

## § 179.5

*Office of the Administrator* means the Agency's Administrator and Deputy Administrator and their immediate staff, including the judicial officer.

*OPPTS* means the Agency's Office of Prevention, Pesticides and Toxic Substances.

[55 FR 50293, Dec. 5, 1990, as amended at 57 FR 28087, June 24, 1992]

### § 179.5 Other authority.

Questions regarding procedural matters arising under this part or part 178 of this chapter that are not addressed by this part or part 178 of this chapter shall be resolved by the Administrator or presiding officer, as appropriate.

## Subpart B—Initiation of Hearing

### § 179.20 Notice of hearing.

(a) If the Administrator determines under §178.32 of this chapter that a hearing is justified on any issue, the Administrator will file with the hearing clerk and publish in the FEDERAL REGISTER a Notice of Hearing. The Notice of Hearing will set forth:

(1) The docket number for the hearing.

(2) Each order, regulation, or petition denial that is the subject of the hearing, and a statement specifying any part of any such regulation or order that has been stayed in the Administrator's discretion.

(3) The identity of each person whose request for a hearing has been granted, and of any other person whose petition under §180.7 of this chapter occasioned the order that the hearing concerns.

(4) A statement of the issues of fact on which a hearing has been found to be justified.

(5) A statement of the objections whose resolution depends on the resolution of those issues of fact.

(6) A statement that the presiding officer will be designated by the Chief Administrative Law Judge.

(7) The time within which notices of participation should be filed under §179.42.

(8) The date, time, and place of the preliminary conference, or a statement that the date, time, and place will be announced in a later notice, and the place of the hearing.

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(9) The time within which parties must submit written information and views under §179.83.

(10) Designations with respect to separation of functions published under §179.24(b)(2).

(b) The statement of the issues of fact on which a hearing has been justified determines the scope of the hearing and the matters on which evidence may be introduced. The issues may be revised by the presiding officer. A party may obtain interlocutory review by the Administrator of a decision by the presiding officer to revise the issues to include an issue on which the Administrator has not granted a request for a hearing or to eliminate an issue on which a request for a hearing has been granted.

(c) A hearing is deemed to begin on the date of publication of the Notice of Hearing.

[55 FR 50293, Dec. 5, 1990, as amended at 70 FR 33359, June 8, 2005]

### § 179.24 Ex parte discussions; separation of functions.

(a) Any person may meet or correspond with any officer or employee of the Agency concerning a matter under parts 178 or 180 of this chapter prior to publication of a Notice of Hearing under §179.20.

(b) Upon publication of a Notice of Hearing, the following separation of function rules apply:

(1) OPPTS, as a party to the hearing, is responsible for presentation of its position at the hearing and in any pleading or oral argument before the Administrator. The Pesticides and Toxic Substances Division of the Office of General Counsel shall advise and represent OPPTS with respect to the hearing and in any pleading or oral argument before the Administrator. An employee or other representatives of OPPTS may not participate in or advise the Administrator or any of his representatives on any decision under this part, other than as witness or counsel in public proceedings, except as provided by paragraph (b)(2) of this section. There is to be no other communication between representatives of OPPTS and the presiding officer or any representative of the Office of the Administrator concerning the merits of

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the hearing until after issuance of the decision of the Administrator.

(2) The Administrator may designate persons who otherwise would be regarded as representatives of OPPTS, to serve as representatives of the Office of the Administrator on matters pertaining to the hearing, and may also designate persons who otherwise would be regarded as representatives of the Office of the Administrator to serve as representatives of OPPTS. Such designations will be included in the Notice of Hearing published under § 179.20.

(3) The Office of the Administrator is responsible for the final decision of the matter, with the advice and participation of anyone in the Agency other than representatives of OPPTS.

(c) Between the date of publication of the Notice of Hearing and the date of the Administrator's final decision on the matter, communication concerning the matter involved in the hearing will be restricted as follows:

(1) No person outside the Agency may have an ex parte communication with the presiding officer or any representative of the Office of the Administrator concerning the merits of the hearing. Neither the presiding officer nor any representative of the Office of the Administrator may have any ex parte communication with a person outside the Agency concerning the merits of the hearing.

(2) A written communication contrary to this section must be immediately served on all other participants and filed with the hearing clerk by the presiding officer at the hearing, or by the Administrator, depending on who received the communication. An oral communication contrary to this section must be immediately recorded in a written memorandum and similarly served on all other parties and filed with the hearing clerk. A person, including a representative of a party in the hearing, who is involved in an oral communication contrary to this section, must, to the extent necessary to determine the substance of the communication, be made available for cross-examination during the hearing with respect to the substance of that communication. Rebuttal testimony pertinent to a written or oral communica-

tion contrary to this section will be permitted.

(d) The prohibitions specified in paragraph (c) of this section also apply to a person who, in advance of the publication of a Notice of Hearing, knows that the notice has been signed. The prohibitions become applicable to such a person as of the time the knowledge is acquired.

(e) The making of a communication contrary to this section may, consistent with the interests of justice and the policies underlying the FFDCA, result in a decision adverse to the person knowingly making or causing the making of the communication.

[55 FR 50293, Dec. 5, 1990, as amended at 57 FR 28087, June 24, 1992; 70 FR 33359, June 8, 2005]

**Subpart C—Participation and Appearance; Conduct**

**§ 179.42 Notice of participation.**

(a) OPPTS shall be a party to a hearing under this part. Any other person may participate as a party in such a hearing to the extent specified by this section.

(b) A person desiring to participate in a hearing must file with the hearing clerk within 30 days after publication of the Notice of Hearing under § 179.20, a Notice of Participation in the following form:

NOTICE OF PARTICIPATION

Docket No. \_\_\_\_\_  
Under 40 CFR part 179, please enter the participation of: \_\_\_\_\_  
(Name) \_\_\_\_\_  
(Street address) \_\_\_\_\_  
(City and State) \_\_\_\_\_  
(Telephone number) \_\_\_\_\_  
Service on the above will be accepted by:  
\_\_\_\_\_  
(Name) \_\_\_\_\_  
(Street address) \_\_\_\_\_  
(City and State) \_\_\_\_\_  
(Telephone number) \_\_\_\_\_  
Signed: \_\_\_\_\_  
Date: \_\_\_\_\_

(c) An amendment to a Notice of Participation must be filed with the hearing clerk and served on all parties.