Environmental Protection Agency
Office of Land and Emergency Management
1200 Pennsylvania Avenue NW
Washington, DC 20460
Filed via: https://www.regulations.gov (Docket EPA-HQ-OLEM-2026-2047 accepts direct comments)

Re: Docket No. EPA-HQ-OLEM-2026-2047; FRL-13112-01-OLEM â€” Rescinding the Regulations for Arbitration Requirements and Procedures for Small Superfund Cost Recovery Claims
Regulations.gov reference: EPA-HQ-OLEM-2026-2047 (participating agency, comment form available)
Comment deadline: August 3, 2026

To the Agency:

I write to object to the proposed rescission of 40 CFR part 304, the regulations governing arbitration procedures for small Superfund cost recovery claims, published at 91 FR 33134 on June 3, 2026. Congress, through section 122(h)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act, codified at 42 U.S.C. 9622(h)(2), authorized EPA to establish arbitration as a method of settling cost recovery claims brought under section 107(a) of CERCLA, 42 U.S.C. 9607(a), where total response costs for the facility concerned do not exceed 500,000 dollars excluding interest. EPA exercised that authority in 1988, adopting part 304 to give small potentially responsible parties, including small businesses, small landowners, and local governments, a quicker and less costly alternative to full federal court litigation for resolving these bounded-dollar cleanup cost disputes. Eliminating that mechanism does not merely tidy up the Code of Federal Regulations; it removes the only congressionally sanctioned off-ramp from adversarial litigation available to the very parties least equipped to litigate against the United States or well-resourced co-defendants in federal district court.

The burden of this rescission will fall disproportionately on small businesses and small municipalities. A cost recovery claim under section 107(a) capped at 500,000 dollars excluding interest is, almost by definition, a dispute involving smaller potentially responsible parties or smaller sites, since larger contamination claims exceed that statutory ceiling and already proceed through Department of Justice referral and settlement under section 122(h)(1), 42 U.S.C. 9622(h)(1), or through litigation. Without part 304's arbitration track, a small landowner, a small manufacturer, or a cash-strapped local government facing a claim within that dollar range will have no alternative but full federal civil litigation, with its attendant discovery costs, expert witness fees, and protracted timelines. Parties with in-house counsel, litigation budgets, and institutional experience in CERCLA defense will bear this shift far more easily than the small entities part 304 was designed to serve. The practical effect is to reallocate leverage in cost recovery disputes away from small, resource-constrained defendants and toward parties, whether corporate or governmental, that can better absorb the costs of conventional litigation.

EPA's stated justification for rescission is that part 304 introduces unnecessary complexity to the body of federal regulations and that the agency is not aware of the process ever having been used. Neither rationale satisfies the reasoned-decisionmaking obligation the Administrative Procedure Act imposes on rulemaking, including rulemaking that rescinds an existing rule. Under 5 U.S.C. 553(c), an agency must respond to significant issues raised by a rulemaking record, and under Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983), an agency rescinding a rule bears the same obligation to articulate a satisfactory explanation, grounded in the relevant data, as it would when promulgating one in the first instance; the Supreme Court there held that an agency changing course must supply a reasoned analysis for the change beyond what would be required had it never acted at all. EPA's preamble does not identify any deficiency in how arbitration under part 304 has functioned when invoked, nor any complaint from a regulated party about the procedure, nor any cost or harm attributable to the regulation's continued existence. An assertion that a provision is unused, standing alone, is not evidence that the provision is harmful, unwanted, or contrary to the public interest; it may equally reflect that the great majority of section 107(a) claims exceed the 500,000 dollar threshold and never reach part 304 at all, a possibility the agency's preamble does not address or rule out.

Nor does the preamble engage with the obvious alternative EPA was required to consider before rescinding a functioning dispute resolution option: leaving part 304 in place at no cost to the agency so that it remains available if and when a qualifying small claim arises. Under State Farm, an agency's failure to consider significant and obvious alternatives to the course it has chosen is itself a basis for finding the action arbitrary and capricious. EPA's own certification under the Regulatory Flexibility Act states that this rule will have no net burden on small entities because it imposes no additional requirement, but that framing addresses only the cost of compliance with part 304 itself; it does not address the increased litigation burden that will fall on small entities once the arbitration alternative is no longer available to them. An action that removes a benefit is not rendered costless merely because it removes no obligation.

The statutory text of section 122(h)(2) confirms that Congress specifically contemplated arbitration as a tool for resolving smaller cost recovery disputes without full-scale litigation, and EPA's own 1988 rulemaking record, which the current proposal does not dispute, explained that arbitration was meant to provide a quicker and less costly method of resolution than traditional litigation or negotiation. A rescission that eliminates this tool based solely on administrative tidiness, without identifying any flaw in its design or operation, disserves the interests of the small businesses, small landowners, and local governments that section 122(h)(2) was enacted to benefit, and substitutes a bare assertion of simplification for the reasoned explanation the Administrative Procedure Act requires.

For these reasons, I urge EPA to withdraw this proposal and retain 40 CFR part 304 in its current form, or, at minimum, to supplement the rulemaking record with a reasoned explanation addressing the disparate impact of rescission on small potentially responsible parties and the availability of less disruptive alternatives before proceeding to a final rule.

Respectfully submitted,
Concerned Citizen