

**§ 304.33**

**40 CFR Ch. I (7-1-03 Edition)**

(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.