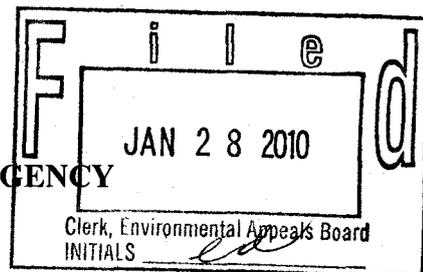


ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



ORDER AUTHORIZING ELECTRONIC FILING IN PROCEEDINGS BEFORE THE ENVIRONMENTAL APPEALS BOARD NOT GOVERNED BY 40 C.F.R. PART 22

Before Environmental Appeals Judges Edward E. Reich, Charles J. Sheehan, Kathie A. Stein, and Anna L. Wolgast

Per Curiam:

The Environmental Appeals Board ("Board" or "EAB"), pursuant to its authority delegated by the Administrator, 40 C.F.R. § 1.25(e),¹ hereby authorizes electronic filing² in all cases³ currently or subsequently filed with the Board other than those brought under 40 C.F.R.

¹ The Board exercises this delegated authority in several contexts. *See generally* 42 U.S.C. § 9606(b) (petitions for reimbursement of response costs pursuant to section 106(b) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")); 40 C.F.R. pt. 27 (program fraud civil remedies); 40 C.F.R. pt. 60 (subpart AAA - standards of performance for new residential wood heaters); 40 C.F.R. pt. 71 (federal operating permit program under Title V of the Clean Air Act); 40 C.F.R. pt. 78 (appeal procedures for Acid Rain program); 40 C.F.R. pt. 85 (control of air pollution from mobile sources); 40 C.F.R. pt. 124 (procedures for issuing, modifying, revoking and reissuing, or terminating permits issued under several laws); 40 C.F.R. pt. 164 (rules of practice governing several types of non-enforcement hearings under the Federal Insecticide, Fungicide, and Rodenticide Act); 40 C.F.R. pt. 209 (rules of practice governing hearings for orders issued under section 11(d) of the Noise Control Act); 40 C.F.R. pt. 222 (action on ocean dumping permit applications under section 102 of the Marine Protection, Research, and Sanctuaries Act).

² This order does not mandate electronic filing. Rather, it authorizes the use of electronic filing in addition to those filing methods already authorized and enumerated in the regulations governing proceedings before the Board. *See, e.g.*, 40 C.F.R. § 27.26(a)(4) (discussing filing by mail); 40 C.F.R. § 85.1807(c) (same); 40 C.F.R. § 209.11(c) (same); *see also* 40 C.F.R. § 78.4(c) (referencing the Board's authority to reject a filing that fails to comply with any requirement of part 78 and return it by mail).

³ This order does not affect filing practice before Presiding Officers. *See, e.g.*, 40 C.F.R. §§ 27.1, .18; 40 C.F.R. §§ 78.6(b), 78.13-.15; 40 C.F.R. § 85.1807; 40 C.F.R. § 222.6; *see also* 40 C.F.R. § 164.2 (regulations governing FIFRA non-enforcement hearings encompass Administrative Law Judges and Hearing Officers in addition to Presiding Officers); 40 C.F.R. §§ 209.3(b), .18 (initial hearings conducted by Administrative Law Judge).

part 22, and adopts the following conditions and limitations to facilitate electronic filing. The Board has issued a separate order addressing electronic filing in part 22 proceedings. *See* Order Authorizing Electronic Filing in Proceedings Before the Environmental Appeals Board Under 40 C.F.R. Part 22 (Jan. 28, 2010), *available at* <http://www.epa.gov/eab>. These conditions and limitations may be amended from time to time by further order of the Board. The Board may issue an order modifying these conditions and limitations in a specific case or class of cases if deemed appropriate in the exercise of its discretion. The Board, in its sole discretion, may revoke this authority at any time.

General Filing Requirements

Effective immediately, litigants may electronically file documents, including notices of appeal, motions, briefs, and accompanying exhibits, utilizing the Central Data Exchange (“CDX”).⁴ To be considered timely, documents submitted electronically must be received by 11:59 p.m. Eastern Time on the day the document is required to be filed with the Board.^{5,6}

⁴ The Environmental Protection Agency has created the Central Data Exchange (“CDX”), a single portal that allows users to register and then submit information electronically to a number of Agency programs. The Board utilizes this portal to allow for the electronic submission of documents. More information about CDX can be found on its website at <http://cdx.epa.gov>.

⁵ The CDX system will generate an electronic receipt containing the date and time of the filing, and both the person submitting the document and the Clerk of the Board will receive a copy of the electronic receipt.

⁶ While deadlines are normally established by regulation, with respect to petitions for reimbursement filed under section 106(b) of CERCLA, 42 U.S.C. § 9606(b), the Board has held that one of the four statutory prerequisites a petitioner must establish before the Board will consider the merits of a reimbursement request is that the petition was timely submitted. *See, e.g., In re Grand Pier Center, LLC*, 12 E.A.D. 403, 407 n.7 (EAB 2005); *In re A&W*

Anyone choosing to file electronically⁷ should register with CDX through its website at <http://cdx.epa.gov>. A motion and associated brief may be electronically filed together, but exhibits or attachments filed in support of a brief, motion, or other document should be submitted separately from the brief or motion. Where there are multiple exhibits or attachments, they should be filed together in a single electronic file to the extent technically practicable. Sending a document directly to the Board via e-mail, rather than through the CDX portal, does not constitute electronic filing unless otherwise specified by the Board.

To the extent that the governing regulations require that any document filed (other than exhibits) in a proceeding shall be signed by the person making the filing, or by an attorney or other representative, utilization of the CDX system fulfills the signature requirement. *See, e.g.*, 40 C.F.R. § 27.26(a)(3) (requiring that “[e]very pleading and paper shall be signed * * *”); 40 C.F.R. § 78.4(a) (stating that “[a]ll original filings made under this part shall be signed * * *”). By filing a document through the CDX system, a party, or its attorney or other representative, represents that the signatory has read the document, that to the best of his or her knowledge the statements made therein are true, and that the document is not interposed for delay. The full name of the filing party, or of its attorney or other representative, should be typed

Smelters and Refiners, Inc., 6 E.A.D. 302, 315 (EAB 1996).

⁷ Until now, a person could submit documents electronically using CDX, but in order for any document to be considered “filed” with the Board, a paper copy of the submission, sent by mail or hand delivery, was required, although electronic submission of the document excused parties from the requirement of submitting multiple copies. *See, e.g.*, 40 C.F.R. § 27.26(a)(1) (requiring two copies of each document in addition to the original); 40 C.F.R. § 78.4(d) (same); 40 C.F.R. § 85.1807(c) (same); 40 C.F.R. § 164.101(a)(3) (requiring five copies of all material filed); 40 C.F.R. § 209.11(a) (requiring two copies of each document in addition to the original). With this order, any electronic submission filed in accordance with its terms will be considered “filed” with the Board.

or printed below the signature line of the electronically filed document.⁸

Insofar as the corresponding regulations require that multiple copies of a document be filed, a party, or its attorney or other representative, that files a document electronically is deemed to satisfy this requirement. *See, e.g.*, 40 C.F.R. § 27.26(a)(1) (requiring two copies of each document in addition to the original); 40 C.F.R. § 78.4(d) (same); 40 C.F.R. § 85.1807(c) (same); 40 C.F.R. § 164.101(a)(3) (requiring five copies of all material filed); 40 C.F.R. § 209.11(a) (requiring two copies of each document in addition to the original).

Limitations Regarding Length

A party, or its attorney or other representative, that electronically files a document that exceeds fifty (50) pages in length,⁹ inclusive of certificate of service, table of contents, subject

⁸ A party, or its attorney or other representative, filing electronically shall ensure that a certificate of service accompanies each document filed with the Board, and shall serve a copy of each document filed in the proceeding on each party. *See, e.g.*, 40 C.F.R. § 27.26(b) (“A party filing a document * * * shall, at the time of filing, serve a copy of such document on every other party.”); 40 C.F.R. § 78.4(e)(2) (“Every filing made under this part shall be accompanied by a certificate of service * * *.”); 40 C.F.R. § 85.1807(c)(2) (stating that at the same time a document is filed copies shall be served upon all other parties, and that it shall be accompanied by a certificate of service); 40 C.F.R. § 164.5(a) (same); 40 C.F.R. § 209.11(b) (same); 40 C.F.R. § 222.12(b)(5) (requiring a “certificate of service of the notice of appeal on all other parties to the adjudicatory hearing”).

⁹ Certain parts of Title 40 of the Code of Federal Regulations contain other filing requirements regarding length that still apply to documents filed electronically. *See, e.g.*, 40 C.F.R. § 85.1807(u)(4) (stating that a brief in excess of forty pages shall not be filed without leave of the Environmental Appeals Board); 40 C.F.R. § 209.31(d) (same); 40 C.F.R. § 222.12(b), (d) (stating that both the notice of appeal and any memorandum filed in response thereto shall be “no more than 40 pages in length”).

index, and table of cases,¹⁰ but exclusive of exhibits or attachments, shall send a paper copy of the document by U.S. mail, or by hand, courier, or commercial delivery service, within one business day of the date of the electronic filing. *See* EAB Practice Manual at 9-10 (June 2004), available at <http://www.epa.gov/eab/pmanual.pdf> (providing separate addresses for the EAB depending on the method of filing). If the combined page length of all of the exhibits or attachments submitted in support of a brief or motion exceeds fifty (50) pages, the requirement to submit a paper copy within one business day applies to the entire set of exhibits or attachments.¹¹ Any paper copy submitted subsequent to an electronic filing must be accompanied by a signed certification stating that it is identical to the filed electronic copy. The Board may exclude from the record any electronically filed document exceeding fifty (50) pages in length if a party, or its attorney or other representative, fails to send or deliver a paper copy of the document within one business day of the electronic filing.¹² *See, e.g.*, 40 C.F.R. § 78.4(c).

¹⁰ *See, e.g.*, 40 C.F.R. § 78.4(e)(2) (requiring a certificate of service); 40 C.F.R. § 85.1807(c)(2), (u)(3) (requiring a certificate of service, subject index, a table of cases, and a proposed form of rule or order in any appeal brief filed); 40 C.F.R. § 164.101(a)(1) (requiring proposed findings of fact, conclusions, orders or rulings when filing an appeal); 40 C.F.R. § 209.31 (requiring a subject index, table of cases, and a proposed form of rule or order in any appeal brief filed).

¹¹ For purposes of this order only, if the paper copy is sent via U.S. mail, the timeliness of the submission will be determined by the postmark. If the paper copy is delivered by courier or commercial delivery service, the timeliness of the submission will be determined by the verified time when the courier or commercial delivery service took possession of the document. If a document is delivered by hand, the timeliness of the submission will be determined by the date stamp placed on the document when it is received by the Board.

¹² With the exception of exhibits or attachments, when filing multiple documents, such as a notice of appeal and an appeal brief, paper copies need not be submitted if each document is filed separately and does not exceed fifty (50) pages. If a single document, or an exhibit or set of exhibits, is more than fifty pages, it may not be electronically filed in sections to avoid the requirement for submitting a paper copy. Such lengthy document may, however, be

Confidential Business Information

The Board will consider business confidentiality claims waived when a document is electronically filed. A party, or its attorney or other representative, submitting business information to the Board for which a claim of confidentiality is made must do so by filing paper copies of the document in the manner described in the applicable regulations. *See, e.g.*, 40 C.F.R. § 85.1808 (procedures for submitting confidential information in proceedings regarding an EPA-ordered automobile recall for failure to meet emissions standards under the Clean Air Act); *see also* 40 C.F.R. pt. 2.

Further Information

For further information, see the Board's website located at www.epa.gov/eab, in particular the Frequently Asked Questions and Electronic Filing web pages. The Board's Practice Manual, also available at www.epa.gov/eab, contains more detailed information about procedures for filing documents before the Board.

So ordered.

Dated: January 28, 2010

electronically filed in sections for technical reasons. If a document in excess of fifty pages is electronically filed in sections for technical reasons, the filer must still submit a paper copy.