



# ***INTERNATIONAL CYANIDE MANAGEMENT INSTITUTE***

## ***Dispute Resolution Procedure***

### ***For The International Cyanide Management Code***

[www.cyanidecode.org](http://www.cyanidecode.org)

**November 2005**

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## Executive Summary

This dispute resolution procedure (“Procedure”) is to be used for the resolution of disputes regarding implementation of the International Cyanide Management Code (“Code”). It has been designed to address disputes regarding auditor credentials, audit findings, and certification and/or de-certification of operations.

The Procedure consists of a three-tier process. In the initial stage, the complainant requests the reconsideration of an audit finding or “International Cyanide Management Institute (“ICMI”) decision or action and engages in an informal dialogue and exchange of information with the respondent in an attempt to resolve the issue through direct negotiations. In order to ensure that all information and issues potentially related to an operation’s compliance with the Code can be identified and fully evaluated, this informal process is open to any interested party. A complainant must file a Request for Reconsideration with the ICMI within 45 days of becoming aware of the audit finding or ICMI decision or action and is expected to present specific information in support of the complaint. If the complainant is not satisfied by the results of the informal process, or another Party to the Dispute is not satisfied by changes made to the disputed decision or action as a result of the Request for Reconsideration, the dispute proceeds to the second stage of the process.

In the second stage of the process, disputes proceed to non-binding mediation where a mediator acceptable to all Parties to the Dispute assists in trying to resolve the dispute to the mutual satisfaction of all parties. A Request for Mediation must be made within 30 days of completion of the informal Request for Reconsideration process. All parties to the mediation must agree to hold ICMI harmless, and to share the cost of the mediator equally. All parties in mediation are responsible for their own costs of participation.

If any of the Parties to the Dispute are not satisfied with the results of mediation or choose to forgo or terminate mediation, the final opportunity to resolve a dispute is through binding arbitration. In this process, an arbitrator or panel of arbitrators agreed to by all Parties to the Dispute resolves the dispute. A Request for Arbitration must be made within 30 days of completion or termination of a mediation process, or completion of the Request for Reconsideration, if mediation is not utilized. All Parties to the Dispute must agree to hold ICMI harmless regardless of the outcome of the process and to pay whatever share of the cost of the arbitration(s) is assigned to them by the arbitrator(s). Parties in arbitration are responsible for their own costs of participation.

In order to pursue mediation and /or arbitration, a complainant must meet the minimum requirements for standing set forth in this Procedure. Most fundamentally, this means that a complainant must be an individual or group that may be affected by implementation of the Code and that can present evidence that the Code has been implemented incorrectly, erroneously or in a manner inconsistent with its stated intent, goals, procedures and/or limitations.

At each stage of the Procedure, parties other than the complainant and respondent that may be involved with the dispute, such as the ICMI or an operation undergoing a Verification Audit for Code certification, are notified of the proceedings and required to provide information and input

to the process. These parties may join in the informal discussions, mediation and/or arbitration, and may request that the dispute move to the next stage of the Procedure if not satisfied with the outcome. The purpose of requiring all such parties to participate in the Procedure in this fashion is to encourage timely, efficient, and final resolution of disputes. Toward this same end, all parties participating in the Procedure agree that its outcome is final and agree to be bound by that outcome.

Stakeholders are reminded that the Code is intended to be implemented in a flexible and site-specific manner, as necessary and appropriate to achieve its Principles and Standards of Practice. While the Implementation Guidance identifies measures typically employed to meet the Code, it is recognized that operations can implement alternate measures to comply with the Code's Principles and Standards of Practice. A stakeholder should be thoroughly familiar with the Code, the Implementation Guidance and other related documentation and ensure that the complaint is valid and supported before invoking this Procedure.

## **Part 1, Resolution of Disputes - General**

### **Dispute Resolution**

- 1.1 The purpose of this Procedure is to establish a methodology to resolve disputes regarding auditor credentials, audit findings, and certification and/or de-certification of operations in connection with implementation of the Code. These include disputes regarding:
  - (a) ICMI's granting or denial of auditor credentials;
  - (b) The finding(s) of a Code verification audit;
  - (c) ICMI administrative actions such as full or conditional certification of an operation, decertification of an operation for demonstrated non-compliance with the Code's Principles and/or Standards of Practice or failure to conduct a verification audit in a timely manner, or failure of ICMI to follow its own established procedures; and
  - (d) Information included in a Summary Audit Report posted on the ICMI website.
- 1.2 For a complaint to be subject to this Procedure, it must be alleged that:
  - (a) A specific decision or action taken by Code auditors or ICMI is contrary to the Code and/or its supporting documents; or
  - (b) An operation certified under the Code is no longer in compliance with the Code's Principles and/or Standards of Practice.
- 1.3 Complaints regarding issues that are not specifically addressed in the Code or that do not involve implementation of the Code, are not subject to review under this Procedure. Determinations of whether complaints are subject to such review shall be made by the

ICMI President, subject to further consideration by the ICMI Board of Directors, as specified herein.

- 1.4 Separate complaints may be combined with the mutual agreement of all Parties to the Dispute, as defined in Section 1.7.
- 1.5 By participating in this Procedure, all Parties to the Dispute, as defined in Section 1.7, acknowledge and agree that the outcome of this Procedure is final, and that the resulting decision is neither subject to additional review under the Procedure nor constitutes separate grounds for invoking the Procedure. Parties to the Dispute also agree to be bound by this Procedure, and to hold the ICMI harmless in connection with resolution of any dispute pursuant to this Procedure.
  - (a) A complaint cannot be re-submitted once the Procedure has been initiated, and a new complaint will not be subject to the Procedure if the ICMI President determines it is substantially equivalent to a complaint that has previously been resolved or one that is currently going through the Procedure.
  - (b) The ICMI President's determination is not considered to be a decision or action subject to further review under this Procedure nor does it constitute separate grounds for invoking the Procedure.
  - (c) No later than the next regularly scheduled meeting of the ICMI Board of Directors, the ICMI President shall advise the Board of any complaints submitted since the previous Board meeting that he has determined to have been previously resolved or which are currently going through the Procedure.
  - (d) The Board may, at its discretion, review any complaints that the President has determined to have been resolved previously or that are currently going through the Procedure and, if it deems appropriate, direct that the complaint be allowed to proceed through the Procedure.
- 1.6 Notwithstanding Section 1.5 above, in the event that a disputed action or decision is changed in response to a Request for Reconsideration as described in Part 2, any Party to the Dispute, as defined in Section 1.7, not satisfied with the outcome may proceed with the complaint to the next step in the Procedure without a new Request for Reconsideration, pursuant to the Procedure and subject to the limitations of Sections 3.4 and 4.2.

**Parties to a Dispute - Definition**

- 1.7 The following entities are Parties to a Dispute:
  - (a) The party filing a complaint with ICMI (“complainant”),
  - (b) The party whose action or decision is the subject of the complaint (“respondent”),

- (c) ICMI,
- (d) A gold mining operation, cyanide production facility or cyanide transporter that is certified or undergoing certification under the Code, if the dispute involves an action or decision taken with respect to a specific operation,
- (e) The lead auditor, if a dispute involves ICMI's granting or denial of auditor credentials or the finding(s) of a Code verification audit.

### **Respondents - Definition**

1.8 Respondents for various types of complaints are as follows:

- (a) The President of ICMI or his designee is the respondent for disputes regarding a decision or action by ICMI and its Board of Directors, including disputes over auditor credentials<sup>1</sup> and allegations that a certified operation is not in compliance with the Code as a result of demonstrated non-compliance with the Code's Principles and/or Standards of Practice, or failure to conduct a verification audit in a timely manner and should, therefore, be de-certified.
- (b) The lead auditor is the respondent for disputes regarding the findings of a Code Verification Audit, including those disputes in connection with complaints that full or conditional certification of an operation is based on incorrect audit findings.<sup>2</sup>

### **Public Availability of Dispute Information**

1.9 Requests for Reconsideration, Requests for Mediation, Requests for Arbitration, and documentation of the outcomes of these processes will be made available to the public on the ICMI website, [www.cyanidecode.org](http://www.cyanidecode.org).

## **Part 2, Informal Resolution**

### **Request for Reconsideration**

2.1 Prior to pursuing mediation or arbitration pursuant to this Procedure, a complainant must seek informal resolution through a Request for Reconsideration except as provided for in Section 1.6.

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<sup>1</sup> Lead auditors must submit an Auditor Credentials Form to ICMI with information on their qualifications. This form is available for public review on the ICMI website along with each operation's Summary Audit Report. ICMI reviews this information and spot checks it to verify its accuracy. The President of ICMI will be the respondent for disputes regarding the veracity of this information and ICMI's decision to grant or deny an auditor's credentials.

<sup>2</sup> ICMI certifies operations based on the findings of an independent third-party audit. While ICMI requires that the auditors meet certain criteria for experience, expertise and lack of conflicts of interest, and further requires that the lead auditor be a Certified Professional Auditor, ICMI can not guarantee the accuracy of the actual on-site audit nor evaluate the merits of a complaint regarding the audit findings since it was not present at the operation during the audit and does not have access to all the documentation review and practices observed by the auditors. Therefore, complaints regarding the certification of an operation that are based on disputed audit findings are appropriately resolved directly with the lead auditor who made the findings. Complaints regarding unethical or unprofessional conduct by an auditor that are not related to audit findings are not subject to this Procedure and should be addressed through the lead auditor's professional certifying organization.

## **Complainant**

- 2.2 Any party<sup>3</sup> who believes that a decision or action of ICMI or of a Code auditor is contrary to the Code and/or its supporting documents may request that the decision or action be reconsidered pursuant to the provisions set forth in Sections 2.3 through 2.5.
- 2.3 Complainants are expected to present specific information and evidence in support of a Request for Reconsideration, including the provision(s) of the Code or its supporting documents alleged to have been violated and the basis for the allegation.
- 2.4 Requests for Reconsideration must be made in writing to the ICMI President at the address provided on the ICMI web site. Failure to do so may bar the complainant from pursuing further resolution through this Procedure.
- (a) The ICMI President shall determine if the complaint meets the criteria of Section 1.2 and therefore is within the jurisdiction of ICMI.
  - (b) If the ICMI President determines that the complaint is outside of ICMI's jurisdiction, he shall so advise the complainant and terminate this Procedure.
  - (c) The ICMI President's determination of jurisdiction is not considered to be a decision or action subject to further review under this Procedure nor does it constitute separate grounds for invoking the Procedure.
  - (d) No later than the next regularly scheduled meeting of the ICMI Board of Directors, the ICMI President shall provide the Board with copies of any Request for Reconsideration forms submitted since the preceding Board meeting that he has determined to be outside of ICMI's jurisdiction.
  - (e) The Board may, at its discretion, investigate any complaints that the President has determined to be outside of ICMI's jurisdiction and take whatever actions consistent with the Code that it deems necessary and appropriate.
- 2.5 The Request for Reconsideration must include contact information for the complainant including an address, telephone number and, if possible, an e-mail address to allow for the respondent and the complainant to conduct a dialogue and exchange information regarding the complaint.

## **ICMI**

- 2.6 ICMI shall distribute copies of a Request for Reconsideration to all other Parties to the Dispute within 10 business days<sup>4</sup> of its receipt.

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<sup>3</sup> The Request for Reconsideration process is available to any individual or group without limit in order to ensure that all information and issues potentially related to an operation's compliance with the Code can be identified and fully evaluated.

<sup>4</sup> Time frames are established in this Procedure in order to move the process along to a timely resolution, and are not intended to operate as a bar to further proceedings if exceeded by a reasonable amount of time for good cause.

## **Respondent**

- 2.7 Upon receipt of a Request for Reconsideration, the respondent (including the ICMI when it is the respondent) may:
- (a) Contact the complainant by telephone, mail or e-mail to initiate a dialogue and exchange information regarding the complaint, and/or
  - (b) Request additional information from other Parties to the Dispute, as defined in Section 1.7, and/or
  - (c) Conduct an inspection of an operation or cause such an inspection to be conducted, if the dispute involves a certified operation or one undergoing certification.
- 2.8 The respondent must reconsider the decision or action under dispute based on the information provided in the Request for Reconsideration and any information provided by the other Parties to the Dispute and either revise the decision or action, in whole or in part, or sustain the original decision or action.
- 2.9 The respondent must advise all Parties to the Dispute of his/her final decision and the reasons for that decision within 45 days<sup>4</sup> of receiving the Request for Reconsideration and the specific information and evidence in support of the complaint identified in Section 2.3, including any additional information requested by the respondent, any information derived by the respondent from a site visit, or relevant advice, information, guidance, or other input from any Secondary Party to the Dispute, as provided for in Section 2.10.

## **All Parties to the Dispute**

- 2.10 All Parties to the Dispute, as defined in Section 1.7 shall provide whatever relevant advice, information, guidance, or other input it deems appropriate during the Request for Reconsideration process.
- (a) Any such information must be provided to all Parties to the Dispute.
  - (b) Input from ICMI is not considered to be a decision or action subject to further review under this Procedure nor does it constitute separate grounds for invoking the Procedure.

## **Timing of Request for Reconsideration**

- 2.11 Requests for Reconsideration and submission of any and all supporting information must be made within 45 days<sup>4</sup> of the complainant's becoming aware of the decision or action being disputed.
- (a) For parties that are directly involved with the decision or action being disputed (e.g., operations disputing an audit finding or a potential lead auditor disputing

ICMI's denial of auditor credentials), the 45-day period commences as soon as the complainant is advised of the decision or action.

- (b) For parties learning of the decision or action through posting on the ICMI web site, the 45-day period commences on the day the information is posted on the site.
- (c) The 45-day time limit does not apply in a situation where a stakeholder alleges that a certified operation is no longer in compliance with the Code.

### **Duty of Reasonable Cooperation**

2.12 All Parties to the Dispute, as defined in Section 1.7, involved in a Request for Reconsideration must abide by the Duty of Reasonable Cooperation provisions set out in Part 5.

## **Part 3, Non-binding Mediation of Disputes**

### **Applicability**

- 3.1 This Part applies to all disputes that are not satisfactorily resolved through the Request for Reconsideration process, unless any Party to the Dispute, as defined in Section 1.7, chooses to forgo mediation and elects to proceed directly to binding arbitration.
- 3.2 A complainant not satisfied by the outcome of a Request for Reconsideration, or any other Party to the Dispute not satisfied with a change in the respondent's action or decision made as a result of a Request for Reconsideration, may continue the Procedure by filing a complete Request for Mediation form with the ICMI President.
  - (a) Parties not satisfied with the outcome of a Request for Reconsideration may elect to proceed directly to arbitration, pursuant to Part 4 of this Procedure.
- 3.3 Multiple complaints arising from a single audit or decision/action should be filed together as long as they involve the same operation or share the same respondent. Once a Request for Mediation form has been submitted to ICMI, additions or revisions to the complaint are allowed only with the agreement of the other Parties to the Dispute.

### **Standing**

- 3.4 The mediation process is available only to "qualified stakeholders."
- 3.5 A "qualified stakeholder" is defined as follows:
  - (a) A company that is a signatory to the Code; or
  - (b) An operation that is owned by a company that is a signatory to the Code and that either is certified under the Code or that seeks certification under the Code; or

- (c) An auditor whose credentials are approved by ICMI or who has requested that his credentials be approved by ICMI; or
- (d) An individual or group that may be affected by implementation of the Code and that can present evidence that the Code has been implemented incorrectly or erroneously or in a manner inconsistent with its stated intent, goals, procedures and/or limitations.
  - (1) “Individual or group that may be affected by implementation of the Code,”<sup>5</sup> means a citizen of, or a group that is chartered, registered, or incorporated in
    - (i) a country in which a certified operation or an operation seeking certification is located;<sup>6</sup> or
    - (ii) a country, other than that identified in Section 3.5(d)(1)(i) above, in which public health or safety, or the use of air, surface water, ground water, or land resources by humans, livestock or wildlife can reasonably be expected to be adversely impacted by the manufacture, transport, use or disposal of cyanide at or to a certified operation or one seeking certification;<sup>7</sup> and
    - (iii) whose complaint involves the operation in question or the auditor of that operation, or involves an administrative decision by ICMI regarding such an operation or auditor.
  - (2) “Evidence” means documentation, first-person testimony, photographs or other materials presented to substantiate the facts alleged in a complaint.
  - (3) “Implemented incorrectly or erroneously or in a manner inconsistent with its stated intent, goals, procedures and limitations” means actions or decisions made by ICMI or by Code auditors that are contrary to the implementing procedures and documentation developed by the ICMI and posted on its web site, [www.cyanidecode.org](http://www.cyanidecode.org), including but not limited to the Code and its Implementation Guidance and Verification Protocols.

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<sup>5</sup> Limitations on standing are intended to be narrow and to allow a broad range of stakeholders access to mediation and/or arbitration of their complaints.

<sup>6</sup> All residents of a country in which a certified operation or one seeking certification is located automatically have such standing regardless of their proximity to the operation.

<sup>7</sup> This applies in situations where production, transport or use of cyanide presents trans-border issues (e.g., transport through one country to another, releases to waters flowing across borders). Citizens of countries other than that in which the certified operation is located must be able to show that the Code decision or action can reasonably be expected to have an adverse impact on their health or safety, or the use of their natural resource by humans, livestock or wildlife. For example, a citizen of a country would likely have standing if a stream in that country used as drinking water for humans or wildlife could be impacted by a release from an operation or during transport of cyanide to that operation.

- 3.6 A Party to the Dispute who has failed to pay his share of any prior mediation or arbitration costs within 30 days<sup>4</sup> of receipt of an invoice from the mediator or arbitrator, or otherwise failed to make alternate arrangements for payment acceptable to the mediator, shall be deemed in default until such payment is received, and is barred from further use of this Procedure for the current dispute or any future disputes until full payment is received.
- 3.7 The ICMI President shall determine if a complainant has standing to proceed with mediation.<sup>8</sup>
- (a) The ICMI President's determination of standing is not considered to be a decision or action subject to further review under this Procedure nor does it constitute separate grounds for invoking the Procedure.
  - (b) No later than the next regularly scheduled meeting of the ICMI Board of Directors, the ICMI President shall provide the Board with copies of any Request for Mediation forms submitted since the preceding Board meeting that he has determined fail to show standing.
  - (c) The Board may, at its discretion, investigate any allegations brought by a complainant lacking standing and take whatever actions consistent with the Code that it deems necessary and appropriate.

## **ICMI**

- 3.8 The ICMI President must:
- (a) Provide all Parties to the Dispute with a copy of a Request for Mediation within 10 business days<sup>4</sup> of such receipt; and
  - (b) Advise all Parties to the Dispute of the claimant's standing to proceed with mediation and of the identity and contact information of all other Parties to the Dispute within 45 days<sup>4</sup> of receipt of a Request for Mediation.

## **Respondent**

- 3.9 The respondent must submit a written response to the Request for Mediation to all Parties to the Dispute within 45 days<sup>4</sup> of receiving notice from the ICMI President that the complainant has standing to proceed with mediation.
- 3.10 If ICMI is the respondent in the mediation process, the ICMI Board of Directors shall, at its discretion, designate a Board member, officer, staff personnel or other individual to represent ICMI during the process.

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<sup>8</sup> The ICMI President's review of a Request for Mediation or Request for Arbitration is not intended to judge the substance of the evidence presented in the complainant, but rather to confirm that the complaint is based on evidence rather than unsupported assertions or allegations, and that the complainant meets the other requirements of Section 3.5.

### **All Parties to the Dispute**

- 3.11 All Parties to the Dispute, as defined in Section 1.7, shall provide whatever relevant advice, information, guidance or other input it deems appropriate during the mediation process.
- (a) Any such information must be provided to all Parties to the Dispute and to the mediator.
  - (b) Input from ICMI is not considered to be a decision or action subject to further review under this Procedure nor does it constitute separate grounds for invoking the Procedure.

### **Selection of Mediator**

- 3.12 One mediator acceptable to all Parties to the Dispute will be employed to assist in identifying a resolution mutually acceptable to all Parties to the Dispute.
- 3.13 The Parties to the Dispute are responsible for arranging for suitable mediation services, and are encouraged to engage the services of a professional mediator with the following attributes:
- (a) Experience mediating environmentally-related cases (e.g., those involving pollution prevention, cleanup or consequences of pollution, land use, natural resource use or distribution, environmental permitting, facility or infrastructure siting disputes, environmental justice, and negotiated rulemaking, enforcement, or compliance; or
  - (b) Experience mediating cases involving the setting of governmental policy at the national, regional, state or local level, such as environmental or natural resource policy, health or safety policy, or education policy; and
  - (c) Training in dispute resolution and consensus building; and
  - (d) Education or training in substantively relevant fields, such as law, environmental sciences or policy, engineering, public administration or management, communication theory, planning, conflict resolution; and
  - (e) Listing on the rosters of professional neutrals of, or otherwise affiliated with or identified through organizations including but not limited to the United States Institute for Environmental Conflict Resolution, the American Arbitration Association, the Institute of Arbitrators and Mediators (Australia), the ADR Institute of Canada, and the Santiago Arbitration and Mediation Center (Chile).<sup>9</sup>

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<sup>9</sup> These organizations are offered only as examples that may be able to provide mediation services or whose procedures may be useful as models for mediation. Their inclusion is not intended as an endorsement, and the exclusion of other arbitration organizations is not intended to reflect ICMI's determination of their expertise, professionalism, or relative merit. Additional organizations can be found on the website of the Permanent Court of

3.14 Notwithstanding Section 3.13 above, any individual acceptable to the all Parties to the Dispute may serve as a mediator regardless of his or her experience, education, training or listing on the roster of an identified organization.

### **Mediation Procedures**

3.15 Procedures for the mediation (e.g., location, language, meetings) will be established with the selected mediator with the mutual agreement of all Parties to the Dispute.

3.16 All Parties to the Dispute shall be allowed to participate in the mediation equally.

3.17 Prior to the start of mediation, all Parties to the Dispute must sign a mediation agreement stipulating the procedures agreed to by all Parties to the Dispute and including the following:

(a) A statement that all Parties to the Dispute acknowledge and agree that the outcome of the ICMI Dispute Resolution Procedure is final. The mediation agreement will also include a statement that the Parties to the Dispute agree to be bound by this Procedure, and further agree to hold the ICMI harmless in connection with the dispute regardless of the outcome of the mediation.

(b) A statement that all Parties to the Dispute agree to share all mediator costs as defined in Section 3.26 on an equal basis.

3.18 Parties entering into mediation are not required to accept its results.

3.19 The complainant may drop the complaint at any time.

3.20 Any Party to the Dispute may terminate the mediation at any time without limit or prejudice and proceed to binding arbitration pursuant to Part 4.<sup>10</sup>

3.21 At the conclusion of the mediation, the mediator shall provide all Parties to the Dispute with a written summary of its discussions and outcome.

### **Timing of Request for Mediation**

3.22 A Request for Mediation must be filed within 30 days<sup>4</sup> of receiving the final decision of the Request for Reconsideration process described in Part 2.

3.23 Mediation shall proceed until a resolution mutually agreeable to all Parties to the Dispute is reached regarding some or all the issues under dispute or until it is terminated by any of the parties.

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Arbitration at <http://www.pca-cpa.org/ENGLISH/AL/#IV>. Some of the identified organizations may not have expertise in environmental or public policy mediation.

<sup>10</sup> Mediation is only effective if all parties make a good-faith effort to reach a mutually-agreeable resolution. Any party can forego mediation and elect to proceed directly to binding arbitration if it believes that the issue will not be resolved through mediation.

## **Costs**

- 3.24 All Parties to the Dispute are responsible for their own costs of participating in the mediation process. Such costs include but are not limited to:
- (a) Costs for the time and expenses in bringing or responding to the complaint and preparation of a Request for Mediation and any other documentation used to support or respond to the Request for Mediation, and
  - (b) Costs involved with identifying a mediator and making the necessary arrangements for mediation services, and
  - (c) Costs for time and expenses in preparing any materials for submission to the mediation process, and
  - (d) Costs and expenses for travel and attendance at any mediation sessions.
- 3.25 All Parties to the Dispute shall pay an equal share of the cost for the services of the mediator.
- 3.26 Mediator costs shall be directly related to the mediator's time and expenses for conducting the mediation process and shall include but are not limited to:
- (a) Any filing fees for the mediation organization,
  - (b) Costs for preparation of the mediation agreement (if prepared by the mediator),
  - (c) Costs for preparation of a report of the outcome of the mediation,
  - (d) Compensation to the mediator for time spent on the mediation, and
  - (e) Costs for the mediator's travel and expenses as necessary to conduct the mediation.

## **Duty of Reasonable Cooperation**

- 3.27 All Parties to the Dispute must abide by the Duty of Reasonable Cooperation provisions set out in Part 5.

## **Part 4, Binding Arbitration**

### **Applicability**

- 4.1 This Part applies to all disputes that have already gone through mediation and to those disputes in which the any of the Parties to the Dispute has elected to proceed directly to binding arbitration.

### **Standing**

- 4.2 The arbitration process is available only to "qualified stakeholders" as defined in Section 3.5.
- 4.3 A Party to the Dispute who has failed to pay his share of any prior mediation or arbitration costs within 30 days<sup>4</sup> of receipt of an invoice from the mediator or arbitrator, or otherwise failed to make alternate arrangements for payment acceptable to the mediator or arbitrator, shall be deemed in default until such payment is received, and is barred from further use of this Procedure for the current dispute or any future disputes until full payment is received.

- 4.4 The ICMI President shall determine if a complainant has standing to proceed with arbitration.<sup>6</sup>
- (a) The ICMI President's determination of standing is not considered to be a decision or action subject to further review under this Procedure nor does it constitute separate grounds for invoking the Procedure.
  - (b) No later than the next regularly scheduled meeting of the ICMI Board of Directors, the ICMI President shall provide the Board with copies of any Request for Arbitration forms submitted since the preceding Board meeting that he has determined fail to show standing.
  - (c) The Board may, at its discretion, investigate any allegations brought by a complainant lacking standing and take whatever actions consistent with the Code that it deems necessary and appropriate.

### **Complainant**

- 4.5 A complainant initiates binding arbitration by filing a complete Request for Arbitration form with the ICMI President.
- 4.6 Multiple complaints arising from a single audit or decision/action should be filed together as long as they involve the same operation or share the same respondent. Once a Request for Arbitration form has been submitted to ICMI, additions or revisions to the complaint are allowed only with the agreement of the other Parties to the Dispute.

### **ICMI**

- 4.7 The ICMI President must:
- (a) Provide all Parties to the Dispute with a copy of a Request for Arbitration within 10 business days<sup>4</sup> of such receipt; and
  - (b) Advise all Parties to the Dispute of the claimant's standing to proceed with arbitration and of the identity and contact information of all other Parties to the Dispute within 45 days<sup>4</sup> of receipt of a Request for Arbitration.

### **Respondent**

- 4.8 The respondent must submit a written response to the Request for Arbitration to all Parties to the Dispute within 45 days<sup>4</sup> of receiving notice from the ICMI President that the complainant has standing to proceed with arbitration.
- 4.9 If ICMI is the respondent in the arbitration process, the ICMI Board of Directors shall, at its discretion, designate a Board member, officer, staff personnel or other individual to represent ICMI during the process.

### **All Parties to the Dispute**

4.10 All Parties to the Dispute, as defined in Section 1.7, shall provide whatever relevant advice, information, guidance or other input it deems appropriate during the arbitration process.

- (a) Any such information must be provided to all Parties to the Dispute and to the arbitrator(s).
- (b) Input from ICMI is not considered to be a decision or action subject to further review under this Procedure nor does it constitute separate grounds for invoking the Procedure.

### **Selection of Arbitrators**

4.11 A professional arbitrator(s) acceptable to all Parties to the Dispute will be employed to resolve the dispute.

- (a) The dispute will be heard by a single arbitrator unless the Parties to the Dispute cannot agree on a single arbitrator.
- (b) If the Parties to the Dispute cannot agree on a single arbitrator, then a three-member panel of arbitrators will be constituted as follows:
  - (1) If there are two Parties to the Dispute, each Party shall select one member, and the two members so selected will then name a third arbitrator who will serve as the Chair of the panel;
  - (2) If there are three Parties to the Dispute, each Party shall select one member, and the three members so selected will then name one to serve as the Chair of the panel; and
  - (3) If there are more than three Parties to the Dispute, only three Parties shall participate in the selection of the arbitration panel pursuant to Section 4.11(b)(2) and the ICMI will not select an arbitrator. However, if ICMI was either the complainant or respondent, then the ICMI Board of Directors shall determine the Parties that will participate in selection of the arbitration panel.

4.12 The Parties to the Dispute are responsible for arranging for suitable arbitration services, and are encouraged to engage the services of a professional arbitrator(s) with the following attributes:

- (a) 200 hours or more of experience arbitrating environmentally-related cases (e.g., those involving pollution prevention, cleanup or consequences of pollution, land use, natural resource use or distribution, environmental permitting, facility or infrastructure siting disputes, environmental justice, and negotiated rulemaking, enforcement, or compliance); or
- (b) 200 hours or more of experience arbitrating cases involving the setting of governmental policy at the national, regional, state or local level, such as environmental or natural resource policy, health or safety policy, or education policy; and

- (c) Advanced training in dispute resolution and consensus building; and
- (d) Post-graduate level education or training in substantively relevant fields, such as law, environmental sciences or policy, engineering, public administration or management, communication theory, planning, conflict resolution, and
- (e) Listing on the rosters of professional neutrals of, or otherwise affiliated with or otherwise identified through organizations including but not limited to the United States Institute for Environmental Conflict Resolution, the American Arbitration Association, the Institute of Arbitrators and Mediators (Australia), the ADR Institute of Canada, the Santiago Arbitration and Mediation Center (Chile), the International Court of Arbitration of the International Chamber of Commerce, the Permanent Court of Arbitration, the European Court of Arbitration, Organization for the Harmonization of Business Law in Africa; and the Institute of Arbitrators and Mediators (Australia).<sup>11</sup>

4.13 Notwithstanding Section 4.12 above, any individual(s) acceptable to the all Parties to the Dispute may serve as an arbitrator regardless of his or her experience, education, training or listing on the roster of an identified organization.

#### **Arbitration Procedures**

4.14 Procedures for the arbitration (e.g., location, language, meetings) will be established with the selected arbitrator(s) with the mutual agreement of all Parties to the Dispute.

4.15 All Parties to the Dispute shall be allowed to participate in the arbitration equally.

4.16 Prior to the start of arbitration, all Parties to the Dispute must sign an arbitration agreement stipulating the procedures agreed to by the Primary Parties to the Dispute and including the following statements:

- (a) A statement that all Parties to the Dispute acknowledge and agree that the outcome of the ICMI Dispute Resolution Procedure is final. The arbitration agreement will also include a statement that the Parties to the Dispute agree to be bound by this Procedure, and further agree to hold the ICMI harmless in connection with the dispute regardless of the outcome of the arbitration.
- (b) A statement that all Parties to the Dispute agree to pay the arbitrator costs assigned to them by the arbitrator, pursuant to Section 4.22.

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<sup>11</sup> These organizations are offered only as examples that may be able to provide arbitration services or whose procedures may be useful as models for arbitration. Their inclusion is not intended as an endorsement, and the exclusion of other arbitration organizations is not intended to reflect ICMI's determination of their expertise, professionalism, or relative merit. Additional organizations can be found on the website of the Permanent Court of Arbitration at <http://www.pca-cpa.org/ENGLISH/AL/#IV>. Some of the identified organizations may not have expertise in environmental or public policy arbitration.

- 4.17 All Parties to the Dispute entering into arbitration are required to accept the decisions of the arbitrator(s) with respect to the resolution of the dispute and the assignment of costs. These decisions are not subject to further review under this Procedure nor do they constitute separate grounds for invoking the Procedure.
- 4.18 The party requesting arbitration may drop the complaint and terminate the arbitration at any time until the arbitrator makes his decision. However, the Parties to the Dispute are still subject to the arbitrator's assignment of the arbitrator costs accrued to date.
- 4.19 At the conclusion of the arbitration, the arbitrator(s) shall provide all Parties to the Dispute with a written summary of its discussions and a detailed explanation of the resolution and the reasons therefore.

#### **Timing of Request for Arbitration**

- 4.20 A Request for Arbitration must be filed within 30 days<sup>4</sup> of the termination of the mediation process described in Part 3.

#### **Costs**

- 4.21 All Parties to the Dispute are responsible for their own costs of participating in the arbitration process. Such costs include but are not limited to:
- (a) Costs for the time and expenses in bringing or responding to the complaint and preparation of a Request for Arbitration and any other documentation used to support or respond to the Request for Arbitration,
  - (b) Costs involved with identifying a mediator and making the necessary arrangements for arbitration services, and
  - (c) Costs for time and expenses in preparing any materials for submission to the arbitration process, and
  - (d) Costs and expenses for travel and attendance at any arbitration sessions.
- 4.22 All Parties to the Dispute shall pay the costs for the services of the arbitrator(s) as assigned by the arbitrator(s).
- (a) Arbitrator costs shall be directly related to the arbitrator's time and expenses for conducting the arbitration process and shall include but are not limited to:
    - (1) Any filing fees for the arbitration organization,
    - (2) Costs for preparation of the arbitration agreement (if prepared by the arbitrator),
    - (3) Costs for preparation of a report of the outcome of the arbitration,
    - (4) Compensation to the arbitrator for time spent on the arbitration, and
    - (5) Costs for the arbitrator's travel and expenses as necessary to conduct the arbitration.
  - (b) In assigning arbitrator costs to the parties, the arbitrator(s) shall consider such factors as each party's good faith and cooperation during the proceedings, the relative strength of each party's positions and which party has prevailed in the

dispute. The relative ability of each party to pay shall not be a factor in cost allocation.

### **Duty of Reasonable Cooperation**

4.23 All Parties to the Dispute must abide by the Duty of Reasonable Cooperation provisions set out in Part 5.

## **Part 5, Duty of Reasonable Cooperation**

### **Duty**

5.1 All Parties to a Dispute being addressed under this Procedure must cooperate reasonably with each other, the mediator and/or the arbitrator(s) in the attempt to resolve the dispute.

### **Scope**

5.2 The duty of reasonable cooperation includes but is not limited to:

- (a) Negotiation in good faith to resolve the dispute,
- (b) Compliance with requests from the mediator or arbitrator or from other Parties to the Dispute for briefs, documentation, testimony, or other participation in the process,
- (c) Timely provision to mediators, arbitrators and all other Parties to the Dispute of all filings and documents furnished to any one of these parties, and
- (d) Civility during the conduct of any proceedings held under this Procedure.

### **Violation of Duty**

5.3 Violations of the provisions of this Part by any of the Parties to the Dispute shall result in the following:

- (a) A decision by a mediator to advise ICMI in writing that one of the Parties to the Dispute has violated the duty of reasonable cooperation. Such decision shall describe the nature of such violation. The ICMI shall report such finding to an arbitrator(s) of the same dispute; and/or
- (b) A decision by an arbitrator to factor such violation into his resolution of the dispute and allocation of arbitration costs.

## **Part 6, Conflicts of Interest**

### **Recusal**

6.1 If, at any time during a proceeding under this Procedure, an ICMI staff personnel, officer of the ICMI or a member of the ICMI's Board of Directors believes that his participation in the resolution of the dispute will create a conflict of interest, that staff personnel, officer or director must immediately disclose that conflict to the Board and immediately

suspend his further participation in the proceeding. He may then disqualify himself permanently or disclose the conflict, in writing, to all of the parties in the proceeding and seek their written waiver of any objections to such staff personnel's, officer's or director's participation.

- (a) If a waiver is obtained from all of the parties to the proceedings, the staff personnel, officer or member may resume participation in the proceedings.
- (b) Where a waiver is obtained from all of the parties, the conflict of interest will not be subject to further review under this Procedure nor will it constitute separate grounds for invoking the Procedure.

6.2 If at any time it appears to any ICMI staff personnel, officer of ICMI or member of the Board of Directors that one of their colleagues has an actual or potential conflict of interest, the staff personnel, officer or member to whom the conflict appears must raise the actual or potential conflict with the staff personnel, officer or member who might be in violation of the conflict rules.

- (a) If the staff personnel, officer or member who might be in violation of the conflict rules believes that such a conflict may exist, he must immediately suspend his further participation in the proceeding. He may then disqualify himself permanently or disclose the conflict, in writing, to all of the parties in the proceeding and seek their written waiver of any objections to such staff personnel's, officer's or director's participation.
  - (1) If a waiver is obtained from all of the parties to the proceedings, the staff personnel, officer or member may resume participation in the proceedings.
  - (2) Where a waiver is obtained from all of the parties, the conflict of interest will not be subject to further review under this Procedure nor will it constitute separate grounds for invoking the Procedure.
- (b) If the staff personnel, officer or member who might be in violation of the conflict rules does not believe that such a conflict may exist, he may present the reason(s) for this belief to the Board of Directors and request that they vote on whether he, in fact, has a conflict and must be disqualified from participation in the proceeding.
  - (1) The vote of a majority of Board members is needed to overcome a presumption of conflict.
  - (2) A Board member who initially raises this concern and a Board member that may have the conflict are prohibited from this vote.
  - (3) If the Board votes that there is no conflict, the officer or member may resume participation in the proceedings.

- (4) If the Board votes that there is no conflict, the conflict of interest will not be subject to further review under this Procedure nor will it constitute separate grounds for invoking the Procedure

6.3 For purposes of this Part, a “conflict of interest” refers to a situation when staff personnel, an officer of ICMI or a member the Board of Directors of ICMI has competing professional or personal obligations or personal or financial interests that would make it difficult to fulfill his duties fairly.