

§ 179.83

40 CFR Ch. I (7-1-06 Edition)

a business confidentiality claim regarding such information under part 2 of this chapter, the availability of such information to the other parties or to the public shall be determined by EPA in accordance with part 2 of this chapter, including specifically the procedures and principles set forth in § 2.301(g)(3) and (g)(4) of this chapter. The presiding officer shall make the determinations with respect to the matters referred to in § 2.301(g)(3) and (g)(4) to the extent provided, and shall take such steps as are necessary for the protection of information entitled to confidential treatment or otherwise exempt from public disclosure, including issuance of protective orders to parties or taking testimony in a closed hearing.

§ 179.83 Disclosure of data and information.

(a) Within 60 days of the publication of the Notice of Hearing under § 179.20, or, if no party will be prejudiced, within another period set by the presiding officer, the Assistant Administrator shall file with the hearing clerk, in accordance with § 179.80, the following documents numbered and organized in the manner prescribed by the presiding officer:

(1) The portions of the administrative record of the proceeding developed under part 178 of this chapter, and under part 180 of this chapter, that are relevant to the issues in the hearing.

(2) All documents in the files of OPPTS containing factual information or expert opinion, whether favorable or unfavorable to the position of OPPTS, which relate to the issues involved in the hearing. For purposes of this paragraph, "files" means the principal files in OPPTS in which documents relating to each of the issues in the hearing are ordinarily kept. Documents that are internal memoranda reflecting the deliberative process, or are attorney work product, or were prepared specifically for use in connection with the hearing, are not required to be submitted.

(3) All other documentary data and information upon which OPPTS plans to rely upon in the hearing.

(4) A narrative position statement on the factual issues in the Notice of

Hearing and the nature of the supporting evidence that OPPTS intends to introduce.

(5) A signed statement that, to the best knowledge and belief of the Assistant Administrator, the submission complies with this section.

(b) Within 70 days of the publication of the Notice of Hearing or, if no party will be prejudiced, within another period of time set by the presiding officer, each party other than OPPTS shall submit to the hearing clerk in accordance with § 179.80 the following documents, numbered and organized in the manner prescribed by the presiding officer:

(1) Any objections that the administrative record filed under paragraph (a)(1) of this section is incomplete.

(2) All documents (other than those filed under paragraph (a) of this section) in the party's files containing factual information or expert opinion, whether favorable or unfavorable to the party's position, that relates to the issues involved in the hearing. For purposes of this paragraph, "files" means the party's principal files in which documents relating to each of the issues in the hearing are ordinarily kept. Documents that are attorney work product, or were prepared specifically for use in connection with the hearing, are not required to be submitted.

(3) All other documentary data and information the party plans to rely upon in the hearing.

(4) A narrative position statement on the factual issues in the Notice of Hearing and the nature of the supporting evidence the party intends to introduce.

(5) A signed statement that, to the best knowledge and belief of the party, the submission complies with this section.

(c) Submissions required by paragraphs (a) and (b) of this section may be supplemented later in the proceeding, with the approval of the presiding officer, upon a showing that the material contained in the supplement was not reasonably known by or available to the party when the submission was made or that the relevance of the material contained in the supplement could not reasonably have been foreseen.

(d) If a party fails to comply substantially and in good faith with this section, the presiding officer may infer that such failure was for the purpose of withholding information that is unfavorable to the party's position, and may make such further adverse inferences and findings with respect to such failure as are warranted.

(e) Parties may reference each other's submissions. To reduce duplicative submissions, parties are encouraged to exchange and consolidate lists of documentary evidence. If a particular document is bulky or in limited supply and cannot reasonably be reproduced, and it constitutes relevant evidence, the presiding officer may authorize submission of a reduced number of copies.

(f) The presiding officer will rule on questions relating to this section.

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

§ 179.85 Purpose of preliminary conference.

The presiding officer will conduct one or more preliminary conferences for the following purposes:

(a) To determine the areas of factual disagreement to be considered at the hearing.

(b) To establish any necessary procedural rules to control the course of the hearing and the schedule for the hearing.

(c) To group parties with substantially similar interests, for purposes of presenting evidence, making objections, cross-examination, and presenting oral argument.

(d) To obtain stipulations and admissions of facts.

(e) To take other action that may expedite the hearing.

§ 179.86 Time and place of preliminary conference.

A preliminary conference will commence at the date, time, and place announced in the Notice of Hearing, or as otherwise specified by the Administrator or presiding officer in a subsequent notice. The preliminary conference may not commence until after expiration of the time for filing notices of participation under § 179.42. The pre-

siding officer may specify that two or more such conferences shall be held.

§ 179.87 Procedures for preliminary conference.

Parties in a hearing must appear at the preliminary conference(s) prepared to present a position on the matters specified in § 179.85. A preliminary conference may be held by telephone, or other electronic means, if appropriate.

(a) To expedite the hearing, parties are encouraged to prepare in advance for the conference. Parties should cooperate with each other and should request information and begin preparation of testimony at the earliest possible time. Failure of a party to appear at the preliminary conference or to raise matters that could reasonably be anticipated and resolved at that time will not delay the progress of the hearing, and constitutes a waiver of the rights of the party regarding such matters as objections to the agreements reached, actions taken, or rulings issued. Such failure to appear may also be grounds for striking the party's participation under § 179.42(f).

(b) Each party shall bring to the preliminary conference the following specific information, which will be filed with the hearing clerk under § 179.80:

(1) Any additional information to supplement the submission which may have been filed under § 179.83, and/or which may be filed if approved under § 179.83(c).

(2) A list setting forth each person who has been identified as a witness whose oral or written testimony will be offered by the party at the hearing, with a full curriculum vitae for each and a summary of the expected testimony (including a list of the principal exhibits on which the witness will rely) or a statement as to when such a summary will be furnished. A party may amend its witness and document list to add, delete, or substitute witnesses or documents.

(c) The presiding officer may hold preliminary conferences off the record in an effort to reach agreement on disputed factual or procedural questions.

(d) The presiding officer shall issue and file under § 179.80 a written order reciting the actions taken at each preliminary conference and setting forth