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documentation that must be made available for review during inspections and audits.

§ 27.255 Recordkeeping requirements.

(a) Except as provided in § 27.255(b), the covered facility must keep records of the activities as set out below for at least three years and make them available to the Department upon request. A covered facility must keep the following records:

(1) *Training.* For training, the date and location of each session, time of day and duration of session, a description of the training, the name and qualifications of the instructor, a clear, legible list of attendees to include the attendee signature, at least one other unique identifier of each attendee receiving the training, and the results of any evaluation or testing.

(2) *Drills and exercises.* For each drill or exercise, the date held, a description of the drill or exercise, a list of participants, a list of equipment (other than personal equipment) tested or employed in the exercise, the name(s) and qualifications of the exercise director, and any best practices or lessons learned which may improve the Site Security Plan;

(3) *Incidents and breaches of security.* Date and time of occurrence, location within the facility, a description of the incident or breach, the identity of the individual to whom it was reported, and a description of the response;

(4) *Maintenance, calibration, and testing of security equipment.* The date and time, name and qualifications of the technician(s) doing the work, and the specific security equipment involved for each occurrence of maintenance, calibration, and testing;

(5) *Security threats.* Date and time of occurrence, how the threat was communicated, who received or identified the threat, a description of the threat, to whom it was reported, and a description of the response;

(6) *Audits.* For each audit of a covered facility's Site Security Plan (including each audit required under § 27.225(e)) or Security Vulnerability Assessment, a record of the audit, including the date of the audit, results of the audit, name(s) of the person(s) who conducted

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the audit, and a letter certified by the covered facility stating the date the audit was conducted.

(7) *Letters of Authorization and Approval.* All Letters of Authorization and Approval from the Department, and documentation identifying the results of audits and inspections conducted pursuant to § 27.250.

(b) A covered facility must retain records of submitted Top-Screens, Security Vulnerability Assessments, Site Security Plans, and all related correspondence with the Department for at least six years and make them available to the Department upon request.

(c) To the extent necessary for security purposes, the Department may request that a covered facility make available records kept pursuant to other Federal programs or regulations.

(d) Records required by this section may be kept in electronic format. If kept in an electronic format, they must be protected against unauthorized access, deletion, destruction, amendment, and disclosure.

Subpart C—Orders and Adjudications

§ 27.300 Orders.

(a) *Orders Generally.* When the Assistant Secretary determines that a facility is in violation of any of the requirements of this Part, the Assistant Secretary may take appropriate action including the issuance of an appropriate Order.

(b) *Orders Assessing Civil Penalty and Orders to Cease Operations.* (1) Where the Assistant Secretary determines that a facility is in violation of an Order issued pursuant to paragraph (a) of this section, the Assistant Secretary may enter an Order Assessing Civil Penalty, Order to Cease Operations, or both.

(2) Following the issuance of an Order by the Assistant Secretary pursuant to paragraph (b)(1) of this section, the facility may enter further consultations with Department.

(3) Where the Assistant Secretary determines that a facility is in violation of an Order issued pursuant to paragraph (a) of this section and issues an Order Assessing Civil Penalty pursuant to paragraph (b)(1) of this section, a chemical facility is liable to the United

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.

(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

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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.

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§ 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).

(1) The Presiding Officer shall promptly issue any necessary scheduling order for any additional briefing of the issue of summary adjudication on the Application for Review and Response.

(2) The Presiding Officer may conduct scheduling conferences and other proceedings that the Presiding Officer determines to be appropriate.

(b) If the Presiding Officer determines that there is no genuine issue of material fact and that one party or the other is entitled to decision as a matter of law, then the record shall be closed and the Presiding Officer shall issue an Initial Decision on the Application for Review pursuant to § 27.340.

(c) If a Presiding Officer determines that any factual issues require the cross-examination of one or more witnesses or other proceedings at a hearing, the Presiding Officer, in consultation with the parties, shall promptly schedule a hearing to be conducted pursuant to § 27.335.

§ 27.335 Hearing procedures.

(a) Any hearing shall be held as expeditiously as possible at the location most conducive to a prompt presentation of any necessary testimony or other proceedings.

(1) Videoconferencing and teleconferencing may be used where appropriate at the discretion of the Presiding Officer.

(2) Each party offering the affirmative testimony of a witness shall present that testimony by declaration, affidavit, or other sworn statement submitted in advance as ordered by the Presiding Officer.

(3) Any witness presented for further examination shall be asked to testify under an oath or affirmation.

(4) The hearing shall be recorded verbatim.

(b)(1) A facility or other person may appear and be heard on his own behalf or through any counsel of his choice who is qualified to possess CVI.

(2) A facility or other person individually, or through counsel, may offer relevant and material information including written direct testimony which he believes should be considered in opposition to the administrative action

or which may bear on the sanction being sought.

(3) The facility or other person individually, or through counsel, may conduct such cross-examination as may be specifically allowed by the Presiding Officer for a full determination of the facts.

§ 27.340 Completion of adjudication proceedings.

(a) The Presiding Officer shall close and certify the record of the adjudication promptly upon the completion of:

(1) Summary judgment proceedings,

(2) A hearing, if necessary,

(3) The submission of post hearing briefs, if any are ordered by the Presiding Officer, and

(4) The conclusion of oral arguments, if any are permitted by the Presiding Officer.

(b) The Presiding Officer shall issue an Initial Decision based on the certified record, and the decision shall be subject to appeal pursuant to § 27.345.

(c) An Initial Decision shall become a final agency action on the expiration of the time for an Appeal pursuant to § 27.345.

§ 27.345 Appeals.

(a) *Right to Appeal.* A facility or any person who has received an Initial Decision under § 27.340(b) has the right to appeal to the Under Secretary acting as a neutral appeals officer.

(b) *Procedure for Appeals.* (1) The Assistant Secretary, a facility or other person, or a representative on behalf of a facility or person, may institute an Appeal by filing a Notice of Appeal with the office of the Department hereinafter designated by the Secretary.

(2) The Assistant Secretary, a facility, or other person must file a Notice of Appeal within seven calendar days of the service of the Presiding Officer's Initial Decision.

(3) The Appellant shall file with the designated office and simultaneously serve each Notice of Appeal and all subsequent filings on the General Counsel.

(4) An Initial Decision is stayed from the timely filing of a Notice of Appeal until the Under Secretary issues a Final Decision, unless the Secretary

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lifts the stay due to exigent circumstances pursuant to § 27.310(d).

(5) The Appellant shall file and serve a Brief within 28 calendar days of the notification of the service of the Presiding Officer's Initial Decision.

(6) The Appellee shall file and serve its Opposition Brief within 28 calendar days of the service of the Appellant's Brief.

(c) The Under Secretary may provide for an expedited appeal for appropriate matters.

(d) *Ex Parte Communications.* (1) At no time after the filing of a Notice of Appeal pursuant to paragraph (b)(1) of this section and prior to the issuance of a Final Decision on an Appeal pursuant to paragraph (f) of this section with respect to a facility or other person shall the Under Secretary, his designee, 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.

(2) If, after the filing of a Notice of Appeal pursuant to paragraph (b)(1) of this section and prior to the issuance of a Final Decision on an Appeal pursuant to paragraph (f) of this section with respect to a facility or other person, the Under Secretary, his designee, 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 Under Secretary or his designee.

(3) 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.

(e) A facility or other person may elect to have the Under Secretary participate in any mediation or other res-

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olution process by expressly waiving, in writing, any argument that such participation has compromised the Appeal process.

(f) The Under Secretary shall issue a Final Decision and serve it upon the parties. A Final Decision made by the Under Secretary constitutes final agency action.

(g) The Secretary may establish procedures for the conduct of Appeals pursuant to this section.

Subpart D—Other

§ 27.400 Chemical-terrorism vulnerability information.

(a) *Applicability.* This section governs the maintenance, safeguarding, and disclosure of information and records that constitute Chemical-terrorism Vulnerability Information (CVI), as defined in § 27.400(b). The Secretary shall administer this section consistent with section 550(c) of the Homeland Security Appropriations Act of 2007, including appropriate sharing with Federal, State and local officials.

(b) *Chemical-terrorism Vulnerability Information.* In accordance with section 550(c) of the Department of Homeland Security Appropriations Act of 2007, the following information, whether transmitted verbally, electronically, or in written form, shall constitute CVI:

(1) Security Vulnerability Assessments under § 27.215;

(2) Site Security Plans under § 27.225;

(3) Documents relating to the Department's review and approval of Security Vulnerability Assessments and Site Security Plans, including Letters of Authorization, Letters of Approval and responses thereto; written notices; and other documents developed pursuant to §§ 27.240 or 27.245;

(4) Alternate Security Programs under § 27.235;

(5) Documents relating to inspection or audits under § 27.250;

(6) Any records required to be created or retained under § 27.255;

(7) Sensitive portions of orders, notices or letters under § 27.300;

(8) Information developed pursuant to §§ 27.200 and 27.205; and

(9) Other information developed for chemical facility security purposes that the Secretary, in his discretion,