

## § 27.305

States for a civil penalty of not more than \$25,000 for each day during which the violation continues.

(c) *Procedures for Orders.* (1) At a minimum, an Order shall be signed by the Assistant Secretary, shall be dated, and shall include:

(i) The name and address of the facility in question;

(ii) A listing of the provision(s) that the facility is alleged to have violated;

(iii) A statement of facts upon which the alleged instances of noncompliance are based;

(iv) A clear explanation of deficiencies in the facility's chemical security program, including, if applicable, any deficiencies in the facility's Security Vulnerability Assessment, Site Security Plan, or both; and

(v) A statement, indicating what action(s) the chemical must take to remedy the instance(s) of noncompliance; and

(vi) The date by which the facility must comply with the terms of the Order.

(2) The Assistant Secretary may establish procedures for the issuance of Orders.

(d) A facility must comply with the terms of the Order by the date specified in the Order unless the facility has filed a timely Notice for Application for Review under § 27.310.

(e) Where a facility or other person contests the determination of the Assistant Secretary to issue an Order, a chemical facility may seek an adjudication pursuant to § 27.310.

(f) An Order issued under this section becomes final agency action when the time to file a Notice of Application for Review under § 27.310 has passed without such a filing or upon the conclusion of adjudication or appeal proceedings under this subpart.

## § 27.305 Neutral adjudications.

(a) Any facility or other person who has received a Finding pursuant to § 27.230(a)(12)(iv), a Determination pursuant to § 27.245(b), or an Order pursuant to § 27.300 is entitled to an adjudication, by a neutral adjudications officer, of any issue of material fact relevant to any administrative action which deprives that person of a cognizable interest in liberty or property.

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(b) A neutral adjudications officer appointed pursuant to § 27.315 shall issue an Initial Decision on any material factual issue related to a Finding pursuant to § 27.230(a)(12)(iv), a Determination pursuant to § 27.245, or an Order pursuant to § 27.300 before any such administrative action is reviewed on appeal pursuant to § 27.345.

## § 27.310 Commencement of adjudication proceedings.

(a) *Proceedings instituted by facilities or other persons.* A facility or other person may institute proceedings to review a determination by the Assistant Secretary:

(1) Finding, pursuant to the § 27.230(a)(12)(iv), that an individual is a potential security threat;

(2) Disapproving a Site Security Plan pursuant to § 27.245(b); or

(3) Issuing an Order pursuant to § 27.300(a) or (b).

(b) *Procedure for applications by facilities or other persons.* A facility or other person may institute Proceedings by filing a Notice of Application for Review specifying that the facility or other person requests a Proceeding to review a determination specified in paragraph (a) of this section.

(1) An Applicant institutes a Proceeding by filing a Notice of Application for Review with the office of the Department hereinafter designated by the Secretary.

(2) An Applicant must file a Notice of Application for Review within seven calendar days of notification to the facility or other person of the Assistant Secretary's Finding, Determination, or Order.

(3) The Applicant shall file and simultaneously serve each Notice of Application for Review and all subsequent filings on the Assistant Secretary and the General Counsel.

(4) An Order is stayed from the timely filing of a Notice of Application for Review until the Presiding Officer issues an Initial Decision, unless the Secretary has lifted the stay due to exigent circumstances pursuant to paragraph (d) of this section.

(5) The Applicant shall file and serve an Application for Review within fourteen calendar days of the notification to the facility or other person of the

Assistant Secretary's Finding, Determination, or Order.

(6) Each Application for Review shall be accompanied by all legal memoranda, other documents, declarations, affidavits, and other evidence supporting the position asserted by the Applicant.

(c) *Response.* The Assistant Secretary, through the Office of General Counsel, shall file and serve a Response, accompanied by all legal memoranda, other documents, declarations, affidavits and other evidence supporting the position asserted by the Assistant Secretary within fourteen calendar days of the filing and service of the Application for Review and all supporting papers.

(d) *Procedural modifications.* The Secretary may, in exigent circumstances (as determined in his sole discretion):

- (1) Lift any stay applicable to any Order under § 27.300;
- (2) Modify the time for a response;
- (3) Rule on the sufficiency of Applications for Review; or
- (4) Otherwise modify these procedures with respect to particular matters.

**§ 27.315 Presiding officers for proceedings.**

(a) Immediately upon the filing of any Application for Review, the Secretary shall appoint an attorney, who is employed by the Department and who has not performed any investigative or prosecutorial function with respect to the matter, to act as a neutral adjudications officer or Presiding Officer for the compilation of a factual record and the recommendation of an Initial Decision for each Proceeding.

(b) Notwithstanding paragraph (a) of this section, the Secretary may appoint one or more attorneys who are employed by the Department and who do not perform any investigative or prosecutorial function with respect to this subpart, to serve generally in the capacity as Presiding Officer(s) for such matters pursuant to such procedures as the Secretary may hereafter establish.

**§ 27.320 Prohibition on ex parte communications during proceedings.**

(a) At no time after the designation of a Presiding Officer for a Proceeding and prior to the issuance of a Final Decision pursuant to § 27.345 with respect to a facility or other person, shall the appointed Presiding Officer, or any person who will advise that official in the decision on the matter, discuss *ex parte* the merits of the proceeding with any interested person outside the Department, with any Department official who performs a prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person.

(b) If, after appointment of a Presiding Officer and prior to the issuance of a Final Decision pursuant to § 27.345 with respect to a facility or other person, the appointed Presiding Officer, or any person who will advise that official in the decision on the matter, receives from or on behalf of any party, by means of an *ex parte* communication, information which is relevant to the decision of the matter and to which other parties have not had an opportunity to respond, a summary of such information shall be served on all other parties, who shall have an opportunity to reply to the *ex parte* communication within a time set by the Presiding Officer.

(c) The consideration of classified information or CVI pursuant to an in camera procedure does not constitute a prohibited *ex parte* communication for purposes of this subpart.

**§ 27.325 Burden of proof.**

The Assistant Secretary bears the initial burden of proving the facts necessary to support the challenged administrative action at every proceeding instituted under this subpart.

**§ 27.330 Summary decision procedures.**

(a) The Presiding Officer appointed for each Proceeding shall immediately consider whether the summary adjudication of the Application for Review is appropriate based on the Application for Review, the Response, and all the supporting filings of the parties pursuant to §§ 27.310(b)(5) and 27.310(c).