on _____ the
date
Regional Administrator _____ a request
granted/granted in part
for an Evidentiary Hearing under EPA rules for the above identified National Pollutant Discharge Elimination System (NPDES) Permit. The request for hearing, dated _____,
date
was filed by _____, _____.
name of party requesting address of party requesting

Further proceedings involving this Permit will be governed by EPA's Rules for Decisionmaking which are found at 40 C.F.R. Part 124 (published in the Federal Register at 44 F.R. 32854 on June 7, 1979). Copies of these rules are available for inspection and copying at the Regional Office.

EPA's contact person for information regarding this permit [124.41 (c)(3)] and from whom copies of the permit, the statement of basis or fact sheet and the Regional Administrator's order granting the hearing may be obtained is:

Name
Address
Telephone

The administrative record containing all documents relating to the permit is located at _____ [124.41 (c)(4)]
room number and address

and is available for public inspection between _____ a.m. and _____ p.m., Monday through Friday, except holidays.

[Section 316(a) information if applicable] [124.41(c)(5)]

Public notice of the draft permit was dated _____. [124.41(g)(1)]
date

A public hearing on this permit was/was not, held on _____ .
date

The purpose of this Evidentiary Hearing is to determine whether the permit, as it was issued by EPA, should be changed in the manner suggested by the Request for Hearing. The case will be assigned to an EPA Administrative Law Judge for hearing and preparation of an initial decision. The following is a summary of rules with regard to the Evidentiary Hearing process: [124.41(g)(3)]

1. Any person seeking to be a party must file a request to be admitted as a party to the hearing within 15 days of the date of publication of this notice, that is, no later than _____. [124.41(h)(4)(i)] [124.79]
   date

2. Any person seeking to be party may propose additional material issues of law or fact not already raised by the original requester or another party. [124.41(h)(4)(ii)]
   HOWEVER, under EPA Rules no evidence shall be submitted and no issue shall be raised by any party to a hearing that was not submitted to or raised in the administrative record unless good cause is shown for the failure to submit them. [124.76]

3. The terms and conditions of the permit at issue may be amended after the evidentiary hearing and any person interested in the permit must request to be a party in order to preserve any right to appeal or otherwise contest the final administrative determination. [124.41(h)(4)(iii)]

4. Parties may be represented by counsel or other authorized agent or representative. [124.73(b)]

5. The Agency trial staff for this proceeding is composed of the following persons: [124.41(h)(5)] [124.77] [124.78]

Names

6. The Decisional Body for this proceeding is composed of the following persons: [124.41(h)(5)] [124.77] [124.78]

Names

7. The Regional Hearing Clerk is: [124.41(h)(6)]

Name
Address
Telephone

8. A request to become a party to these proceedings must meet the following requirements: [124.79]

a) Such requests shall state each legal or factual question alleged to be at issue, and their relevance to the permit decision, together with a designation of the specific factual areas to be adjudicated and the hearing time estimated to be necessary for that adjudication. [124.74]
Information supporting the request or other written document relied upon to support the request shall be submitted unless it is already in the administrative record.

b) The name, mailing address and telephone number of the person making such request;

c) A clear and concise factual statement of the nature and scope of the interest of the requester;

d) The names and addresses of all persons whom the requester represents; and

e) A statement by the requester that upon motion of any party or sua sponte by the Presiding Officer and without cost or expense to any other party, the requester shall make available to appear and testify, the following:

i) The requester;
ii) All persons represented by the requester, and
iii) All officers, directors, employees consultants and agents of the requester and the persons represented by the requester.

f) Specific references to the contested permit terms and conditions, as well as suggested revised or alternative permit terms and conditions (not excluding permit denial) which in the judgement of the requester, would be required to implement the purposes and policies of the Act.

g) In the case of challenges to the application of control or treatment technologies identified in the statement of basis or fact sheet, identification of the basis for the objection, and the alternative technologies or combination of technologies which the requester believes are necessary to meet the requirements of the Act.

h) Specific identification of each of the discharger's obligations which should be stayed if the request is granted. If the request contests more than one permit term or condition then each obligation which is proposed to be stayed must be referenced to the particular contested term warranting the stay.

The following is a general description of the receiving water and the location of each existing or proposed discharge point and of the permittee's activities: [124.41 (c)(2)]

The following is a brief description of the permit terms and conditions which have been contested and for which the Evidentiary Hearing has been granted: [124.41 (h)(3)]

EX PARTE COMMUNICATIONS: [124.78]

No interested person outside the EPA or member of the EPA trial staff shall make or knowingly cause to be made to any members of the decisional body an *ex parte* communication relevant to the merits of the proceedings. Nor shall the members of the decisional body initiate such communications themselves.

"*Ex parte* communication" means any communication, whether written or oral, relating to the merits of the proceeding between the decisional body and an interested person outside the EPA or the EPA trial staff where such communication was not originally filed or stated in the administrative record or in the hearing. *Ex parte* communications do not include:

i) Communications between EPA employees other than between the EPA trial staff and the members of the decisional body
ii) Discussions between the decisional body and either
   a) Interested persons outside the EPA; or
   b) The EPA trial staff;

If all parties have received prior written notice of such proposed communications and have been given the opportunity to be present and participate therein.

iii) Communications between EPA employees including trial staff but not the decisional body and any persons outside the EPA including interested persons outside the EPA.

"Interested person outside the EPA" includes the permit applicant, any person who filed written comments in the proceedings, any person who requested the hearing, any

person who requested to participate or intervene in the hearing, any participant or party in the hearing and the attorney of record for such persons.

FILING AND SERVICE:

An original and one (1) copy of all written submissions relating to an evidentiary hearing filed after the notice of hearing is published shall be filed with the Regional Hearing Clerk. The party filing any submission shall serve a copy of such submission upon the Presiding Officer and each party of record. Service shall be by mail or personal delivery.

Every submission shall be accompanied by an acknowledgement of service by the person served or proof of service in the form of a statement of the date, place, time, and manner of service and the names of the persons served, certified by the person who made service. (A signed statement that an attached list of persons were mailed the submission is sufficient to meet the requirements of this paragraph. Certified mail is not required).

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION A

402 Permit Street
Discharge, OH 95217

IN THE MATTER OF:	)	
	)	
	)	
NATIONAL POLLUTANT DISCHARGE	)	
ELIMINATION SYSTEM EVIDENTIARY	)	
HEARING	)	PROPOSED
	)	PREHEARING ORDER
	)	

Permit No. _____

Ajax Manufacturing Company
Permittee

[This form is intended to be used by the Agency Trial Staff as a checklist of those procedural matters which, if followed, will greatly expedite the hearing. It applies equally in both Evidentiary and Nonadversary Hearing cases (the latter where a Trial Staff is designated). This checklist should be consulted as soon as a Request for Hearing has been granted and should be reviewed regularly during preparations for the Hearing.

It is appropriate to draft a Proposed Prehearing Order for consideration by the Presiding Officer at the Prehearing Conference. Where this is done, the Proposed Order should be accompanied by a "Motion to Adopt Proposed Prehearing Order" and should be filed and served before the Prehearing Conference. Such a Motion should state that the Proposed Order represents the position of the Agency Trial Staff on the matters contained in the Order which position will be asserted at the Prehearing Conference.

Obviously, Prehearing Conferences can be streamlined and expedited if the Presiding Officer and other parties to the Hearing are informed of the Trial Staff's position prior to the Conference.

A commendable alternative to this recommended practice is the submission of a "Proposed Agenda for Prehearing Conference" prior to the Conference. However, the Proposed Order approach has the additional benefit of enabling the Trial Staff to come to grips with its position on the appropriate issues at an early stage and to articulate the position in a form which may be used conveniently by the Presiding Officer in preparing the Order required by 124.83(e).]

(e) The Presiding Officer shall prepare a written prehearing order reciting the actions taken at the prehearing conference and setting forth the schedule for the hearing, unless a transcript has been taken and accurately reflects these matters The order shall include a written statement of the areas of factual agreement and disagreement and of the methods and procedures to be used in developing the evidence and the respective duties of the parties in connection therewith This order shall control the subsequent course of the hearing unless modified by the Presiding Officer for good cause shown.

[124.83(e)]

§ 124.83 Prehearing conferences.

(a) The Presiding Officer, *sua sponte*, or at the request of any party, may direct the parties or their attorneys or duly authorized representatives to appear at a specified time and place for one or more conferences before or during a hearing, or to submit written proposals or correspond for the purpose of considering any of the matters set forth in paragraph (c) of this section.

[NOTE: The Proposed Order format is a convenient method for submitting the "written proposals" called for by 124.83(a).]

(b) The Presiding Officer shall allow a reasonable period before the hearing begins for the orderly completion of all prehearing procedures and for the submission and disposition of all prehearing motions. Where the circumstances warrant, the Presiding Officer shall call a prehearing conference to inquire into the use of available procedures contemplated by the parties and the time required for their completion, to establish a schedule for their completion, and to set a tentative date for beginning the hearing.

(c) In conferences held, or in suggestions submitted, under paragraph (a), the following matters may be considered:

(1) The necessity or desirability of simplification, clarification, amplification or limitation of the issues.

(2) The admission of facts and of the genuineness of documents, and the possibility of stipulations with respect to facts.

(3) The consideration of and ruling upon objections to the introduction into evidence at the hearing of any written testimony, documents, papers, exhibits, or other submissions proposed by a party, except that the administrative record required by § 124 64 shall be received in evidence subject to the provisions of § 124 85(d)(2). Notwithstanding the foregoing, at any time before the end of the hearing any party may make, and the Presiding Officer shall consider and rule upon, motions to strike testimony or other evidence other than the administrative record on the grounds of relevance, competency or materiality.

(4) The identification of matters of which official notice may be taken.

(5) The establishment of a schedule which includes definite or tentative times for as many of the following as are deemed necessary and proper by the Presiding Officer:

(i) The submission of narrative statements of position on each factual issue in controversy;

(ii) The submission of written testimony and documentary evidence (e g., affidavits, data, studies, reports and any other type of written material) in support of such statements; or

(iii) Written requests to any party for the production of additional documentation, data, or other information relevant and material to the facts in issue.

(6) The grouping of participants with substantially like interests for purposes of eliminating duplicative or repetitive development of the evidence and making and arguing motions and objections.

(7) Such other matters as may expedite the hearing or aid in the disposition of the matter.

[NOTE: Each of the above mentioned 7 items may be addressed appropriately in a Proposed Prehearing Order. In any event, Counsel ought to be prepared to address each of these issues (i.e., state a position) at the Prehearing Conference.]

(d) At a prehearing conference or within some reasonable time set by the Presiding Officer, each party shall make available to all other parties the names of experts and other witnesses it expects to call. At its discretion or at the request of the Presiding Officer, a party may include a brief narrative summary of any witness's anticipated testimony. Copies of any written testimony, documents, papers, exhibits, or materials which a party expects to introduce into evidence, and the administrative record required by § 124.64, shall be marked for identification as ordered by the Presiding Officer. Witnesses, proposed written testimony and other evidence may be added or amended only upon a finding by the Presiding Officer that good cause existed for failure to introduce the additional or amended material within the time specified by the Presiding Officer. Agency employees and consultants shall be made available as witnesses by the Agency to the same extent that production of such witnesses is required of other parties under § 124.74(c)(4). (See also § 124.85(b)(16))

[NOTE: Preparation and exchange of witness and exhibit lists (i.e., lists of exhibits marked for identification) before the Hearing begins invariably saves hours (and sometimes days) of valuable hearing time.]

[Order on Request
For Intervention]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION A

402 Permit Street
Discharge, OH 95217

IN THE MATTER OF:	)	
	)	
NATIONAL POLLUTANT DISCHARGE	)	
ELIMINATION SYSTEM EVIDENTIARY	)	
HEARING	)	ORDER ON REQUEST
	)	FOR INTERVENTION
	)	
Permit No. _____	)	
Ajax Manufacturing Company	)	
Permittee	)	
	)	

[Text should recite facts about the request - an analysis as to whether the request meets the requirements of 124.79 (b) (including the requirements of 124.74 and 124.76) and an order granting/denying the request.]

_____
Dated

_____
Administrative Law Judge

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION A

402 Permit Street
Discharge, OH 95217

IN THE MATTER OF:	)	
	)	
	)	
NATIONAL POLLUTANT DISCHARGE	)	
ELIMINATION SYSTEM EVIDENTIARY	)	
HEARING	)	MOTION FOR
	)	
	)	
Permit No. ___ _____		
Ajax Manufacturing Company		_____
Permittee		

§ 124.86 Motions.

(a) Any party may make a motion, (including a motion to dismiss a particular claim or a contested issue), to the Presiding Officer about any matter relating to the proceeding. All motions shall be filed and served as provided in § 124.80 except those made on the record during an oral hearing before the Presiding Officer.

(b) Within 10 days after service of any written motion, any party to the proceeding may file a response to the motion. The time for response may be shortened to three days or extended for an additional ten days by the Presiding Officer for good cause shown.

(c) Notwithstanding § 122.15, any party may file with the Presiding Officer a motion seeking to apply to the permit any regulatory or statutory requirement issued or made available after the issuance of the permit under § 124.61. The Presiding Officer shall grant any motion to apply a new statutory requirement unless he or she finds it contrary to legislative intent. The Presiding Officer may grant a motion to apply a new regulatory requirement where appropriate to carry out the purposes of the Act, and where no party would be unduly prejudiced thereby

[NOTE: Properly drawn Motions, when based upon carefully considered points and authorities, may serve key functions.

Motions provide a convenient vehicle for focusing the attention of the Presiding Officer and the other parties on one or many issues which arise before the Hearing begins and which, if decided upon beforehand, will save hearing time. Motions during the Hearing which involve important issues often occupy time for parties to prepare responses and to be heard orally. For important controversial issues which can be identified early (e.g., grouping of parties, consolidation and severance, summary determination, production of documents) identification of issues through Motions will save time at the Hearing for the presentation of facts.]

[NOTE: Memoranda of Points and Authorities in support of a Motion may be incorporated into the body of the Motion or into a separate Memorandum. If included in the body of the Motion, Points and Authorities should be so labeled. If included in a separate Memorandum, the Memorandum should be filed and served with the Motion. The Motion itself should then refer to the "attached Memorandum."]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION A

402 Permit Street
Discharge, OH 95217

IN THE MATTER OF:	)	
	)	
NATIONAL POLLUTANT DISCHARGE	)	
ELIMINATION SYSTEM EVIDENTIARY	)	
HEARING	)	
	)	
	)	
Permit No. _____	)	STIPULATION
Ajax Manufacturing Company	)	
Permittee	)	
	)	

It is hereby stipulated by and between the Permittee and the Agency Trial Staff in the above identified proceeding that:

1. Permittee hereby withdraws its request for evidentiary hearing.

2. The permit involved in this proceeding shall be modified as follows:

a.
b.
c.

[Specify changes by using carefully drawn amending language — (e.g., Delete... Substitute ...) referring to specific conditions of the permit.]

3. This Stipulation shall not bind the Environmental Protection Agency or have any force or effect or be filed in this proceeding until approved and signed by the Deputy Assistant Administrator for Water Enforcement.

Dated by the last signatory hereto: _____
Date

Ajax Manufacturing Company

By _____

Title _____

U.S. Environmental Protection Agency

By _____
Counsel for Agency Trial Staff

Approved: _____
Deputy Assistant Administrator
for Water Enforcement

NPDES EVIDENTIARY HEARINGS

Procedures Followed by Regional Hearing Clerk, Region III

I. Open Case and Establish Files

Regional Hearing Clerk (RHC) receives the original request for evidentiary hearing (and one copy).

1. If person requesting hearing is other than permittee and it is not indicated in request whether copy was served on the permittee, contact requester to ascertain whether the permittee has been copied.

2. Assign case number by State, using next available number on case assignment sheet (Exhibit 1). This sheet is filed at the beginning of the case log book.

3. Send acknowledgment of receipt to requester (Exhibit 2).

4. Complete Items 1 through 15 of the case data form (Exhibit 3).

5. Type two file labels:

   a. for attorney's file
   b. for RHC file (This file will be turned into the official docket file if the issues are not settled informally by stipulation.)

6. Put the following in the attorney's file and give to appropriate Section Chief for assignment:

   a. copy of request
   b. copy of acknowledgment
   c. case data form (attached to front of folder)

II. Attorney is Responsible for the Following:

1. Designation of Trial Staff and Decisional Body letter (Exhibit 4). Original goes to RHC file.

2. Order granting hearing. Xeroxed copies of original go to RHC file and attorney case file.

   a. Evidentiary Hearing - Exhibit 5a.
   b. Panel Hearing - Exhibit 5b.

3. Denial of request for evidentiary hearing (Exhibits 6a-6d).

   (Exhibits 6a-6d deal with denial of a hearing request because the contested term or condition is based upon state certification. Other denial letters may be available from the RHC or must be individually prepared.)

   a. Pennsylvania requests: Send copy of denial to Maxine Woelfling, Bureau of Regulatory Counsel, Pennsylvania DER, Room 505 Executive House Building, Harrisburg 17120.

III. Prepare Public Notice

RHC receives from the attorney the draft public notice, case data form completed through 16b. and xeroxed copy of state certification.

1. Type original public notice and one carbon copy.

   a. Evidentiary Hearing - Exhibit 7a.
   b. Panel Hearing - Exhibit 7b.

2. Complete transmittal memorandum (Exhibit 8), retain one copy, and send memo with original public notice to the appropriate Section Chief in Permits Enforcement Branch.

   Permits Enforcement Branch handles the following:

   a. Notice is sent to printer postdated two weeks to allow for printing and mailing.

   b. Printer is supplied with addressed labels from an updated mailing list and handles mailings. Mailing list is comprised of government offices, citizens, etc. who have requested the receipt of public notices.

3. Put copies of public notice and transmittal memo in RHC file.

4. Enter information from public notice in "Public Notices" log (Exhibit 9).

Distribute Public Notice

(Extra copies of public notice have been returned from printer.)

1. Distribute the following copies of the public notice internally:

   a. one to attorney per permit involved.
   b. one to Mike Chern (3IR10).
   c. one to appropriate Section Chief in PEB.

2. Mail notice to the following:

   a. Two copies to the principal office of the Municipality or political subdivision affected by the facility or discharge (Exhibit 10).

   b. Two copies to the United States Post Office serving the premises (Exhibit 11).

   c. One copy to permittee and requester, if they differ. Include:

      (1) state certification letter (if appropriate)
      (2) Corps of Engineers certification letter (if appropriate)

   d. One copy of notice to each person who filed a written comment during the comment period (or made a statement at the public hearing, if any).

   e. Request for Assignment of Administrative Law Judge: One copy to Chief Administrative Law Judge together with letter from Division Director requesting assignment of Administrative Law Judge (ALJ) (Exhibit 12). Copy to attorney.

      (1) When notified that ALJ has been assigned, send transmittal letter (Exhibit 13) and include copies of the following:

         (a) permit
         (b) request for hearing
         (c) granting of request for hearing
         (d) designation of agency trial staff and decisional body
         (e) requests to be admitted as parties, if any
         (f) granting of requests to be admitted as parties

Admit Additional Parties

1. RHC gives original request to join to attorney and retains copy for RHC file.

2. Attorney indicates whether request is granted or denied.

   Granted: Type letter (Exhibit 14) and give copy to attorney.

   Denied: Attorney will write letter for Division Director with copy to RHC.

   Granted/Denied in Part: Attorney will write letter for Division Director with copy to RHC.

VI. Open Official Docket File

1. All yellow (official) copies and other official documents as shown on Exhibit 15 currently contained in the attorney's file must be xeroxed by the secretary/attorney if s/he wishes to retain a copy of these documents. These documents must be given to the RHC at this time for inclusion in the official docket file.

VII. Amend Permit Based on Stipulation

1. The evidentiary hearing has been settled informally. The attorney has prepared the stipulation of settlement and sends to company for signature. Attorney will draft individual letter.

2. If State is a party, attorney sends original stipulation to State (Exhibit 16), retains one copy and records in "Stipulation of Settlement" tracking log.

3. Original stipulation is then sent to Enforcement Division Director; retain one copy; record in "Stipulation" log. (Exhibit 17)

4. Original of executed stipulation is then sent by RHC to ALJ (Exhibit 18) ; retain one copy; record in "Stipulation" log.

5. Copy of entered stipulation is sent to all parties (Exhibit 19) ; original and one copy to RHC; record in "Stipulation" log.

   a. Pennsylvania cases: Send copy to Maxine Woelfling, Bureau of Regulatory Counsel, Pennsylvania DER, Room 505 Executive House Building, Harrisburg 17120.

Copy of completed stipulation is sent to PEB (Exhibit 20) Record in "Stipulation" log.

a. PEB will mail the following to the company by certified mail:

Step 1: a. draft permit amendment
b. public notice

Step 2: a. letter (Exhibit 21)
b. stipulation of settlement
c. permit amendment

RHC retains original Stipulation of Settlement.

VIII. Consolidation of Hearings

1. When more than one request is received for an evidentiary hearing covering two or more permits, and the attorney wishes to consolidate the requests, Motion for Consolidation should be made to the Regional Administrator or the Presiding Officer with Order for Consolidation prepared for signature. (Exhibit 22)

2. RHC sends signed Order of Consolidation to parties (Exhibit 23).

Note: Consolidation by Administrator or RA is not recommended after the appointment of a Presiding Officer.

IX. Withdrawal of Request for Evidentiary Hearing

1. If form letter can be used, attorney will give RHC withdrawal request. RHC will prepare letter granting request for Division Director's signature (Exhibit 24).

   a. Pennsylvania cases: Send copy to Maxine Woelfling, Bureau of Regulatory Counsel, Pennsylvania DER, Room 505 Executive House Building, Harrisburg 17120.

Transcript of Hearings

1. RHC will arrange for stenographic services and will request original and two copies of transcript:

   a. Original to be retained by RHC.
   b. Copy to ALJ.
   c. Copy to attorney.

2. RHC will notify all parties that certified transcript of proceedings have been filed (Exhibit 25). Any party who desires a copy may obtain one from the RHC upon payment of costs.

3. If ALJ requests stenographic services for a prehearing conference, RHC will follow Steps 1 and 2 above.

Every submission shall be accompanied by an acknowledgment of service by the person served or proof of service in the form of a statement of the date, place, time, and manner of service and the names of the persons served, certified by the person who made service. A signed statement that an attached list of persons were mailed the submission is sufficient to meet these requirements. Certified mail is not required.

EXHIBIT 1

NPDES EVIDENTIARY HEARINGS

CASE ASSIGNMENT SHEET

Case Number	Permit No.	Name	Attorney Assigned

EXHIBIT 2

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
6TH AND WALNUT STREETS
PHILADELPHIA PENNSYLVANIA 19106

In reply refer to 3EN--

Re: Company name (if addressee is not permittee)
Evidentiary Hearing No.
NPDES Permit No.

Dear :

We have received and hereby acknowledge your request for an evidentiary hearing pursuant to 40 C.F.R. Part 124, Subpart H. A decision on the timeliness and adequacy of the request is pending, and you will be informed in writing when action has been taken.

Your request for evidentiary hearing has stayed the entire permit pending the Agency's decision on your request for hearing (40 C.F.R. § 124.15(b)(2); 45 Fed. Reg. 33491 - May 19, 1980). That decision will be made by * and will specify the permit terms which are stayed pending resolution of the evidentiary hearing and the uncontested permit terms which will become effective 30 days from the date of the decision (40 C.F.R. § 124.60(c); 45 Fed. Reg. 33495 - May 19, 1980).

If you have any questions, please feel free to call the undersigned at (215) 597-----.

Sincerely yours,

(Name)
Regional Hearing Clerk

cc: Permittee if permittee is not requester

sert date which is 60 days from permit issuance.

EXHIBIT 3

NPDES EVIDENTIARY HEARING - CASE DATA FORM

1. Case number:_____
2. Names of attorney/engineer assigned:_____
3. Name of company (permittee):_____
4. Location of company (permittee) including county:_____
_____
5. Name of requester if different from name of company (permittee):
_____

6. NPDES permit number:_____
   a. /___/ Renewal /___/ Modification (Check if applicable)
7. /___/ Major /___/ Minor
8. /___/ Municipal /___/ Industrial
9. SIC code:_____
10. a. Date of original permit application:_____
    b. Date(s) of modification request(s):_____
    c. Date of application for renewal permit:_____
11. Date of public notice of draft permit, if any:_____
12. Close of comment period, if any:_____
13. Date of permit issuance:_____
14. Date permit expires:_____

15. Date of evidentiary hearing request:_____
16. Date request /___/ Granted in Full /___/ Granted/Denied in Part
    /___/ Denied _____
    a. State certification issues:_____
    b. Legal issues:_____
17. Date of public notice of evidentiary hearing:_____
18. Agency trial staff:_____
19. Agency decisional body:_____
20. Hearing issues? a. Compliance schedule: _____
    b. Effluent limitations: _____
    c. Monitoring, reporting:_____
    d. Other: _____
21. Name(s) of additional parties requesting to join and date of request:
    a._____ _____
    b._____ _____
    c._____ _____
22. Date(s) of informal meeting(s) with company:_____

23. Settlement achieved: /___/ Yes /___/ No

IF 23 IS YES

24. Date stipulation sent to company:_____
25. Date stipulation returned by company:_____
    (NEXT STEPS ARE CONTROLLED IN STIPULATION LOG)
26. Date stipulation entered:_____
27. Date of revised permit:_____

IF 23 IS NO

28. Date of referral to ALJ:_____
29. Name of ALJ:_____

(over)

30. Date of Prehearing conference: _____
31. Date briefs filed: _____
32. Date of hearing - Estimated: _____
    Actual: _____
33. Date proposed findings and conclusion filed: _____
34. Date decision rendered: _____
35. Appeals taken? /___/ Yes /___/ No
36. If yes, date briefs filed: _____
37. Date of appeal decision: _____

38. DATE CASE CLOSED: _____

COMMENTS:

BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY EXHIBIT 4

REGION III

Curtis Building
Sixth and Walnut Streets
Philadelphia, Pennsylvania 19106

N THE MATTER OF	:	
	:	
ATIONAL POLLUTANT DISCHARGE	:	
LIMINATION SYSTEM EVIDENTIARY	:	
EARING	:	ENFORCEMENT DIVISION
	:	DIRECTOR'S DESIGNATION
ERMIT NO. WV-0000841	:	OF AGENCY TRIAL STAFF
ORG-WARNER CHEMICALS	:	AND DECISIONAL BODY
IVISION,	:	
ORG-WARNER CORPORATION	:	
PERMITTEE	:	

n accordance with the provisions of 40 C.F.R. Sections 24.77 and 124.78, I hereby designate the following ersons as members of the Agency Trial Staff and ec-ional Body, respectively, in the above identified roceeding:

Agency Trial Staff: Robert L. Collings
Ray V. Mihailovich
Elo-Kai Ojamaa

The U.S. Environmental Protection Agency,
Region III,
Enforcement Division,
Sixth and Walnut Streets,
Philadelphia, Pennsylvania, 19106.

Decisional Body: Presiding Officer to be appointed by the Office of Administrative Law Judge,
U.S. Environmental Protection Agency,
Washington, D.C. 20460

ted: JAN 11 1980

R. Sarah Compton
Director, Enforcement Division

EXHIBIT 5a

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
6TH AND WALNUT STREETS
PHILADELPHIA, PENNSYLVANIA 19106

In Reply Refer To: 3EN32

JAN 11 1980

David M. Flannery, Esquire
Love, Wise, Robinson & Woodroe
P.O. Box 951
Charleston, West Virginia 25323

Re: Borg-Warner Chemicals Division
Borg-Warner Corporation
NPDES Permit No. WV-0000841
Case No. WV-154

Dear Mr. Flannery:

I have reviewed your request for an evidentiary hearing in connection with the above NPDES permit. I find that the request meets the requirements imposed by 40 C.F.R. § 124.74, and accordingly, pursuant to 40 C.F.R. § 124.75, I have determined to grant the evidentiary hearing as to all the issues presented in your request of October 8, 1979 (see enclosure).

This Order to grant your request will serve as the specification and notice of terms and conditions which are contested (and therefore stayed) and uncontested (and therefore effective) which is required by 40 C.F.R. § 124.61(e).

The following terms and conditions of the above identified permit are contested and the force and effect of these terms and conditions is stayed pending final Agency action:

(1) Under Part I(A): "Effluent limitations and Monitoring Requirements", the effluent limitations for Ammonia: 318 kg/day (700 lbs/day) daily average, 636 kg/day (1400 lbs/day) daily maximum.

(2) Under Part III: "Other Requirements"; Bioassay Test Requirement Procedural Steps (paragraphs 2, 3 and 4).

SP the issues are few, send without public notice as soon as possible. RHC will send public notice.

All other terms and conditions of the permit are uncontested and therefore are enforceable obligations of the discharger, specifically including the effluent discharge limitations and monitoring requirements for BOD_5, TSS, Surfactants, Chromium, and temperature and the monitoring requirement for Ammonia, as well as the pH parameter, the prohibition on floating solids and visible foam and all standard permit terms and conditions.

Upon determination of the first legal issue presented, should the Agency prevail, Borg-Warner will be notified that, pursuant to 40 C.F.R. § 124.61(e)(6)(iv), it will be required to comply with the alternate ammonia effluent limitation of 1407 lbs/day Daily average and 2000 lbs/day Daily maximum which you proposed pending final resolution of the ammonia effluent limitation issue.

A copy of the Public Notice of Evidentiary Hearing is enclosed. We anticipate that after all persons interested in the matter have filed requests to become parties, the Office of Administrative Law Judge will set a time and place for the hearing and for prehearing proceedings.

Please address any inquiries you may have to:

Anne M. Marvel, Regional Hearing Clerk
U.S. Environmental Protection Agency, Region III
6th and Walnut Streets
Philadelphia, Pennsylvania 19106
Telephone: (215)597-8913

Sincerely yours,

R. Sarah Compton
Director, Enforcement Division

Enclosure:

I HEREBY CERTIFY THAT THE WITHIN IS A TRUE AND CORRECT COPY OF THE ORIGINAL Order FILED IN THE MATTER

ATTORNEY FOR

EXHIBIT 5b

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
6TH AND WALNUT STREETS
PHILADELPHIA, PENNSYLVANIA 19106

In reply refer to 3EN--

Re: NPDES Permit No.
Regional Administrator's Order
Granting Nonadversary Hearing

Dear :

This will acknowledge your Request for a Panel Hearing dated _____, on the above identified permit.

This Order constitutes my decision to grant/grant in part/ deny in part your Request in accordance with EPA Rules at 40 C.F.R. 124.114.

Referring to your Request for Hearing, I have determined to grant your request as to the following issues:

(State issues in language used by requester)

I have determined to deny your request as to the following issues for the reasons stated:

(State issues in language used by requester - briefly stating reasons)

Public Notice of this Order Granting a Panel Hearing and of designation of Agency Trial Staff and members of the decisional body and a statement of the person who will issue the recommended decision will be issued in the near future.

Sincerely yours,

Director
Enforcement Division

EXHIBIT 6a

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
6TH AND WALNUT STREETS
PHILADELPHIA, PENNSYLVANIA 19106

In reply refer to 3EN--

Re: Company name (if addressee is not permittee)
Evidentiary Hearing No.
NPDES Permit No.

Dear :

Enclosed please find a public notice of evidentiary hearing concerning the above permit.

You will note that not all of the issues raised in your request are listed for consideration in the hearing process. The issue not included was omitted because the permit requirement on which it is based is derived from state certification, given pursuant to Section 401 of the Federal Water Pollution Control Act. Given that circumstance, neither the presiding officer nor the Regional Administrator has jurisdiction under the Act or Regulations to consider changing that requirement. Your request for a hearing on that issue is therefore denied.

The only change this Agency can make in that certification-based requirement to which you have objected, is a change which a revised state certification letter would permit. Accordingly, you may wish to raise this matter with appropriate state officials.

If the state determines that a revised certification is appropriate, this Agency will then consider any request for revision of the subject permit upon receipt of such revised certification.

Sincerely yours,

(Name)
Director
Enforcement Division

Enclosures:
Public Notice
State Certification Letter

EXHIBIT 6b

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
6TH AND WALNUT STREETS
PHILADELPHIA, PENNSYLVANIA 19106

In reply refer to 3EN--

Re: Company name (if addressee is not permittee)
Evidentiary Hearing No.
NPDES Permit No.

Dear :

Enclosed please find a public notice of evidentiary hearing concerning the above permit.

You will note that not all of the issues raised in your request are listed for consideration in the hearing process. Those issues not included were omitted because the permit requirements on which they are based are derived from the state certification, given pursuant to Section 401 of the Federal Water Pollution Control Act. Given that circumstance, neither the presiding officer nor the Regional Administrator has jurisdiction under the Act or Regulations to consider changing those requirements. Your request for an evidentiary hearing on those issues is therefore denied.

The only changes this Agency can make in those certification-based requirements to which you have objected, are changes which a revised state certification letter would permit. Accordingly, you may wish to raise these matters with appropriate state officials.

If the state determines that a revised certification is appropriate, this Agency will then consider any request for revision of the subject permit upon receipt of such revised certification.

Sincerely yours,

(Name)
Director
Enforcement Division

Enclosures:
Public Notice
State Certification Letter

EXHIBIT 6c

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
6TH AND WALNUT STREETS
PHILADELPHIA, PENNSYLVANIA 19106

In reply refer to 3EN--

Re: Company name (if addressee is not permittee)
NPDES Permit No.

Dear :

We have completed our review of your request for an evidentiary hearing in the above matter. The issue you raise in your request for a hearing is based on state certification pursuant to Section 401 of the Federal Water Pollution Control Act. Given that circumstance, neither the presiding officer nor the Regional Administrator has jurisdiction under the Act or Regulations to consider changing that requirement. Your request for an evidentiary hearing is therefore denied.

The only change this Agency can make in that certification-based requirement to which you have objected, is a change which a revised state certification letter would permit. Accordingly, you may wish to raise this matter with appropriate state officials.

If the state determines that a revised certification is appropriate, this Agency will then consider any request for revision of the subject permit upon receipt of such revised certification.

Sincerely yours,

(Name)
Director
Enforcement Division

Enclosure:
State Certification Letter

EXHIBIT 6d

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
6TH AND WALNUT STREETS
PHILADELPHIA, PENNSYLVANIA 19106

In reply refer to 3EN--

Re: Company name (if addressee is not permittee)
NPDES Permit No.

Dear :

We have completed our review of your request for an evidentiary hearing in the above matter. The issues you raise in your request for a hearing are based on state certification pursuant to Section 401 of the Federal Water Pollution Control Act. Given those circumstances, neither the presiding officer nor the Regional Administrator has jurisdiction under the Act or Regulations to consider changing those requirements. Your request for an evidentiary hearing is therefore denied.

The only changes this Agency can make in those certification-based requirements to which you have objected, are changes which a revised state certification letter would permit. Accordingly, you may wish to raise these matters with appropriate state officials.

If the state determines that a revised certification is appropriate, this Agency will then consider any request for revision of the subject permit upon receipt of such revised certification.

Sincerely yours,

(Name)
Director
Enforcement Division

Enclosure:
State Certification Letter

EXHIBIT 7a

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
PERMIT PROGRAM
(Section 402 of the Federal Water Pollution Control Act, as amended)

PUBLIC NOTICE
of
EVIDENTIARY HEARING
to
CONSIDER NPDES PERMIT TO DISCHARGE

U. S. ENVIRONMENTAL PROTECTION AGENCY
REGION III
6th & WALNUT STREETS
PHILADELPHIA, PA. 19106

The United States Environmental Protection Agency, Region III, has granted a request for an evidentiary hearing on the NPDES permit set forth below:

Name and Address of Permittee :

Name and Address of Facility Where Discharge Occurs :

NPDES Application Number :

NPDES Permit Number :

Date of Issuance of Permit :

Public Notice Number :

Date Issued :

Public Notice of Evidentiary Hearing :

Date Issued :

Receiving Waters :

Location of Discharge :

Name and Address of Person Requesting Hearing :

The purpose of this evidentiary hearing is to resolve the issues raised by the person requesting the hearing. These issues are listed at the end of this Public Notice. Briefly, the permit terms and conditions being contested are:

The evidentiary hearing is an administrative proceeding that closely resembles a court hearing. The Presiding Officer will be an Administrative Law Judge who will conduct the necessary pre-hearing proceedings, preside at the hearing, and prepare the initial decision. These proceedings will be governed by the Environmental Protection Agency Procedures for Decision Making which are found at 40 C.F.R. Part 124 (published on May 19, 1980, at 45 Fed. Reg. 33484 et seq.) Copies of these procedures are available for inspection and copying at the Regional Office. In addition, rules established in the Administrative Procedure Act, 5 U.S.C. § 551 et seq., will govern at the evidentiary hearing. The Environmental Protection Agency strongly urges interested persons to review carefully the above-mentioned Regulations and Act.

As provided in 40 C.F.R. § 124.79, any person may submit a request to become a party to this evidentiary hearing within 15 days of the issuance of this public notice to:

Anne M. Marvel, Regional Hearing Clerk
U. S. Environmental Protection Agency, Region III
6th & Walnut Streets
Philadelphia, Pa. 19106
Telephone: (215) 597-8913

All requests must meet the following requirements:

1. Such requests shall state each legal or factual question alleged to be at issue, and their relevance to the permit decision, together with a designation of the specific factual areas to be adjudicated and the hearing time estimated to be necessary for that adjudication. Information supporting the request or other written document relied upon to support the request shall be submitted unless it is already in the administrative record.

2. The name, mailing address and telephone number of the person making such request.

3. A clear and concise factual statement of the nature and scope of the interest of the requester.

4. The names and addresses of all persons whom the requester represents.

5. A statement by the requester that upon motion of any party or sua sponte by the Presiding Officer and without cost or expense to any other party, the requester shall make available to appear and testify, the following:

i) The requester;

ii) All persons represented by the requester; and

iii) All officers, directors, employees, consultants and agents of the requester and the persons represented by the requester.

6. Specific references to the contested permit terms and conditions, as well as suggested revised or alternative permit terms and conditions (not excluding permit denial) which in the judgment of the requester would be required to implement the purposes and policies of the Act.

7. In the case of challenges to the application of control or treatment technologies identified in the statement of basis or fact sheet, identification of the basis for the objection, and the alternative technologies or combination of technologies which the requester believes are necessary to meet the requirements of the Act.

8. Specific identification of each of the discharger's obligations which should be stayed if the request is granted. If the request contests more than one permit term or condition, then each obligation which is proposed to be stayed must be referenced to the particular contested term warranting the stay.

An original and one copy of all written submissions relating to an evidentiary hearing filed after the notice of hearing is published shall be filed with the Regional Hearing Clerk. The party filing any submission shall serve a copy of such submission upon the Presiding Officer and each party of record. Service shall be by mail or personal delivery.

Every submission shall be accompanied by an acknowledgment of service by the person served or proof of service in the form of a statement of the date, place, time, and manner of service and the names of the persons served, certified by the person who made service. (A signed statement that an attached list of persons were mailed the submission is sufficient to meet the requirements of this paragraph. Certified mail is not required.)

Any person seeking to be a party may propose additional material issues of law or fact not already raised by the original requester or another party. However, under EPA Rules no evidence shall be submitted and no issue shall be raised by any party to a hearing that was not submitted to or raised in the administrative record unless good cause is shown for the failure to submit them.

Parties may be represented by counsel or other authorized agent or representative.

The terms and conditions of the permit at issue may be amended after the evidentiary hearing and any person interested in the permit must request to be a party in order to preserve any right to appeal or otherwise contest the final administrative determination.

The Agency Trial Staff and the Decisional Body for this proceeding, who are subject to the ex parte communications rule, are:

Agency Trial Staff:

U. S. Environmental Protection Agency, Region III
Enforcement Division
6th & Walnut Streets
Philadelphia, Pa. 19106

Decisional Body: Presiding Officer to be appointed by the Office of the Administrative Law Judge.

Pursuant to 40 C.F.R. § 124.78, the ex parte communications rule provides that no interested person or member of the Agency Trial Staff shall communicate, either orally or in writing, about the merits of the proceedings with any member of the Decisional Body unless all parties have received prior written notice of such proposed communication and have been given the opportunity to be present and participate therein or such communication was originally filed or stated in the administrative record or in the hearing.

Interested persons may obtain further information, request a copy of the permit and inspect and copy forms and related documents by contacting:

(Name)
Environmental Protection Assistant
(Appropriate Section)
Permits Enforcement Branch
U. S. Environmental Protection Agency, Region III
6th & Walnut Streets
Philadelphia, Pa. 19106

Copies of the public notice and fact sheet are available at no charge at the United States Environmental Protection Agency, Region III office. Copies of all other information are available at a cost of 20 cents per page at the United States Environmental Protection Agency at the same location.

Please bring the foregoing to the attention of the persons who you know would be interested in these matters.

Legal Issues:

Factual Issues:

EXHIBIT 7B

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
PERMIT PROGRAM
(Section 402 of the Federal Water Pollution Control Act, as amended)

PUBLIC NOTICE
of
PANEL HEARING
to
CONSIDER NPDES PERMIT TO DISCHARGE

U. S. ENVIRONMENTAL PROTECTION AGENCY
REGION III
6th & WALNUT STREETS
PHILADELPHIA, PA. 19106

Name and Address of Permittee :

Name and Address of Facility Where Discharge Occurs :

NPDES Application Number :

NPDES Permit Number :

Date of Issuance of Permit :

Public Notice Number :

Date Issued :

Public Notice of Panel Hearing :

Date Issued :

Receiving Waters :

Location of Discharge :

Name and Address of Person Requesting Hearing :

This is to give notice that on _____(date)_____ the Regional Administrator granted a Request for a Panel Hearing under EPA's rules for Non-Adversary Procedures in connection with the above-identified National Pollutant Discharge Elimination System (NPDES) Permit. The request for hearing dated _____ was filed by _____(name and address of party requesting)_____.

(Or: The hearing in this case is being held by direction of the Regional Administrator.)

Further proceedings involving this Permit will be governed by EPA's Rules for Decisionmaking which are found at 40 C.F.R. Part 124 (published in the Federal Register at 45 Fed. Reg. 33484 (May 19, 1980). Copies of these rules are available for inspection and copying at the Regional Office.

EPA's contact person for information regarding this Permit and from whom copies of the draft Permit, the statement of basis or fact sheet, and the Regional Administrator's Order granting the hearing may be obtained is:

Name
Address
Telephone

The administrative record containing all documents relating to the Permit is located at ___room number and address___ and is available for public inspection between ____ a.m. and ____ p.m., Monday through Friday, except holidays.

(Section 316(a) information if applicable.)

The purpose of the Panel Hearing is to determine whether the draft Permit, as prepared by the EPA Staff, should be changed in the manner suggested by the Request for Hearing.

(Or: Specify the issues identified sua sponte by the R.A.)

An EPA Administrative Law Judge will serve as Presiding Officer for this proceeding and I have determined that the Presiding Officer will prepare the Recommended Decision in this case.

(Or: The RA will prepare the Recommended Decision in this case.)

(Or: The parties have waived their right to have an Administrative Law Judge serve as Presiding Officer and _____ a lawyer employed by the EPA and without prior connection with this proceeding will serve as Presiding Officer.)

The following persons will serve as members of the technical panel (Decisional Body):

Name
Address
Area of Expertise

The following EPA employees will provide staff support to the panel but may not sit as panel members:

Name
Address

I have determined to designate an Agency Trial Staff for this case. The following persons will serve as Agency Trial Staff:

Name
Address

(Or: I have determined not to designate an Agency Trial Staff for this case.)

Your attention is directed to the following Rule on Ex Parte Communications:

No interested person outside the EPA or member of the EPA Trial Staff shall make or knowingly cause to be made to any members of the decisional body an ex parte communication relevant to the merits of the proceedings. Nor shall members of the decisional body initiate such communications themselves.

"Ex parte communications" means any communication written or oral relating to the merits of the proceeding between the decisional body and an interested person outside the Agency or the Agency Trial Staff where such communication was not originally filed or stated in the administrative record or in the hearing. Ex parte communications do not include:

(i) Communications between Agency employees other than between the Agency Trial Staff and the members of the decisional body:

(ii) Discussions between the decisional body and either

(A) Interested persons outside the Agency; or

(B) The Agency Trial Staff;

If all parties have received prior written notice of such proposed communications and have been given the opportunity to be present and participate therein.

(iii) Communications between Agency employees including Trial Staff but not the decisional body and any persons outside the Agency including interested persons outside the Agency.

"Interested person outside the Agency" includes the permit applicant, any person who filed written comments in the proceeding, any person who requested the hearing, any person who requested to participate or intervene in the hearing, any participant or party in the hearing and the attorney of record for such persons.

The following is a summary of EPA's rules which will apply to this non-adversary proceeding:

(a) Each person desiring to participate shall file a motion to participate with the Regional Hearing Clerk no later than _____(date)_____.

(Suggest 15 days from notice.)

(b) Each request shall include:

(1) A brief statement of the interest of the person in the proceeding;

(2) A brief outline of the points to be addressed;

(3) An estimate of the time required;

(4) The name, mailing address and telephone number of the person making such request;

(5) A clear and concise factual statement of the nature and scope of the interest of the requester;

(6) The names and addresses of all persons whom the requester represents; and

(7) A statement by the requester that, upon motion of any party, or sua sponte by the Presiding Officer and without cost or expense to any other party, the requester shall make available to appear and testify, the following:

(i) The requester;

(ii) All persons represented by the requester; and

(iii) All officers, directors, employees, consultants and agents of the requester and the persons represented by the requester.

(8) Specific references to the contested permit terms and conditions, as well as suggested revised or alternative permit terms and conditions (not excluding permit denial) which, in the judgment of the requester, would be required to implement the purposes and policies of the Act.

(9) If the request is submitted by an organization, a non-binding list of the persons to take part in the presentation.

(c) At least two weeks before the scheduled date of the hearing, the Presiding Officer will make a hearing schedule available and will mail it to each person who has requested to participate.

(d) All comments on the Draft Permit must be presented as follows:

(1) No later than 30 days before the scheduled start of the hearing, that is, no later than ____(date)_____, each party shall file all of its comments on the draft permit, based on information in the administrative record and any other information which is or reasonably could have been available to that person. All comments shall include any affidavits, studies, data, tests, or other materials relied upon for making any factual statements in the comments.

(2)(a) Written comments filed under paragraph (1) of this section shall constitute the bulk of the evidence submitted at the hearing. Oral statements at the hearing should be brief and in the nature of argument. They should be restricted either to points that could not have been made in written comments, or to emphasizing points which are made in the comments, but which the participant believes can be more effectively argued in the hearing context.

(b) Notwithstanding the foregoing, within two weeks prior to the deadline specified in paragraph (a) of this section for the filing of comments, any party who has filed a request to participate in the hearing may move to submit all or part of its comments orally at the hearing in lieu of submitting written comments and the Presiding Officer shall, within one week, grant such motion if the Presiding Officer finds that such person will be prejudiced if required to submit such comments in written form.

(3) Parties to any hearing may submit written material in response to the comments filed by other participants under paragraph (1) of this section at the time they appear at the panel stage of the hearing.

The Regional Hearing Clerk is:

(Name)
Regional Hearing Clerk (3EN--)
U. S. Environmental Protection Agency
6th & Walnut Streets
Philadelphia, Pennsylvania 19106
(215) 597-----

Filing and Service: An original and one (1) copy of all written submissions relating to an evidentiary hearing filed after the notice of hearing is published shall be filed with the Regional Hearing Clerk. The party filing any submission shall serve a copy of such submission upon the Presiding Officer and each party of record. Service shall be by mail or personal delivery.

Every submission shall be accompanied by an acknowledgement of service by the person served or proof of service in the form of a statement of the date, place, time, and manner of service and the names of the persons served, certified by the person who made service.

A signed statement that an attached list of persons were mailed the submission is sufficient to meet the requirements of this paragraph. Certified mail is not required.

The following is a general description of the applicant's activities and operations which result in the discharge described in the Permit Application:

(Description)

The following is a general description of the receiving water and of the location of each existing or proposed discharge point:

(Description)

Date:_____ _____
Regional Administrator

EXHIBIT 8

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region III – 6th & Walnut Sts.
Philadelphia, Pa. 19106

SUBJECT: Company name
Evidentiary Hearing No.
NPDES Permit No.

DATE:

FROM: (Name)
Regional Hearing Clerk (3EN30)

TO: (Name)
Chief, (Appropriate Section)
Permits Enforcement Branch (3EN--)

Attached please find the original copy of the public notice on the subject evidentiary hearing. It is complete except for the date of issuance, which I understand the Environmental Protection Assistant will supply.

Please be sure that the names of all persons who commented on the draft permit are included in the mailing. Also, copies are required to go to Federal and State agencies with jurisdiction over fish, shellfish and wildlife resources and to other appropriate governmental authorities including any affected State. As this may include more than the "discharge" state, please have the Environmental Protection Assistant check with the assigned engineer as to how wide an area should be covered.

Please provide me with the excess copies of the printed notice as soon as they are available.

Thank you for your cooperation.

Enclosure

EXHIBIT 9

TRACKING OF PUBLIC NOTICES OF EVIDENTIARY HEARINGS

Docket No.	To Printer	Company or Municipality	Location	Date of Notice

EXHIBIT 10

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
6TH AND WALNUT STREETS
PHILADELPHIA, PENNSYLVANIA 19106

In reply refer to 3EN--

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Municipality

Re: Posting of Public Notice for 30-Day Period
(Company name)
NPDES Permit No.

Dear Sir:

We are required by our regulations published as 40 C.F.R. Part 124, Subpart E in the May 19, 1980 Federal Register, page 33498 et seq. to post the attached public notice in the principal office of the municipality affected by the above-referenced facility or discharge.

We are requesting that you post this notice in a conspicuous place for a 30-day period.

We appreciate your cooperation in this matter. If you have any questions, please call the undersigned at (215) 597-----.

Sincerely yours,

(Name)
Regional Hearing Clerk

Enclosure

EXHIBIT 11

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
6TH AND WALNUT STREETS
PHILADELPHIA, PENNSYLVANIA 19106

In reply refer to 3EN--

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Postmaster

Re: Posting of Public Notice for 30-Day Period
(Company name)
NPDES Permit No.

Dear Sir:

We are required by our regulations published as 40 C.F.R. Part 124, Subpart E in the May 19, 1980 Federal Register, page 33498 et seq. to post the attached public notice in the post office serving the premises of the facility or discharge referenced above.

We are requesting that you post this notice in a conspicuous place in your post office for a 30-day period.

We appreciate your cooperation in this matter. If you have any questions, please call the undersigned at (215) 597-----.

Sincerely yours,

(Name)
Regional Hearing Clerk

Enclosure

EXHIBIT 12

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
6TH AND WALNUT STREETS
PHILADELPHIA, PENNSYLVANIA 19106

In reply refer to 3EN--

The Honorable _____
Chief Administrative Law Judge
U. S. Environmental Protection Agency
401 M Street, S.W.
Washington, D. C. 20460

Re: Name of permittee
Evidentiary Hearing No.
NPDES Permit No.

Dear Judge :

In accordance with the requirements of 40 C.F.R. Section 124.81, I am referring the above identified proceeding to you with the request that you assign an Administrative Law Judge to serve as Presiding Officer.

A copy of the notice of grant of an Evidentiary Hearing is enclosed.

Sincerely yours,

(Name)
Director
Enforcement Division

Enclosure

EXHIBIT 13

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
6TH AND WALNUT STREETS
PHILADELPHIA, PENNSYLVANIA 19106

In reply refer to 3EN30

The Honorable
Administrative Law Judge (A-110)
U. S. Environmental Protection Agency
401 M Street, S.W.
Washington, D. C. 20460

Re: Company name
Evidentiary Hearing No.
NPDES Permit No.

Dear Judge :

Subsequent to Judge Perlman's assignment to you of the subject evidentiary hearing, I am enclosing copies of the following:

(Include only what is applicable)
Permit effective ____(date)_____.
Request for evidentiary hearing.
Request for evidentiary hearing granted.
Designation of agency trial staff and decisional body.
Request(s) to be admitted as parties from:

Request(s) to be admitted as parties granted.

Sincerely yours,

(Name)
Regional Hearing Clerk

Enclosures

cc: Parties w/o enclosures

EXHIBIT 14

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
6TH AND WALNUT STREETS
PHILADELPHIA, PENNSYLVANIA 19106

In reply refer to 3EN--

Re: Name of permittee
Evidentiary Hearing No.
NPDES Permit No.

Dear :

In accordance with the provisions of 40 C.F.R. Part 124, Subpart E, published at 45 Fed. Reg. 33500 (May 19, 1980), your request to join as a party in the above-captioned matter is hereby granted.

As a party of record you will receive notices and invitations to attend all informal and formal negotiations held prior to the evidentiary hearing. If the matter results in an evidentiary hearing, you will, of course, be directly involved in the proceedings.

If you have any questions relating to any aspect of this matter, please feel free to call , an attorney in the Enforcement Division at (215) 597----.

Sincerely yours,

(Name)
Director
Enforcement Division

(Copy to assigned Judge)

EXHIBIT 15

NPDES EVIDENTIARY HEARINGS

List of essential documents to be included in official file maintained by Regional Hearing Clerk once case has been assigned to an ALJ.*

- Request
- Acknowledgment letter
- Denial
- Granting of request
- Public notice
- Certification of posting in post office
- Requests to join as party
- Denial or granting of request to join
- Referral of legal issues
- Letter to Perlman requesting assignment of ALJ
- Letter of assignment of ALJ
- Order from assigned judge setting prehearing conferences
- Motions and briefs exchanged
- Transcript, if any
- Other official documents relating to prehearing and hearing
- Official correspondence between parties and ALJ
- Order setting hearing date
- Transcript of hearing
- Findings of fact and issues of law
- Motions to amend
- Regional Administrator's decision
- Appeals to Administrator
- Third/Fourth Circuit Appeals

* additional documents may be included at request of attorney assigned to the case

EXHIBIT 16

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
6TH AND WALNUT STREETS
PHILADELPHIA, PENNSYLVANIA 19106

In reply refer to 3EN

(State environmental office)

Re: Company name
Evidentiary Hearing No.
NPDES Permit No.

Dear :

Enclosed please find stipulation of settlement for the subject evidentiary hearing. Please sign in the appropriate place and return the stipulation to my attention.

Sincerely yours,

(Name)
Attorney
Enforcement Division

Enclosure

EXHIBIT 17

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Region III – 6th & Walnut Sts.
Philadelphia, Pa. 19106

SUBJECT: Stipulation of Settlement for (Name)
Evidentiary Hearing No.
NPDES Permit No.

DATE:

FROM: (Name)
Attorney, Legal Branch (3EN--)

TO: (Name)
Director, Enforcement Division (3EN00)

THRU: Benjamin G. Stonelake, Jr.
Chief, Legal Branch (3EN30)

Attached please find a stipulation resulting from the settlement of the above company's evidentiary hearing request.

Please sign in the appropriate place and date the stipulation in the line provided. Upon your signature, please return the stipulation to my attention.

Enclosure

EXHIBIT 18

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
6TH AND WALNUT STREETS
PHILADELPHIA, PENNSYLVANIA 19106

In reply refer to 3EN--

The Honorable
Administrative Law Judge (A-110)
U. S. Environmental Protection Agency
401 M Street, S.W.
Washington, D. C. 20460

Re: Company name
Evidentiary Hearing No.
NPDES Permit No.

Dear Judge :

Enclosed please find stipulation of settlement for the subject evidentiary hearing.

Please sign in the appropriate place and date in the line provided. Upon your signature, please return the stipulation to my attention so that I may provide conformed copies to all parties of record and start the permit amendment process.

Sincerely yours,

(Name)
Attorney
Enforcement Division

Enclosure

EXHIBIT 19

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
6TH AND WALNUT STREETS
PHILADELPHIA, PENNSYLVANIA 19106

In reply refer to 3EN--

Re: Company name, if not addressee
Evidentiary Hearing No.
NPDES Permit No.

Dear :

Attached for your files is a copy of the signed stipulation of settlement for the subject evidentiary hearing.

If you have any questions, please call the undersigned at (215) 597-8913.

Sincerely yours,

(Name)
Regional Hearing Clerk

Enclosure

EXHIBIT 20

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Region III – 6th & Walnut Sts.
Philadelphia, Pa. 19106

SUBJECT: Stipulation of Settlement for (Name)
Evidentiary Hearing No.
NPDES Permit No.

DATE:

FROM: (Name)
Attorney, Legal Branch (3EN--)

TO: (Name)
Chief, (Appropriate Section)
Permits Enforcement Branch

Attached please find a signed stipulation* for the subject evidentiary hearing. Please initiate your Form E and prepare the appropriate revision.

Thank you.

*If applicable, add "with amended permit pages attached".

EXHIBIT 21

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
6TH AND WALNUT STREETS
PHILADELPHIA, PENNSYLVANIA 19106

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Re: NPDES Permit No. __ _____
Amendment Number_____
(Evidentiary Hearing)

Dear

Enclosed is Amendment Number ____ revising the referenced National Pollutant Discharge Elimination System Permit previously issued in accordance with provisions of the Clean Water Act as amended. This revision is made pursuant to the resolution of Evidentiary Hearing No. __-EH-___.

The revisions are effective on _____, in accordance with the stipulation of _____, resolving the request for evidentiary hearing previously granted regarding this permit. Appropriately revised permit pages are enclosed.

Sincerely yours,

(Name)
Director
Enforcement Division

Enclosures

(Enclose amended permit pages and copy of stipulation)

This exhibit is set up for the Regional Administrator's signature. If applicable, substitute "Presiding Officer".

BEFORE THE REGIONAL ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III

In the Matter of National Pollutant Discharge Elimination System Permits: (List permit numbers)

Motion for Consolidation

Evidentiary hearing requests by the _____(Name)_____ for Permit Numbers _____ will be granted at the end of the Public Notice Period of _____(Date)_____. (Give reason that requests may be consolidated.)

Regulation 40 C.F.R. § 124.82 provides that it is within the discretion of the Regional Administrator to consolidate two or more proceedings whenever it appears that this will expedite or simplify consideration of the issues. Given the above information, the Enforcement Division hereby moves that the Regional Administrator consolidate the above proceedings.

_____ Date

_____
(Name)
Attorney
Enforcement Division

Certificate of Service

I hereby certify that copies of the attached Motion for Consolidation were served according to the Service List via United States Mail, postage prepaid, on this day of , 19--.

_____
(Attorney's name)

Service List

Evidentiary Hearing for NPDES Permit Nos._____

Jack J. Schramm
Regional Administrator (3RA00)
EPA, Region III
6th & Walnut Streets
Philadelphia, Pa. 19106

Regional Hearing Clerk (3----)
EPA, Region III
6th & Walnut Streets
Philadelphia, Pa. 19106

List rest of parties

BEFORE THE REGIONAL ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III

In the Matter of National Pollutant Discharge
Elimination System Permits: (List permit numbers)

Order of Consolidation

By motion of the Enforcement Division, EPA Region III and pursuant to Regulation 40 C.F.R. § 124.82, I hereby Order the Consolidation of the Evidentiary Hearings requested by _____(Name)_____ for National Pollutant Discharge Elimination Permits: _____ as it appears that this will expedite and simplify consideration of the issues.

_____ _____

Date Jack J. Schramm
Regional Administrator

EXHIBIT 23

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
6TH AND WALNUT STREETS
PHILADELPHIA, PENNSYLVANIA 19106

In reply refer to 3EN--

List names and addresses
of parties

Re: Name of permittee
Evidentiary Hearing No.
NPDES Permit Nos.

Gentlemen:

Attached is Order of Consolidation of the evidentiary hearings on the above-referenced permits issued by Regional Administrator Jack J. Schramm on _____(date)_____.

Sincerely yours,

(Name)
Regional Hearing Clerk

EXHIBIT 24

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
6TH AND WALNUT STREETS
PHILADELPHIA, PENNSYLVANIA 19106

In reply refer to 3EN--

NOTE: THIS SHOULD NOT BE USED AFTER APPOINTMENT OF A PRESIDING OFFICER.

Re: Company name (if applicable)
Evidentiary Hearing No.
NPDES Permit No.

Dear :

We are in receipt of your letter of _____(date)_____, _____ withdrawing your request for an evidentiary hearing on the above-referenced case.

Your request for withdrawal is granted.

Sincerely yours,

(Name)
Director
Enforcement Division

EXHIBIT 25

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
6TH AND WALNUT STREETS
PHILADELPHIA, PENNSYLVANIA 19106

In reply refer to 3EN30

The Honorable
Administrative Law Judge (A-110)
U. S. Environmental Protection Agency
401 M Street, S.W.
Washington, D. C. 20460

Re: (Name of permittee)
Evidentiary Hearing No.
NPDES Permit No.

Dear Judge:

In accordance with the provision of 40 C.F.R. § 124.87(c), the certified transcript of the hearing (or prehearing, whichever is applicable) held on , 198_, on the above subject matter was filed on , 198_.

Sincerely yours,

(Name)
Regional Hearing Clerk

INCLUDE CERTIFICATION OF SERVICE AND SEND COPY OF LETTER AND CERTIFICATION TO ALL PARTIES.