

§ 10.38

to receive all correspondence, transcripts, and other documents pertaining to the proceeding under this part.

[47 FR 38676, Sept. 2, 1982, as amended at 52 FR 31610, Aug. 21, 1987; 54 FR 53316, Dec. 28, 1989]

§ 10.38 Certifications.

Whenever information is made a part of the record under the exceptions authorized by §10.28 (i), (j), or (l), the record shall contain certificates evidencing that the required determinations have been made.

PART 11—CRITERIA AND PROCEDURES FOR DETERMINING ELIGIBILITY FOR ACCESS TO OR CONTROL OVER SPECIAL NUCLEAR MATERIAL

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AUTHORITY: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

Section 11.15(e) also issued under sec. 501, 85 Stat. 290 (31 U.S.C. 483a).

SOURCE: 45 FR 76970, Nov. 21, 1980, unless otherwise noted.

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GENERAL PROVISIONS

§ 11.1 Purpose.

This part establishes the requirements for special nuclear material access authorization, and the criteria and procedures for resolving questions concerning the eligibility of individuals to receive special nuclear material access authorization for conduct of certain activities, licensed or otherwise, which involve access to or control over special nuclear material.

§ 11.3 Scope.

(a) The requirements, criteria, and procedures of this part apply to the establishment of and eligibility for special nuclear material access authorization for employees, contractors, consultants of, and applicants for employment with, licensees or contractors of the Nuclear Regulatory Commission where such employment, contract, service, or consultation involves any job falling within the criteria of §11.11 or §11.13.

(b) The requirements, criteria, and procedures of this part are in addition to and not in lieu of any requirements, criteria, or procedures for access to or control over classified special nuclear material.

§ 11.5 Policy.

It is the policy of the Nuclear Regulatory Commission to carry out its authority to establish and administer, in a manner consistent with traditional American concepts of justice, a personnel security program in the interests of the common defense and security for the purpose of safeguarding special nuclear material and preventing sabotage which would endanger the public by exposure to radiation. To this end, the Commission has established criteria for determining eligibility for special nuclear material access authorization and will afford affected individuals the opportunity for administrative review of questions concerning their eligibility for special nuclear material access authorization.

§ 11.7 Definitions.

As used in this part:

(a) Terms defined in parts 10, 25, 50, 70, 72, 73, and 95 of this chapter have

the same meaning when used in this part.

(b) *Special nuclear material access authorization* means an administrative determination that an individual (including a contractor or consultant) who is employed by or is an applicant for employment with an affected Commission contractor, licensee of the Commission, or contractor of a licensee of the Commission may work at a job which affords access to or control over special nuclear material and that permitting the individual to work at that job would not be inimical to the common defense and security.

(c) *NRC-‘U’ special nuclear material access authorization* means an administrative determination based upon a national agency check and a full-field background investigation, normally conducted by the Office of Personnel Management, that an individual in the course of employment is eligible to work at a job falling within the criterion of § 11.11(a)(1) or § 11.13.

(d) *‘NRC-‘R’ special nuclear material access authorization* means an administrative determination based upon a national agency check and credit investigation that an individual in the course of employment is eligible to work at a job falling within the criterion of § 11.11(a)(2).

[45 FR 76970, Nov. 21, 1980, as amended at 46 FR 58282, Dec. 1, 1981; 50 FR 39077, Sept. 27, 1985; 55 FR 11574, Mar. 29, 1990]

#### **§ 11.8 Information collection requirements: OMB approval.**

(a) The Nuclear Regulatory Commission has submitted the information collection requirements contained in this part to the Office of Management and Budget (OMB) for approval as required by the Paperwork Reduction Act (44 U.S.C. et seq.). The NRC may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. OMB has approved the information collection requirements contained in this part under control number 3150-0062.

(b) The approved information collection requirements contained in this part appear in §§ 11.9, 11.11, 11.13, 11.15, and 11.16.

[62 FR 52185, Oct. 6, 1997]

#### **§ 11.9 Specific exemptions.**

The Commission may, upon application of any interested party, grant an exemption from the requirements of this part. Exemptions will be granted only if they are authorized by law and will not constitute an undue risk to the common defense and security. Documentation related to the request, notification and processing of an exemption shall be maintained for three years beyond the period covered by the exemption.

[45 FR 76970, Nov. 21, 1980, as amended at 53 FR 19245, May 27, 1988]

#### **§ 11.10 Maintenance of records.**

Each record required by this part must be legible throughout the retention period specified by each Commission regulation. The record may be the original or a reproduced copy or a microform provided that the copy or microform is authenticated by authorized personnel and that the microform is capable of producing a clear copy throughout the required retention period. The record may also be stored in electronic media with the capability for producing legible, accurate, and complete records during the required retention period. Records such as letters, drawing, specification, must include all pertinent information such as stamps, initials, and signatures etc. The licensee shall maintain adequate safeguards against tampering with and loss of records.

[53 FR 19245, May 27, 1988]

#### REQUIREMENTS FOR SPECIAL NUCLEAR MATERIAL ACCESS AUTHORIZATION

#### **§ 11.11 General requirements.**

(a) Each licensee who uses, processes, stores, transports, or delivers to a carrier for transport, formula quantities of special nuclear material (as defined in part 73 of this chapter) subject to the physical protection requirements of §§ 73.20, 73.25, 73.26, 73.45, and 73.46, and each person subject to the general licensing requirements of § 70.20a, shall identify at its facility or plant (excluding all non-power reactor facilities and storage of fuel incident thereto and facilities and plants in which the licensee possesses or uses only irradiated

special nuclear material subject to the exemption of §73.6(b)), describe, and if not already provided, provide to the Commission, by December 26, 1985 by amendment to its security plan:

(1) All jobs in which an individual could steal or divert special nuclear material, or commit sabotage which would endanger the public by exposure to radiation, by working alone or in cooperation with an individual who does not possess an NRC-U special nuclear material access authorization, or by directing or coercing any individual to assist in the theft, diversion, or sabotage. Such jobs include but are not limited to:

(i) All positions in the licensee's security force,

(ii) Management positions with the authority to:

(A) Direct the actions of members of the security force or alter security procedures, or

(B) Direct routine movements of special nuclear material, or

(C) Direct the routine status of vital equipment.

(iii) All jobs which require unescorted access within onsite alarm stations.

(iv) All jobs which require unescorted access<sup>2</sup> to special nuclear material or within vital areas.

(2) All jobs which require unescorted access within protected areas and which do not fall within the criterion of paragraph (a)(1) of this section.

(b) After 365 days following Commission approval of the amended security plan submitted in accordance with paragraph (a) of this section, no individual may be permitted to work at any job determined by the Commission to fall within the criterion of paragraph (a)(1) of this section without an NRC-U special nuclear material access authorization, and no individual may be permitted unescorted access to any protected area at any site subject to this part without either an NRC-U or NRC-R special nuclear material access authorization. The exceptions to the requirement for an NRC-U and NRC-R

<sup>2</sup>This does not alter the requirement for methods to observe individuals within material access areas as stated in §73.46(e)(9) of this chapter.

special nuclear material access authorization are as follows:

(1) Exceptions to the requirement for an NRC-U special nuclear material access authorization for an individual to work at a job within the criteria of paragraph (a)(1) are provided for:

(i) Any individual employed in such a job on October 28, 1985, who is not yet in receipt of an NRC-U special nuclear material access authorization from the Commission, provided that a complete application has been submitted to and is pending before the NRC for processing for that employee in accordance with §11.15 (a) and (b); or

(ii) Any individual in possession of an NRC-L or R access authorization or an equivalent active Federal security clearance but not yet in receipt of the NRC-U special nuclear material access authorization, provided that a complete application has been submitted to and is pending before the NRC for processing for that employee in accordance with §11.15 (a) or (b), or both.

(2) Exceptions to the requirement for an NRC-R special nuclear material access authorization for an individual to have unescorted access to a protected area are provided for:

(i) Any individual employed in such a job on October 28, 1985 who is not yet in receipt of an NRC-R special nuclear material access authorization from the Commission, provided that a complete application has been submitted to and is pending before the NRC for processing for that employee in accordance with §11.15 (a) and (b); or

(ii) Any individual in possession of an NRC-L access authorization or an equivalent active Federal security clearance, provided that a complete application has been submitted to the NRC for processing for that employee in accordance with §11.15 (a) or (b), or both.

[45 FR 76970, Nov. 21, 1980, as amended at 46 FR 56599, Nov. 18, 1981; 50 FR 39077, Sept. 27, 1985]

#### **§ 11.13 Special requirements for transportation.**

(a) All individuals who, after 365 days following approval of the amended security plan submitted in accordance with §11.11(a), transport, arrange for transport, drive motor vehicles in road

shipments of special nuclear material, pilot aircraft in air shipments of special nuclear material, act as monitors at transfer points, or escort road, rail, sea, or air shipments of special nuclear material subject to the appropriate physical protection requirements of §§ 73.20, 73.25, 73.26, or 73.27 of this chapter, or who are authorized to alter the scheduling and routing of such transport shall have NRC-U special nuclear material access authorization. Exceptions are provided for:

(1) Any individual who is employed in such a job on October 28, 1985 and who is not yet in receipt of an NRC-U special nuclear material access authorization from the Commission, provided that a complete application has been submitted to and is pending before the NRC for processing for that employee in accordance with § 11.15 (a) and (b) or

(2) Any individual in possession of an NRC-L or R access authorization or equivalent active Federal security clearance but not yet in receipt of the NRC-U special nuclear material access authorization, provided that a complete application has been submitted to and is pending before the NRC for processing for that employee in accordance with § 11.15 (a) or (b), or both.

(b) Each licensee who, 365 days after Commission approval of the amended security plan submitted in accordance with § 11.11(a), transports or delivers to a carrier for transport special nuclear material subject to the physical protection requirement of §§ 73.20, 73.25, 73.26, or 73.27 of this chapter shall confirm and record prior to shipment the name and special nuclear material access authorization number of all individuals identified in paragraph (a) of this section assigned to the shipment. The licensee shall retain this record for three years after the last shipment is made. However, the licensee need not confirm and record the special nuclear material access authorization number in the case of any individual for whom an application has been submitted and is pending before the NRC in accordance with paragraph (a) of this section.

[50 FR 39078, Sept. 27, 1985, as amended at 53 FR 19245, May 27, 1988]

**§ 11.15 Application for special nuclear material access authorization.**

(a)(1) Application for special nuclear material access authorization, renewal, or change in level shall be filed by the licensee on behalf of the applicant with the Director, Division of Security, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Applications for affected individuals employed on October 28, 1985, shall be submitted within 60 days of notification of Commission approval of the amended security plan.

(2) Licensees who wish to secure NRC-U or NRC-R special nuclear material access authorizations for individuals in possession of an active NRC Q or L access authorization or other security clearance granted by another Federal agency based on an equivalent investigation shall submit a "Security Acknowledgement" (NRC Form 176) and a "Request for Access Authorization" (NRC Form 237). NRC will process these requests by verifying the data on an NRC cleared individual, or by contacting the Federal agency which granted the clearance, requesting certification of the security clearance, and determining the investigative basis and level of the clearance. Licensees may directly request the Federal agency which administered the security clearance, if other than NRC, to certify to the NRC that it has on file an active security clearance for an individual and to specify the investigative basis and level of the clearance.

(b) Applications for special nuclear material access authorization for individuals, other than those qualifying under the provisions of § 11.15(a)(2), must be made on forms supplied by the Commission, including:

(1) Questionnaire for Sensitive Positions (SF-86, Parts 1 and 2);

(2) Two completed standard fingerprint cards (FD-258);

(3) Security Acknowledgement (NRC Form 176);

(4) Other related forms where specified in accompanying instruction (NRC-254); and

(5) A statement by the employer, prospective employer, or contractor identifying the job to be assigned to or assumed by the individual and the level of authorization needed, justified by

appropriate reference to the licensee's security plan.

(c)(1) Except as provided in paragraphs (c)(2) and (c)(3) of this section, NRC-U and NRC-R special nuclear material access authorizations must be renewed every five years from the date of issuance. An application for renewal must be submitted at least 120 days before the expiration of the five year period and must include:

(i) A statement by the licensee that at the time of application for renewal the individual's assigned or assumed job requires an NRC-U special nuclear material access authorization, justified by appropriate reference to the licensee's security plan;

(ii) The questionnaire for Sensitive Positions (SF-86, Parts 1 and 2);

(iii) Two completed standard fingerprint cards (FD-258); and

(iv) Other related forms specified in accompanying NRC instructions (NRC Form 254).

(2) An exception to the time for submission of NRC-U special nuclear material access authorization renewal applications and the paperwork required is provided for those individuals who have a current and active DOE-Q access authorization and who are subject to DOE Reinvestigation Program requirements. For these individuals, the submission to DOE of the SF-86 pursuant to DOE Reinvestigation Program requirements (generally every five years) will satisfy the NRC renewal submission and paperwork requirements even if less than five years has passed since the date of issuance or renewal of the NRC-U access authorization. Any NRC-U special nuclear material access authorization renewed in response to provisions of this paragraph will not be due for renewal until the date set by DOE for the next reinvestigation of the individual pursuant to DOE's Reinvestigation Program.

(3) An exception to the time for submission of NRC-R special nuclear material access authorization renewal applications and the paperwork required is provided for those individuals who have a current and active DOE-L or DOE-Q access authorization and who are subject to DOE Reinvestigation Program requirements. For these individuals, the submission to DOE of the

SF-86 pursuant to DOE Reinvestigation Program requirements (generally every five years) will satisfy the NRC renewal submission and paperwork requirements even if less than five years has passed since the date of issuance or renewal of the NRC-R access authorization. Any NRC-R special nuclear material access authorization renewed pursuant to this paragraph will not be due for renewal until the date set by DOE for the next reinvestigation of the individual pursuant to DOE's Reinvestigation Program.

(4) Notwithstanding the provisions of paragraph (c)(2) or (c)(3) of this section, the period of time for the initial and each subsequent NRC-U or NRC-R renewal application to NRC may not exceed seven years. Any individual who is subject to the DOE Reinvestigation Program requirements but, for administrative or other reasons, does not submit reinvestigation forms to DOE within seven years of the previous submission, shall submit a renewal application to NRC using the forms prescribed in paragraph (c)(1) of this section before the expiration of the seven year period.

(d) If at any time, due to new assignment or assumption of duties, a change in special nuclear material access authorization level from NRC "R" to "U" is required, the individual shall apply for a change of level of special nuclear material access authorization. The application must include a description of the new duties to be assigned or assumed, justified by appropriate reference to the licensee's security plan.

(e)(1) Each application for special nuclear material access authorization, renewal, or change in level must be accompanied by the licensee's remittance, payable to the U.S. Nuclear Regulatory Commission, according to the following schedule:

i. NRC-U requiring full field investigation .....	\$3,275
ii. NRC-U requiring full field investigation (expedited processing) .....	3,800
iii. NRC-U based on certification of comparable full field background investigation .....	10
iv. NRC-U or R renewal .....	180
v. NRC-R .....	180

vi. NRC-R based on certification of comparable investigation ..... 20

<sup>1</sup>If the NRC determines, based on its review of available data, that a full field investigation is necessary, a fee of \$3,275 will be assessed prior to the conduct of the investigation.

<sup>2</sup>If the NRC determines, based on its review of available data, that a National Agency Check and Credit investigation is necessary, a fee of \$80.00 will be assessed prior to the conduct of the investigation; however, if a full field investigation is deemed necessary by the NRC, based on its review of available data, a fee of \$3,275 will be assessed prior to the conduct of the investigation.

(2) Material access authorization fees will be published each time the Office of Personnel Management notifies NRC of a change in the background investigation rate it charges NRC for conducting the investigation. Any such changed access authorization fees will be applicable to each access authorization request received upon or after the date of publication. Applications from individuals having current Federal access authorizations may be processed expeditiously at no cost, since the Commission may accept the certification of access authorizations and investigative data from other Federal government agencies which grant personnel access authorizations.

(f)(1) Any Federal employee, employee of a contractor of a Federal agency, licensee, or other person visiting an affected facility for the purpose of conducting official business, who possesses an active NRC or DOE-Q access authorization or an equivalent Federal security clearance granted by another Federal agency ("Top Secret") based on a comparable full field background investigation may be permitted, in accordance with §11.11, the same level of unescorted access that an NRC-U special nuclear material access authorization would afford.

(2) Any Federal employee, employee of a contractor of a Federal agency, licensee, or other person visiting an affected facility for the purpose of conducting official business, who possesses an active NRC or DOE-L access authorization or an equivalent security clearance granted by another Federal agency ("Secret") based on a background investigation or national agency check and credit investigation may be permitted, in accordance with §11.11, the same level of unescorted access that an NRC-R special nuclear material access authorization would afford. An NRC or DOE-L access authorization or an

equivalent security clearance ("Secret"), based on a background investigation or national agency check, which was granted or being processed by another Federal agency prior to April 30, 1990 is acceptable to meet this requirement.

[50 FR 39078, Sept. 27, 1985, as amended at 55 FR 11574, Mar. 29, 1990; 55 FR 14379, Apr. 17, 1990; 58 FR 44435, Aug. 23, 1993; 60 FR 26356, May 17, 1995; 63 FR 25156, May 7, 1998]

**§ 11.16 Cancellation of request for special nuclear material access authorization.**

When a request for an individual's access authorization is withdrawn or cancelled, the licensee shall notify the Chief, Personnel Security Branch, NRC Division of Security immediately, by telephone, so that the full field investigation or national agency check and credit investigation may be discontinued. The caller shall provide the full name and date of birth of the individual, the date of request, and the type of access authorization originally requested ("U" or "R"). The licensee shall promptly submit written confirmation of the telephone notification to the Personnel Security Branch, NRC Division of Security. A portion of the fee for the "U" special nuclear material access authorization may be refunded depending upon the status of the full field investigation at the time of withdrawal or cancellation.

[55 FR 11574, Mar. 29, 1990, as amended at 55 FR 14379, Apr. 17, 1990]

CRITERIA FOR DETERMINING ELIGIBILITY FOR ACCESS TO, OR CONTROL OVER, SPECIAL NUCLEAR MATERIAL

**§ 11.21 Application of the criteria.**

(a) The decision to grant or deny special nuclear material access authorization is a comprehensive, common-sense judgment, made after consideration of all the relevant information, favorable or unfavorable, that to grant or deny special nuclear material access authorization is or is not inimical to the common defense and security and is or is not clearly consistent with the national interest.

(b) To assist in making these determinations, on the basis of all the information in a particular case, there are

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set forth in §10.11 of this chapter a number of specific types of derogatory information. These criteria are not exhaustive but contain the principal types of derogatory information which in the opinion of the Commission create a question as to the individual's eligibility for special nuclear material access authorization. These criteria are subject to continuing review and may be revised from time to time as experience and circumstances may make desirable.

(c) When the reports of investigation of an individual contain information reasonably falling within one or more of the classes of derogatory information listed in §10.11, it shall create a question as to the individual's eligibility for special nuclear material access authorization. In such cases, the application of the criteria shall be made in light of and with specific regard to whether the existence of such information supports a reasonable belief that the granting of a special nuclear material access authorization would be inimical to the common defense and security. The Director, Division of Security, may authorize the granting of special nuclear material access authorization on the basis of the information in the case or may authorize the conduct of an interview with the individual and, on the basis of such interview and such other investigation as the Director deems appropriate, may authorize the granting of special nuclear material access authorization. Otherwise, a question concerning the eligibility of an individual for special nuclear material access authorization shall be resolved in accordance with the procedures set forth in §§10.20 through 10.38 of this chapter.

(d) In resolving a question concerning the eligibility or continued eligibility of an individual for special nuclear material access authorization by action of the Hearing Examiner,<sup>4</sup> the following principle shall be applied by the Examiner: Where there are grounds sufficient to establish a reasonable belief as to the truth of the information regarded as substantially derogatory and when the existence of such information

<sup>4</sup>The function of the Hearing Examiner is described in part 10 of this chapter.

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supports a reasonable belief that granting access would be inimical to the common defense and security, this shall be the basis for a recommendation for denying or revoking special nuclear material access authorization if not satisfactorily rebutted by the individual or shown to be mitigated by circumstance.

[45 FR 76970, Nov. 21, 1980, as amended at 47 FR 38683, Sept. 2, 1982]

#### VIOLATIONS

### § 11.30 Violations.

(a) The Commission may obtain an injunction or other court order to prevent a violation of the provisions of—

(1) The Atomic Energy Act of 1954, as amended;

(2) Title II of the Energy Reorganization Act of 1974, as amended; or

(3) A regulation or order issued pursuant to those Acts.

(b) The Commission may obtain a court order for the payment of a civil penalty imposed under section 234 of the Atomic Energy Act:

(1) For violations of—

(i) Sections 53, 57, 62, 63, 81, 82, 101, 103, 104, 107, or 109 of the Atomic Energy Act of 1954, as amended;

(ii) Section 206 of the Energy Reorganization Act;

(iii) Any rule, regulation, or order issued pursuant to the sections specified in paragraph (b)(1)(i) of this section;

(iv) Any term, condition, or limitation of any license issued under the sections specified in paragraph (b)(1)(i) of this section.

(2) For any violation for which a license may be revoked under section 186 of the Atomic Energy Act of 1954, as amended.

[57 FR 55070, Nov. 24, 1992]

### § 11.32 Criminal penalties.

(a) Section 223 of the Atomic Energy Act of 1954, as amended, provides for criminal sanctions for willful violation of, attempted violation of, or conspiracy to violate, any regulation issued under sections 161b, 161i, or 161o of the Act. For purposes of section 223, all regulations in part 11 are issued under one or more of sections 161b, 161i,

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or 161o, except for the sections listed in paragraph (b) of this section.

(b) The regulations in part 11 that are not issued under sections 161b, 161i, or 161o for the purposes of section 223 are as follows: §§ 11.1, 11.3, 11.5, 11.7, 11.8, 11.9, 11.16, 11.21, 11.30, and 11.32.

[57 FR 55070, Nov. 24, 1992]

## PART 12—IMPLEMENTATION OF THE EQUAL ACCESS TO JUSTICE ACT IN AGENCY PROCEEDINGS

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AUTHORITY: Sec. 203(a)(1), Pub. L. 96-481, 94 Stat. 2325 (5 U.S.C. 504(c)(1)); Pub. L. 99-80, 99 Stat. 183.

SOURCE: 59 FR 23121, May 5, 1994, unless otherwise noted.

### Subpart A—General Provisions

#### § 12.101 Purpose.

The purpose of this part is to state the regulatory requirements for award of attorney fees to eligible individuals and entities in certain administrative proceedings before the Nuclear Regu-

latory Commission, in implementation of the Equal Access to Justice Act, 5 U.S.C. 504 (EAJA), which provides for the award of attorney fees and other expenses to parties to “adversary adjudications”, as defined in 5 U.S.C. 504(b)(1)(C). In general, an “adversary adjudication” is an adjudication that is required by statute to be determined on the record after opportunity for hearing before an agency of the United States and in which the position of the agency, or any component of the agency, is presented by an attorney or other representative who enters an appearance and participates in the proceeding. However, some agency adjudications are expressly excluded from coverage by 5 U.S.C. 504 (e.g., an adjudication for the purpose of granting or renewing a license) even though they fall within this general definition, and certain appeals before an agency board of contract appeals and Program Fraud Civil Remedies Act hearings conducted under 31 U.S.C. ch. 38 are expressly covered.

An eligible party may receive an award in an adversary adjudication when the party prevails over the Commission, unless the Commission’s position was substantially justified or special circumstances make an award unjust. The regulations in this part describe the parties eligible for awards and the proceedings that are covered. They also explain how to apply for awards, and the procedures and standards that the Commission will use to make them.

#### § 12.102 When the EAJA applies.

The EAJA applies to any covered adversary adjudication pending or commenced before the Commission on or after August 5, 1985.

#### § 12.103 Proceedings covered.

(a) The EAJA applies to the following proceedings:

(1) Hearings under the Program Fraud Civil Remedies Act (31 U.S.C. 3801-12);

(2) Any appeal of a decision made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) before an agency board of contract appeals as provided in section 8 of that Act (41 U.S.C. 607); and