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Part VI

Environmental Protection Agency

40 CFR Part 304

Arbitration Procedures for Small Superfund Cost Recovery Claims; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 304

[FRL-3521-8]

Arbitration Procedures for Small Superfund Cost Recovery Claims

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: Pursuant to sections 107(a) and 122(h)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986 ("CERCLA"), and Executive Order No. 12580, 52 FR 2923 (January 29, 1987), the Environmental Protection Agency ("EPA") is promulgating today a rule which establishes and governs the procedures for EPA's arbitration of small CERCLA section 107(a) cost recovery claims. This rule implements EPA's authority under section 122(h)(2) of CERCLA, which authorizes the head of any department or agency with authority to undertake a response action under CERCLA to use arbitration as a method of settling CERCLA section 107(a) claims for recovery of response costs incurred by the United States pursuant to section 104 of CERCLA, when the total response costs for the facility concerned do not exceed $500,000, excluding interest, and when the claim has not been referred to the Department of Justice for civil action.

DATES: This final rule is effective on August 28, 1989.

ADDRESSES: The public docket for this final rule is located in Room M3105, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, and is available for viewing by appointment from 9:00 a.m. to 4:00 p.m. Monday through Friday, excluding holidays. For an appointment, please call Janice Linett at (202) 382-3077.

FOR FURTHER INFORMATION CONTACT: Janice Linett, U.S. Environmental Protection Agency, Office of Enforcement and Compliance Monitoring, Waste Enforcement Division, Room M3105, Mail Code LE-134S, 401 M Street, SW., Washington, DC 20460, (202) 382-3077.

SUPPLEMENTARY INFORMATION: The contents of today's preamble are set forth in the following form:

I. Introduction
II. Responsiveness Summary
III. Changes from Proposed to Final Rule
IV. Summary of Supporting Analyses
A. Executive Order No. 12291
B. Regulatory Flexibility Act
C. Paperwork Reduction Act
List of Subjects in 40 CFR Part 304

I. Introduction

Section 122(h)(2) of CERCLA provides EPA, as well as any other department or agency authorized to undertake a response action under CERCLA, with authority to promulgate regulations, after consultation with the Attorney General, for the use of arbitration as a method of settling certain CERCLA section 107(a) claims for recovery of response costs incurred by the United States pursuant to section 104 of CERCLA. This authority is limited to cases in which the total response costs for the facility concerned do not exceed $500,000, excluding interest, and which have not been referred to the Department of Justice for civil action.

On August 4, 1988, EPA proposed a regulation to implement its authority under section 122(h)(2) of CERCLA (53 FR 29428). The August 4, 1988 preamble discussed the purpose of the proposed rule in Part I and provided a detailed summary of the proposed rule in Part II. EPA accepted public comment on the proposed rule for 60 days and received 4 letters totalling 12 pages of comment.

Today, EPA is promulgating the final rule to implement its CERCLA section 122(h)(2) authority. This rule establishes and governs the procedures for EPA's arbitration of CERCLA section 107(a) cost recovery claims. In preparing this final rule, EPA has carefully considered all public comments on the proposed rule and is making some modifications in response to those comments. A summary of all comments received and EPA's response to each comment is provided in Part II of today's preamble. All changes from the proposed to final rule are discussed in Part III of today's preamble. Part IV of this preamble presents supporting analyses, and Part V of this preamble provides a list of subjects addressed by this rulemaking.

II. Responsiveness Summary

Comments were received from 4 commenters. Commenter 1 is Texaco Inc. Commenter 2 is Ford Motor Co. Commenter 3 is The Washington Legal Foundation. Commenter 4 is The MITRE Corp. Comments that do not relate to any particular subpart of the proposed rule are identified as General. Comments relating to specific portions of the proposed rule are organized according to the subpart, section, and paragraph of the proposed rule to which they relate. Each comment contains a summary of the comment and EPA's response.

Comment #1: (Commenter 1, General) Sites with response costs that do not exceed $500,000 will probably result in settlement, rather than arbitration, unless there are only a handful of PRPs.

Response: In enacting section 122(h)(2) of CERCLA, Congress recognized that arbitration could be a valuable settlement tool in appropriate circumstances. While the Agency recognizes that small cost recovery cases will often be settled by traditional means, rather than through arbitration, the Agency believes that arbitration offers a useful alternative. It may be particularly useful where there are multiple PRPs, because the parties may request that the arbitrator allocate responsibility for payment of EPA's response costs among the participating PRPs.

Comment #2: (Commenter 1, General) EPA's various attempts to favor itself in the proposed rule and to retain considerable unilateral authority in the proposed rule will make it less likely that arbitration will be used.

Response: This commenter also provides specific comments on the portions of the proposed rule that it considers biased in favor of the Agency. Each specific comment is discussed below.

Comment #3: (Commenter 2, General) This comment expresses support for the use of arbitration to settle cost recovery claims and regrets that the statutorily imposed $500,000 cost limitation will minimize the availability of this process.

Response: No response needed.

Comment #4: (Commenter 2, General) The proposed rule contains some flaws, which, if left uncorrected, will limit the appeal of the process to PRPs and reduce its potential effectiveness.

Response: This commenter also provides specific comments on the portions of the proposed rule which it believes to be flawed. Each specific comment is discussed below.

Comment #5: (Commenter 3, General) This comment expresses support for EPA's proposed rule because it benefits all parties involved by keeping potential litigants out of the overcrowded federal courts, avoids needless expenditure of time and resources, avoids the atmosphere of hostility that may result from delays encountered in litigation, and offers a speedy settlement by an impartial party whose decision is not subject to *de novo* review in court and is not susceptible to multiple appeals. This commenter strongly favors EPA's implementation of its CERCLA Section 122(h)(2) authority and agrees with EPA that arbitration is especially appropriate when the case does not present issues of

national or precedential significance. The commenter also supports this voluntary arbitration process because it will result in a binding decision on issues agreed upon by the parties and will thus obviate any future disputes as to the validity of the settlement.

Response: No response needed.

Comment #6: (Commenter 1. Subpart A, § 304.12(d)) It is unclear when the "Association" will be selected by EPA. The selection of the arbitration organization should be made prior to a PRP request for arbitration.

Response: EPA agrees that, for arbitrations to be administered by the "Association," the "Association" should be selected prior to a PRP request for arbitration. EPA plans to select the "Association" by competitive procurement. Because the procurement process is a lengthy procedure, it is likely that there will be a period of time between the effective date of this final rule and the award of a contract to the "Association." During this interim period, EPA believes that a vehicle should be available for conducting arbitrations pursuant to this regulation. Thus, EPA has amended the proposed rule to permit EPA and one or more PRPs at a facility to submit one or more issues arising in an EPA cost recovery claim for resolution by arbitration during the interim period between the effective date of the final rule and the award of a contract to the "Association." During the interim period, referral of a claim shall be accomplished by EPA and the participating PRP(s) entering into a joint request for arbitration and reaching mutual agreement upon the selection and appointment of an arbitrator on a case-by-case basis, in accordance with appropriate procurement procedures. Any arbitrations agreed upon in this manner shall be conducted in accordance with all provisions of this rule, except for those provisions relating specifically to the duties of the "Association," which duties shall be performed in a manner agreed upon by the parties. All costs of such arbitrations, including the arbitrator's fee, shall be divided equally among all parties, except that expenses of witnesses shall be borne by the party producing such witnesses, the expense of an interpreter shall be borne by the party requesting such interpreter, and the expense of the stenographic record and all transcripts thereof shall be prorated equally among all parties ordering copies. Amendments to the proposed rule which provide for these interim procedures are found at §§ 304.21(e) (Referral of claims), 304.22(e) (Appointment of Arbitrator), and 304.41(e) (Administrative fees, expenses, and Arbitrator's fee).

Comment #7: (Commenter 2, Subpart A, § 304.12(d)) The preamble states that an organization, defined as the "Association," will be selected based upon its ability to provide technically-capable arbitrators and that such organization will be required to "make disclosures designed to ensure that it is free from any institutional biases." The proposed rule should include criteria to select such an organization, specify the technical capabilities that arbitrators should possess, and include a requirement that the selected organization make full disclosure.

Response: EPA plans to select the arbitration association by competitive procurement. A great deal of information is routinely required of organizations interested in an EPA contract (*e.g.*, financial information, past performance on other contracts, key personnel) that will assist the Agency in identifying any possible bias. EPA regulations also specifically address organizational conflicts of interest (48 CFR 1509, 1552.209–70, 1552.209–71, and 1552.209–72). If necessary, EPA may request further organizational information and make it part of the evaluation criteria in selecting the organization. Section 304.23 of the proposed rule includes procedures for disclosure by each individual arbitrator and for disqualification of the arbitrator based on circumstances likely to affect his or her impartiality.

Comment #8: (Commenter 4, Subpart A, § 304.12(d)) The entity to serve as the "Association" should not be selected through a competitive process which includes cost, in addition to qualifications and suitability, as one of its criteria. Including the cost criteria will preclude organizations that have chosen not to compete on the basis of cost from consideration. Such organizations are intrinsically freer from conflict of interest and bias and are better suited to serve as the "Association" than those which belong to the profit-making or cost-competing sector. A not-for-profit status coupled with a refusal to compete are indicative of a company's determination to provide independent and objective analysis and to work in the public interest rather than as the agent of a client. This posture is essential in any third-party neutral and is particularly important in Superfund settlements. Selection on the basis of cost may create the impression that the entity serves at the pleasure of EPA rather than occupying a neutral position, because an entity selected due to financial considerations is more subject to influence on the basis of those considerations than one that is not. Selection on the basis of qualifications and suitability, without cost, would achieve fairness without endangering the success of the process. This is not to say that not-for-profit, non-cost-competing companies are not subject to cost controls: they undergo rigorous continual federal government audits which result in governmental approval of cost sensitive parameters for each upcoming year. Some also voluntarily adhere to the Cost Accounting Standards incorporated by reference in the Federal Acquisition Regulations. By procuring the services of one of these companies on the basis of qualifications, the government procures services, the costs of which have been previously determined by the government to be appropriate and competitive.

Response: As noted in EPA's Response to Comments 6 and 7 above, EPA plans to select the "Association" by competitive procurement. Competitive procurement is the primary method by which Federal agencies award contracts. EPA has not determined that profit-making organizations are inherently biased, subject to influence, or otherwise incapable of performing the functions of the "Association," or that there is some other compelling reason to restrict the basis for the selection of the "Association" in the manner requested by the commenter. Accordingly, EPA declines to adopt the commenter's suggestion.

Comment #9: (Commenter 1, Subpart B, § 304.20(b)) As written, if, during the course of the arbitration, projected response costs exceed $500,000, the arbitration will become nonbinding or terminate. Instead, the arbitrator should retain jurisdiction, and the arbitration should proceed as a binding arbitration so long as the original estimate of $500,000 was made in good faith and was supportable when the request for arbitration was submitted.

Response: EPA's authority to use arbitration is contained in section 122(h)(2) of CERCLA. That section authorizes use of arbitration as a method of settling cost recovery claims of the United States "where the total response costs for the facility concerned do not exceed $500,000 (excluding interest)." If response costs increase to an amount that exceeds this statutory ceiling prior to the rendering of a final arbitral decision, EPA lacks authority to resolve the claim by binding arbitration and, therefore, declines to make the change requested. As noted in Part II.B.

of the preamble to the proposed rule. EPA does not anticipate that the procedure for converting the proceeding to a non-binding arbitration will be often invoked, because the Agency does not intend to use arbitration under this rule unless and until it can establish, with reasonable accuracy and certainty, the total amount of response costs incurred and to be incurred at the site.

Comment #10: (Commenter 2, Subpart B, § 304.20(c)) The second sentence of this paragraph states, "Any issues arising in EPA's claim that are not submitted for resolution shall be deemed to be not in dispute and shall not be raised in any action seeking enforcement of the decision for the purpose of overturning or otherwise challenging the final decision, except as provided in section 304.40(c) of this part." This sentence and the last sentence of § 304.40(c)(3) should be deleted. (The last sentence of § 304.40(c)(3) restates the prohibition and includes an exception that allows a party to raise new issues if necessary to show that the decision was achieved through fraud, misconduct, partiality, excess of jurisdiction or authority, or violation of public policy.) These provisions should be deleted because the language can be interpreted to mean that any issue not raised during the arbitration, including unforseeable issues or issues that are not yet ripe, cannot be disputed in the future in any forum. For example, a PRP group may wish to implement a proposed remedy, but may dispute EPA's claim for response costs. In such a case, arbitration of EPA's costs may be useful. Since the above language could be interpreted to mean that PRPs may not dispute issues which arise during implementation of the remedy, they may be reluctant to submit cost issues to arbitration or feel compelled to raise all imaginable remedy issues, thereby increasing the complexity and cost of the arbitration. CERCLA cases typically involve several phases and all issues may not be ripe for resolution at the same time.

Response: First, it is highly unlikely that arbitration under this rule could be used in the hypothetical situation posed by the commenter, because it can only be used if the total past and future response costs of the United States do not exceed $500,000. The United States' response costs at a site at which remedial action will be undertaken will most likely exceed this statutory ceiling. Second, the purpose of the language to which the commenter refers is to ensure that the arbitral proceeding results in a final and binding decision on the EPA cost recovery claim submitted for arbitration by precluding the parties from subsequently raising issues not presented to the arbitrator as a defense to payment of the arbitrator's award. The achievement of a final and binding decision is one of the primary advantages of arbitration, which benefits EPA and the participating PRPs alike. Third, § 304.20(c) deals only with issues in the arbitration proceeding and enforcement thereof, and does not purport to limit the issues parties may raise in other proceedings. Finally, the decision will not produce the result the commenter fears because, under § 304.40(d) of the proposed rule, the final decision is not admissible as evidence of any issue of fact or law in any proceeding, except as needed for the United States to enforce the decision and obtain payment and except as needed for a participating PRP to defend against a contribution action concerning the EPA cost recovery claim submitted for arbitration. For these reasons, EPA declines to make the change requested.

Comment #11: (Commenter 2, Subpart B, §§ 304.20 (d)(3) and (d)(4)(i)) The proposed rule, in § 304.20(d)(4)(i), identifies ability to pay as one of the factors that an arbitrator may use to allocate costs among participating PRPs if the joint request for arbitration does not specify the factors. Ability to pay should be deleted as one of the factors because: (1) it is dissimilar to the other factors which relate to the relative hazard to the public, *e.g.*, mobility, toxicity, volume; (2) it may sanction the fundamentally unjust proposition that liability should be assessed based on ability to pay; (3) it may result in "deep pocket" PRPs shunning the arbitration process, and (4) it may be used as guidance by the arbitrator when allocating liability under § 304.20(d)(3), which allows the arbitrator to allocate liability even if not requested by the parties.

Response: As the commenter points out, § 304.20(d)(4)(i), without waiving the general applicability of the joint and several liability standard, offers the parties the option of specifying in the joint request for arbitration, the factors to be applied by the arbitrator in performing the allocation. Thus, the parties may agree on a case-by-case basis that ability to pay will not be considered by the arbitrator as one of the factors. If the parties do not supply their own factors, this section specifies that the arbitrator shall base the allocation on such factors as the arbitrator considers relevant, in his or her sole discretion, such as volume, toxicity, and mobility of the hazardous substances, ability to pay, and inequities and aggravating factors. EPA believes that ability to pay is an appropriate factor because, among other reasons, it is among the factors Congress has authorized the President to consider when evaluating CERCLA settlements. In addition to permitting the parties to specify their own allocation factors, the rule also addresses, through § 304.20(d)(4)(ii), the commenter's specific concern that PRPs will avoid using arbitration if certain PRPs at the site are non-viable. That section permits the parties to specify in the joint request that the arbitrator may allocate less than all response costs awarded to EPA. As noted in Part II.B. of the preamble to the proposed rule, one of the reasons this provision was included is to encourage PRPs to use arbitration even if certain PRPs at the site are non-viable. Finally, the commenter's concern that an arbitrator will consider ability to pay when allocating liability for payment under the second sentence of § 304.20(d)(3) is unfounded. That provision directs the arbitrator to allocate liability based upon the portion of the harm attributable to each participating PRP, if the arbitrator finds that the actual or threatened harm at the facility is divisible. The provision applies only if the arbitrator finds that harm at the facility is divisible and specifically directs the arbitrator to allocate liability for payment of EPA's award based upon the portion of the harm attributable to each participating PRP. It does not provide the arbitrator with the discretion to apply any other factors. For these reasons, EPA declines to make the change requested.

Comment #12: (Commenter 3, Subpart B, § 304.20(d)(4)(ii)) The Commenter agrees with this provision, which allows the parties to specify in the joint request that the arbitrator may allocate less than 100% of response costs awarded to EPA. The commenter notes that this provision is more generous than the rule enunciated in *U.S.* v. *NEPACCO*, 819 F.2d 726, 747 (8th Cir. 1986) (United States entitled to recover all costs associated with any response action upheld as not arbitrary and capricious), but believes that it should be included since it will encourage PRPs to use arbitration because they will not be penalized by having allocated to them response costs attributable to non-participating or non-viable PRPs.

Response: EPA agrees that the proposed arbitration rule sets forth a standard of review and procedure that is more generous than that provided for under the statute and case law. It is EPA's conclusion that, under section 107

of CERCLA and established case law. EPA is entitled to recover "all costs" incurred by EPA in connection with all aspects of a response action upheld as not arbitrary and capricious. For the limited purpose of encouraging PRP participation in arbitrations under this rule, the Agency has adopted the approach contained in § 304.20(d)(4)(ii).

Comment #13: (Commenter 1, Subpart B, § 304.20(e)(1)) The arbitrator's review of the adequacy of any response action taken by EPA should not be limited to documents compiled by EPA, as would be required under this provision.

Response: Under section 113(j) of CERCLA, judicial review of any issues concerning the adequacy of any response action taken or ordered by the President is limited to the administrative record upon which the President has based the selection of the response action. *See, e.g., U.S. v. Seymour*, 679 F. Supp. 859 (S.D. Ind. 1987); *U.S. v. Rohm & Haas*, 660 F. Sup. 672 (D. N.J. 1987). As noted in Part II.B. of the preamble to the proposed rule, EPA maintains that, consistent with section 113(j), the arbitrator's review of any issue concerning EPA's response action shall be based upon the documents which formed the basis for the selection of the response action, *i.e.*, the administrative record. These documents will include any written public comments received by EPA concerning the selection of the response action and any EPA responses thereto. For this reason, EPA declines to make the change requested. EPA has, however, deleted the phrase "compiled by EPA" from this section, because, in addition to EPA, a State or political subdivision of a State, or an Indian Tribe, or another Federal agency may compile the administrative record when it has been designated as the "lead agency" for the site within the meaning of the National Contingency Plan, 40 CFR Part 300. A conforming change has been made to §§ 304.30(b)(3), 304.30(c)(3), and 304.32(j)(6).

Comment #14: (Commenter 3, Subpart B, § 304.20 (e)(2)(iii) and (e)(3)(iii)) Under the proposed rule, once EPA's response action is upheld (in part or in full), the arbitrator is required to review EPA's costs on an arbitrary and capricious standard and to award EPA all costs incurred (for the portions of the response action upheld) unless the participating PRPs can show the costs were: (1) Not actually incurred or to be incurred; or (2) not actually incurred or to be incurred in connection with the response action; or (3) clearly excessive, taking into account the circumstances of the response action and relative to acceptable government procurement and contracting practices in light of the circumstances of the response action. Under *U.S. v. NEPACCO*, the United States is entitled to recover all costs associated with any response action upheld as not arbitrary and capricious. As such, the "clearly excessive" standard is more generous than the standard applied in judicial cost recovery proceedings. However, it has several clear benefits that weigh in favor of its use: (1) It encourages PRPs to use arbitration rather than take their chances in court, in which forum the issue of excessive costs is not necessarily relevant; (2) it places the burden of proof upon the PRP and thus requires little additional work on the part of the Agency; (3) it contains sufficient qualifications that PRPs will rarely be able to prove the costs were excessive. Thus, although the standard is more generous than that which would be applied in the judicial arena, the benefits clearly outweigh any detriment.

Response: Again, as set forth in the Response to Comment #12, EPA agrees that the standard of review provided in § 304.20 (e)(2)(iii) and (e)(3)(iii) is more generous than PRPs are entitled to in judicial cost recovery actions. It is EPA's view that, under the language of section 107 of CERCLA, judicial review of EPA's costs is limited to whether the costs incurred were not inconsistent with the NCP. Under this standard, matters to be reviewed are confined to: Whether the implemented cleanup was consistent with the response action selected by EPA; whether the response action was performed; and whether the claimed costs were actually incurred. Unless the selection of the response action is determined to be inconsistent with the NCP, based on a standard of review of arbitrary and capricious or otherwise not in accordance with law, EPA is entitled to recover all its actual costs of implementation of the response action. This circumscribed review of costs is intended to support the principal objectives of CERCLA: (1) To place the ultimate financial burden of hazardous waste cleanup on those parties responsible for the problem; and (2) to assure prompt replenishment of the Superfund so that monies can be rededicated to response work at the thousands of other hazardous waste sites in the country that remain unaddressed. EPA has developed a more flexible standard of review for the limited purpose of encouraging use of the arbitration regulation for small cost recovery cases. Permitting PRPs to challenge actual costs to the extent they are clearly excessive, an issue which is not relevant in litigation, may make arbitration more attractive to PRPs than litigation.

Comment #15: (Commenter 1, Subpart B, § 304.21(b)(2)) Waiver of the right to notice and service by a party who fails to furnish information relating to the service (*i.e.*, a party's name, address, and telephone number, and, if the party is represented by an attorney, the attorney's name, address, and telephone number) should be limited only to the period of time during which the party fails to provide such information.

Response: EPA agrees with this comment and has amended this subparagraph accordingly.

Comment #16: (Commenter 1, Subpart B, § 304.24(b)) The last sentence of this paragraph should not allow EPA greater rights to withdraw from the arbitration than provided to other parties.

Response: Under § 304.24(b), any party may move to withdraw from the arbitral proceeding within thirty days after receipt of notice of appointment of the arbitrator. After this thirty-day period, only EPA may withdraw from the proceeding in according with § 304.20(b)(3) or § 304.33(e). Sections 304.20(b)(3) and 304.33(e) address EPA's right to withdraw if public comments received on the proposed arbitral decision disclose to EPA facts or considerations which indicate the proposed decision is inappropriate, improper or inadequate. Section 122(i) of CERCLA requires that EPA provide a thirty-day public comment period on all settlements reached through arbitration pursuant to section 122(h)(2). Section 122(i)(3) of CERCLA requires EPA to consider any comments filed in determining whether to finalize the settlement and authorizes EPA to withdraw from the settlement if the comments disclose facts or considerations which indicate the proposed settlement is inappropriate, improper or inadequate. EPA's right to withdraw based upon public comments is authorized by section 122(i)(3) of CERCLA, and, for this reason, EPA declines to make the requested change. As noted in Part II.C. of the preamble to the proposed rule, EPA anticipates that withdrawal from the proceeding as a result of public comment will be an infrequent occurrence, because small cost recovery decisions of this kind are not likely to generate a large amount of public comment.

Comment #17: (Commenter 1, Subpart C, § 304.32(j)(6)) This subparagraph unfairly gives only EPA the right to supplement the documents compiled by EPA which formed the basis for the selection of the response action.

Response: As noted in EPA's Response to Comment #13 above, EPA maintains that any review of any issue concerning the adequacy of any response action taken or ordered by EPA should, consistent with section 113(j) of CERCLA, be based upon the documents which formed the basis for the selection of the response action. Section 113(j)(1) of CERCLA permits supplemental materials to be considered by a court in accordance with applicable principles of administrative law. EPA has, therefore, amended § 304.32(j)(6) to authorize the arbitrator to permit any party to supplement the documents which formed the basis for the selection of the response action if any party demonstrates that supplementation is appropriate based upon applicable principles of administrative law. The language to which the commenter objects has been deleted.

Comment #18: (Commenter 1, Subpart D, § 304.40(c)(2)(iv)) Among the grounds provided for challenging a final arbitral decision is that it violates "public policy." This term is so broad that arbitral decisions will be subject to challenge for virtually any reason so long as the appeal is couched in terms of "public policy."

Response: Section 304.40(c)(2) provides four grounds for challenging the final arbitral decision, the last of which is that the decision violates public policy. As noted in Part II.D. of the preamble to the proposed rule, these four grounds are based upon generally accepted common law grounds for overturning an arbitrator's decision, as reflected in case law. *See, Local Union No. 28* v. *Newspaper Agency Corp.*, 485 F. Supp. 511 (D. Utah 1980). The Agency does not agree that allowing challenges based upon violation of public policy will permit challenges for virtually any reason. Whether an arbitrator's decision violates public policy is an issue for resolution by the court. *see, e.g., W.R. Grace & Co.* v. *Rubber Workers*, 461 U.S. 757, 766 (1983), and, as the Supreme Court has stated, "[s]uch a public policy . . . must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.' " *Id., quoting Muschany* v. *United States*, 324 U.S. 49, 66 (1945). EPA therefore declines to make the requested change.

Comment #19: (Commenter 2, Subpart D, § 304.40(c)(3)) See Comment #10 and EPA's Response thereto.

III. Changes From Proposed to Final Rule

This section summarizes the changes that have been made to the proposed rule. The reason for each of these changes is discussed in P[...]is preamble or is provided b[...]

Section 304.10: The autho[...]citation in this section has been changed from section 122(h) of CERCLA to section 122(h)(2) of CERCLA to provide a more accurate citation.

Section 304.12: Two clarifying changes have been made to this section. Paragraph (d) of this section, which defines the "Association," has been amended to add the words "to conduct arbitrations pursuant to this part" to the end of the definition. Paragraph (g) of this section, which defines "interested person," has been amended to add the words "to the proceeding" after the word "party."

Section 304.20: Two changes have been made to this section. First, for clarification, the words "actual or threatened" have been inserted before the word "harm" each time it appears in the second sentence of paragraph (d)(3) of this section. Second, the words "compiled by EPA" have been deleted from the last sentence of paragraph (e)(1) of this section because the administrative record may be compiled by a Federal agency other than EPA, or by a State or political subdivision of a State, or by an Indian Tribe when such non-EPA entity is designated as "lead agency" within the meaning of the NCP. The identical change has been made to §§ 304.30(b)(3), 304.30(c)(3), and 304.32(j)(6). This change is explained in Comment #13, Part II, of this preamble.

Section 304.21: Four changes have been made to this section. First, the words "may be" in the first clause of paragraph (a) of this section have been changed to "is" for clarification. Second, the last sentence of paragraph (b)(2) of this section has been amended to clarify that a party who fails to furnish the information necessary for notice and service under this part is deemed to have waived his or her right to notice and service only until such time as that party furnishes the missing information. (*See* Comment #5, Part II, of this preamble for explanation.) Third, paragraph (b)(ix) of this section has been deleted. This preamble clarified that EPA will select the "Association" through competitive procurement. Since EPA cannot advance funds to a contractor, references in the proposed rule implying advances by EPA of filing fees, administrative fees and expenses, and the arbitrator's fee have been deleted. (*See* § 304.41 (a) and (d) and the discussion of changes to these two paragraphs below.) Fourth, a new paragraph (e) has been added to this section. This paragraph explains that, prior to EPA's selection of the Association, EPA and one or more PRPs at a facility may agree to submit one or more issues arising in an EPA cost recovery claim for resolution by arbitration. Any such agreement must be contained in a joint request for arbitration which meets all requirements of paragraph (b) of this section. New paragraph (e) also provides that any arbitration agreed upon in this manner shall be governed by this final rule, except for those provisions which pertain specifically to the duties of the Association, which duties shall be performed in a manner agreed upon by the parties. It also explains that in any arbitration initiated pursuant to new paragraph (e), the selection and appointment of the arbitrator shall be governed by new § 304.22(e), and payment of all costs of the arbitration shall be governed by new § 304.41(e), both of which are described below. The third and fourth changes to this section are explained in Comment #6, Part II, of this preamble.

Section 304.22: Two changes have been made to this section. First, the word "accepted" in the fifth sentence of paragraph (b) has been changed to "invited" for clarification. Second, a new paragraph (e) has been added to this section. This new paragraph (e) explains that if EPA and one or more PRPs at a facility agree to arbitrate an EPA cost recovery claim prior to the selection of the Association as provided in § 304.21(e), they shall reach mutual agreement upon the selection and appointment of an arbitrator on a case-by-case basis, and the Administrator shall obtain the services of the arbitrator using appropriate procurement procedures. New paragraph (e) further provides that any person appointed as an arbitrator in this manner shall make disclosures to the parties pursuant to § 304.23 of this part, shall arbitrate the claim pursuant to the jurisdiction and authority granted to the arbitrator under § 304.20 of this part, and shall otherwise conduct the arbitration pursuant to the procedures estblished by this rule. This second change is explained in Comment #6, Part II, of this preamble.

Section 304.31: Paragraph (e) of this section has been amended to require a party who intends to be represented by counsel to provide the telephone number of counsel in addition to the name and address. The identical change has been made to § 304.32(e). This change is needed to make the information required by §§ 304.31(e) and 304.32(e) consistent with that required by § 304.21(b)(2) (Referral of Claims).

Section 304.32: Paragraph (j)(6) of this section has been amended. The first

sentence has been changed to allow the arbitrator to permit any party to supplement the documents which formed the basis for the selection of the response action (with additional documents, affidavits, or oral testimony) if any party demonstrates that supplementation is appropriate based upon applicable principles of administrative law. The second sentence of this paragraph has been deleted. This change is explained in Comment #17, Part II, of this preamble.

Section 304.33: Paragraph (d) of this section has been amended to require service of the proposed decision to be made by certified mail, return receipt requested, or by personal service to ensure that the decision is received by the parties.

Section 304.40: Two changes have been made to this section. First, paragraph (c)(1) of this section has been amended to clarify that the final decision is a settlement under section 122(h) of CERCLA, which may be directly enforced pursuant to section 122(h)(3) of CERCLA. As amended, the first and second sentences of paragraph (c)(1) have been modified to provide that: "If any award made in the final decision is not paid within the time required by § 304.33(f) of this part, the final decision may be enforced as a settlement under section 122(h) of CERCLA, 42 U.S.C. 9622(h), by the Attorney General on behalf of EPA in an appropriate Federal district court pursuant to section 122(h)(3) of CERCLA, 42 U.S.C. 9622(h)(3)." The remainder of this paragraph is unchanged. Second, the first clause of paragraph (d) of this section, "[e]xcept as otherwise provided in this secion," has been amended for clarification to indicate the more precise cross-reference to paragraph (c) of this section.

Section 304.41: Three changes have been made to this section. First, the last two sentences of paragraph (a) of this section have been deleted. As noted in the discussion of § 304.21 above, EPA cannot advance fees to a contractor. Accordingly, the requirement that all parties advance the filing fee has been deleted from paragraph (a). PRPs may, of course, provide such an advance. Second, paragraph (d) of this section has been similarly revised to delete references to advance deposits from all parties for the arbitrator's fee and the administrative fee, and to provide instead that the "Association" make appropriate arrangements for payment of these fees by the parties. Third, a new paragraph (e) has been added to this section. It provides that in any arbitration conducted prior to the selection of the Association (see § 304.21(e)), all fees and expenses of the arbitral proceeding, including the arbitrator's fee, shall be divided equally among all parties, except that expenses of witnesses shall be borne by the party producing such witnesses, expenses of an interpreter shall be borne by the party requesting such interpreter, and expenses of the stenographic record and all transcripts thereof shall be prorated equally among all parties ordering copies. This change is explained in Comment #6, Part II, of this preamble.

Section 304.42: Paragraph (c) of this section has been amended to require the parties to serve all papers associated with the proceeding by personal service, or by certified mail, return receipt requested, or by first class mail, and to require the arbitrator and the "Association" to serve all papers associated with the proceeding by personal service or by certified mail, return receipt requested. This change is to ensure that all papers from the arbitrator and the "Association" are received by the parties.

IV. Summary of Supporting Analyses

A. Executive Order No. 12291

Regulations must be classified as major or non-major to satisfy the rulemaking protocol established by Executive Order No. 12291. According to Executive Order No. 12291, major rules are regulations that are likely to result in:

(1) An annual effect on the economy of $100 million or more; or

(2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

EPA has determined that this regulation is a non-major rule under Executive Order No. 12291 because it will not result in any of the impacts identified above. This regulation provides an entirely voluntary procedure by which PRPs at a facility may reach agreement with EPA to have their liability for a CERCLA section 107(a) cost recovery claim resolved by arbitration. Arbitration is an alternative dispute resolution technique that should provide a quicker and less costly method of resolution than traditional litigation or negotiation. Therefore, the Agency has not prepared a regulatory impact analysis for this regulation. This regulation was submitted to the Office of Management and Budget for review as required by Executive Order No. 12291.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 requires that a Regulatory Flexibility Analysis be performed for all rules that are likely to have "significant economic impact on a substantial number of small entities." EPA certifies that this regulation will not have a significant economic impact on a substantial number of small entities because the rule provides a wholly voluntary procedure by which PRPs at a facility may reach agreement with EPA to have their liability for a CERCLA section 107(a) cost recovery claim resolved by arbitration. Arbitration is an alternative dispute resolution technique that should provide a quicker and less expensive method of resolution than traditional litigation or negotiation. Therefore, EPA has not prepared a Regulatory Flexibility Analysis.

C. Paperwork Reduction Act

This regulation is not subject to the provisions of the Paperwork Reduction Act. Any collection of information in this regulation is required in the course of an enforcement action against a specific party or parties and, therefore, is exempt from coverage under the Act.

List of Subjects in 40 CFR Part 304

Administrative practice and procedure, Claims, Intergovernmental relations, Hazardous substances, Hazardous wastes, Natural resources, Superfund.

Date: May 22, 1989.

William K. Reilly,

Administrator.

For the reasons set forth in the preamble, Part 304, Title 40 of the Code of Federal Regulations is added as set forth below:

PART 304—ARBITRATION PROCEDURES FOR SMALL SUPERFUND COST RECOVERY CLAIMS

Subpart A—General

Sec.

304.10 Purpose.
304.11 Scope and applicability.
304.12 Definitions.

Subpart B—Jurisdiction of Arbitrator, Referral of Claims, and Appointment of Arbitrator

304.20 Jurisdiction of Arbitrator.
304.21 Referral of claims.
304.22 Appointment of Arbitrator.

Sec.
304.23 Disclosure and challenge procedures.
304.24 Intervention and withdrawal.
304.25 *Ex parte* communication.

Subpart C—Hearings Before the Arbitrator

304.30 Filing of pleadings.
304.31 Pre-hearing conference.
304.32 Arbitral hearing.
304.33 Arbitral decision and public comment.

Subpart D—Other Provisions

304.40 Effect and Enforcement of final decision.
304.41 Administrative fees, expenses, and Arbitrator's fee.
304.42 Miscellaneous provisions.

Authority: 42 U.S.C. 9607(a) and 9622(h)(2), Executive Order No. 12580, 52 FR 2923 (January 29, 1987).

Subpart A—General

§ 304.10 Purpose.

This regulation establishes and governs procedures for the arbitration of EPA cost recovery claims arising under section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9607(a), as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499, 100 Stat. 1613 (1986) ("CERCLA"), pursuant to the authority granted EPA by section 122(h)(2) of CERCLA, 42 U.S.C. 9622(h)(2), and Executive Order No. 12580, 52 FR 2923 (January 29, 1987).

§ 304.11 Scope and applicability.

The procedures established by this regulation govern the arbitration of EPA claims for recovery, under section 107(a) of CERCLA, 42 U.S.C. 9607(a), of response costs incurred at or in connection with a facility by the United States pursuant to section 104 of CERCLA, 42 U.S.C. 9604. The procedures are applicable when:

(a) The total past and projected response costs for the facility concerned do not exceed $500,000, excluding interest; and

(b) The Administrator and one or more PRPs have submitted a joint request for arbitration pursuant to § 304.21 of this part.

§ 304.12 Definitions.

Terms not defined in this section have the meaning given by section 101 of CERCLA, 42 U.S.C. 9601, or the National Oil and Hazardous Substances Pollution Contingency Plan, 40 CFR Part 300. All time deadlines in this part are specified in calendar days and shall be computed in the manner described in Rule 6(a) of the Federal Rules of Civil Procedure.

Except when otherwise specified, the following terms are defined for purposes of this part as follows:

(a) "CERCLA" means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601, *et seq.*, as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499, 100 Stat. 1613 (1986).

(b) "Administrator" means the EPA Administrator or his designee.

(C) "Arbitrator" means the person appointed in accordance with § 304.22 of this part and governed by the provisions of this part.

(d) "Association" means the organization offering arbitration services selected by EPA to conduct arbitrations pursuant to this part.

(e) "Claim" means the amount sought by EPA as recovery of response costs incurred and to be incurred by the United States at a facility, which does not exceed $500,000, excluding interest.

(f) "*Ex parte* communication" means any communication, written or oral, relating to the merits of the arbitral proceeding, between the Arbitrator and any interested person, which was not originally filed or stated in the administrative record of the proceeding. Such communication is not "*ex parte* communication" if all parties to the proceeding have received prior written notice of the proposed communication and have been given the opportunity to be present and to participate therein.

(g) "Interested person" means the Administrator, any EPA employee, any party to the proceeding, any potentially responsible party associated with the facility concerned, any person who filed written comments in the proceeding, any participant or intervenor in the proceeding, all officers, directors, employees, consultants, and agents of any party, and any attorney of record for any of the foregoing persons.

(h) "National Contingency Plan" or "NCP" means the National Oil and Hazardous Substances Pollution Contingency Plan, developed under section 311(c)(2) of the Federal Water Pollution Control Act, 33 U.S.C. 1251, *et seq.*, as amended, revised periodically pursuant to section 105 of CERCLA, 42 U.S.C. 9605, and published at 40 CFR Part 300.

(i) "National Panel of Environmental Arbitrators" or "Panel" means a panel of environmental arbitrators selected and maintained by the Association to arbitrate cost recovery claims under this part.

(j) "Participating PRP" is any potentially responsible party who has agreed, pursuant to § 304.21 of this part, to submit one or more issues arising in an EPA claim for resolution pursuant to the procedures established by this part.

(k) "Party" means EPA and any person who has agreed, pursuant to § 304.21 of this part, to submit one or more issues arising in an EPA claim for resolution pursuant to the procedures established by this part, and any person who has been granted leave to intervene pursuant to § 304.24(a) of this part.

(l) "Persons" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.

(m) "Potentially responsible party" or "PRP" means any person who may be liable pursuant to section 107(a) of CERCLA, 42 U.S.C. 9607(a), for response costs incurred and to be incurred by the United States not inconsistent with NCP.

(n) "Response action" means remove, removal, remedy and remedial action, as those terms are defined by section 101 of CERCLA, 42 U.S.C. 9601, including enforcement activities related thereto.

(o) "Response costs" means all costs of removal or remedial action incurred and to be incurred by the United States at a facility pursuant to section 104 of CERCLA, 42 U.S.C. 9604, including, but not limited to, all costs of investigation and information gathering, planning and implementing a response action, administration, enforcement, litigation, interest and indirect costs.

Subpart B—Jurisdiction of Arbitrator, Referral of Claims, and Appointment of Arbitrator

§ 304.20 Jurisdiction of Arbitrator.

(a) In accordance with the procedures established by this part, the Arbitrator is authorized to arbitrate one or more issues arising in an EPA claim when:

(1) The total past and projected response costs for the facility concerned do not exceed $500,000, excluding interest; and

(2) The Administrator and one or more PRPs have submitted a joint request for arbitration pursuant to § 304.21 of this part.

(b)(1) If the total past and projected response costs for the facility concerned increase to a dollar amount in excess of $500,000, excluding interest, prior to the rendering of the final decision pursuant to § 304.33 of this part, the parties may mutually agree to continue the proceeding as non-binding arbitration pursuant to the procedures established by this part, except that §§ 304.33(e) and 304.40 of this part shall not apply.

(2) If all of the parties agree to continue the proceeding as non-binding arbitration, the proposed decision

rendered by the Arbitrator pursuant to § 304.33 of this part shall not be binding upon the parties, unless all of the parties agree to adopt the proposed decision as an administrative settlement pursuant to section 122(h)(1) of CERCLA, 42 U.S.C. 9622(h)(1). Any administrative settlement agreed upon in this manner shall be subject to the prior written approval of the Attorney General (or his designee) pursuant to section 122(h)(1) of CERCLA and shall be subject to public comment pursuant to section 122(i) of CERCLA, 42 U.S.C. 9622(i).

(3) If the parties do not agree to continue the proceeding as non-binding arbitration, or if the administrative settlement agreed upon is not approved by the Attorney General (or his designee), or if EPA withdraws or withholds consent from the administrative settlement as a result of public comment, EPA shall withdraw from the proceeding and the Association shall assess or refund, as appropriate, any administrative fees, expenses, or Arbitrator's fees.

(c) The Arbitrator's authority, as defined by paragraphs (d) and (e) of this section, to determine issues arising in EPA's claim is limited only to the issues submitted for resolution by the parties in the joint request for arbitration pursuant to § 304.21 of this part. Any issues arising in EPA's claim that are not submitted for resolution shall be deemed to be not in dispute and shall not be raised in any action seeking enforcement of the decision for the purpose of overturning or otherwise challenging the final decision, except as provided in § 304.40(c) of this part.

(d)(1) If the issue of liability of any participating PRP has been submitted for resolution, the Arbitrator shall determine whether the participating PRP is liable pursuant to section 107(a) of CERCLA, 42 U.S.C. 9607(a), subject only to the defenses specifically enumerated in section 107(b) of CERCLA, 42 U.S.C. 9607(b).

(2) If the issue of the dollar amount of response costs recoverable by EPA has been submitted for resolution, the Arbitrator shall determine, pursuant to paragraph (e) of this section, the dollar amount of response costs recoverable by EPA pursuant to section 107(a) of CERCLA, 42 U.S.C. 9607(a), and shall award the total amount of such costs to EPA.

(3) Unless the Arbitrator finds that the actual or threatened harm at the facility is divisible, any participating PRP whom the Arbitrator determines to be liable shall be jointly and severally liable for the total amount of response costs awarded to EPA. If the Arbitrator finds that the actual or threatened harm is divisible, the Arbitrator shall allocate liability for payment of EPA's award among the participating PRPs based on the portion of the actual or threatened harm attributable to each participating PRP.

(4) Notwithstanding the indivisibility of the actual or threatened harm, and without waiving the general applicability of the joint and several liability standard, as an alternative to paragraph (d)(3) of this section, the parties may request the Arbitrator to allocate responsibility for payment of response costs awarded to EPA among the participating PRPs whom the Arbitrator determines to be liable. Any such request shall be made in the joint request for arbitration pursuant to § 304.21 of this part. If such a request is made, the provisions of paragraphs (d)(4)(i), (d)(4)(ii), and (d)(4)(iii) of this section shall apply.

(i) The joint request for arbitration may specify the factors to be applied by the arbitrator when allocating among the participating PRPs responsibility for payment of the response costs awarded to EPA. If the joint request does not specify such factors, the Arbitrator shall base the allocation on such factors as the arbitrator considers relevant, in his or her sole discretion, such as volume, toxicity, and mobility of the hazardous substances contributed to the facility by each participating PRP, ability to pay, and inequities and aggravating factors.

(ii) The joint request for arbitration may specify that the Arbitrator may allocate among the participating PRPs less than all response costs awarded to EPA. If this is not specified, the Arbitrator shall allocate among the participating PRPs 100% of the response costs awarded to EPA.

(iii) The burden of establishing the appropriate allocation of responsibility for payment of the response costs awarded to EPA shall rest entirely with the participating PRPs.

(5) The parties may request that the Arbitrator perform an allocation even if the issue of the liability of the participating PRPs is not submitted for resolution in the joint request for arbitration. Such a request for allocation shall be made in the joint request for arbitration pursuant to § 304.21 of this part. If such a request is made, the provisions of paragraphs (d)(4)(i), (d)(4)(ii), and (d)(4)(iii) of this section shall apply.

(e)(1) If any issue concerning the adequacy of EPA's response action has been submitted for resolution or arises during the Arbitrator's determination of the dollar amount of response costs recoverable by EPA, the Arbitrator shall uphold EPA's selection of the response action, unless any participating PRP can establish that the selection was inconsistent with the NCP. The Arbitrator's review of the adequacy of any response action taken by EPA shall be based upon the documents which formed the basis for the selection of the response action.

(2) If the Arbitrator upholds EPA's selection of the response action in full, the Arbitrator shall award EPA all response costs incurred and to be incurred in connection with the response action, unless any participating PRP can establish that all or part of such costs were:

(i) Not actually incurred or to be incurred; or

(ii) Not actually incurred or to be incurred in connection with the response action; or

(iii) Clearly excessive, taking into account the circumstances of the response action and relative to acceptable government procurement and contracting practices in light of the circumstances of the response action.

(3) If the Arbitrator upholds EPA's selection of the response action only in part, the Arbitrator shall award EPA only those response costs incurred and to be incurred in connection with the portions of the response action that were upheld, unless any participating PRP can establish that all or part of such response costs were:

(i) Not actually incurred or to be incurred; or

(ii) Not actually incurred or to be incurred in connection with the portions of the response action that were upheld; or

(iii) Clearly excessive, taking into account the circumstances of the response action and relative to acceptable government procurement and contracting practices in light of the circumstances of the response action.

(4) The standard of review to be applied by the Arbitrator under paragraphs (e)(1), (e)(2), and (e)(3) of this section is arbitrary and capricious or otherwise not in accordance with law.

(5) In reviewing any procedural errors alleged by any party, the Arbitrator may disallow response costs only if the errors were so serious and related to matters of such central relevance that the response action would have been significantly changed had such errors not been made.

§ 304.21 Referral of claims.

(a) If EPA believes that a claim is an appropriate candidate for arbitration, EPA will notify all identified PRPs for the facility concerned and provide such

PRPs with an opportunity to discuss referral of one or more issues arising in the claim for resolution pursuant to the procedures established by this part. Alternatively, one or more PRPs at a facility may propose to EPA use of arbitration, after receipt of a demand by EPA for payment of a claim, but prior to commencement of civil litigation of the claim. Where practicable, before an agreement to refer a claim for arbitration is made final under this alternative, either the PRPs or EPA shall notify the other PRPs at the facility of the potential use of arbitration.

(b)(1) The Administrator and one or more PRPs associated with a facility may submit to the Association a joint request for arbitration of one or more issues arising in an EPA claim concerning the facility. The joint request shall be signed by all of the parties and shall include:

(i) A brief description of the facility, the EPA response action taken at the facility, the EPA claim, and the parties;

(ii) A statement of the issues arising in the claim that are being submitted by the parties for resolution by arbitration;

(iii) A statement that the parties consent to resolution of the issues jointly submitted pursuant to the procedures established by this part by an Arbitrator appointed pursuant to § 304.22 of this part;

(iv) A statement that the parties agree to be bound by the final decision on all issues jointly submitted by the parties for resolution and to pay any award made in the final decision, subject to the right to challenge the final decision solely on the grounds and in the manner prescribed by § 304.40(c) of this part;

(v) A statement that the parties agree that the award made in the final decision may be enforced pursuant to § 304.40(c) of this part;

(vi) A statement that the parties agree that the final decision shall be binding only with respect to the response costs at issue in the claim submitted for arbitration;

(vii) A statement that the parties agree that the statute of limitations governing the EPA claim submitted shall be extended for a time period equal to the number of days from the date the joint request for arbitration is submitted to the Association to the date of resolution of any enforcement action relating to the final decision; and

(viii) A statement that each signatory to the joint request is authorized to enter into the arbitration and to bind legally the party represented by him or her to the terms of the joint request.

(2) The joint request shall also include the name, address and telephone number of each party, and, if a party is represented by an attorney, the attorney's name, address and telephone number. A party changing any of this information must promptly communicate the change in writing to the Association and all other parties. A party who fails to furnish such information or any changes thereto is deemed to have waived his or her right to notice and service under this part until such time as the party furnishes the missing information.

(c) Any party may move to modify the joint request for arbitration to include one or more additional issues arising in the referred claim. To be effective, any such modification must be signed by the Arbitrator and all other parties. The joint request for arbitration may also be modified to add one or more additional parties, if such intervention is permitted by § 304.24(a) of this part. To be effective, any such modification must be signed by the Arbitrator, the intervening party or parties, and all other parties.

(d) The statute of limitations governing the EPA claim submitted for arbitration shall be extended for a time period equal to the number of days from the date the joint request for arbitration is submitted to the Association to the date of resolution of any enforcement action relating to the final decision.

(e) Prior to the selection of the Association, the Administrator and one or more PRPs associated with a facility may agree to submit one or more issues arising in an EPA claim for resolution by arbitration. Any such agreement shall be contained in a joint request for arbitration which meets all requirements of paragraph (b) of this section. In any such arbitration, the arbitrator shall be selected pursuant to § 304.22(e) of this part, and payment of all costs associated with the arbitration shall be made pursuant to § 304.41(e) of this Part. Arbitrations agreed upon pursuant to this paragraph shall be governed by the procedures established by this part, except for those procedures which pertain specifically to the duties of the Association. All duties of the Association shall be performed in a manner agreed upon by all of the parties.

§ 304.22 Appointment of Arbitrator.

(a) The Association shall establish and maintain a National Panel of Environmental Arbitrators.

(b) Within ten days of the filing of the joint request for arbitration, the Association shall identify and submit simultaneously to all parties an indentical list of ten persons chosen from the National Panel of Environmental Arbitrators, whom the Association believes will not be subject to disqualification because of circumstances likely to affect impartiality pursuant to § 304.23 of this part. Each party shall have ten days from the date of receipt of the list to identify any persons objected to, to rank the remaining persons in the order of preference, and to return the list to the Association. If a party does not return the list within the time specified, all persons on the list are deemed acceptable to that party. From among the persons whom the parties have indicated as acceptable, and, in accordance with the designated order of mutual preference, if any, the Association shall invite an Arbitrator to serve. If the parties fail to mutually agree upon any of the persons named, or if the invited Arbitrator is unable to serve, or if for any other reason the appointment cannot be made from the submitted lists, the Association shall make the appointment from among the other members of the Panel. In no event shall appointment of the Arbitrator by the Association take longer than thirty days from the filing of the joint request for arbitration.

(c) Within seven days of the appointment of the Arbitrator, the Association shall mail to each of the parties notice of the identity of the Arbitrator and the date of the appointment, together with a copy of these rules. The Arbitrator shall, within five days of his or her appointment, file a signed acceptance of the case with the Association. The Association shall, within seven days of receipt of the Arbitrator's acceptance, mail notice of such acceptance to the parties.

(d) If any appointed Arbitrator should resign, die, withdraw, be disqualified or otherwise be unable to perform the duties of the office, the Association may, on satisfactory proof, declare the office vacant. Vacancies shall be filled in accordance with the applicable provisions of this section, and the matter shall be resumed.

(e) If the Administrator and one or more PRPs associated with a facility enter into a joint request for arbitration prior to the selection of the Association (*see* § 304.21(e) of this part), the Administrator and the participating PRPs shall reach mutual agreement upon the selection and appointment of an Arbitrator on a case-by-case basis, and the Administrator shall obtain the services of that person using appropriate procurement procedures. Any person appointed as an Arbitrator pursuant to this paragraph shall make disclosures to the parties pursuant to § 304.23 of this part, shall resolve the issues submitted for resolution pursuant to the

jurisdiction and authority granted to the Arbitrator in § 304.20 of this part, and shall otherwise conduct the arbitral proceeding pursuant to the procedures established by this part.

§ 304.23 Disclosure and challenge procedures.

(a) A person appointed as an Arbitrator under § 304.22 of this part shall, within five days of receipt of his or her notice of appointment, disclose to the Association any circumstances likely to affect impartiality, including any bias or any financial or personal interest in the result of the arbitration, or any past or present relationship with the parties or their counsel, or any past or present relationship with any PRP to which the claim may relate.

(b) Upon receipt of such information from an appointed Arbitrator or other source, the Association shall, within two days of receipt, communicate such information to the parties. Such communication may be made orally or in writing, but if made orally, shall be confirmed in writing.

(c) If any party wishes to request disqualification of an Arbitrator, such party shall notify the Association and the other parties of such request and the basis therefor within seven days of receipt of the information on which such request is based.

(d) The Association shall make a determination on any request for disqualification of an Arbitrator within seven days after the Association receives any such request, and shall notify the parties in writing of such determination. This determination shall be within the sole discretion of the Association, and its decision shall be final.

§ 304.24 Intervention and withdrawal.

(a) (1) No later than thirty days prior to the pre-hearing conference (*see* § 304.31 of this part), any PRP associated with the facility which is the subject of the referred claim may move to intervene in the arbitral proceeding for the purpose of having one or more issues relating to his or her responsibility for payment of the referred claim resolved.

(2) If the Arbitrator has been appointed, a motion to intervene shall be filed with the Arbitrator and a copy shall be served upon all parties. If the Arbitrator has not yet been appointed, a motion to intervene shall be submitted to the Association and a copy shall be served upon all parties.

(3) Any such motion to intervene may be granted only upon the written approval of the Arbitrator and all of the parties in the form of a modification to the joint request for arbitration pursuant to § 304.21(c) of this part. by signing such a modification, the intervening party consents to be bound by the terms of the joint request for arbitration submitted pursuant to § 304.21(b) of this part and any modifications previously made thereto pursuant to § 304.21(c) of this part, and consents to be bound by such revisions to the time limits for the filing of pleadings as the Arbitrator may make to prevent delaying the pre-hearing conference.

(b) Any party may move to withdraw from the arbitral proceeding within thirty days after receipt of the notice of appointment of the Arbitrator (*see* § 304.22 of this part). The Arbitrator may approve such withdrawal, without prejudice to the moving party, and shall assess such administrative fees and expenses (*see* § 304.41 of this part) against the withdrawing party as the Arbitrator deems appropriate. No party may withdraw from the arbitral proceedings after this thirty-day period, except that EPA may withdraw from the proceeding in accordance with § 304.20(b)(3) or § 304.33(e) of this part.

§ 304.25 Ex parte communication.

(a) No interested person shall make or knowingly cause to be made to the Arbitrator an *ex parte* communication.

(b) The Arbitrator shall not make or knowingly cause to be made to any interested person an *ex parte* communication.

(c) The Association may remove the Arbitrator in any proceeding in which it is demonstrated to the Association's satisfaction that the Arbitrator has engaged in prohibited *ex parte* communication to the prejudice of any party. If the Arbitrator is removed, the procedures in § 304.22(d) of this part shall apply.

(d) Whenever an *ex parte* communication in violation of this section is received by or made known to the Arbitrator, the Arbitrator shall immediately notify in writing all parties to the proceeding of the circumstances and substance of the communication and may require the party who made the communication or caused the communication to be made, or the party whose representative made the communication or caused the communication to be made, to show cause why that party's arguments or claim should not be denied, disregarded, or otherwise adversely affected on account of such violation.

(e) The prohibitions of this section apply upon appointment of the Arbitrator and terminate on the date of the final decision.

Subpart C—Hearings Before the Arbitrator

§ 304.30 Filing of pleadings.

(a) Discovery shall be in accordance with this section and § 304.31 of this part.

(b) Within thirty days after receipt of the notice of appointment of the Arbitrator (*see* § 304.22 of this part), EPA shall submit to the Arbitrator two copies of a written statement and shall serve a copy of the written statement upon all other parties. The written statement shall in all cases include the information requested in paragraphs (b)(1), (b)(6), and (b)(7) of this section, shall include the information requested in paragraph (b)(2) of this section if the issue of liability of any participating PRP has been submitted for resolution, shall include the information requested in paragraph (b)(3) of this section if any issue concerning the adequacy of EPA's response action has been submitted for resolution or may arise during the Arbitrator's determination of the dollar amount of response costs recoverable by EPA, shall include the information requested in paragraph (b)(4) of this section if the issue of the dollar amount of response costs recoverable by EPA has been submitted for resolution, and shall include the information requested in paragraph (b)(5) of this section if any issue concerning allocation of liability for payment of EPA's award has been submitted for resolution.

(1) A statement of facts, including a description of the facility, the EPA response action taken at the facility, the response costs incurred and to be incurred by the United States in connection with the response action taken at the facility, and the parties:

(2) A description of the evidence in support of the following four elements of liability of the participating PRP(s) whose liability pursuant to section 107(a) of CERCLA, 42 U.S.C. 9607(a), is at issue, and any supporting documentation therefor:

(i) The site at which EPA's response action was taken is a "facility" as defined by section 101(9) of CERCLA, 42 U.S.C. 9601(9);

(ii) There was a "release or threat of release" within the meaning of sections 101(22) and 104(a) of CERCLA, 42 U.S.C. 9601(22) and 9604(a), of a "hazardous substance" as defined by section 101(14) of CERCLA, 42 U.S.C 9601(14), at the facility at which EPA's response action was taken;

(iii) The release or threat of release caused the United States to incur "response costs" as defined in § 304.12(o) of this part; and

(iv) The participating PRP is in one of the categories of liable parties in section 107(a) of CERCLA, 42 U.S.C. 9607(a);

(3) An index of any documents which formed the basis for the selection of the response action taken at the facility (all indexed documents shall be made available to any participating PRP);

(4) A summary, broken down by category, of all response costs incurred and to be incurred by the United States in connection with the response action taken by EPA at the facility (supporting documentation for the summary shall be made available to any participating PRP pursuant to the procedures described in Rule 1006 of the Federal Rules of Evidence);

(5) To the extent such information is available, the names and addresses of all identified PRPs for the facility, the volume and nature of the substances contributed to the facility by each identified PRP, and a ranking by volume of the substances contributed to the facility;

(6) A recommended location for the pre-hearing conference and the arbitral hearing; and

(7) Any other statement or documentation that EPA deems necessary to support its claim.

(c) Within thirty days after receipt of EPA's written statement, each participating PRP shall submit to the Arbitrator two copies of an answer and shall serve a copy of the answer upon all other parties. The answer shall in all cases include the information requested in paragraphs (c)(1), (c)(6), and (c)(7) of this section, shall include the information requested in paragraph (c)(2) of this section if the issue of the liability of the answering participating PRP has been submitted for resolution, shall include the information requested in paragraph (c)(3) of this section if any issue concerning the adequacy of EPA's response action has been submitted for resolution or may arise during the Arbitrator's determination of the dollar amount of response costs recoverable by EPA, shall include the information requested in paragraph (c)(4) of this section if the issue of the dollar amount of response costs recoverable by EPA has been submitted for resolution, and shall include the information requested in paragraph (c)(5) of this section if any issue concerning the allocation of responsibility for payment of EPA's award has been submitted for resolution:

(1) Any objections to the statement of facts in EPA's written statement, and, if so, a counterstatement of facts;

(2) Any objections to EPA's position on the liability of the answering participating PRP pursuant to section 107(a) of CERCLA, 42 U.S.C. 9607(a), a description of the evidence in support of the defenses to liability of the answering participating PRP which are specifically enumerated in section 107(b) of CERCLA, 42 U.S.C. 9607(b) (*i.e.*, that the release or threat of release of a hazardous substance at the facility was caused solely by an act of God, an act of war, an act or omission of an unrelated third party, or any combination thereof), and any supporting documentation thereof;

(3) Any objections to the response action taken by EPA at the facility based upon any documents which formed the basis for the selection of the response action;

(4) Any objections to EPA's summary and supporting documentation for all response costs incurred and to be incurred by the United States in connection with the response action taken by EPA at the facility;

(5) Any documentation which the participating PRP deems relevant to the allocation of responsibility for payment of EPA's award.

(6) A recommended location for the pre-hearing conference and the arbitral hearing; and

(7) Any other statement or documentation that the participating PRP deems necessary to support its claim.

(d) EPA may file a response to any participating PRP's answer within twenty days of receipt of such answer. Two copies of any such response shall be served upon the Arbitrator, and a copy of any such response shall be served upon all parties.

(e) If EPA files a response, any participating PRP may file a reply thereto within ten days after receipt of such response. Two copies of any such reply shall be served upon the Arbitrator, and a copy of any such reply shall be served upon all parties.

§ 304.31 Pre-hearing conference.

(a) The Arbitrator and the parties shall exchange witness lists (with a brief summary of the testimony of each witness) and any exhibits or documents that the parties have not submitted in their pleadings pursuant to § 304.30 of this part, within 110 days after the appointment of the Arbitrator (*see* § 304.22 of this part) or within 10 days prior to the pre-hearing conference, whichever is earlier.

(b) The Arbitrator shall select the location, date, and time for the pre-hearing conference, giving due consideration to any recommendations by the parties.

(c) The pre-hearing conference shall be held within one hundred twenty days after the appointment of the Arbitrator (*see* § 304.22 of this part).

(d) The Arbitrator shall mail to each party notice of the pre-hearing conference not later than twenty days in advance of such conference, unless the parties by mutual agreement waive such notice.

(e) Any party may be represented by counsel at the pre-hearing conference. A party who intends to be so represented shall notify the other parties and the Arbitrator of the name, address and telephone number of counsel at least three days prior to the date set for the pre-hearing conference. When an attorney has initiated the arbitration by signing the joint request for arbitration on behalf of a party, or when an attorney has filed a pleading on behalf of a party, such notice is deemed to have been given.

(f) The pre-hearing conference may proceed in the absence of any party who, after due notice, fails to appear.

(g) (1) At the pre-hearing conference, the Arbitrator and the parties shall exchange witness statements, a stipulation of uncontested facts, a statement of disputed issues, and any other documents, including written direct testimony, that will assist in prompt resolution of the dispute and avoid unnecessary proof.

(2) The Arbitrator and the parties shall consider the settlement of all or part of the claim. The Arbitrator may encourage further settlement discussions among the parties. Any settlement reached may be set forth in a proposed decision in accordance with § 304.33 of this part. If such a settlement is not set forth in a proposed decision, the settlement shall be treated as an administrative settlement pursuant to section 122(h)(1) of CERCLA, 42 U.S.C. 9622(h)(1), and shall be subject to public comment pursuant to section 122(i) of CERCLA, 42 U.S.C. 9622(i).

§ 304.32 Arbitral hearing.

(a) The Arbitrator may, in his sole discretion, schedule a hearing with the parties on one or more of the disputed issues identified in the statement of disputed issues pursuant to § 304.31(g)(1) of this part.

(b) The Arbitrator shall select the location, date, and time for the arbitral hearing, giving due consideration to any recommendations by the parties.

(c) The hearing shall commence within forty-five days after the pre-hearing conference (*see* § 304.31 of this part). The Arbitrator may, upon a showing by the parties that settlement is likely, extend the date for the hearing for up to thirty additional days, if further

settlement discussions have been held pursuant to §304.31(g)(2) of this part.

(d) The Arbitrator shall mail to each party notice of the hearing not later than twenty days in advance of the hearing, unless the parties by mutual agreement waive such notice. Such notice shall include a statement of the disputed issues to be addressed at the hearing. The Arbitrator need not mail a second notice to the parties if the date for the hearing is extended pursuant to paragraph (c) of this section.

(e) Any party may be represented by counsel at the hearing. A party who intends to be so represented shall notify the other parties and the Arbitrator of the name, address and telephone number of counsel at least three days prior to the date set for the hearing. When an attorney has initiated the arbitration by signing the joint request on behalf of a party, or when an attorney has filed a pleading on behalf of a party, or when notice has been given pursuant to § 304.31(e) of this part, such notice is deemed to have been given.

(f) The Arbitrator shall make the necessary arrangements for the making of a true and accurate record of the arbitral hearing.

(g) The Arbitrator shall make the necessary arrangements for the services of an interpreter upon the request of one or more of the parties.

(h) The Arbitrator may take adjournments upon the request of any party or upon the Arbitrator's own initiative and shall take such adjournment when all of the parties agree thereto.

(i) The Arbitrator shall administer oaths to all witnesses before they testify at the arbitral hearing.

(j) (1) A hearing shall be opened by the recording of the location, date, and time of the hearing, the presence of the Arbitrator and the parties, and counsel if any, and by the Arbitrator's acknowledgment for the record of all pleadings and all other documents that have been filed by the parties.

(2) The hearing shall be conducted in accordance with the Arbitrator's jurisdiction as defined by § 304.20 of this part.

(3) The Arbitrator may, at any time, require oral statements clarifying the issues to be addressed at the hearing.

(4) The Arbitrator may require the parties to present witnesses for questioning by the Arbitrator and for direct and cross-examination by the parties on any of the disputed issues, except for any disputed issues concerning the selection or adequacy of the response action, which shall be governed by paragraph (j)(6) of this section.

(5) The Arbitrator shall define the scope of oral testimony. A party may present oral direct testimony only upon a showing of good cause why such testimony could not have been submitted in written form, or upon consent of all of the parties.

(6) Notwithstanding §§ 304.20(e)(1) and 304.20(e)(4) of this part, the Arbitrator may permit any party to supplement the documents which formed the basis for the selection of the response action (with additional documents, affidavits, or oral testimony), if any party demonstrates that supplementation is appropriate based upon applicable principles of administrative law.

(k) (1) Except as provided in paragraph (j)(6) of this section, exhibits and other documentary evidence not included in a party's pleadings, not exchanged prior to the pre-hearing conference pursuant to § 304.31(a) of this part, or not exchanged at the pre-hearing conference pursuant to § 304.31(g)(1) of this part, may be introduced at the hearing only upon a showing of good cause by the moving party or upon consent of all of the parties.

(2) Except as provided in paragraph (j)(6) of this section, witnesses not identified in a party's witness list may be presented at the hearing only upon a showing of good cause by the moving party or upon consent of all of the parties.

(3) The Arbitrator shall be the judge of the relevance and materiality of the evidence offered during the proceeding and of the applicability of legal privileges. Conformity to legal rules of evidence shall not be required.

(4) The Arbitrator may make such orders as may be necessary for *in camera* consideration of evidence for reasons of business confidentiality as defined by 40 CFR 2.201(e) and as consistent with section 104(e)(7) of CERCLA, 42 U.S.C. 9604(e)(7).

(l) The hearing may proceed in the absence of any party who, after due notice, fails to appear or fails to obtain an adjournment. If a party, after due notice, fails to appear or fails to obtain an adjournment, such party will be deemed to have waived the right to be present at the hearing.

(m) After all disputed issues have been heard by the Arbitrator, the Arbitrator may permit the parties to make closing statements, after which the Arbitrator shall declare the hearing closed.

(n) The hearing shall be completed within two weeks, unless the Arbitrator extends the hearing for good cause.

(o) The Arbitrator may permit the parties to submit proposed findings of fact, rulings, or orders within ten days after receipt of the hearing transcript or such longer time upon a finding of good cause.

(p) The parties may provide, by written agreement, for the waiver of the hearing.

§ 304.33 Arbitral decision and public comment.

(a) The Arbitrator shall render a proposed decision within forty-five days after the hearing is closed, or within forty-five days after the pre-hearing conference if no hearing is held, unless the parties have settled the dispute prior to the rendering of the proposed decision.

(b) (1) The proposed decision shall be in writing and shall be signed by the Arbitrator. It shall be limited in accordance with the Arbitrator's jurisdiction as defined by § 304.20 of this part, and shall, if such issues have been jointly submitted by the parties for resolution, contain the Arbitrator's determination of:

(i) Which participating PRPs, if any, are liable pursuant to section 107(a) of CERCLA, 42 U.S.C. 9607(a);

(ii) The dollar amount of response costs, if any, to be awarded to EPA, and

(iii) The allocation of responsibility for payment of EPA's award, if any, among the participating PRPs.

(2) The proposed decision shall also assess arbitration fees and expenses (*see* § 304.41 of this part) in favor of any party, or combination of parties, and, in the event any administrative fees or expenses are due the Association, in favor of the Association.

(c) If the parties settle their dispute during the course of the proceeding, the Arbitrator may, upon the parties' request, set forth in the terms of the agreed settlement in a proposed decision. Except as provided in § 304.20(b) of this part, a proposed decision which embodies an agreed settlement shall be subject to all applicable provisions of this part, including, but not limited to, paragraph (e) of this section and § 304.40 of this part.

(d) The parties shall accept as legal delivery of the proposed decision the placing in the United States mail of a true copy of the proposed decision, sent by certified mail, return receipt requested, addressed to each party's last known address or each party's attorney's last known address, or by personal service.

(e) (1) Pursuant to section 122(i) of CERCLA, 42 U.S.C. 9622(i), notice of the

proposed decision shall be published promptly by EPA in the **Federal Register**. Such notice shall include the name and location of the facility concerned, the names of the parties to the proceeding, and a brief summary of the proposed decision, and shall provide persons who are not parties to the proceeding a thirty-day period in which to file written comments relating to the proposed decision. Any filed comments shall be made available to the participating PRPs and to the public. The participating PRPs shall have ten days from the close of the public comment period in which to submit to EPA in writing their views on the merits of any comments filed. EPA shall consider any comments filed, and shall, within thirty days after the close of the ten-day period during which the participating PRPs may submit their views on any comments filed, provide written notice to the Arbitrator and the participating PRPs. The written notice shall be made available to the public and shall include:

(i) A summary of any comments filed;

(ii) Responses to any comments filed;

(iii) A discussion of whether any comments filed disclose to EPA facts or considerations which indicate the proposed decision is inappropriate, improper or inadequate; and

(iv) EPA's determination as to whether modification of the proposed decision or withdrawal from the arbitral proceeding is necessary based upon such comments.

(2) If EPA's written notice does not state that modification or withdrawal is necessary based upon public comments, then the proposed decision shall become final thirty days after the date of issuance of EPA's written notice. If EPA's written notice states that modification or withdrawal is necessary, the parties shall have thirty days from the date of issuance of EPA's written notice to modify the proposed decision so that it is no longer inappropriate, improper or inadequate and to set forth the proposed decision, as modified, in an agreed settlement. If an agreed settlement is reached, such agreed settlement shall be the final decision. If the parties do not modify the proposed decision in an agreed settlement within thirty days, the proposed decision shall be null and void and of no legal effect. EPA shall withdraw from the proceeding, and the Arbitrator shall assess such administrative fees and expenses (*see* § 304.41 of this part) against the parties as the Arbitrator deems appropriate.

(f) Payment of EPA's award, if any, and any fees or expenses due pursuant to the final decision, shall be made within thirty days after the date of the final decision.

(g) The Arbitrator shall, upon written request of any party, furnish to such party certified facsimiles of all papers in the Arbitrator's possession that may be required in judicial proceedings relating to the arbitration pursuant to § 304.40 of this part.

Subpart D—Other Provisions

§ 304.40 Effect and enforcement of final decision.

(a) Pursuant to section 122(h)(4) of CERCLA, 42 U.S.C. 9622(h)(4), any participating PRP who has resolved his or her liability for an EPA claim through a final decision reached pursuant to the procedures established by this part shall not be liable for claims for contributions regarding matters addressed by the final decision.

(b) The final decision shall be binding and conclusive upon the parties as to issues that were jointly submitted by the parties for resolution and addressed in the decision.

(c) (1) If any award made in the final decision is not paid within the time required by § 304.33(f) of this part, the final decision may be enforced as a settlement under section 122(h) of CERCLA, 42 U.S.C. 9622(h), by the Attorney General on behalf of EPA in any appropriate Federal district court pursuant to section 122(h)(3) of CERCLA, 42 U.S.C. 9622(h)(3). Pursuant to section 122(h)(3) of CERCLA, the terms of the final decision shall not be subject to review in any such action.

(2) In any such enforcement action initiated by the United States, the final decision may be challenged by any party if:

(i) It was achieved through fraud, misconduct, or partiality on the part of the Arbitrator;

(ii) It was achieved through fraud or misconduct by one of the parties affecting the result;

(iii) The Arbitrator exceeded his or her jurisdiction under § 304.20 of this part or failed to decide the claim within the bounds of his or her authority under this part; or

(iv) It violates public policy.

(3) Except as necessary to show such fraud, misconduct, partiality, excess of jurisdiction or authority, or violation of public policy, in any such enforcement action, a party may not raise, for the purpose of overturning or otherwise challenging the final decision, issues arising in the claim that were not submitted for resolution by arbitration.

(d) Except as provided in paragraph (c) of this section, and except as necessary for a participating PRP to defend against an action seeking contribution for matters addressed by the final decision, no final decision shall be admissible as evidence of any issue of fact or law in any proceeding brought under any provision of CERCLA or any other provision of law.

(e) Neither the initiation of an arbitral proceeding nor the rendering of a final decision on an EPA claim shall preclude or otherwise affect the ability of the United States, including EPA, to:

(1) Seek injunctive relief against any participating PRP for further response action at the facility concerned pursuant to CERCLA or any other applicable statute, regulation or legal theory; or

(2) Take further response action at the facility concerned pursuant to CERCLA or any other applicable statute, regulation or legal theory; or

(3) Seek reimbursement from any participating PRP for any costs not the subject of the arbitral proceeding pursuant to CERCLA or any other applicable statute, regulation or legal theory; or

(4) Seek any relief for any violation of criminal law from any participating PRP; or

(5) Seek damages for injury to, destruction of, or loss of natural resources from any participating PRP; or

(6) Seek any relief, civil or criminal, from any person not a party to the arbitral proceeding under CERCLA or any other applicable statute, regulation or legal theory.

§ 304.41 Administrative fees, expenses, and Arbitrator's fee.

(a) The Association shall prescribe an Administrative Fee Schedule and a Refund Schedule, which shall be subject to the approval of EPA. The schedule in effect at the time of filing or the time of refund shall be applicable.

(b) Expenses of witnesses shall be borne by the party producing such witnesses. The expense of the stenographic record and all transcripts thereof shall be prorated equally among all parties ordering copies, unless otherwise agreed by the parties, or unless the Arbitrator assesses such expenses or any part thereof against any specified party in the decision. The expense of an interpreter shall be borne by the party requesting the interpreter.

(c) The Association shall establish the per diem fee for the Arbitrator, subject to the approval of EPA, prior to the commencement of any activities by the Arbitrator. Arrangements for compensation of the Arbitrator shall be made by the Association.

(d) The Association shall make appropriate arrangements to pay the

Arbitrator's fee and the administrative fee, and shall render an accounting to the parties in accordance with the Arbitrator's award, within thirty days after the date of the final decision.

(e) In any arbitration conducted prior to the selection of the Association (*see* § 304.21(e) of this part), all fees and expenses of the arbitral proceeding, including the Arbitrator's fee, shall be divided equally among all parties, except that expenses of witnesses shall be borne by the party producing such witnesses, expenses of an interpreter shall be borne by the party requesting such interpreter, and the expense of the stenographic record and all transcripts thereof shall be prorated equally among all parties ordering copies.

§ 304.42 Miscellaneous provisions.

(a) Any party who proceeds with the arbitration knowing that any provision or requirement of this part has not been complied with, and who fails to object thereto either orally or in writing in a timely manner, shall be deemed to have waived the right to object.

(b) The original of any joint request for arbitration, modification to any joint request for arbitration, pleading, letter, or other document filed in the proceeding (except for exhibits and other documentary evidence) shall be signed by the filing party or by his or her attorney.

(c) All papers associated with the proceeding that are served by a party to an opposing party shall be served by personal service, or by United States first class mail, or by United States certified mail, return receipt requested, addressed to the party's attorney, or if the party is not represented by an attorney or the attorney cannot be located, to the last known address of the party. All papers associated with the proceeding that are served by the Arbitrator or by the Association shall be served by personal service or by United States certified mail, return receipt requested, addressed to the party's attorney, or if the party is not represented by an attorney or the attorney cannot be located, to the last known address of the party.

(d) If any provision of this part, or the application of any provision of this part to any person or circumstance, is held invalid, the application of such provision to other persons or circumstances and the remainder of this part shall not be affected thereby.

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