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Title 40 —Protection of Environment

Chapter I —Environmental Protection Agency

Subchapter J —Superfund, Emergency Planning, and Community Right-to-Know Programs

Part 305 Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Administrative Hearing Procedures for Claims Against the Superfund

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

Authority: 42 U.S.C. 9601 *et seq.*; E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp. p. 193.

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Subpart A—General

§ 305.1 Scope.

(a)

- (1) This part governs all administrative proceedings for the total or partial denial of response claims asserted against the Hazardous Substance Superfund (the Fund) pursuant to sections 111(a)(2) and 122(b)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), 42 U.S.C. 9601 *et seq.*
- (2) Sections 111(a)(2) and 122(b)(1) of CERCLA authorize EPA, among other things, to use the Fund to reimburse certain persons who file claims for eligible response costs incurred in carrying out the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 CFR part 300. In the event that the Claims Official declines to pay all or part of a claim, a claimant may request an administrative hearing pursuant to § 305.4(a) within 30 days after receiving notice of the Claims Official's decision. The procedures governing such a proceeding are set forth in this part.

- (b) Procedural questions arising at any stage of the proceeding which are not addressed in this part shall be resolved at the discretion of the Claims Official, the Review Officer, or the Presiding Officer, as appropriate.

§ 305.2 Use of number and gender.

As used in this part, words in the singular also include the plural and words in the masculine gender also include the feminine, as the case may require.

§ 305.3 Definitions.

- (a) The following definitions apply to this part:

Administrative Law Judge means an Administrative Law Judge appointed under 5 U.S.C. 3105.

Agency or EPA means the United States Environmental Protection Agency.

CERCLA or the Act means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), 42 U.S.C. 9601 *et seq.*

Claim means a demand in writing for a sum certain, which is presented to the Fund in accordance with CERCLA sections 111 and 112.

Claimant means any person who presents a claim to the Fund for reimbursement under CERCLA section 112(b)(1).

Claims Official means the Assistant Administrator or the Regional Administrator or his delegatee who makes the initial decision awarding or denying a claim in whole or in part.

Confidential business information or CBI means business information for which a person has made a "business confidentiality claim" as defined in 40 CFR 2.201(h) and in accordance with all applicable provisions in 40 CFR part 2, subpart B, except insofar as the Administrator has denied the claim pursuant to the procedures in 40 CFR part 2, subpart B.

Final order means the decision of the Review Officer which has become final in accordance with § 305.4(a), or of the Presiding Officer, or in the case of a voluntary agreement (see § 305.25) of the parties, disposing of all legal and factual matters presented in the Request for a Hearing. A final order made by the Review Officer or the Presiding Officer shall contain findings of fact, conclusions of law, as well as the reasons therefore, and an order for an award of a sum certain, or an explanation of why no award is granted. The final order may consist of one or more of the following documents: the findings of fact, conclusions of law, and order of the Review Officer or the Presiding Officer; a voluntary agreement; an accelerated order; or a default order, if the default order provides for dismissal of the Request for a Hearing with prejudice. A final order is the final administrative decision of the Agency and (with the exception of a voluntary agreement) is appealable to the Federal district court for the district where the release or threat of release took place.

Fund or Superfund means the Hazardous Substance Superfund established by section 9507 of the Internal Revenue Code of 1986.

Hearing means a hearing on the record open to the public and conducted under this part.

Hearing Clerk means the Hearing Clerk, A-110, United States Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

National Contingency Plan or NCP means the National Oil and Hazardous Substances Pollution Contingency Plan developed under section 311(c) of the Clean Water Act and revised pursuant to section 105 of CERCLA (40 CFR part 300).

Party means EPA or any person that participates in a proceeding under this part as a Requestor.

Preauthorization means EPA's prior approval to submit a claim against the Fund for necessary response costs incurred as a result of carrying out the NCP.

Presiding Officer means the Administrative Law Judge designated by the Chief Administrative Law Judge, or the Chief Administrative Law Judge himself, in the absence of such designation, to conduct a hearing pursuant to this part.

Proceeding means the entire process of review of a claim conducted pursuant to this part that is initiated by a Request for a Hearing. A hearing is part of a proceeding.

Request for a Hearing means a written notice requesting an administrative hearing of the total or partial denial of a claim by the Claims Official. Such hearing shall be governed by this part.

Requestor is the party who files a Request for a Hearing.

Review Officer means the EPA Administrator or his delegatee who is authorized to exercise all powers and duties prescribed or delegated under the Act or this part to him.

Voluntary agreement (see § 305.25) means a written communication, signed by all the parties or their counsel or representatives, containing an order acceptable to both the Requestor and EPA. A voluntary agreement shall state that, for purposes of this proceeding, EPA consents to the award of a sum certain to the Requestor or such other consideration as the parties deem appropriate. A voluntary agreement is effective without approval of the Presiding Officer and is a final order as defined in this part.

- (b) Terms defined in CERCLA or in 40 CFR part 300 and not defined in this part are used consistent with the meanings given in CERCLA or 40 CFR part 300.

§ 305.4 Powers and duties of the Review Officer and the Presiding Officer; disqualification.

- (a) **Review Officer.** The Review Officer is authorized to receive Requests for a Hearing; attempt to promote settlement; make the decision of the Agency on the claim if the claimant does not request referral of the Request for a Hearing to the Chief Administrative Law Judge; and refer a Request for a Hearing to the Chief Administrative Law Judge when necessary. The Review Officer shall make the decision of the Agency on the claim in writing and shall serve the Requestor and the Claims Official with a copy of his decision. The Review Officer may, *sua sponte*, without ruling on the merits of the Request for a Hearing, refer it to the Chief Administrative Law Judge for decision. If the Requestor is not satisfied with the decision of the Review Officer, he may, within 10 days of service of such decision, request that the Review Officer refer the Request for a Hearing to the Chief Administrative Law Judge. The Requestor shall also serve such notice on the Claims Official. Otherwise the decision of the Review Officer is a final order. When referring a matter to the Chief Administrative Law Judge, the Review Officer shall include the Request for a Hearing, a copy of his decision, and any other pertinent documents. The Review Officer also shall notify the Requestor, the Hearing Clerk, and the Claims Official when he refers a Request for a Hearing to the Chief Administrative Law Judge. The Hearing Clerk, shall, upon receipt of the relevant documents, establish a file for the hearing. Thereafter, a copy of all pleadings must be filed with the Hearing Clerk. This requirement is in addition to the applicable service of documentation requirements contained in § 305.5(b)(2). The Review Officer shall exercise all other powers and duties prescribed or delegated to him under the Act or this part.
- (b) **Presiding Officer.** Upon receipt from the Review Officer of the Request for a Hearing, the Chief Administrative Law Judge shall designate himself or another Administrative Law Judge as Presiding Officer and shall transmit all documents related to the Request for a Hearing to the Presiding Officer. The Presiding Officer shall then notify the parties of his assignment pursuant to § 305.4(c). The Presiding Officer shall conduct a fair and impartial proceeding, assure that the facts are fully elicited, adjudicate all issues, and avoid delay. The Presiding Officer shall have authority to:
- (1) Conduct administrative hearings under this part;
 - (2) Rule upon motions, requests, and offers of proof, dispose of procedural requests, and issue all necessary orders;
 - (3) Administer oaths and affirmations;
 - (4) Examine witnesses and receive documentary or other evidence;
 - (5) Order a party, or an officer or agent thereof, for good cause, upon motion, or *sua sponte*, to produce testimony, documents, or other nonprivileged evidence, and failing the production thereof without good cause being shown, draw adverse inferences against that party;
 - (6) Admit or exclude evidence;

- (7) Hear and decide questions of law and fact;
 - (8) Require parties to attend conferences for the settlement or simplification of the issues, or the expedition of the proceedings;
 - (9) Extend the time limit for a final order in the hearing for a period not to exceed 60 days;
 - (10) Render findings of fact, conclusions of law, and a final order;
 - (11) Assess costs of the proceeding pursuant to § 305.36(b);
 - (12) Do all other acts and take all measures necessary for the maintenance of order and for the efficient and impartial adjudication of issues arising in proceedings governed by this part; and
 - (13) Resolve all disputes based on the evidence and applicable law; see § 305.31 concerning evidence.
- (c) The Presiding Officer shall notify the parties that the Request for a Hearing has been assigned to him, and that he has received the case file from the Chief Administrative Law Judge. After ruling on any objections to jurisdiction, or final disposition of any objections to disqualification, the Presiding Officer shall render a final order within 90 days after he affirmatively accepts such jurisdiction. The Presiding Officer shall render a final order within the allotted time, unless all parties agree in writing to an extension, or unless, in his discretion, either upon motion of a party or *sua sponte*, he allows an extension of time not to exceed 60 days. If all parties agree in writing to an extension of the time period within which the Presiding Officer must issue a final order, the extension shall be for the period agreed to in writing by all parties. There are no limits to such periods other than that to which the parties have agreed in writing. An agreement by the parties to extend the time limit does not preclude the Presiding Officer from extending the time limit to issue a final order *sua sponte* or upon motion of a party, nor does an extension by the Presiding Officer preclude the parties from agreeing to an extension.
- (d) ***Disqualification; withdrawal.***
- (1) Neither the Review Officer nor the Presiding Officer may perform functions provided for in this part regarding any matter in which he: has a financial interest; or has any relationship with a party or with the subject matter that would make it inappropriate for him to act. A party shall, by motion presented within 5 days after receiving notice of the assignment of the Presiding Officer, make any objection to his assignment. Otherwise, any objections to the qualifications of the Presiding Officer are waived, unless such objections arise after the time for presenting objections allowed by this paragraph. In such case, any objection must be made within 5 days of the time within which it arose. Either party may appeal the Presiding Officer's ruling on a motion to disqualify him to the Chief Administrative Law Judge. The Chief Administrative Law Judge shall rule on such motion in a timely fashion. When the Chief Administrative Law Judge is the Presiding Officer, he shall refer any challenge to his qualification to hear the case to another Administrative Law Judge for decision. The Review Officer or the Presiding Officer may at any time withdraw from any proceeding in which he deems himself disqualified or unable to act for any reason.
 - (2) If the Review Officer or the Presiding Officer is disqualified or withdraws from the proceeding, a qualified individual who has none of the infirmities listed in paragraph (d)(1) of this section shall be assigned to replace him. The Administrator shall appoint a new Review Officer. The Chief Administrative Law Judge shall assign a new Presiding Officer from among the available Administrative Law Judges.

- (3) The Chief Administrative Law Judge shall have the power to rule on motions for disqualification as described in paragraph (d)(1) of this section and may, at any stage in the hearing, reassign the case to an Administrative Law Judge other than the one originally assigned in the event of the unavailability of the Administrative Law Judge or where reassignment will result in efficiency in the scheduling of hearings and will not prejudice the parties.

§ 305.5 Filing, service, and form of pleadings and documents.

(a) *Filing of pleadings and documents.*

- (1) The original and one copy of the Request for a Hearing shall be served on the Review Officer. Service on the Review Officer shall be made in the manner prescribed by paragraph (b) of this section. The Requestor shall serve his Request for a Hearing on the Review Officer within 30 days of receipt of the Claims Official's decision. The Review Officer shall promptly notify the Claims Official of receipt of a Request for a Hearing and shall provide him a copy of such request. The original of all other pleadings and documents shall be filed with the appropriate official and a copy served on each party.
- (2) A certificate of service shall accompany each document filed or served. Except as otherwise provided, a party filing documents with the Hearing Clerk, after filing of the answer, shall serve copies thereof upon all other parties and the Presiding Officer. The Presiding Officer shall maintain a duplicate file during the course of the proceeding.
- (3) When the Presiding Officer corresponds directly with a party, the original of the correspondence shall be sent to the Hearing Clerk, a copy shall be maintained by the Presiding Officer in the duplicate file, and a copy shall be sent to all parties. A party who corresponds directly with the Presiding Officer shall, in addition to serving all other parties, send a copy of all such correspondence to the Hearing Clerk. A certificate of service shall accompany each document served under this paragraph.

(b) *Service of pleadings and documents –*

- (1) ***Service of Request for a Hearing.*** Service of a signed original Request for a Hearing with copy thereof may be made on the Review Officer either personally or by certified mail, return receipt requested. The Review Officer shall assign a docket number to the Request for a Hearing, and shall notify the Requestor, the Hearing Clerk, and the Claims Official of such docket number.
- (2) ***Service of documents other than the Request for a Hearing.***
 - (i) All documents other than the Request for a Hearing may be served on the appropriate official personally or by certified mail, return receipt requested, or by first class mail, postage pre-paid. After initiation of the hearing, a party serving any document must also submit a copy of such document to the Hearing Clerk.
 - (ii) Service upon the Claims Official, the Review Officer, or the Hearing Clerk shall be made by delivering two copies of the document to the appropriate official in the manner prescribed in paragraph (b)(2)(i) of this section.
 - (iii) Service upon a domestic or foreign corporation or upon a partnership or other unincorporated association that is subject to an action under a common name shall be made in the manner prescribed in paragraph (b)(2)(i) of this section, directed to an officer, partner, a managing or general agent, or to any other person authorized by appointment or by Federal or State law to receive service of process.

- (iv) Service upon a State or local unit of government, or a State or local officer, agency, department, corporation or other instrumentality shall be made by serving a copy of the document in the manner prescribed by the law of the State for the service of process on any such persons, or:
 - (A) If upon a State or local unit of government, or a State or local department, agency, corporation or other instrumentality, by personal service or certified mail, as prescribed by paragraph (b)(1) of this section, directed to the Chief Executive Officer thereof;
 - (B) If upon a State or local officer, by personal service or certified mail, as prescribed by paragraph (b)(1) of this section, to such officer.
- (v) Service upon an officer of agency of the United States shall be made by delivering a copy of the document to the officer or agency, or in any manner prescribed for service by applicable regulations. If the agency is a corporation, the document shall be served as prescribed in paragraph (b)(2)(iii) of this section.

(c) ***Form of pleadings and documents.***

- (1) Except as provided herein, or by order of the Presiding Officer, there are no specific requirements as to the form of documents.
- (2) The first page of every pleading, letter, or other document shall contain a caption identifying the Requestor, the docket number assigned by the Review Officer, and the official to whom the document is directed. All pleadings greater than ten pages in length, and all legal briefs, shall contain a table of contents and a table of citations with page references.
- (3) The original of any pleading, letter or other document (other than exhibits) shall be signed by the party filing or by his counsel or other representative. The signature constitutes a representation by the signer that he has read the pleading, letter, or other document, that to the best of his knowledge, information and belief, the statements made therein are true, and that it is not interposed for delay.
- (4) The initial document filed by any party shall contain his name, address and telephone number. Any changes in this information shall be communicated promptly to the appropriate official, and all parties to the proceeding. A party who fails to furnish such information and any changes thereto shall be deemed to have waived his right to notice and service under this part.
- (5) The Claims Official, Review Officer, Presiding Officer, or Hearing Clerk may refuse to file any document which does not comply with paragraph (c) of this section. Written notice of such refusal, stating the reasons therefore, shall be promptly given to the party submitting the document. Such party may amend and resubmit any document refused for filing, if such amendment and resubmission is timely. If, for good cause shown, amendment and resubmission is not timely, a party may request an extension of the time in which to submit a document to the appropriate official.

(d) ***Confidential Business Information.***

- (1) Any person filing or serving any pleading or document under this part containing information claimed as Confidential Business Information (CBI) shall assert the claim as specified in 40 CFR 2.203(b). The failure to assert a CBI claim in accordance with this section, at the time the pleading or document is filed or served, shall constitute a waiver of any rights to assert any CBI claim with respect to the business information in the pleading or document.

- (2) Any pleading or document containing CBI shall be filed in a double envelope. The outside envelope should not mention that CBI is contained. The inside envelope shall specify the envelope contains CBI.
- (3) For each original or copy of each pleading or document filed or served which contains CBI, the person shall submit two versions.
 - (i) One version must be complete. In that version, the person shall mark the specific information claimed as CBI pursuant to this section.
 - (ii) The CBI must be deleted in the second version, and all information claimed as CBI must be indicated in such version, as well as the nature of the information claimed as CBI, and the fact that another version containing the CBI has been filed pursuant to this section.
- (4) The Hearing Clerk shall not accept for filing any CBI pleading or document which does not comply with the requirements of paragraphs (d)(2) and (3) of this section.
- (5) All claims of CBI, and all information entitled to treatment as CBI, shall be governed by the provisions of 40 CFR part 2, subpart B, for CERCLA, as well as any other EPA regulatory provisions affecting the confidentiality of the information.

[58 FR 7706, Feb. 8, 1993, as amended at 59 FR 26, Jan. 3, 1994]

§ 305.6 Computation and extension of time.

- (a) **Computation.** In computing any period of time described or allowed in this part, except as otherwise provided, the day of the event from which the designated period begins to run shall not be included. Saturdays, Sundays, and Federal legal holidays shall be included. When a stated time expires on a Saturday, Sunday, or Federal legal holiday, the stated time period shall be extended to include the next business day.
- (b) **Extension of time.** The Presiding Officer, or Review Officer as appropriate, may grant an extension of time for the filing of any pleading, document or motion upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties, or upon his own motion. Such a motion by a party may only be made after notice to all other parties, unless the movant can show good cause why serving notice is impracticable. The motion shall be filed in advance of the date on which the pleading, document or motion is due to be filed, unless the failure of a party to make timely motion for extension of time was the result of excusable neglect.
- (c) **Service by mail.** Service of the Request for a Hearing is complete when the return receipt is signed by the Review Officer. Service of all other pleadings and documents is complete upon mailing. Where a pleading or document is served by mail, 5 days shall be added to the time allowed by this part for the filing of a responsive pleading or document.

§ 305.7 *Ex parte* discussion of proceeding.

At no time after the Request for a Hearing is referred to the Presiding Officer shall the Presiding Officer discuss *ex parte* the merits of the proceeding with any interested person outside the Agency, with any Agency staff member who performed a prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person. Any *ex parte* memorandum or other communication addressed to the Presiding

Officer during the pendency of the proceeding and relating to the merits thereof, by or on behalf of any party, shall be regarded as an argument made in the proceeding and shall be served upon all other parties. Any other party shall be given the opportunity to reply to such memorandum or communication.

§ 305.8 Examination of documents filed.

- (a) **Inspection of Documents.** Subject to the provisions of law restricting public disclosure of confidential information, any person may, during Agency business hours, inspect and copy any document filed in any proceeding. Such documents shall be made available by the Claims Official, Review Officer, or Hearing Clerk, as appropriate.
- (b) **Costs.** The cost of duplicating documents filed in any proceeding shall be borne by the person seeking copies of such documents. The Agency may waive this cost in appropriate cases.

Subpart B—Parties and Appearances

§ 305.10 Appearances.

Any party may appear in person or by counsel or other representative. A partner may appear on behalf of a partnership and an officer may appear on behalf of a corporation. Persons who appear as counsel or other representative must conform to the standards of conduct and ethics required of practitioners before the courts of the United States.

§ 305.11 Consolidation and severance.

- (a) **Consolidation.** The Presiding Officer may, by motion or *sua sponte*, consolidate any or all matters at issue in two or more proceedings docketed under this part where:
 - (1) There exist common parties or common questions of fact or law;
 - (2) Consolidation would expedite and simplify consideration of the issues; and
 - (3) Consolidation would not adversely affect the rights of parties engaged in otherwise separate proceedings.
- (b) **Severance.** The Presiding Officer may, by motion or *sua sponte*, for good cause shown, order any proceedings severed with respect to any or all parties or issues.

Subpart C—Prehearing Procedures

§ 305.20 Request for a hearing; contents.

- (a) Within 30 days after receiving notice that the Claims Official has declined to pay all or part of a claim, the claimant may file a Request for a Hearing with the Review Officer. The Request for a Hearing shall contain:
 - (1) A statement of the authority for the Request for a Hearing;
 - (2) A concise statement of the reasons that the Requestor disputes the Claims Official's denial of all or part of the claim;
 - (3) A request for an administrative hearing concerning the Claims Official's total or partial denial of his claim pursuant to this part; and
 - (4) A statement of amount that the Requestor demands to be awarded from the Fund.

- (b) The Requestor must file with the Request for a Hearing two copies of:
 - (1) The Preauthorization Decision Document for the response work that is the subject of the claim;
 - (2) The claim filed with EPA pursuant to CERCLA section 111(a)(2) or 122(b)(1); and
 - (3) The written notice from the Claims Official denying all or part of the claim.

§ 305.21 Amendment of request for a hearing; withdrawal.

- (a) **Amendment of Request for a Hearing.** The Requestor may amend the Request for a Hearing once as a matter of right at any time before the answer is filed. Otherwise the Requestor may amend the Request for a Hearing only upon motion granted by the Presiding Officer. The Claims Official shall have 10 additional days from the date of service of the amended claim to file his answer.
- (b) **Withdrawal of Request for a Hearing.** The Requestor may withdraw the Request for a Hearing, or any part thereof, without prejudice one time before the answer has been filed. After one withdrawal without prejudice before the filing of an answer, or after the filing of an answer, the Requestor may withdraw the Request for a Hearing, or any part thereof, without prejudice, only upon motion granted by the Presiding Officer. In no case may a Request for a Hearing be filed more than 30 days after the Requestor has received notice that the Claims Official has declined to pay all or part of a claim.

§ 305.22 Answer to the request for a hearing.

- (a) **General.** The Claims Official shall file an original and one copy of a written answer to the Request for a Hearing with the Hearing Clerk when he: contests any material fact upon which the Request for a Hearing is based; contends that the amount of money demanded in the Request for a Hearing is inappropriate; or contends that he is entitled to judgment as a matter of law. Any such answer to the Request for a Hearing must be filed with the Hearing Clerk and served on all parties within 15 days after the Presiding Officer has assumed jurisdiction over the case as provided by § 305.4(d).
- (b) **Contents of the answer.** The answer shall clearly and directly admit, deny, or explain each of the factual allegations in the Request for a Hearing with regard to which the Claims Official has any knowledge. When the Claims Official has no knowledge of a particular allegation and so states, the allegation is deemed denied. The answer shall also state:
 - (1) The circumstances or arguments which are alleged to constitute the grounds of defense; and
 - (2) The facts which the Claims Official intends to place at issue.
- (c) **Failure to admit, deny, or explain.** Failure of the Claims Official to admit, deny or explain any material factual allegation contained in the claim constitutes an admission of the allegation.
- (d) **Amendment of the answer.** The Claims Official may amend the answer to the Request for a Hearing upon motion granted by the Presiding Officer.

§ 305.23 Motions.

- (a) **General.** All motions, except those made orally on the record during a hearing, shall: be in writing; state the grounds therefor with particularity; set forth the relief sought and a proposed order; and be accompanied by an affidavit, certificate, other evidence, or legal memorandum relied upon. Such motions shall be served as provided by § 305.5(b)(2)(i).

- (b) **Response to motions.** A party's response to any written motion must be filed within 10 days after service of such motion, unless additional time is allowed for such response. The response shall be accompanied by any affidavit, certificate, other evidence or legal memorandum relied upon. If no response is filed within the designated period, the parties may be deemed to have waived any objection to the granting of the motion. The Presiding Officer may set a shorter time for response, or make such other orders concerning the disposition of motions as he deems appropriate.
- (c) **Decision.** The Presiding Officer, or Chief Administrative Law Judge, in the absence of a Presiding Officer, shall rule on all motions. Oral argument on motions will be permitted in the discretion of the Presiding Officer. See § 305.4(a) concerning motions to extend the time limit for final orders.

§ 305.24 Default order.

- (a) **Default.** A party may be found to be in default: after motion, upon failure of the Claims Official to file a timely answer to the Request for a Hearing; after motion or *sua sponte*, upon failure to comply with a prehearing or hearing order of the Presiding Officer; or after motion or *sua sponte*, upon failure to appear at a conference or hearing without good cause being shown. No finding of default on the basis of failure to appear at a hearing shall be made against the Claims Official unless the Requestor presents sufficient evidence to the Presiding Officer to establish a prima facie case in support of his claim. Any motion for a default order shall include a proposed default order and shall be served upon all parties. The alleged defaulting party shall have 10 days from service to reply to the motion. Default by the Claims Official constitutes, for purposes of the pending action only, an admission of all facts alleged in the claim and a waiver of his right to a hearing on such factual allegations. Default by the Requestor may result in the dismissal of the Request for a Hearing with prejudice.
- (b) **Procedures upon default.** When the Presiding Officer finds a default has occurred, he shall issue a default order against the defaulting party. The default order shall constitute the final order in the proceeding, and shall be filed with the Hearing Clerk.
- (c) **Contents of a default order.** A default order shall include findings of fact showing the grounds for the order; conclusions regarding all material issues of law; costs to be assessed pursuant to § 305.36, if applicable; and, the amount to be awarded the claimant, if any.
- (d) **Setting aside a default order.** For good cause shown, the Presiding Officer may set aside a default order.

§ 305.25 Informal settlement; voluntary agreement.

- (a) **Settlement policy.** The Agency encourages settlement of a proceeding at any time if the settlement is consistent with the provisions and objectives of the Act and applicable regulations. Settlement conferences shall not affect the Claims Official's obligation to file a timely answer under § 305.22.
- (b) **Voluntary agreement.** The voluntary agreement shall state that, for the purpose of this proceeding, the Claims Official consents to the award of a sum certain to the Requestor or in the case of no award, that both parties agree to settle the matter. The voluntary agreement shall include an order acceptable to both the Requestor and EPA, and shall be signed by all parties or their counsel or representatives. A voluntary agreement is effective without approval of the Presiding Officer and is a final order as defined in this part.

§ 305.26 Prehearing conference.

- (a) **Purpose of prehearing conference.** Unless a conference appears unnecessary, the Presiding Officer, at any time before the hearing begins, shall direct the parties and their counsel or other representatives to appear at a conference before him to consider:

- (1) The settlement of the case;
 - (2) The simplification of issues and stipulation of facts not in dispute;
 - (3) The necessity or desirability of amendments to the pleadings;
 - (4) The exchange of exhibits, documents, prepared testimony, and admissions or stipulations of fact which will avoid unnecessary proof;
 - (5) The limitation of the number of expert or other witnesses;
 - (6) Setting a time and place for the hearing; and
 - (7) Any other matters which may expedite the disposition of the proceeding.
- (b) **Exchange of witness lists and documents.** Unless otherwise ordered by the Presiding Officer, each party at the prehearing conference shall make available to all other parties: the names of the expert and other witnesses he intends to call, together with a brief narrative summary of their expected testimony; and copies of all documents and exhibits which each party intends to introduce into evidence. Documents and exhibits shall be marked for identification as ordered by the Presiding Officer. Documents that have not been exchanged and witnesses whose names have not been exchanged shall not be introduced into evidence or allowed to testify without permission of the Presiding Officer. The Presiding Officer shall allow the parties reasonable opportunity to review new evidence.
- (c) **Record of the prehearing conference.** No transcript of a prehearing conference relating to settlement shall be made. With respect to other prehearing conferences, no transcript of any prehearing conferences shall be made unless ordered by the Presiding Officer upon motion of a party or *sua sponte*. The Presiding Officer shall prepare and file for the record a written summary of the action taken at the conference and shall serve that summary on all parties in the manner provided in § 305.5(b)(2). The summary shall incorporate any written stipulations or agreements of the parties and all rulings and appropriate orders containing directions to the parties.
- (d) **Location of the prehearing conference.** The prehearing conference shall be held in the county where the release occurred, in the city in which the EPA Regional Office is located (in the Region where the release or threat of release occurred), or in Washington, DC, unless the Presiding Officer determines that there is good cause to hold it at another location or by telephone.
- (e) **Unavailability of a prehearing conference.** If a prehearing conference is unnecessary or impracticable, the Presiding Officer, on motion or *sua sponte*, may direct the parties to correspond with him to accomplish any of the objectives set forth in this section.
- (f) **Other discovery.**
- (1) Discovery shall include any of the methods described in rule 26(a) of the Federal Rules of Civil Procedure.
 - (2) The parties may conduct any mutually agreed upon discovery without participation or determination of the Presiding Officer except that such voluntary discovery may be subject to such time limitations as the Presiding Officer deems appropriate.
 - (3) Except as provided by paragraphs (b) and (f)(2) of this section, further discovery, under this section, shall be permitted only pursuant to order of the Presiding Officer. Any party to the proceeding desiring an order of discovery shall make a motion therefore. Such motion shall set forth:
 - (i) The circumstances warranting the discovery;

- (ii) The nature of the information expected to be discovered; and
 - (iii) The method of discovery sought, including, where relevant, the proposed time and place where the discovery will be conducted.
- (4) The Presiding Officer shall issue an order for discovery only upon a showing of good cause and upon a determination:
 - (i) That such discovery will not in any way unreasonably delay the proceeding;
 - (ii) That the information to be obtained is not otherwise obtainable; and
 - (iii) That such information has significant probative value.

If the Presiding Officer determines that the motion should be granted, he shall issue an order for such discovery together with the conditions and terms thereof.

- (5) The Presiding Officer shall order depositions upon oral questions only upon a finding that:
 - (i) The information sought cannot be obtained by alternative methods of discovery; or
 - (ii) There is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.
- (6) When the information sought to be obtained is within the control of one of the parties, failure to comply with an order issued pursuant to this paragraph may lead to:
 - (i) The inference that the information to be discovered would be adverse to the party from whom the information was sought; or
 - (ii) The issuance of a default order under § 305.24(a).
- (g) **Interpreters.** The Presiding Officer shall make the necessary arrangements for the services of an interpreter upon the motion of a party or *sua sponte*. The cost of the interpreter shall normally be borne by the party requesting the service, but the Presiding Officer may apportion the cost among the parties as justice demands.

§ 305.27 Accelerated order, order to dismiss.

- (a) **General.** The Presiding Officer, upon motion of any party or *sua sponte*, may at any time render an accelerated order in favor of the Requestor or the Claims Official as to all or any part of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and the party is entitled to judgment as a matter of law, as to all or any part of the proceeding. In addition, the Presiding Officer, upon motion of the Claims Official, may at any time dismiss a Request for a Hearing without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a *prima facie* case or other grounds which show no right to relief on the part of the Requestor.
- (b) **Effect.**
 - (1) If an accelerated order or an order to dismiss is issued as to all the issues in the proceeding, the order constitutes the final order of the Presiding Officer, and shall be filed with the Hearing Clerk.

- (2) If an accelerated order or an order to dismiss is rendered on less than all issues in the proceeding, the Presiding Officer shall determine what material facts exist without substantial controversy and what material facts remain controverted in good faith. He shall thereupon issue an interlocutory order specifying the facts which appear substantially uncontroverted, and the issues upon which the hearing will proceed.

Subpart D—Hearing Procedure

§ 305.30 Scheduling the hearing.

- (a) **Filing of answer.** When an answer is filed, the Hearing Clerk shall forward such answer to the Presiding Officer.
- (b) **Notice of hearing.** The Presiding Officer shall serve upon the parties a notice of hearing setting forth a time and place for the hearing. The Presiding Officer may issue the notice of hearing at any appropriate time, but not later than 20 days prior to the date set for the hearing.
- (c) **Postponement of hearing.** No request for postponement of a hearing shall be granted except upon motion and for good cause shown.
- (d) **Location of the hearing.** The location of the hearing shall be determined in accordance with the method of determining the location of a prehearing conference under § 305.26(d).

§ 305.31 Evidence.

- (a) **General.** The Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, or otherwise unreliable or of little probative value, except that evidence which would be excluded in the Federal courts under Rule 408 of the Federal Rules of Evidence (28 U.S.C. appendix) is not admissible. In the presentation, admission, disposition, and use of evidence, the Presiding Officer shall follow the provisions regarding confidential business information of 40 CFR part 2, subpart B for CERCLA. The commercial or trade secret status of any information shall not, however, preclude its being introduced into evidence. The Presiding Officer may make such orders as may be necessary to consider such evidence *in camera*, including the preparation of a supplemental final order to address questions of law or fact which arise out of that portion of the evidence which is confidential or which includes trade secrets. For the purpose of recording the hearing, the court reporter shall be considered “a person under contract or subcontract to EPA to perform work for EPA in connection with the Act or regulations which implement the Act” pursuant to 40 CFR 2.301(h)(2); unless the affected business, as defined in 40 CFR 2.201(d), agrees to some other procedures approved by the Presiding Officer.
- (b) **Examination of witnesses.** Witnesses shall be examined orally, under oath or affirmation, except as otherwise provided in this part or by the Presiding Officer. A party shall have the right to cross-examine a witness who appears at the hearing provided that such cross-examination is not unduly repetitious.
- (c) **Verified statements.** The Presiding Officer may admit and insert into the record as evidence, in lieu of oral testimony, statements of fact or opinions prepared by a witness. The admissibility of the evidence contained in the statement shall be subject to the same rules as if the testimony were produced under oral examination. Before any such statement is read or admitted into evidence, the witness shall deliver a copy of the statement to the Presiding Officer, the reporter, and opposing counsel. The witness presenting the statement shall swear to or affirm the statement and shall be subject to appropriate oral cross-examination upon the contents thereof.

- (d) **Admission of affidavits and other statements where the witness is unavailable.** The Presiding Officer may admit into evidence affidavits and other verified written statements of witnesses who are unavailable. The term "unavailable" shall have the meaning accorded to it by rule 804(a) of the Federal Rules of Evidence.
- (e) **Exhibits.** Where practicable, an original and one copy of each exhibit shall be filed with the Presiding Officer for the record and copy shall be furnished to each party. A true copy of any exhibit may be substituted for the original.
- (f) **Official notice.** Official notice may be taken of any matter which may be judicially noticed in the Federal courts and of other facts within the specialized knowledge and experience of the Agency. Opposing parties shall be given adequate opportunity to show that such facts are erroneously noticed.

§ 305.32 Objections and offers of proof.

- (a) **Objection.** Any objection concerning the conduct of the hearing may be stated orally or in writing during the hearing. The party raising the objection must supply a short statement of its grounds. The ruling by the Presiding Officer on any objection and the reasons given for it shall be part of the record. An exception to each objection overruled shall be automatic and is not waived by further participation in the hearing.
- (b) **Offer of proof.** Whenever evidence is excluded from the record, the party offering the evidence may make an offer of proof, which shall be included in the record. The offer of proof for excluded oral testimony shall consist of a brief statement describing the nature of the evidence excluded. The offer of proof for excluded documents or exhibits shall consist of the insertion into the record of the documents or exhibits excluded.

§ 305.33 Burden of presentation; burden of persuasion.

The Requestor has the burden of going forward with his case and of proving that the amount demanded in the Request for a Hearing is justified. Accordingly, the Requestor bears the burdens of presentation and persuasion. Following the establishment of a prima facie case, the Claims Official shall have the burden of presenting and of going forward with any defense to the allegations set forth in the Request for a Hearing. Each matter of controversy shall be determined by the Presiding Officer upon a preponderance of the evidence.

§ 305.34 Filing the transcript.

The hearing shall be transcribed verbatim. Promptly following the taking of the last evidence, the reporter shall transmit to the Hearing Clerk the original and as many copies of the transcript of testimony as are called for in the reporter's contract with the Agency, and also shall transmit to the Presiding Officer a copy of the transcript. A certificate of service shall accompany each copy of the transcript. The Hearing Clerk shall notify all the parties of the availability of the transcript and shall furnish the Requestor with a copy of the transcript upon payment of the cost of reproduction, unless a Requestor can show that the cost is unduly burdensome. Any person not a party to the proceeding may receive a copy of the transcript upon payment of the reproduction fee, except for those parts of the transcript ordered to be kept confidential by the Presiding Officer. Any party may file a motion to correct the transcript in accordance with the provision of § 305.23.

§ 305.35 Proposed findings, conclusions, and order.

Within 20 days after the parties are notified of the availability of the transcript, any party may submit for the consideration of the Presiding Officer proposed findings of fact, conclusions of law, and a proposed order, together with briefs in support thereof. The Presiding Officer shall set a time by which reply briefs may be submitted. The Presiding Officer may by order extend the time or change the schedule of such submissions or allow further

submissions as may be appropriate. All submissions shall be in writing, shall be served upon all parties, and shall contain references to the record for all proposed findings of fact and appropriate citations for authorities relied upon.

§ 305.36 Final order; costs.

- (a) **Filing and content.** The Presiding Officer shall issue and file with the Hearing Clerk a final order as soon as practicable after the period for filing reply briefs under § 305.35 has expired, but within the time allowed for issuance of a final order as prescribed by § 305.4(d). The final order shall contain his findings of fact, conclusions of law, as well as the reasons therefor, and an order for an award for a sum certain, or an explanation of why no award is granted.
- (b) **Costs.** If the Presiding Officer concludes in writing that the Request for a Hearing was frivolous, he may direct the Hearing Clerk to assess all or part of the costs of the proceeding against the Requestor. In such case, the Hearing Clerk shall assess such costs as directed by the Presiding Officer, and shall serve notice of such direction and the amount of such costs on all parties. No later than 5 days after receipt of notice of assessment of costs, the Requestor may move that the Presiding Officer review the assessment of costs by the Hearing Clerk. The Presiding Officer may uphold, reverse, or modify the action of the Hearing Clerk in assessing costs.