

**§ 304.21**

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

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

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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 en-

forcement 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 indential 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