(c) Importance of the case, egregiousness of the violation, potential for or existence of environmental harm;

(d) Concealment of a person criminally culpable or existence of an organized criminal conspiracy to conceal the offense(s) committed by the named defendant(s);

(e) Willingness of the claimant to assist the Government's prosecution of the offense(s), which assistance includes providing further information and grand jury testimony, participating in trial preparation, and trial testimony if consistent with the limits on claimant identity disclosure as set forth in §303.31.

(f) Value of the claimant's assistance in comparison to that given by all other sources of information and evidence which led to arrest and conviction.

§303.31 Assurance of claimant confidentiality.

No person, except as authorized by the Agency's Office of Enforcement and Compliance Monitoring to have this knowledge, shall be given access to the identity of, or information that would lead to the identity of, a claimant who has requested anonymity prior to disclosing information to the Agency.

§303.32 Pre-payment offers.

Prior to the actual payment of an award, no employee of the United States Government, including any person purporting to act on behalf of the United States Environmental Protection Agency, is authorized by these regulations to make any promise, offer, or representation with respect to the Agency's grant of an award in exchange for information.

§303.33 Filing a claim.

(a) Any individual seeking an award under this regulation is required to file a claim for such an award with the Deputy Assistant Administrator for Criminal Enforcement not later than 45 days after the conviction of the person(s) involved in the prosecution in which the information was provided.

(b) The claim submission must provide, at a minimum, a summary of the information provided, the date the information was provided, and the name and title of the person to whom the information was provided.

(c) All claim submissions must be submitted to the Office of Criminal Enforcement Counsel (LE–134X), United States Environmental Protection Agency, 1200 Pennsylvania Ave., NW,Washington, DC 20460. The claim envelope should also specify whether the information was submitted under a request for anonymity and whether such request is still in effect. All such externally identified claims shall be handled in accordance with the Agency procedures for maintaining informant confidentiality, as referenced in §303.31 of this subpart.

PART 304—ARBITRATION PROCEDURES FOR SMALL SUPERFUND COST RECOVERY CLAIMS

Subpart A—General

Sec.

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

Subpart C—Hearings Before the Arbitrator

Subpart D—Other Provisions

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

SOURCE: 54 FR 23179, May 30, 1989, unless otherwise noted.

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.

PART 305—COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA) ADMINISTRATIVE HEARING PROCEDURES FOR CLAIMS AGAINST THE SUPERFUND

Subpart A—General

Sec.