

### § 305.32

### 40 CFR Ch. I (7-1-07 Edition)

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.

**PART 307—COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA) CLAIMS PROCEDURES**

**Subpart A—General**

- Sec.  
 307.10 Purpose.  
 307.11 Scope and applicability.  
 307.12 Use of number and gender.  
 307.13 Computation of time.  
 307.14 Definitions.  
 307.15 Penalties.

**Subpart B—Eligible Claimants; Allowable Claims; Preauthorization**

- 307.20 Who may present claims.  
 307.21 Nature of eligible claims.  
 307.22 Preauthorization of response actions.  
 307.23 EPA's review of preauthorization applications.

**Subpart C—Procedures for Filing and Processing Response Claims**

- 307.30 Requesting payment from the potentially responsible party.  
 307.31 Filing procedures.  
 307.32 Verification, award, and administrative hearings.  
 307.33 Records retention.