

Environmental Protection Agency

§ 304.12

(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