



# The Environmental Appeals Board

## Practice Manual

**Notice:** This revised document incorporates new changes that will go into effect on **March 26, 2013**, when the rule revising section 124.19 takes effect. For guidance on the current rule, see the current version of the Practice Manual available on the Environmental Appeals Board's guidance documents Web page

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**This document is solely intended as guidance. The policies and procedures in this guidance do not constitute a rulemaking by the Agency, and may not be relied on to create a substantive or procedural right or benefit enforceable at law by any person.**

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## I. INTRODUCTION

The Environmental Appeals Board (“EAB” or “Board”) of the U.S. Environmental Protection Agency (“EPA” or “Agency”) is a permanent, impartial, four-member body that is independent of all Agency components outside the immediate Office of the Administrator.<sup>1</sup> It is the final Agency decisionmaker on administrative appeals under all major environmental statutes that EPA administers. *See* 40 C.F.R. § 1.25(e). The EAB was created on March 1, 1992, to recognize the growing importance of EPA adjudicatory proceedings as a mechanism for implementing and enforcing the environmental laws and to “inspir[e] confidence in the fairness of Agency adjudications.”<sup>2</sup> Changes to Regulations to Reflect the Role of the New Environmental Appeals Board in Agency Adjudications, 57 Fed. Reg. 5320, 5322 (Feb. 13, 1992); *see also* S. Rep. No. 103-257, 103d Cong. 2d Sess. 86 (1994). Practice before the EAB is primarily governed by federal regulations.

This Manual provides general descriptions of the regulatory framework for EAB

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<sup>1</sup> EPA is headed by an Administrator who is appointed by the President. The Administrator formally delegated to the EAB the authority to adjudicate permit and penalty appeals. Changes to Regulations to Reflect the Role of the New Environmental Appeals Board in Agency Adjudications, 57 Fed. Reg. 5320, 5320 (Feb. 13, 1992). Thus, the EAB “answers only to the Administrator of the Agency.” *In re Marine Shale Processors, Inc.*, 5 E.A.D. 751, 795 (EAB 1995), *aff’d*, 81 F.3d 1371 (5th Cir. 1996), *cert. denied*, 519 U.S. 1055 (1997). When the EAB is the decisionmaker in an enforcement proceeding, after the complaint has been filed the EAB is expressly prohibited by regulation from engaging in *ex parte* discussion on the merits of the proceeding with Agency staff members who performed a prosecutorial or investigative function in that proceeding (or a factually related proceeding) or with any interested person outside EPA. *See* 40 C.F.R. § 22.8.

<sup>2</sup> Prior to March 1992, EPA’s Chief Judicial Officer or, in some cases, a Judicial Officer, decided civil penalty appeals, pursuant to a delegation of authority from the Administrator. The Administrator decided permit appeals based on the recommendation of the Chief Judicial Officer or a Judicial Officer.

proceedings and provides guidance to litigants on matters related to practice before the EAB. However, “[a]n EPA guidance document does not have the force of law,” and therefore this Manual should not be relied on as dispositive of the matters it addresses. *In re V-1 Oil Co.*, 8 E.A.D. 729, 748 (EAB 2000). Practitioners should always consult the applicable statute and regulations for the specific substantive and procedural requirements under any authority described in this Manual. In the event of any discrepancy between this Manual and the regulations, the regulations govern.

The [Appendix](#) to this Manual provides templates for filings in EAB proceedings. These templates are solely for the guidance of participants in EAB proceedings. Submissions need not conform to them provided that all applicable regulatory requirements have been satisfied.

The EAB provides additional information about its procedures in A Citizens’ Guide to the Environmental Appeals Board and in its responses to Frequently Asked Questions (“FAQs”), both of which are on the EAB’s Web site at [www.epa.gov/eab](http://www.epa.gov/eab). The Clerk of the Board, and the attorneys who serve as counsel to the EAB, are available to answer questions from litigants and the general public about the appeals process. However, the attorneys do not provide legal advice to the public and they will not discuss the particulars of a matter pending before the EAB. *See, e.g.*, 40 C.F.R. § 22.8 (barring *ex parte* discussion of the merits of any proceeding before the EAB). Persons with questions about the appeals process may call the Clerk of the Board at (202) 233-0122.

The EAB has issued many decisions that interpret the federal regulations governing appeals procedures, some of which are referenced in this Manual. The full text of all published EAB decisions (*see* Section II.E.1), and all unpublished final orders (*see* Section II.E.3) issued



after November 1996 can be accessed on the EAB Web site at [www.epa.gov/eab](http://www.epa.gov/eab).

## II. GENERAL

### A. Functions and Powers of the EAB

Section 1.25(e)(1) of Title 40 of the Code of Federal Regulations (“C.F.R.”) establishes the EAB as “a permanent body with continuing functions” that “shall decide each matter before it in accordance with applicable statutes and regulations.” Section 1.25(e)(2) provides that:

The Environmental Appeals Board shall exercise any authority expressly delegated to it in this title. With respect to any matter for which authority has not been expressly delegated to the Environmental Appeals Board, the Environmental Appeals Board shall, at the Administrator’s request, provide advice and consultation, make findings of fact and conclusions of law, prepare a recommended decision, or serve as the final decisionmaker, as the Administrator deems appropriate.

The Agency has prescribed rules that govern the EAB’s proceedings, as detailed in the following section.

### B. EAB Jurisdiction

The jurisdiction of the EAB is established primarily by regulation. The majority of the EAB’s cases are appeals from administrative enforcement decisions (mostly civil penalty cases) and appeals from permit decisions. Appeals from administrative enforcement decisions are governed primarily by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (“CROP”), codified at 40 C.F.R. part 22. Appeals from permit decisions are governed primarily

by the procedures codified at 40 C.F.R. part 124.<sup>3</sup> However, the following permit proceedings are governed by the CROP rather than the part 124 regulations:

(1) revocation or suspension of a permit under sections 105(a) and (f) of the Marine Protection, Research, and Sanctuaries Act (“MPRSA”), as amended, 33 U.S.C. § 1415(a) and (f), and 40 C.F.R. § 22.1(a)(3);

(2) termination of an EPA-issued National Pollutant Discharge Elimination System (“NPDES”) permit under Clean Water Act § 402(a), 33 U.S.C. § 1342(a), and 40 C.F.R. § 22.1(a)(6); and

(3) the termination of an EPA-issued permit, under Resource Conservation Recovery Act (“RCRA”) § 3008(a), 42 U.S.C. § 6928(a)(3), and the suspension or revocation of authority to operate pursuant to RCRA § 3005(e), 42 U.S.C. § 6925(e), and 40 C.F.R. § 22.1(a)(4).

The EAB is also authorized to hear appeals under other statutory and regulatory authorities. These categories of appeals are addressed briefly in Section V.

In addition to its express regulatory authority, the EAB exercises authority delegated by the EPA Administrator (“Administrator”). For example, the EAB considers petitions for reimbursement of costs incurred in complying with cleanup orders issued under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”), 42 U.S.C. §§ 9601-9675. *See* Delegation of Authority 14-27 (“Petitions for

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<sup>3</sup> The procedural rules set forth in 40 C.F.R. part 124 were revised in 2012. *See* Revisions to Procedural Rules to Clarify Practices and Procedures Applicable in Permit Appeals Pending Before the Environmental Appeals Board, 78 Fed. Reg. 5281 (Jan. 25, 2013). These regulatory changes are summarized in Section IV below.

Reimbursement”). As noted in Section II.A, the EAB may also be requested by the Administrator, on a specific matter, to “provide advice and consultation, make findings of fact and conclusions of law, prepare a recommended decision, or serve as the final decisionmaker, as the Administrator deems appropriate.” 40 C.F.R. § 1.25(e)(2); *see, e.g., In re Tennessee Valley Auth.*, 9 E.A.D. 357, 368 (EAB 2000).

#### C. Environmental Appeals Judges and Staff

The Environmental Appeals Board is a permanent body composed of no more than four Environmental Appeals Judges who are Senior Executive Service (“SES”)-level career Agency attorneys. Under the internal procedures governing the EAB’s organization, the judges serve as co-equals. There is no Chief Judge or equivalent. At any given time, one judge serves as the lead judge for administrative matters, a position that rotates among the judges on an annual basis. Decisions regarding case priorities are made by the EAB as a whole. Cases are randomly assigned to panels comprised of three judges, who decide each matter by majority vote.<sup>4</sup> 40 C.F.R. § 1.25(e). Concurring and dissenting opinions may be issued. A number of staff attorneys (“Counsel to the Board”), the Clerk of the Board (“Clerk”), a staff assistant, and a secretary assist the EAB in carrying out its responsibilities.

#### D. Judicial Review; Final Agency Action

The Administrative Procedure Act (“APA”) provides a right of judicial review of “Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court \* \* \* .” 5 U.S.C. § 704. In enforcement and CERCLA cases where

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<sup>4</sup> Two EAB members constitute a quorum if a three-member panel cannot be convened. If the EAB sits as a panel of two members, and there is a tie vote, the matter can be referred to the Administrator to break the tie. 40 C.F.R. § 1.25(e)(1).

there is no remand back to the Agency, the decision of the EAB constitutes final agency action and may be appealed to a federal court. A final decision constitutes the “consummation of the agency’s decision-making process” and is determinative of the rights of the parties.<sup>5</sup> The decisions of the EAB generally cannot be appealed to the Administrator.<sup>6</sup> Moreover, there is no provision for review by the Administrator on his or her initiative.<sup>7</sup> Unlike enforcement and CERCLA cases where there is no remand back to the Agency, final agency action on a permit occurs after administrative review procedures before the EAB have been exhausted and the Regional Administrator subsequently issues a final permit decision. *See* Sections III.C (enforcement appeals) and IV.C (permit appeals) of this Manual for additional information. If the EAB issues a remand order or an interlocutory decision that requires further action from the Presiding Officer (enforcement appeals) or the permitting authority (permit appeals), the EAB may require the parties to appeal contested portions of any decision on remand to the EAB in order to exhaust administrative remedies. *See, e.g.*, 40 C.F.R. § 124.19(l)(2)(iii).

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<sup>5</sup> *City of San Diego v. EPA*, 242 F.3d 1097, 1101 (9th Cir. 2001). According to the U.S. Supreme Court, agency action is “final” if it constitutes “the ‘consummation of the agency’s decision-making process’” and if it determines “rights or obligations.” *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

<sup>6</sup> Title 40 § 22.31(e) of the C.F.R. provides the sole exception. It applies to any final EAB order issued to a federal department, agency, or instrumentality after an appeal. In such a circumstance, the head of the affected department, agency, or instrumentality may request a conference with the Administrator following the issuance of the EAB’s final order. The Administrator’s decision becomes the final order in the matter.

<sup>7</sup> Although the EAB has the authority to refer a matter on appeal to the Administrator on its own initiative, that authority is intended to be exercised only in exceptional cases. *See* 40 C.F.R. § 22.4(a) (enforcement cases); *id.* § 124.2 (permit cases).

Under the APA, a federal court will only review the EAB's decision to determine whether it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see Pepperell Assoc. v. EPA*, 246 F.3d 15, 22 (1st Cir. 2001) ("To the extent that the EAB's decision reflects a gloss on its interpretation of the governing EPA regulations, a reviewing court must also afford those policy judgments substantial deference, deferring to them unless they are arbitrary, capricious, or otherwise 'plainly' impermissible."); *see also Martex Farms, S.E. v. U.S. EPA*, 559 F.3d 29, 32 (1st Cir. 2009) (stating that the court reviews the EAB's penalty assessment with "heightened deference"); *Catalina Yachts, Inc. v. EPA*, 112 F. Supp. 2d 965, 967 (C.D. Cal. 2000), *aff'g In re Catalina Yachts, Inc.*, 8 E.A.D. 199 (EAB 1999).

#### E. Final EAB Decisions and Orders

All final EAB decisions and final EAB orders may be cited in EAB proceedings at any time after issuance, using the forms of citation set forth below.

##### 1. Published Decisions

The EAB designates many of its decisions as published decisions. These decisions are initially issued as slip opinions; they are subsequently reformatted as published decisions and assigned a volume and page number in a series of bound volumes titled Environmental Administrative Decisions ("E.A.D.").<sup>8</sup> Each volume of the E.A.D. contains a subject index and reference tables. Volumes 8 and 13 contain five-year consolidated subject indexes. Currently

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<sup>8</sup> Individual volumes of the E.A.D. may be purchased from the U.S. Superintendent of Documents by calling (202) 512-1800 or by accessing its website at <http://bookstore.gpo.gov/>. Volumes 1-3 contain three hundred selected opinions that were issued by EPA's Administrator, Chief Judicial Officer and Judicial Officers between March 1972 and March 1992, before the creation of the EAB.

the E.A.D. contains decisions issued by the EAB through June 2008. Additional volumes will be issued as warranted.

The complete text of any published EAB decision may be accessed electronically at the EAB's Web site, [www.epa.gov/eab](http://www.epa.gov/eab), or by contacting the Clerk of the Board. See Section II.K. The full text of these decisions is also commercially available through LEXIS<sup>®</sup> and WESTLAW<sup>®</sup>. The EAB has adopted an official form of citation for its published decisions. A published EAB decision should be cited by E.A.D. volume and page number, indicating the EAB as the decisionmaker and the year the decision was issued. An example of a citation to an EAB decision that appears in volume 12 of the E.A.D. is as follows:

*In re Env'tl. Disposal Sys., Inc.*, 12 E.A.D. 254 (EAB 2005)

An example of a citation to a specific page of that opinion is as follows:

*In re Env'tl. Disposal Sys., Inc.*, 12 E.A.D. 254, 281 (EAB 2005)

The EAB has also adopted an official form of citation for a slip opinion that has not yet been reported.<sup>9</sup> A slip opinion should be cited by its EAB appeal number, indicating the EAB as the decisionmaker and the complete date on which the decision was issued. An example of a citation to a slip opinion is as follows:

*In re Ram, Inc.*, RCRA (9006) Appeal Nos. 08-01 & 08-02 (EAB July 10, 2009)

An example of a citation to a specific page of that opinion is as follows:

*In re Ram, Inc.*, RCRA (9006) Appeal Nos. 08-01 & 08-02, slip.op. at 8 (EAB July 10,

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<sup>9</sup> When the EAB itself cites a slip opinion, the citation also indicates the volume of the E.A.D. in which the opinion will appear, as, for example, *In re Desert Rock Energy Co.*, PSD Appeal Nos. 08-03 through 08-06, slip op. at 10 (EAB Sept. 24, 2009), 14 E.A.D. \_\_\_. Litigants citing a slip opinion are not expected to indicate the volume number in which the opinion will appear.

2009).

Final EAB decisions in CERCLA § 106(b) cases should be cited using the form of citation for published EAB decisions as described in this section.

## 2. Pre-EAB Decisions

Enforcement decisions that were issued by EPA's Chief Judicial Officer ("CJO") or by a Judicial Officer ("JO"), and permit decisions that were issued by the Administrator prior to the creation of the EAB, may be cited in EAB proceedings, although citations to EAB cases standing for the same point, if any, are preferable. Selected pre-EAB decisions have been published in volumes 1-3 of the E.A.D. If the decision appears in the E.A.D., it should be cited by volume and page number, indicating the decisionmaker (i.e., Adm'r, CJO, or JO) and the year the opinion was issued. An example of a citation to a pre-EAB decision is as follows:

*In re Boliden-Metech, Inc.*, 3 E.A.D. 439 (CJO 1990).

An example of a citation to a specific page of that decision is as follows:

*In re Boliden-Metech, Inc.*, 3 E.A.D. 439, 451 (CJO 1990).

## 3. Unpublished Final Orders

The EAB also issues unpublished final orders that are dispositive of the outcome of the case but that the EAB does not designate as published decisions. These orders may be cited in proceedings before the EAB, indicating the appeal number, complete date, and title of the order as follows:

*In re Gateway Generating Station*, PSD Appeal No. 09-02 (EAB Sept. 15, 2009)  
(Order Dismissing Petition for Review)

Unpublished final orders that were issued subsequent to November 1996 may be accessed at the EAB's Web site located at [www.epa.gov/eab](http://www.epa.gov/eab). Copies of other EAB orders may be obtained from the Clerk of the Board. *See infra* Section II.K.

F. Service of EAB Decisions

The EAB serves its decisions upon the parties by U.S. Postal Service mail. EAB decisions and orders are served when they are placed in the mail.

G. Subsequent Histories of Published Decisions and Unpublished Final Orders in Federal Court

The EAB maintains two tables on its web site that contain information relating to the subsequent history of published decisions and unpublished final orders that have been appealed to the federal district and circuit courts of appeal, titled EAB Decisions Reviewed by the Federal Courts and EAB Decisions Pending Federal Review.

H. Oral Argument

Oral argument takes place in the EPA Administrative Courtroom, located at the U.S. Environmental Protection Agency, EPA East Building, Room 1152, 1201 Constitution Avenue, N.W., Washington, D.C. Oral arguments before the EAB are open to the public. For security purposes however, advance notice is required to gain entry into the EPA building where the Courtroom is located. Persons wishing to attend oral argument must contact the Clerk of the Board (Eurika Durr, 202-233-0122, [durr.eurika@epa.gov](mailto:durr.eurika@epa.gov)) not less than one week prior to the scheduled oral argument, so as to allow the Clerk reasonable opportunity to notify appropriate security personnel. The Board has audio-visual equipment in the courtroom that permits participation in oral argument via video conference at the Board's discretion. A schedule of oral arguments may



be obtained from the Clerk of the Board. The schedule is also available on the EAB's Web ([www.epa.gov/eab](http://www.epa.gov/eab)).

### I. General Filing Requirements

General filing requirements are described in this section. For additional filing requirements, consult Sections III.D for enforcement appeals, Section IV.D for permit appeals, and Section VI for CERCLA § 106(b) reimbursement proceedings.

Documents in EAB proceedings may be filed by mail (either through the U.S. Postal Service ("USPS") or a non-USPS carrier), hand-delivery, or electronically. The EAB does not accept notices of appeal, petitions for review, or briefs submitted by facsimile. The EAB will accept motions and responses to motions filed by facsimile provided that they do not contain attachments.

The EAB uses different addresses for different methods of paper delivery. *See* Section I.2. Parties are on notice that filing pleadings with the USPS may result in a delay in delivery caused by USPS mail-screening procedures, including a sterilization procedure that is randomly applied to mail delivered to the U.S. government.<sup>10</sup> Whenever possible, parties are encouraged to utilize the EAB's electronic filing system to avoid potential delays due to additional mail-screening procedures.

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<sup>10</sup> If a party fails to meet a filing deadline solely because of a delay caused by mail-screening procedures, the Board may exercise its discretion, on a case-by-case basis, to excuse a late filing.

## 1. Electronic Filing

### a. E-Filing Authorized

All submissions in proceedings before the EAB may be filed electronically, subject to any appropriate conditions and limitations imposed by the EAB. *See* Order Authorizing Electronic Filing in Proceedings Before the Environmental Appeals Board Under 40 C.F.R. Part 22 (Jan. 28, 2010) and Order Authorizing Electronic Filing in Proceedings Before the Environmental Appeals Board Not Governed by 40 C.F.R. Part 22 (Jan. 28, 2010). Parties who want to file a document or documents electronically must first register online in order to access the electronic filing system.<sup>11</sup> Additional information on electronic filing and instructions on how to register online are provided online at [www.epa.gov/eab](http://www.epa.gov/eab).

### b. Timeliness of Electronic Submissions

The Board's electronic filing system will provide the party submitting the document and the Clerk of the Board with an electronic receipt that shows the date and time of filing. The Board will consider a document that was filed electronically to be timely if the electronic receipt shows that the document was received by 11:59 p.m. Eastern Time on the day the document is required to be filed with the Board.

A party experiencing technical problems with the electronic filing system should refer to the Electronic Filing tab on the EAB's website ([www.epa.gov/eab](http://www.epa.gov/eab)) for information on who to contact for assistance. If the problem is caused by a malfunction of the electronic filing system and EPA technicians are unable to solve the problem, the party should promptly notify the Clerk of the

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<sup>11</sup> Compliance with EAB electronic filing requirements constitutes compliance with applicable signature requirements. Litigants filing electronically should still type or print their full name below the signature line.

Board and make alternative filing arrangements. A party experiencing problems with the electronic filing system after 4:30 p.m. Eastern Time, when the Clerk's office closes, should notify the Clerk immediately via email or on the next business day and provide any supporting evidence of such problems, such as a printed copy of an error message or screen print of an error page. The EAB will verify reported outages of the electronic filing system.

“It is a petitioner's responsibility to ensure that filing deadlines are met, and the Board will generally dismiss petitions for review that are received after a filing deadline.” *In re AES Puerto Rico, L.P.*, 8 E.A.D. 324, 329 (EAB 1999), *aff'd sub nom. Sur Contra La Contaminacion v. EPA*, 202 F.3d 443 (1st Cir. 2000). A party filing electronically assumes the risk at all times of filing problems caused by its own errors in using the EAB's electronic filing system.<sup>12</sup>

c. Requirements for Paper Copies of Electronic Submissions

A party filing a document electronically is not required to submit a paper copy to the EAB, except as explained in this paragraph.<sup>13</sup> A party filing electronically any single document that exceeds 50 pages (including the certificate of service, table of contents, and table of authorities, but excluding exhibits and attachments), must deliver to the EAB or place in the mail a paper copy of

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<sup>12</sup> It is within the Board's discretion, on a case-by-case basis, to accept a late filing under special circumstances. A filing problem not attributable to a malfunction of the EAB's electronic filing system will not normally be considered a special circumstance justifying late filing. Thus, any party filing electronically is advised to allow sufficient time in advance of the filing deadline to correct any such error.

<sup>13</sup> This section describes the requirement set forth in the Board's standing orders authorizing electronic filing that a party submit to the EAB a paper copy of any document filed electronically that exceeds 50 pages. *See* Order Authorizing Electronic Filing in Proceedings Before the Environmental Appeals Board under 40 C.F.R. Part 22, at 4 (Jan. 28, 2010); Order Authorizing Electronic Filing in Proceedings Before the Environmental Appeals Board not Governed by 40 C.F.R. Part 22, at 4-5 (Jan. 28, 2010). Copies of the standing orders are available on the EAB's website at [www.epa.gov/eab](http://www.epa.gov/eab).

the document for the EAB's records within one business day of the date of the electronic filing. *See infra* Section II.I.2 (providing EAB addresses). A party filing electronically any exhibits or attachments in support of a brief or motion that in total exceed 50 pages must deliver to the EAB or place in the mail a paper copy of the entire set of exhibits or attachments within one business day of the date of the electronic filing. However, the official filing date remains the date the EAB receives the electronic filing. A paper copy required under this paragraph must be accompanied by a signed certification that it is identical to the electronic submission.<sup>14</sup> Litigants filing exhibits that they want to be viewed in color should either provide the EAB with a hard copy of the color exhibit or electronically file a scanned color copy.

d. Duplicate Facsimiles Not Accepted

The Clerk will not accept for filing any facsimile duplicate of a document that has been filed electronically.

e. Confidential Business Information ("CBI") Claims

A party waives any claim that the document contains CBI if that document is filed electronically.

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<sup>14</sup> For purposes of this requirement only, if the paper copy is sent via U.S. mail, the timeliness of the submission will be determined by the postmark. *See* Order Authorizing Electronic Filing in Proceedings Before the Environmental Appeals Board under 40 C.F.R. Part 22, at 4 n.10 (Jan. 28, 2010); Order Authorizing Electronic Filing in Proceedings Before the Environmental Appeals Board not Governed by 40 C.F.R. Part 22, at 5 n.11 (Jan. 28, 2010). If the paper copy is delivered by courier or commercial delivery service, the timeliness of the submission will be determined by 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. The EAB may exclude from the record any electronically filed document, or set of exhibits or attachments, that does not comply with the foregoing requirement. For more information, see the EAB's Frequently Asked Questions and Electronic Filing web pages, located on its website at [www.epa.gov/eab](http://www.epa.gov/eab).

2. Paper Filing

a. EAB Mailing Address

ALL documents that are sent through the USPS, except by USPS Express Mail, MUST be addressed to the EAB's mailing address, which is:

Clerk of the Board  
U.S. Environmental Protection Agency  
Environmental Appeals Board  
1200 Pennsylvania Avenue, NW  
Mail Code 1103M  
Washington, D.C. 20460-0001

Documents sent to the EAB's hand-delivery address (below) through the USPS will be returned to the sender and will not be considered filed.

Express Mail is hand-delivered by the U.S. Postal Service and must be delivered as outlined in Section II.I.2.b below. Documents sent by commercial delivery services such as UPS or Federal Express are also hand-delivered and must be delivered as outlined in Section II.I.2.b below.

b. EAB Hand-Delivery Address

Documents that are hand-carried in person or that are delivered via courier or a non-USPS carrier such as UPS or Federal Express MUST be delivered to:

Clerk of the Board  
U.S. Environmental Protection Agency  
Environmental Appeals Board  
1201 Constitution Avenue, NW  
EPA East Building, Room 3334  
Washington, D.C. 20004

Please use the Board's phone number, (202) 233-0122, for hand-delivered documents. Documents that are hand-carried may be delivered to the Clerk of the Board from 8:30 a.m. to 12:00 p.m. and 1:00 p.m. to 4:30 p.m., Monday through Friday (excluding federal holidays).

c. Case Name and Case Identifier on Envelope or Outside Packaging

Any envelope or other packaging containing documents sent to the EAB's mailing address or hand-delivery address, as prescribed above, should bear a complete and accurate return address in the upper left hand corner. The envelope or packaging should also clearly state the case name and case identifier in the lower left hand corner. In all instances, if an appeal has already been filed with the Clerk of the Board, the case name and case identifier are the name and appeal number assigned to the matter by the Clerk. If an appeal has not yet been filed: (a) for enforcement cases, state the name of the non-EPA party and the docket number (e.g., Dkt. No. CWA-02-0000) of the proceeding below; (b) for permit appeals, state the name of the permittee or facility and the permit number (e.g., NPDES Permit No. ID-0000-00); and (c) for CERCLA reimbursement petitions, state the name of the clean-up site.

d. Timeliness of Submissions Filed by Mail

A document is filed when it is received by the Clerk of the Board at the address specified for the appropriate method of delivery as described in Sections II.I.2.a and II.I.2.b above. Documents received after 4:30 p.m. will be date-stamped on the following day. If the EAB establishes a briefing schedule by order, any date the EAB specifies for filing a pleading means the date by which it must be *received*, unless otherwise specified in the order.

Specific deadlines for submissions in enforcement and permit proceedings are described in Sections III.D.1.a and IV.D.2.a, respectively. As further discussed in those sections, the EAB has

held that it will strictly construe deadlines for filing appeals. Deadlines for petitions for reimbursement filed pursuant to CERCLA § 106(b) are set forth in the Revised Guidance on Procedures for Submission and Review of CERCLA Section 106(b) Reimbursement Petitions (Feb. 23, 2012) found on the Board's Web site ([www.epa.gov/eab](http://www.epa.gov/eab)).<sup>15</sup>

### 3. Required Information for All Filings

Documents filed with the EAB in a proceeding shall contain the name, address, telephone number, and email address (if available) of the person filing the pleading. Parties shall promptly notify the Clerk of the Board, the Regional Hearing Clerk, and all parties to the proceeding, of any changes in this information. In a permit proceeding governed by 40 C.F.R. § 124.19, the name of the case and the docket number should also appear on the document. A signature<sup>16</sup> (in blue ink for those not filing electronically) by the party filing or by the party's attorney or duly authorized representative is also required.

### 4. Format and Length of Filed Documents

The EAB prefers that all documents be typed and double-spaced on 8 ½ x 11 paper, that the pages of each document be numbered, and that each document contain the sender's email address and facsimile number, if available. Otherwise, form and content requirements vary slightly based on the type of appeal filed.

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<sup>15</sup> See Section VI.B of this Manual for general information about deadlines for filing CERCLA reimbursement petitions.

<sup>16</sup> Compliance with EAB electronic filing requirements constitutes compliance with applicable signature requirements. Litigants filing electronically should still type or print their full name below the signature line.

The regulations at 40 C.F.R. part 22 specify format and content requirements for all briefs filed in appeals of initial decisions regarding enforcement. *See* 40 C.F.R. § 22.30(a). In addition to containing tables of contents and authorities (with page references), all briefs filed under part 22 must also include a statement of the issues presented for review, a statement of the nature of the case and the facts relevant to the issues presented for review, argument on the issues presented, and a short conclusion containing, among other things, the relief sought. *Id.*; *see also* Section III.D.1.b (describing form and content requirements in detail); [Appendix](#) (containing samples of enforcement appeal documents).

The procedural rules that govern appeals of permit decisions specify format requirements for all briefs filed in permit appeals. *See* 40 C.F.R. § 124.19(d); *infra* Section IV.D (discussing in detail the content requirements for all briefs filed in permit appeals); [Appendix](#) (containing samples of permit appeal documents). The permit regulations also provide that petitions and response briefs may not exceed 14,000 words, and that all other briefs may not exceed 7,000 words. In lieu of a word limitation, petitions and response briefs may not exceed thirty pages and all other briefs may not exceed fifteen pages. 40 C.F.R. § 124.19(d)(3) (describing in detail what parts of a brief count toward the word or page limitation).

Parties to appeals not subject to the limitations on length contained in 40 C.F.R. part 124 are strongly encouraged to limit briefs to 50 pages (including the certificate of service, table of contents, and table of authorities). “To assure the efficient use of Agency resources,” the EAB has the discretion to reject a brief on the ground that it is unduly long. *In re Rocky Well Service, Inc.*, SDWA Appeal Nos. 08-03 & 08-04, at 1 (EAB Dec. 15, 2008) (Order Rejecting Brief Because of Excessive Length and Requiring Revised Brief).



#### J. Alternative Dispute Resolution

The EAB encourages parties to pursue all avenues of dispute resolution and has implemented its own alternative dispute resolution (“ADR”) program to assist parties in resolving disputes before the Board. ADR has been successfully used by other federal agencies and by federal courts (including appellate courts) in settling contested matters. ADR refers to voluntary techniques for resolving conflict with the help of a neutral third party. The EAB’s ADR program offers parties the option of participating in ADR with the assistance of an EAB Judge acting as a neutral evaluator/mediator. Questions regarding the program may be addressed to the Clerk of the Board. *See* Section II.K (containing contact information for the Clerk of the Board). For more information about the Board’s ADR program, visit the EAB’s website at [www.epa.gov/eab](http://www.epa.gov/eab).

#### K. Clerk of the Board

The Clerk of the Board (“Clerk”) maintains the EAB’s docket. The docket can be accessed on the EAB’s web site located at [www.epa.gov/eab](http://www.epa.gov/eab). The Clerk’s office is open from 8:30 a.m. to 12:00 p.m. and from 1:00 p.m. to 4:30 p.m. Monday through Friday (excluding federal holidays). The Clerk can be reached by telephone at (202) 233-0122 during office hours.

Subject to the provisions of law restricting the public disclosure of confidential information, any person may inspect and copy any document that was filed in any proceeding before the EAB. *See* 40 C.F.R. § 22.9 (stating the rule on inspecting and copying documents in enforcement proceedings). An appointment with the Clerk should be made to inspect or copy documents. The EAB provides the first 100 pages of copies at no charge. Beyond that, the cost of duplication of documents is \$.15 per page, or \$.30 per double-sided page. However, duplication costs may be waived when the total fee amounts to less than \$14.00. Non-confidential documents

filed in a case that is pending before the EAB can be found on [Active Dockets Web page](#) within the EAB's website ([www.epa.gov/eab](http://www.epa.gov/eab)).

L. EAB Web Site

The EAB Web site contains extensive information about the EAB and its procedures.

Information that is available on the EAB's website includes:

1. EAB Dockets (list of active cases with associated filings as well as closed cases)
2. EAB Published Decisions (complete text)
3. EAB Unpublished Final Orders Issued Since November 1996 (complete text)
4. EAB Decisions Reviewed by the Federal Courts (Table 1)
5. EAB Decisions Pending Federal Court Review (Table 2)
6. Standing Orders
7. EAB Guidance Documents
8. Regulations Governing Appeals
9. Alternative Dispute Resolution (ADR)
10. Electronic Filing
11. Upcoming Oral Arguments
12. Frequently Asked Questions ("FAQs")

### III. APPEALS UNDER THE CONSOLIDATED RULES OF PRACTICE (CROP), 40 C.F.R. PART 22

#### A. Introduction

This section describes the rules of practice for EAB proceedings governed by the Consolidated Rules of Practice (“CROP”), codified at 40 C.F.R. part 22. In general, the CROP describes the EAB’s role as follows:

The Environmental Appeals Board rules on appeals from the initial decisions, rulings and orders of a Presiding Officer<sup>[17]</sup> in proceedings under [the CROP]; acts as Presiding Officer until the respondent files an answer in proceedings under [the CROP] commenced at EPA Headquarters; and approves settlements of proceedings under [the CROP] commenced at EPA Headquarters.

40 C.F.R. § 22.4(a)(i). The EAB has the discretion to resolve issues that are not expressly addressed in the CROP pursuant to 40 C.F.R. § 22.1(c).<sup>18</sup> *See In re Zaclon, Inc.*, 7 E.A.D. 482, 490 n.7 (EAB 1998).

Although the Federal Rules of Civil Procedure do not apply to EPA administrative proceedings, the EAB may look to them for guidance in interpreting the CROP. *See, e.g., In re Euclid of Va., Inc.*, 13 E.A.D. 616, 657-58 (EAB 2008); *In re Zaclon, Inc.*, 7 E.A.D. 482, 490 n.7 (EAB 1998); *In re Lazarus, Inc.*, 7 E.A.D. 318, 330 n.25 (EAB 1997); *see also P. R. Aqueduct &*

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<sup>17</sup> A Presiding Officer is an EPA Administrative Law Judge in most proceedings under the CROP. However, where the complaint is premised on Subpart I of the CROP (*see infra* Section III.B), which establishes procedures not subject to section 554 of the APA, 5 U.S.C. § 554, the Presiding Officer is a Regional Judicial Officer. *See* 40 C.F.R. § 22.51.

<sup>18</sup> Section 22.1(c) provides that “[q]uestions arising at any stage of the proceeding which are not addressed in these Consolidated Rules of Practice shall be resolved at the discretion of the \* \* \* Environmental Appeals Board \* \* \*.” *See also* 40 C.F.R. § 22.4(a)(2) (The EAB has the authority to “do all acts and take all measures as are necessary for the efficient, fair and impartial adjudication of issues arising in a proceeding \* \* \* .”).

*Sewer Auth. v. U.S. EPA*, 35 F.3d 600, 608 (1st Cir. 1994) (stating EPA’s view that federal rules “may inform administrative practice in appropriate situations”).

B. Scope of the CROP

The CROP applies to most EPA administrative enforcement proceedings and to certain proceedings for the revocation, suspension, or termination of a permit. Section 22.1 lists the types of proceedings that are covered by the CROP as follows:

- (1) The assessment of any administrative civil penalty under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), as amended (7 U.S.C. 136l(a));
- (2) The assessment of any administrative civil penalty under sections 113(d), 205(c), 211(d), and 213(d) of the Clean Air Act (“CAA”), as amended (42 U.S.C. §§ 7413(d), 7524(c), 7545(d), 7547(d));
- (3) The assessment of any civil penalty or for the revocation or suspension of any permit under section 105(a) and (f) of the Marine Protection, Research, and Sanctuaries Act (“MPRSA”), as amended (33 U.S.C. § 1415(a), (f));
- (4) The issuance of a compliance order or the issuance of a corrective action order, the termination of a permit pursuant to section 3008(a)(3), the suspension or revocation of authority to operate pursuant to section 3005(e), or the assessment of any civil penalty under sections 3008, 9006, and 11005 of the Solid Waste Disposal Act, as amended (42 U.S.C. §§ 6925(d), 6925(e), 6928, 6991e, 6992d), except as provided in 40 C.F.R. part 24;
- (5) The assessment of any administrative civil penalty under sections 16(a) and 207 of the Toxic Substances Control Act (“TSCA”) (15 U.S.C. §§ 2615(a), 2647);
- (6) The assessment of any Class II penalty under sections 309(g) and 311(b)(6), or termination of any permit issued pursuant to section 402(a) of the Clean Water Act (“CWA”), as amended (33 U.S.C. §§ 1319(g), 1321(b)(6), 1342(a));
- (7) The assessment of any administrative penalty under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”), as amended (42 U.S.C. § 9609);

- (8) The assessment of any administrative civil penalty under section 325 of the Emergency Planning and Community Right-To-Know Act of 1986 (“EPCRA”), (42 U.S.C. § 11045);
- (9) The assessment of any administrative civil penalty under sections 1414(g)(3)(B), 1423(c), and 1447(b) of the Safe Drinking Water Act (“SDWA”) as amended (42 U.S.C. §§ 300g-3(g)(3)(B), 300h-2c, 300j-6(b)), or the issuance of any order requiring both compliance and the assessment of any administrative penalty under SDWA § 1423(c); and
- (10) The assessment of any administrative civil penalty or the issuance of any order requiring compliance under section 5 of the Mercury-Containing and Rechargeable Battery Management Act (42 U.S.C. § 14304).

Subpart I of the CROP establishes procedures for specified adjudicatory proceedings that are not subject to section 554 of the APA. Pursuant to 40 C.F.R. § 22.50(b), an adverse ruling in a proceeding governed by Subpart I may be appealed to the EAB to the same extent as other decisions under the CROP.

### C. Judicial Review; Final Agency Action

Non-EPA parties typically have a right to obtain judicial review of an EAB decision issued under the CROP. The right to judicial review is typically governed by the particular environmental statute that is the subject of the litigation, or by the APA if the statute itself does not address it.<sup>19</sup>

Pursuant to the APA, the right to judicial review does not arise until there has been final Agency action on the matter, *see supra* Section II.D. Generally, unless the EAB remands the case, the EAB’s final order constitutes final agency action for purposes of judicial review. 40 C.F.R.

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<sup>19</sup> *See, e.g.*, CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1); TSCA § 16(a), 15 U.S.C. § 2615(a); CWA § 509, 33 U.S.C. § 1369; Solid Waste Disposal Act § 7006(b), 42 U.S.C. § 6976(b).

§ 22.31(a).<sup>20</sup> A party dissatisfied with the EAB's decision may file a motion for reconsideration with the EAB within 10 days of service of the order. *Id.* § 22.32. A motion for reconsideration will not stay the effective date of the order unless a stay is specifically ordered by the EAB. *Id.* There is a high bar for granting motions for reconsideration. The EAB will grant a motion for reconsideration to correct an obvious error, a mistake of law or fact, or a change in the applicable law. *See, e.g., In re Capozzi, Inc.*, RCRA (3008) Appeal No. 02-01, at 3 (EAB Oct. 16, 2003) (Order Denying Motion for Reconsideration). However, "the filing of a motion for reconsideration should not be regarded as an opportunity to reargue the case in a more convincing fashion." *In re Pyramid Chem. Co.*, RCRA (3008) Appeal No. 03-03, at 2 (EAB Nov. 8, 2004) (Order Denying Motion for Reconsideration).

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<sup>20</sup> As noted above, the Board has the discretion pursuant to 40 C.F.R. § 22.4(a)(1) to refer a matter to the Administrator. In addition, when the EAB issues a final order to a department, agency, or instrumentality of the United States, the head of the affected department, agency, or instrumentality may request a conference with the Administrator within 30 days of service of the EAB order. 40 C.F.R. § 22.31(e). In that instance, the Administrator's decision constitutes final agency action for purposes of appeal. *Id.* Aside from such a timely request for a conference with the Administrator from the head of a federal facility pursuant to 40 C.F.R. § 22.31(e), a motion directed to the Administrator will not be considered unless it relates to a matter that the EAB has referred to the Administrator pursuant to 40 C.F.R. § 22.4(a), or is a motion to disqualify pursuant to 40 C.F.R. § 22.4(d).

## D. Appeals Procedure<sup>21</sup>

### 1. Notice of Appeal and Appeal Brief

#### a. Deadline for Filing

Any party may appeal the Presiding Officer's decision (the "Initial Decision") within 30 days from service of that decision. 40 C.F.R. § 22.30. A Notice of Appeal is considered filed when received by the EAB. 40 C.F.R. § 22.5(a). *See supra* Section II.I.2.d. Provisions relating to computation of time for purposes of meeting that deadline are governed by 40 C.F.R. § 22.7, which provides:

The [EAB] \* \* \* may grant an extension of time for filing any document: upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties; or upon its own initiative. *Any motion for an extension of time shall be filed sufficiently in advance of the due date so as to allow other parties reasonable opportunity to respond and to allow the \* \* \* Environmental Appeals Board reasonable opportunity to issue an order.*

40 C.F.R. § 22.7(b) (emphasis added).

The EAB applies the regulatory deadline for filing a Notice of Appeal strictly, and will dismiss a late appeal in most cases. The EAB does not excuse a late-filed appeal unless it finds special circumstances to justify the untimeliness. *In re B&L Plating, Inc.*, 11 E.A.D. 183, 190 (EAB 2003); *see also In re Outboard Marine Corp.*, 6 E.A.D. 194, 196 (EAB 1995). The EAB may extend the deadline for filing the appeal brief if good cause is shown and there is no prejudice to opposing parties. *See In re B & B Wrecking and Excavating, Inc.*, 4 E.A.D. 16, 17 (EAB 1992);

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<sup>21</sup> An Initial Decision becomes the final agency decision 45 days after service unless within the time frame specified in the regulation, either party moves to reopen the hearing, appeals the decision to the EAB, or moves to set aside a default order that constitutes an Initial Decision. 40 C.F.R. § 22.27(c). The EAB may also elect to review the Initial Decision on its own initiative, in which case the Initial Decision would not become final agency action. *Id.*

*see also In re Guam Waterworks Auth.*, NPDES Appeal Nos. 09-15 & 09-16, at 4 (EAB Nov. 3, 2009) (Order Granting Motion in the Alternative to Timely File Summary Petitions with Extension of Time to File Supplemental Briefs); *In re City & Cnty. of Honolulu*, NPDES Appeal No. 09-01, at 2-3 (EAB Feb. 2, 2009) (Order Granting Alternative Motion for Extension of Time to File Petitions for Review). The CROP emphasizes that any motion for an extension of time shall be filed sufficiently in advance of the due date so as to allow other parties reasonable opportunity to respond and to allow the EAB reasonable opportunity to issue an order. 40 C.F.R. § 22.7(b); *see also In re MGP Ingredients of Illinois, Inc.*, PSD Appeal No. 09-03, at 4 (Jan. 8, 2010) (Order Imposing Sanctions, Setting Final Deadline for Filing Response and Scheduling Status Conference); [Appendix](#), Template No. 5 (template for motion for an extension of time).

b. Form and Content

Section 22.5(c) of the CROP contains requirements for documents that are filed with the EAB. There is no specific form for a Notice of Appeal. The regulations do provide that the Notice of Appeal should contain: (1) a caption that indicates the name of the case and the docket number; (2) the name, address, and telephone number of the person who is authorized to receive service relating to the proceeding; (3) a signature by the party or its representative; and (4) a certificate of service. 40 C.F.R. § 22.5(c)(4). Parties are required by the regulations to notify the EAB and all parties of any changes in the information provided.

The Notice of Appeal should be accompanied by an appeal brief. Specifications for the contents of an appeal brief are set forth in the CROP, which provide that:

The appellant's brief shall contain tables of contents and authorities (with page



references), a statement of the issues presented for review, a statement of the nature of the case and the facts relevant to the issues presented for review (with appropriate references to the record), argument on the issues presented, a short conclusion stating the precise relief sought, alternative findings of fact, and alternative conclusions regarding issues of law or discretion.

40 C.F.R. § 22.30(a). Legal briefs and memoranda that exceed twenty pages in length (excluding attachments) must also contain a table of contents and a table of authorities with page references.

*Id.* § 22.5(c)(2). The regulations provide that the EAB may exclude from the record any pleading or document that does not comply with the regulatory requirements. *Id.* § 22.5(c)(5).

c. Motions

All motions shall be in writing, set forth the relief sought, state the grounds for relief with particularity, and be accompanied by any supporting documentation. 40 C.F.R. § 22.16. A motion shall state whether the opposing party concurs or objects to granting the request set forth in the motion.<sup>22</sup> Unless the EAB sets a shorter or longer time for a response, a party's response to any written motion must be filed within 15 days after service of the motion. *Id.*

Motions may be filed by mail, hand-delivery, facsimile (if without attachments), or electronically.<sup>23</sup> Motions for an extension of time shall be filed sufficiently in advance of the due date as to allow other parties reasonable opportunity to respond and to allow the EAB reasonable opportunity to consider whether to issue an order. *Id.* § 22.7(a)-(b). Because a Presiding Officer is not assigned to the case until the answer is filed, a motion for extension of time within which to file an answer shall be made to the EAB for cases initiated at EPA Headquarters and to the

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<sup>22</sup> If the requestor cannot determine the position of the opposing party on the motion after making a reasonable effort to do so, the requestor shall represent that fact in its pleading.

<sup>23</sup> *See supra* Section II.I.1.d. The Clerk will not accept for filing any facsimile duplicate of a document that has been filed electronically.

Regional Administrator for cases initiated in a Region. *Id.* § 22.16(c).

d. Non-party Participation

Any person who is not a party to a proceeding may move for leave to intervene or to file a non-party brief. 40 C.F.R. § 22.11. A person requesting to intervene in a proceeding after the exchange of information pursuant to 40 C.F.R. § 22.19(a) occurs shall not be granted permission to intervene without showing good cause for failing to file a request before the exchange of information. *Id.* § 22.11(a).

2. Filing and Service Requirements

a. Filing

The CROP sets forth basic filing requirements for paper filings in EAB proceedings, and further provides that the EAB may authorize by order the facsimile or electronic filing of any document, in lieu of paper filing, under appropriate conditions and limitations. *Id.* § 22.5(a)(1). The EAB has issued an order authorizing parties to file documents electronically in proceedings under the CROP. *See supra* Section II.I.1.

The CROP requires an original and one copy of any filing, *id.* § 22.5(a)(1), but when a litigant chooses to file a paper copy, rather than an electronic copy, of a notice of appeal and accompanying appeal brief, litigants should submit the original document signed in blue ink along with any supporting documentation. The EAB's requirement for the submission of one paper copy for certain electronic filings is discussed in Section II.I.c.

The EAB has not authorized the filing of documents by facsimile, except that motions and responses to motions that do not include attachments, may be filed by facsimile. Upon filing a motion by facsimile, the sender should, within 24 hours, place in the mail or hand-deliver the

original copy of the motion to the EAB. The Clerk of the Board will not include in the record any facsimile duplicate of a motion or response to motion that is filed electronically. *See supra* Section II.I.1.d.

b. Service

The CROP sets forth requirements for service of documents. *See* 40 C.F.R. § 22.5(b).

3. Cross Appeals

If a timely Notice of Appeal has been filed, any other party may file a Notice of Appeal on any issue within 20 days after the date on which the first Notice of Appeal was served.

*Id.* § 22.30(a)(i).

E. Scope and Standard of EAB Review

1. Scope of Review

A party's right of appeal to the EAB is "limited to those issues raised during the course of the proceeding and by the initial decision, and to issues concerning subject matter jurisdiction."

*Id.* § 22.30(c).

2. Standard of Review

The CROP provides for *de novo* review of both the factual and legal conclusions of the Presiding Officer.<sup>24</sup> 40 C.F.R. § 22.30(f) (The EAB "shall adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed"); *see In re Ram, Inc.*, RCRA (9006) Appeal Nos. 08-01 & 08-02, slip op. at 10 (EAB July 10, 2009), 14 E.A.D. \_\_\_; *see also In re Billy Yee*, 10 E.A.D. 1, 10 (EAB 2001) (stating that "[t]he Board

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<sup>24</sup> *See* APA, 5 U.S.C. § 557(b) ("On appeal from \* \* \* the initial decision, the agency has all the power [that] it would have in making the initial decision except as it may limit the issues on notice or by rule.").

generally reviews the Presiding Officer’s factual and legal conclusions on a *de novo* basis \* \* \*”). However, the EAB will generally give deference to findings of fact based upon the testimony of witnesses because the Presiding Officer is in a position to assess their credibility.<sup>25</sup> Moreover, the EAB has ordinarily not reversed decisions based on minor pleading deficiencies.<sup>26</sup>

The EAB applies the “preponderance of the evidence” standard established by 40 C.F.R. § 22.24(b). *See In re The Bullen Cos.*, 9 E.A.D. 620, 632 (EAB 2001). The regulation provides that:

- (a) The complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate. Following complainant’s establishment of a prima facie case, respondent shall have the burden of presenting any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief. The respondent has the burdens of presentation and persuasion for any affirmative defenses.
- (b) Each matter of controversy shall be decided by the Presiding Officer upon a preponderance of the evidence.

40 C.F.R. § 22.24. The EAB has stated that the “preponderance of the evidence” standard requires

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<sup>25</sup> “When a Presiding Officer has ‘the opportunity to observe the witnesses testify and to evaluate their credibility, his factual findings are entitled to considerable deference \* \* \* .’” *In re Chempace Corp.*, 9 E.A.D. 119, 134 (EAB 2000) (citing *In re Echevarria*, 5 E.A.D. 626, 638 (EAB 1994)); *see also In re Ram, Inc.*, RCRA (9006) Appeal Nos. 08-01 & 08-02, slip op. at 10 (EAB July 10, 2009), 14 E.A.D. \_\_\_; *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998). The EAB has given deference to presiding officers on decisions regarding the admissibility of evidence, *In re Great Lakes Div. of Nat’l Steel Corp.*, 5 E.A.D. 355, 368 (EAB 1994), and decisions regarding discovery, *In re Billy Yee*, 10 E.A.D. 1, 10 (EAB 2001).

<sup>26</sup> The Board “adheres to the generally accepted legal principle that ‘administrative pleadings are liberally construed and easily amended.’” *In re Port of Oakland*, 4 E.A.D. 170, 205 (EAB 1992) (citing *Yaffe Iron & Metal Co. v. U.S. Env’tl. Prot. Agency*, 774 F.2d 1008, 1012 (10th Cir. 1985), *aff’g In re Yaffe Iron & Metal Co.*, TSCA Appeal No. 81-2 (Aug. 9, 1982)); *accord In re Env’tl. Prot. Servs., Inc.*, 13 E.A.D. 506, 560-61 & n.67; *In re Wego Chem. & Mineral Corp.*, 4 E.A.D. 513, 525 n.11 (EAB 1993).

that “a fact finder should believe that his factual conclusion is more likely than not.” *In re Euclid of Va., Inc.*, RCRA (9006) Appeal Nos. 06-05 & 06-06, slip op. at 13 (EAB Mar. 11, 2008), 14 E.A.D. \_\_\_; *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998).

#### F. Review Initiated by the EAB

The EAB has 45 days from the date the Initial Decision was served upon the parties to determine whether to review an initial decision on its own initiative, pursuant to 40 C.F.R. § 22.30(b).<sup>27</sup> The EAB uses this authority sparingly.

#### G. Interlocutory Appeals

Interlocutory appeals to the EAB are governed by 40 C.F.R. § 22.29. A motion requesting that the Presiding Officer certify the order or ruling to the EAB for review must be made to the Presiding Officer within ten days after service of the order from which the appeal is requested.<sup>28</sup> A certified interlocutory appeal may be accepted by the EAB if: (1) the order or ruling involves an important question of law or policy concerning which there are substantial grounds for difference of opinion; and (2) either an immediate ruling will advance the termination of the proceeding, or

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<sup>27</sup> The EAB may review a decision on its own initiative after the 45-day deadline if it has granted an extension of time to file an appeal that will extend the filing deadline beyond the 45-day deadline for such review. *See, e.g., In re Zaclon, Inc.*, RCRA Appeal No. 07-03, at 2 n.1 (EAB Aug. 21, 2007) (Order Granting Complainant’s Second Motion for Extension of Time to File Notice of Appeal); *In re Rhee Bros., Inc.*, FIFRA Appeal No. 06-02, at 2 n.1 (EAB Oct. 18, 2006) (Order Granting Region III’s Motion for Extension of Time to File Appeal Brief).

<sup>28</sup> If certification is denied, the party may move for interlocutory review directly to the EAB within ten days of the Presiding Officer’s refusal to certify. 40 C.F.R. § 22.29(c). A party does not waive any rights of appeal by not pursuing an interlocutory appeal. *See In re Wego Chem. & Mineral Corp.*, 4 E.A.D. 513, 529-30 & n.16 (EAB 1993).

review after the final order is issued will be inadequate or ineffective.<sup>29</sup>

Upon certification, the EAB has 30 days to take action on the interlocutory appeal, or the appeal will be dismissed automatically without further action by the EAB. As a matter of practice, when the EAB intends to review a matter that has been certified, it will typically issue an order to that effect within the 30-day period and, if appropriate, provide a schedule for briefs or oral argument. The EAB is not required to issue a substantive ruling within 30 days.

#### H. Appeals from Default Orders

A default order issued by the Presiding Officer pursuant to 40 C.F.R. § 22.17 may be appealed to the EAB. *See, e.g., In re Four Strong Builders, Inc.*, 12 E.A.D. 762, 765-66 (EAB 2006); *In re Rybond, Inc.*, 6 E.A.D. 614, 615-16 (EAB 1996); *see also In re Ag-Air Flying Servs., Inc.*, FIFRA Appeal No. 06-01, at 6 (EAB Sept. 1, 2006) (Final Decision and Order). When the order appealed from is a default order, the EAB may not assess a civil penalty in an amount that is higher than the amount proposed in the complaint or in the motion for default (whichever amount is smaller). 40 C.F.R. § 22.30(f). In all other respects, appeals from default orders are governed by the same procedures as appeals from Initial Decisions. *See In re Prod. Plated Plastics, Inc.*, 5 E.A.D. 101, 103-04 (EAB 1994).

#### I. Confidential Business Information (“CBI”)

A person who wishes to assert a CBI claim with regard to any information contained in a pleading or document to be filed in a proceeding under the CROP must assert that claim at the time the pleading or document is filed. 40 C.F.R. § 22.5(d). Filing requirements for CBI are set forth at 40 C.F.R. § 22.5(d)(2) and (3). Any pleading or document that has been filed without a claim of

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<sup>29</sup> *See generally In re CWM Chem. Servs., Inc.*, 6 E.A.D. 1, 10 (EAB 1995).

confidentiality shall be available to the public for inspection and copying. A party filing a document electronically waives any claim that the document contains confidential business information. *See supra* Section II.I.1.e.

#### J. Federal Facilities

Currently, EPA has authority to assess fines and penalties against federal facilities in violation of environmental statutes including the Clean Air Act, 42 U.S.C. §§ 7401 - 7671q, the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 - 6992k, and the Safe Drinking Water Act, 42 U.S.C. §§ 300f - 300j-26. Office of Enforcement and Compliance Assurance, U.S. EPA, EPA-315-B-98-011, *The Yellow Book: Guide to Environmental Enforcement and Compliance at Federal Facilities* at V-1 (1999) (“Yellow Book”), available at <http://www.epa.gov/compliance/resources/publications/civil/federal/yellowbk.pdf>. The Yellow Book contains summaries of EPA’s statute-specific policies and guidance for federal facilities, and provides an overview of enforcement authorities and the enforcement process. *Id.* at V-1, V-3.

Under the Clean Air Act, the procedures set forth in the CROP, including the opportunity for an appeal to the EAB, apply when EPA issues a penalty order against a Federal agency.<sup>30</sup> *See* 42 U.S.C. §§ 7413(d), 7524(c), 7545(d)(1); *see also* Yellow Book at II-10 to -11, V-3 to -4.

The Federal Facility Compliance Act of 1992 amended RCRA, and confirmed that RCRA’s waiver of immunity subjects federal facilities to all available enforcement tools, including administrative orders and penalties, and it specifically authorizes administrative enforcement

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<sup>30</sup> The authority to assess administrative penalties or issue compliance orders against Federal agencies under the Clean Air Act was confirmed in 1997, when the Office of Legal Counsel within the Department of Justice issued an opinion verifying EPA’s authority to do so. Office of Legal Counsel, U.S. Dep’t of Justice, *Administrative Assessment of Civil Penalties Against Facilities Under the Clean Air Act* (July 16, 1997) (Yellow Book App. B).

actions. 42 U.S.C. § 6961(a)-(b); *see also* Yellow Book at II-79, II-87, V-4 to -5. Agency procedures governing RCRA administrative enforcement actions, including the opportunity for an appeal to the EAB, apply to federal agencies, with the exception, consistent with the statutory requirement at 42 U.S.C. § 6961(b)(2), that the head of a federal agency, department, or instrumentality may request a conference with the Administrator within thirty days of service of the EAB's final decision. *See* 40 C.F.R. § 22.31(e). If the request is timely, a decision by the Administrator becomes the final order of the Agency. *Id.*

The Safe Drinking Water Act amendments of 1996 clearly express EPA's administrative authority over federal agencies with respect to, among other things, compliance orders and penalty provisions. *See* 42 U.S.C. §§ 300g-3(g), 300j-6; *see also* Yellow Book at II-102 to -03. The CROP governs the assessment of civil administrative penalties and the issuance of compliance orders against federal facilities under the SDWA. SDWA §§ 1414(g)(3)(B), 1423(a), 1447(b), 42 U.S.C. §§ 300g-3(g)(3)(B), 300h-2(a), 300j-6(b); 40 C.F.R. § 22.1(a)(9). Upon exhaustion of procedures under the CROP, the head of a federal entity subject to a penalty may request the opportunity to confer with the Administrator. 42 U.S.C. 300j-6(b); *see* Yellow Book at V-9; 40 C.F.R. § 22.31(e). The Administrator's obligation to provide an opportunity to confer applies only in connection with EPA-issued orders, not those orders issued by a state with primary enforcement authority under the SDWA. Office of Enforcement and Compliance Assurance, U.S. EPA, *Guidance on Federal Facility Penalty Order Authority Under the Safe Drinking Water Act, as amended in 1996*, at 6-7 & n.8 (May 28, 1998) ("SDWA Guidance"). The SDWA Guidance also states that even in the absence of a statutory requirement, a federal agency may have the opportunity to confer with an appropriate Regional official who has the authority to issue



compliance orders under the SDWA. *See* SDWA Guidance at 4-5; Yellow Book at V-9.

K. EAB Approval of Certain Prehearing Settlements

The parties may discuss the possibility of settlement during the 30-day time period between the filing of the complaint and the filing of the answer. In fact, the rules expressly recognize that the Agency “encourages settlement of proceedings.” 40 C.F.R. § 22.18(b). The Office of Administrative Law Judges and the EAB both have Alternative Dispute Resolution (“ADR”) programs. Further information about the Office of the Administrative Law Judges ADR program may be found at [www.epa.gov/oalj](http://www.epa.gov/oalj). Further information about the EAB’s ADR program is available in section II.J of this Manual, and on the EAB’s website at [www.epa.gov/eab](http://www.epa.gov/eab).<sup>31</sup> The EAB may, on motion, extend the deadline for filing an answer to an EPA Headquarters-initiated complaint while settlement negotiations are in progress. *See supra* Section III.I.1 (stating additional information about motions to extend the deadline for filing an answer).

If an action settles before the hearing begins, the parties are required to prepare both a consent agreement and a proposed final order,<sup>32</sup> which are known collectively as a “CAFO.” A consent agreement does not finally resolve the action until a final order is signed by the Regional Administrator, or if the proceeding is initiated at Headquarters, the EAB. *See* Environmental Appeals Board, Consent Agreement and Final Order Procedures, available on the Guidance Documents Web page of the EAB’s website ([www.epa.gov/eab](http://www.epa.gov/eab)).

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<sup>31</sup> Parties also may pursue settlement on their own accord. The EAB’s ADR program is one option parties may pursue in attempting to settle a proceeding.

<sup>32</sup> *See* 40 C.F.R. § 22.18(b)(2).

#### IV. PERMIT APPEALS UNDER 40 C.F.R. PART 124

##### A. Introduction

This part of the Manual addresses the rules of practice in proceedings governed by 40 C.F.R. part 124 (“Part 124 ”). In 2013, the Board revised the procedural rules contained in Part 124 to simplify and make more efficient the Board’s review process for permit appeals. *See* Revisions to Procedural Rules to Clarify Practices and Procedures Applicable in Permit Appeals Pending Before the Environmental Appeals Board, 78 Fed. Reg. 5281 (Jan. 25, 2013) (“Part 124 Revision”). Most significantly, the changes reconcile provisions contained within the former section 124.19, which over time became redundant, and bring the regulation more fully in line with current practice.<sup>33</sup> *See* Part 124 Revision, 78 Fed. Reg. at 5281.

The procedural rules contained in Part 124 cover appeals from most categories of permit decisions issued by EPA. Part 124 generally defines the EAB role as follows:

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<sup>33</sup> The former section 124.19 stated that a petitioner first must file a substantive petition for review to demonstrate that EAB review of a permit decision was warranted. After the Board considered the substantive petitions along with any briefs filed in response, the Board would determine whether to grant review. 40 C.F.R. § 124.19(a), (c) (2012). Upon a grant of review from the EAB, the former rule then contemplated a second round of substantive briefing and another substantive review process. *Id.* § 124.19(c) (2012); *see also* Part 124 Revision, 78 Fed. Reg. at 5281-82.

As reflected in current practice, however, the EAB determined that a second round of briefing was most often unnecessary because in nearly all cases the EAB could make a decision on the merits based on the substantive briefs already filed. Section 124.19 clarifies for practitioners that substantive briefs must be submitted at the outset of the appeal and that one substantive EAB review will occur. *See* Part 124 Revision, 78 Fed. Reg. at 5282. Nothing in Part 124 prevents the EAB from ordering additional briefing in any appeal where the EAB determines it is warranted. *See* 40 C.F.R. § 124.19(n) (stating that the EAB “may do all acts and take all measures necessary for the efficient, fair, and impartial adjudication of issues arising in an appeal under this part”).

The Administrator delegates authority to the Environmental Appeals Board to issue final decisions in RCRA, PSD, UIC, or NPDES permit appeals filed under this subpart, including informal appeals of denials of requests for modification, revocation and reissuance, or termination of permits under Section 124.5(b). An appeal directed to the Administrator, rather than to the Environmental Appeals Board, will not be considered.

40 C.F.R. § 124.2(a).

Part 124 codifies filing deadlines and other provisions that are intended to facilitate the expeditious resolution of time-sensitive PSD and new source review permit appeals. *See infra* Section IV.D; *see also* Part 124 Revision, 78 Fed. Reg. at 5283. For further information and additional guidance regarding Board procedures for handling PSD and new source review permit appeals, practitioners should consult the EAB’s standing order governing petitions for review of Clean Air Act New Source Review permits (“NSR Standing Order”), available at [www.epa.gov/eab](http://www.epa.gov/eab) (click on Standing Orders).

#### B. Scope of Part 124

Part 124 sets forth procedures that affect permit decisions issued by EPA under the 1984 Hazardous and Solid Waste Amendments to the Resource Conservation Recovery Act (“RCRA”),<sup>34</sup> the National Pollutant Discharge Elimination System (“NPDES”) program under the Clean Water Act,<sup>35</sup> the Underground Injection Control (“UIC”) program under the Safe Drinking Water Act,<sup>36</sup> and the Prevention of Significant Deterioration (“PSD”) program under the Clean Air

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<sup>34</sup> 42 U.S.C. §§ 6901-6992k.

<sup>35</sup> 33 U.S.C. § 1342.

<sup>36</sup> 42 U.S.C. § 300h to 300h-7.

Act.<sup>37</sup> See 40 C.F.R. § 124.19(a). Part 124 also creates an informal appeals procedure for appeals from denials of certain requests for modification, revocation, and reissuance of RCRA, UIC, or NPDES permits.<sup>38</sup> A few categories of permit decisions issued by EPA are governed by the CROP, 40 C.F.R. part 22, or by statute-specific regulations rather than by Part 124. General information about these procedures can be found in Sections II and V of this Manual.

Section 124.19(a) authorizes appeals to the EAB from *federally-issued* RCRA, UIC, NPDES, and PSD permit decisions. This includes permits issued by states or other entities with delegated authority to issue the federal permit. The EAB generally does not have authority to review state-issued permits pursuant to a state permitting program; such permits are reviewable only under the laws of the state that issued the permit.<sup>39</sup> See *In re BP Cherry Point*, 12 E.A.D. 209, 214 (EAB 2005) (“[T]he Board lacks authority to review conditions of a state-issued permit that are adopted solely pursuant to state law.”); *In re Great Lakes Chem. Corp.*, 5 E.A.D. 395, 396 (EAB 1994) (EAB has no authority to review conditions imposed under a state RCRA program); see also *In re Gateway Generating Station*, PSD Appeal No. 09-02, at 10 n.6 (EAB Sept. 15, 2009)

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<sup>37</sup> 42 U.S.C. §§ 7470-7492. Section 328(a) of the Clean Air Act, 42 U.S.C. § 7627(a), establishes permit requirements to control air pollution from outer continental shelf (“OCS”) sources. 40 C.F.R. § 55.1. The Part 124 procedures EPA uses to issue PSD permits are also used by EPA to issue OCS permits. *Id.* § 55.6(a)(3).

<sup>38</sup> See 40 C.F.R. § 124.5 (containing further information regarding these procedures); see also *In re Waste Technologies Indus.*, 5 E.A.D. 646, 655 & n.13 (EAB 1995).

<sup>39</sup> Similarly, the EAB does not have jurisdiction to review state certification decisions under section 401 of the Clean Water Act, 33 U.S.C. § 1341, even though such certifications may determine certain conditions of a federally-issued permit. See, e.g., *In re City of Fitchburg*, 5 E.A.D. 93, 97 (EAB 1994). Rather, “the proper forum to review the appropriateness of a state’s certification is the state court.” *Roosevelt Campobello Int’l Park Commission v. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982).

(Order Dismissing Petition for Review) (“In general, the Board’s jurisdiction to review state-issued permits is limited to those elements of the permit that find their origin in the federal PSD program \* \* \* .”). Note also that persons affected by a general NPDES permit (which imposes restrictions on a class of facilities, in contrast to a specific permit that imposes restrictions on an individual facility), or the the conditions of a general NPDES permit, may not file a petition for review under Part 124. 40 C.F.R. § 124.19(o) (stating general prohibition against appeal of general NPDES permits to the EAB and the options for challenging a general NPDES permit, either in court or by obtaining an individual NPDES permit in lieu of a general NPDES permit).

As mentioned above, the EAB does have jurisdiction to review PSD permits issued by states that administer permit programs under a *delegation* from EPA (in contrast to PSD permits issued by states pursuant to an EPA-approved state implementation plan (“SIP”)). The PSD permits issued pursuant to a federal delegation of authority are considered federally-issued permits for purposes of review by the EAB. See 40 C.F.R. § 124.41 (stating that when EPA has delegated authority to administer regulations to another agency, the term “EPA” shall mean the delegate agency and the term “Regional Administrator” shall mean the chief administrative officer of the delegate agency); see also *In re Desert Rock Energy Co.*, PSD Appeal Nos. 08-03 through 08-06, slip op. at 58-59 (EAB Sept. 24, 2009), 14 E.A.D. \_\_\_; *In re Seminole Electric Coop., Inc.*, PSD Appeal No. 08-09, slip op. at 10 (EAB Sept. 22, 2009), 14 E.A.D. \_\_\_; *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 168-69 (EAB 2000). However, where such a permit combines PSD requirements and non-PSD requirements, only the PSD part of the permit is reviewable by the EAB. See *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 110 n.5 (EAB 1997); *In re Hess Newark Energy Ctr.*, PSD Appeal No. 12-02, at 4-5 (EAB Nov. 20, 2012) (Order Dismissing Petition).

### C. Judicial Review; Final Agency Action

Judicial review of permit decisions is typically governed by the particular environmental statute that is the subject of the litigation, or by the APA if the statute does not address it.<sup>40</sup> Under Agency regulations, an appeal to the EAB is a “prerequisite to seeking judicial review of the final agency action.” 40 C.F.R. § 124.19(I)(1). For purposes of judicial review, “final agency action \* \* \* occurs when agency review procedures under [section 124.19] are exhausted and the Regional Administrator subsequently issues a final permit decision under this paragraph.” *Id.* § 124.19(I)(2). A final permit is issued by the Regional Administrator when either: (1) the EAB issues notice to the parties that the petition for review has been denied; (2) the EAB issues a decision on the merits of the appeal and the decision does not include a remand; or (3) upon completion of remand proceedings, unless the EAB’s remand order specifically provides that appeal of the remand decision will be required to exhaust administrative remedies.<sup>41</sup> *See* 40 C.F.R. § 124.19(I)(2)(i)-(iii); *see generally* Section IV.D.1.

### D. Appeals Procedure

#### 1. Overview

As mentioned above in Section IV.A, in 2013 the EAB revised the Part 124 procedural rules in order to simplify the permit appeal process and promote judicial economy. *See* Part 124 Revision, 78 Fed. Reg. at 5281-82. In addition to clarifying that substantive briefs must be

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<sup>40</sup> *See, e.g.*, CAA § 307(b), 42 U.S.C. § 7607(b); CWA § 509(b)(1), 33 U.S.C. § 1369(b)(1); RCRA § 7006, 42 U.S.C. § 6976; Public Health Service Act § 1448, 42 U.S.C. § 300j-7.

<sup>41</sup> *In re Shell Gulf of Mex., Inc.*, OCS Appeal Nos. 10-01 through 10-04, slip op. at 82 (EAB Dec. 30, 2010), 15 E.A.D. \_\_\_\_; *In re Desert Rock Energy Co.*, PSD Appeal Nos. 08-03 through 08-06, slip op. at 31-32 (EAB Sept. 24, 2009), 14 E.A.D. \_\_\_\_.

submitted at the outset of an appeal and that upon completion of one round of briefing the EAB will undergo a single substantive review process, Part 124 also contains provisions that govern procedures formerly set forth in EAB precedent, EAB standing orders and this Practice Manual. *See id.* at 5281, 5283. The appeal process codified in Part 124 reflects current Board practice and is described in detail in Sections IV.D.2 through IV.D.10 below.

a. Content, Form, and Length of All Briefs

Part 124 states that all briefs filed in permit appeals governed by Part 124 must contain, under appropriate headings, the following information: (1) a table of contents, with page references; (2) a table of authorities with references to pages in the brief where the authorities are cited; (3) a table of attachments, if the brief includes attachments; and (4) a statement of compliance with the word limitation. 40 C.F.R. § 124.19(d)(1)(i)-(iv); *see also id.* § 124.19(d)(2) (discussing attachments to a brief and specifying that the required table of attachments include the title of each appended document and a label identifying where the document can be found); *id.* § 124.19(d)(3) (setting forth word limits for briefs filed in permit appeals); [Appendix](#), Template No. 3 (template for petition for review of permit decision).

In addition, Part 124 specifies that unless otherwise ordered by the EAB, petitions for review and responses may not exceed 14,000 words, and all other briefs (e.g., reply briefs) may not exceed 7,000 words. 40 C.F.R. § 124.19(d)(3). Filers may rely on the word-processing system used to determine the word count, or in lieu of a word limitation, filers may comply with a 30-page limit for petitions and response briefs, or a 15-page limit for all other briefs. *Id.* Headings, footnotes, and quotations count towards the word limit, but the table of contents, table of authorities, table of attachments (if any), statement requesting oral argument (if any), statement of

compliance with the word limitation, and any attachments do not count toward the word limitation.<sup>42</sup> *Id.*

## 2. Petition for review

### a. Deadline for filing

A petition for review of any condition of a RCRA, UIC, NPDES, or PSD permit decision must be filed with the EAB within 30 days after the Regional Administrator serves notice of the issuance of the final permit decision. 40 C.F.R. § 124.19(a)(3). When the permitting authority serves the notice by mail, service is deemed to be completed when the notice is placed in the mail, not when it is received. However, to compensate for the delay caused by mailing, the 30-day deadline for filing a petition is extended by three days if the final permit decision being appealed was served on the petitioner by mail.<sup>43</sup> *Id.* § 124.20(d).

Petitions are deemed filed when they are received by the Clerk of the Board at the address specified for the appropriate method of delivery. *Id.* § 124.19(a)(3), (i). The Board will generally dismiss petitions for review that are received after a filing deadline. *Id.* § 124.19(a)(3), (i), (n); *see, e.g., In re AES Puerto Rico L.P.*, 8 E.A.D. 324, 329 (EAB 1999), *aff'd sub nom. Sur Contra La Contaminacion v. EPA*, 202 F.3d 443 (1st Cir. 2000).

### b. Content

The petitioner bears the burden of demonstrating that the Region based the permit decision

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<sup>42</sup> Where a party can demonstrate a compelling or documented need to exceed these limitations, the party must seek advance leave of the EAB to file a longer document. 40 C.F.R. § 124.19(d)(3).

<sup>43</sup> By motion, a petitioner may request to have the EAB dismiss its appeal after it is filed. 40 C.F.R. § 124.19(k). The motion must briefly state the reason for the request. *Id.*



on a clearly erroneous finding of fact or conclusion of law or that the Board should exercise its discretion to review an important policy matter or an exercise of discretion by the permit issuer. 40 C.F.R. § 124.19(a)(4); *see, e.g., In re City of Attleboro*, NPDES Appeal No. 08-08, slip op. at 10 (Sept. 15, 2009), 14 E.A.D. \_\_\_\_\_. This is the standard of review the EAB uses to determine whether a petitioner has met the burden to demonstrate that review is warranted. *See* 40 C.F.R. § 124.19(a)(4); Section IV.E.2 below (discussing standard of review).

Consistent with Board precedent and now codified in Part 124, a petition for review must identify the contested permit condition or other specific challenge to the permit decision<sup>44</sup> and clearly set forth, with legal and factual support, petitioner’s contentions for why the permit decision should be reviewed. 40 C.F.R. § 124.19(a)(4). As noted above, the petition should contain all arguments that support the petitioner’s claims and demonstrate why review is warranted. In addition, a petition for review must demonstrate that the party has met certain threshold procedural requirements, described below.

i. Requirement That Petitioner Has Participated in the Comment Period (“Standing” to Seek Review)

Any person who filed comments on a draft permit or participated in a public hearing on the permit may petition the EAB to review any condition of the permit. 40 C.F.R. § 124.19(a)(2); *accord In re Christian Cnty. Generation, LLC*, 13 E.A.D. 449, 457-60 (EAB 2008); *In re Avon*

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<sup>44</sup> The former language contained in 40 C.F.R. § 124.19(a) allowed a petitioner to challenge “any condition of a permit decision.” *Id.* (2012). The Board historically and consistently construed this language to include not only specific permit conditions but also the permit decision in its entirety, whether based on substantive or procedural defects. *See* Part 124 Revision, 78 Fed. Reg. at 5284 (citing cases). The language in 40 C.F.R. § 124.19(a)(4) is intended to capture permit challenges that are within the EAB’s existing scope of review but that are not necessarily tied to a specific permit condition. *See id.*

*Custom Mixing Servs., Inc.*, 10 E.A.D. 700, 704-05 (EAB 2002). As the EAB explained in its opinion in *In re EcoEléctrica, L.P.*, 7 E.A.D. 56, 63 n.9 (EAB 1997), a petitioner “has standing to seek review of [a] permit decision by virtue of its acknowledged participation in the public hearing on the permit.” A person who has not filed comments or participated in a hearing on the draft permit may, however, petition for review, “but only to the extent that \* \* \* final permit conditions reflect changes from the proposed draft permit.”<sup>45</sup> 40 C.F.R. § 124.19(a)(2).

A petitioner with standing may raise any issues that are eligible for review under the regulations, even if the petitioner did not raise or previously comment on that particular issue. These regulatory requirements are described below in Section IV.D.2.b.ii.

ii. Requirement That Issues Were Raised During the Comment Period

The petitioner has the obligation to demonstrate that any issues raised in the petition were previously raised by someone (either petitioner or another commenter) during the public comment period (including any public hearing), provided that they were “reasonably ascertainable” at that time. 40 C.F.R. § 124.13; *see* 40 C.F.R. § 124.19(a)(4).<sup>46</sup> The purpose of this requirement is to

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<sup>45</sup> A discussion of “standing” requirements also appears in *In re Am. Soda, L.L.P.*, 9 E.A.D. 280, 288-89 (EAB 2002); *In re Commonwealth Chesapeake Corp.*, 6 E.A.D. 764, 770 (EAB 1997); *In re Envotech, L.P.*, 6 E.A.D. 260, 266-67 (EAB 1996); *In re Beckman Prod. Servs.*, 5 E.A.D. 10, 16-17 (EAB 1994).

<sup>46</sup> Section 124.13 provides that a person “must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period (including any public hearing) under section 124.10.” 40 C.F.R. § 124.13. The EAB has construed this requirement in several cases. *See, e.g., In re City of Palmdale*, PSD Appeal No. 11-07, slip op. at 30-31 (EAB Sept. 17, 2012), 15 E.A.D. at \_\_\_; *In re Christian Cnty. Generation, LLC*, 13 E.A.D. 449, 457-60; *In re Shell Offshore, Inc.*, 13 E.A.D. 357, 394-95 & n.55 (EAB 2007); *In re Sierra Pac. Indus.*, 11 E.A.D. 1, 6-8 (EAB 2003); *In re City of Phoenix*, 9 E.A.D. 515, 524-25 (EAB 2000).

give the permitting authority the opportunity to hear and respond to objections to permit conditions before the permit is issued.<sup>47</sup>

iii. Requirement that Petitioner Identify Specific Comment and Response that Warrants Review

Consistent with Board precedent and now codified in Part 124, petitions for review must meet a minimum standard of specificity. To meet this requirement, petitioners must provide specific citation to the relevant comment and response in the Response to Comments document and explain why the Regional Administrator’s response to the comment was clearly erroneous or otherwise warrants review. 40 C.F.R. § 124.19(a)(4); *In re City of Attleboro*, NPDES Appeal No. 08-08, slip op. at 61 (Sept. 15, 2009), 14 E.A.D. \_\_\_\_ (“[T]he Board will not entertain vague or unsubstantiated claims.”);<sup>48</sup> *In re Westborough*, 10 E.A.D. 297, 305 (EAB 2002) (noting that “a petitioner must demonstrate with specificity in the petition why the Region’s prior response to those objections is clearly erroneous or otherwise merits review”). For permit challenges based on technical issues, the Board expects a petitioner to present “references to studies, reports, or other

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<sup>47</sup> See *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 431 (EAB 1997) (“The purpose of the response to comments and any supplementation of the administrative record at that time is to ensure that interested parties have full notice of the basis for final permit decisions and can address any concerns regarding the final permit in an appeal to the Board pursuant to 40 C.F.R. section 124.19.”); see also *In re Sierra Pac. Indus.*, 11 E.A.D. 1, 8 (EAB 2003); *In re City of Phoenix*, 9 E.A.D. 515, 526 (EAB 2000) (“In NPDES proceedings, as well as other permit proceedings, the broad purpose behind the requirement of raising an issue during the public comment period is to alert the permit issuer to potential problems with a draft permit and to ensure that the permit issuer has an opportunity to address the problems before the permit becomes final.”).

<sup>48</sup> The Board has held that “mere allegations of error” are not enough to warrant review. See *In re City of Attleboro*, NPDES Appeal No. 08-08, slip op. at 32, 45, 61, 74 (EAB Sept. 15, 2009), 14 E.A.D. \_\_\_\_; *In re Arcibo & Aguadilla Reg’l Wastewater Treatment Plants*, 12 E.A.D. 97, 136 n.71 (EAB 2005) (quoting *In re New Eng. Plating Co.*, 9 E.A.D. 726, 737 (EAB 2001)).

materials that provide relevant, detailed, and specific facts and data about permitting matters that were not adequately considered by a permit issuer.” *In re City of Attleboro*, NPDES Appeal No. 08-08, slip op. at 32 (Sept. 15, 2009), 14 E.A.D. \_\_\_\_ (citing *In re Envtl. Disposal Sys., Inc.*, 12 E.A.D. 254, 291 (EAB 2005)).

### 3. Notice to Permittee and Permittee Response

Petitions for review may be filed by someone other than the permittee. In such cases, Part 124 requires that the petitioner serve (i.e., provide a copy to) both the Regional Administrator and the permit applicant. 40 C.F.R. § 124.19(i)(3); *see also* Part 124 Revision. A permit applicant who did not file a petition for review but who nonetheless wishes to participate in the appeal must file a notice of appearance and a response to the petition. 40 C.F.R. § 124.19(b)(3). The appropriate deadline for the permit applicant’s notice of appeal and response brief depends on the type of permit being appealed and is identical to the deadlines imposed on the Regional Administrator. *See id.* § 124.19(b)(1) (specifying that in a PSD or other new source permit appeal responses are due within 21 days after the filing of the petition for review); *id.* § 124.19(b)(2) (stating that in all other permit appeals responses are due within 30 days after the filing of the petition).

### 4. Region, State, or Tribal Authority Response(s) to Petition for Review

Part 124 contains specific deadlines for the Regional Administrator to file a response to a petition for review that vary based on the type of permit at issue.<sup>49</sup> 40 C.F.R. § 124.19(b). In

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<sup>49</sup> Part 124 states at any time prior to 30 days after filing its response to the petition for review, the Regional Administrator, upon notification to the EAB and any interested parties, may withdraw the permit and prepare a new draft permit pursuant to 40 C.F.R. § 124.6 addressing the portions withdrawn. *Id.* § 124.19(j). The new draft permit must proceed through the same

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addition, if the state or tribal authority where a permitted facility or site is or is proposed to be located (if that authority is not the permit issuer) wants to respond to a petition for review, the state or tribal authority must file a notice of appearance and a response in order to participate in the appeal. *Id.* § 124.19(b)(4). The deadline for a state or tribal authority to respond to a petition for review also varies based on the type of permit at being appealed and is identical to the deadlines imposed on the Regional Administrator. *Id.*

a. PSD or Other New Source Review (“NSR”) Permit Appeals

In a PSD or other NSR permit appeal, the Regional Administrator must file a response to a petition for review, a certified index to the administrative record, and the relevant portions of the administrative record within 21 days after the filing of the petition. *Id.* § 124.19(b)(1). A permittee who is not the petitioner or any state or tribal authority wishing to participate in a PSD or other NSR appeal is bound by the same filing deadlines as the Regional Administrator. *Id.* § 124.19(b)(4).

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<sup>49</sup>(...continued)

process of public comment and opportunity for a public hearing as would apply to any other draft permit subject to this part, and any portions of the permit not withdrawn and that are not stayed under section 124.16(a) will continue to apply. *Id.* § 124.19(j). However, if the EAB held oral argument, the Regional Administrator may not unilaterally withdraw the permit, and instead must request that the EAB grant a voluntary remand of the permit or any portion thereof. *Id.*; *cf. id.* § 124.19(d) (2012) (stating that under the previous two-step appeal procedure the Regional Administrator could withdraw a permit any time prior to the Board’s decision to grant or deny review of a petition).

b. All Other Permit Appeals

In all other permit appeals governed by Part 124, the Regional Administrator must file a response to the petition, a certified index of the administrative record, and the relevant portions of the administrative record within 30 days after the filing of the petition. *Id.* § 124.19(b)(2). A permittee who is not the petitioner or any state or tribal authority wishing to participate in an appeal is bound by the same filing deadlines as the Regional Administrator. *Id.* § 124.19(b)(4). The permitting authority should provide the petitioner and the Clerk of the Board with a certificate of service showing the date and method of service.

5. Non-Party Participation as Amicus Curiae (“Friend of the Court”)

Part 124 states that any interested person may file an amicus brief, otherwise known as a “friend of the court” brief, in any permit appeal pending before the EAB provided it is filed no later than 15 days after the permit issuer files its response brief.<sup>50</sup> *Id.* § 124.19(e). Consistent with the high priority the Board places on resolving new source review appeals expeditiously, amicus briefs

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<sup>50</sup> Previously, Part 124 did not address non-party participation or non-party briefs in permit appeal proceedings except where a petition for review had been granted. 40 C.F.R. § 124.19(c) (2012) (“Public notice [of any grant of review by the EAB] shall set forth a briefing schedule for the appeal and shall state that any interested person may file an amicus brief.”). The Board exercised its discretion, where appropriate, to allow intervention and/or non-party briefing at early stages of an appeal, typically allowing permittees not already a party to the proceeding to participate as intervenors, and in certain circumstances granting non-parties leave to participate as amicus curiae. *See In re Desert Rock Energy Co.*, PSD Appeal Nos. 08-03 through 08-06, at 2-3 (Oct. 14, 2008) (granting instrumentality of the Navajo Nation’s motion for leave to participate and conservation group’s motion for leave to file an amicus curiae brief); *In re D.C. Water & Sewer Auth.*, NPDES Appeal Nos. 05-02 & 07-10 through 07-12, at 2 (EAB July 27, 2007) (granting a non-party leave to file a brief); *In re D.C. Water & Sewer Auth.*, NPDES Appeal 07-12, at 2-3 (EAB June 15, 2007) (granting intervenor status to permittee); *In re Four Corners Power Plant*, NPDES Appeal No. 01-06, at 1-2 (EAB Feb. 20, 2001) (granting motion to intervene and file a brief of a tribe whose authority to regulate water quality was at issue); *In re NPDES Permit for Wastewater Treatment Facility of Union Twp.*, NPDES Appeal Nos. 00-26 & 00-28, at 3, 7 (EAB Jan. 23, 2001) (same).

in PSD or other new source review permit appeals must be filed within 21 days after the filing of the petition. 40 C.F.R. § 124.19(e). All amicus briefs must comply with all of the procedural requirements set forth in Part 124. *Id.*

## 6. Replies

### a. PSD or Other New Source Review (“NSR”) Permit Appeals

The EAB will apply a presumption against the filing of a reply brief in PSD or NSR permit appeals. *Id.* § 124.19(c)(1). A petitioner, by motion, may seek leave to file a reply brief, which the EAB in its discretion may grant. *Id.* The motion must be filed simultaneously with the proposed reply brief within 10 days after the service of the response brief. *Id.* In its motion requesting leave to file a reply, the petitioner must specify those arguments in the response to which the petitioner seeks to reply and the reasons that support the petitioner’s need to file a reply to those arguments. *Id.* Petitioners may not raise new issues or arguments in either their motion seeking leave to file a reply brief or the reply brief itself. *Id.* § 124.19(c)(1).

### b. All Other Permit Appeals

In all other permit appeals governed by Part 124, a petitioner may file a reply within 15 days after service of the response. 40 C.F.R. § 124.19(c)(2). Petitioners may not raise new issues or arguments in their reply brief. *Id.* § 124.19(c)(1)-(2). If a reply brief has been filed, the EAB may similarly, upon motion, allow the filing of a surreply brief.

## 7. Filing and Service Requirements

Part 124 sets forth specific filing and service requirements that were not explicitly described in the former rule. *See* 40 C.F.R. § 124.19(i). The EAB will accept documents filed electronically, by mail, or by hand delivery. *Id.* § 124.19(i)(2); *see also supra* Section II.I.1 - II.I.4

(discussion of general filing requirements). Documents filed with the EAB must identify specifically in the caption the permit applicant, the permitted facility, and the permit number. 40 C.F.R. § 124.19(i)(1). Each document must be signed by the person filing the document or his or her representative, and list the signer's name, address, telephone address, e-mail address, and facsimile number, if any. *Id.*

When documents are filed electronically, the full name of the person filing the document must appear below the signature line. *Id.* § 124.19(i)(2)(i). Compliance with EAB electronic filing requirements constitutes compliance with applicable signature requirements. *Id.*

For those who choose to forgo electronic filing and instead file by mail or by hand-delivery, the original and two copies of each document must be filed. *Id.* § 124.19(i)(2)(ii)-(iii). In addition, the person filing the document must include a cover letter to the Clerk of the EAB clearly identifying the documents being submitted, the name of the party on whose behalf the documents are being submitted, as well as the name of the person filing the documents, his or her address, telephone number, and as available, e-mail address and fax number. *Id.* The EAB's requirement for the submission of one paper copy for certain electronic filings is discussed at Section II.I.c.

Motions that do not include attachments may be filed with the EAB by facsimile. 40 C.F.R. § 124.19(i)(2). Upon filing a motion by facsimile, the sender must, within one business day, submit the original copy to the Clerk of the Board either electronically, by mail, or by hand-delivery. *Id.* The EAB may, on a case-by-case basis, authorize facsimile filing of any other document. However, the EAB will not ordinarily authorize the filing of a brief by facsimile.<sup>51</sup>

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<sup>51</sup> The Clerk will not accept for filing any facsimile duplicate of a document that has been filed electronically. *See supra* Section II.I.1.d.



Any person filing a petition for review must serve a copy on the Regional Administrator and the permit applicant (if the applicant is not the petitioner). *Id.* § 124.19(i)(3). Once an appeal is docketed, every document filed with the EAB must be served on all other parties by first class mail or by any reliable commercial delivery service, although upon agreement by the parties service may be made by facsimile or electronic means. *Id.* A certificate of service must be appended to each document filed stating the names of those served, the date and manner of service, and the electronic, mailing, or hand-delivery address, or facsimile number, as appropriate. *Id.* § 124.19(i)(4); *see also* [Appendix](#), Template No. 8 (containing a certificate of service template).

#### 8. Motions

Motions are required to be in writing unless Part 124 prescribes another form, and must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support the motion.<sup>52</sup> 40 C.F.R. § 124.19(f)(1)-(2). Motions shall be accompanied by any necessary supporting documentation. A motion shall state whether the opposing party concurs or objects to granting the request set forth in the motion. 40 C.F.R. § 124.19(f)(2).

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<sup>52</sup> Prior to the recent revision of Part 124, the regulations did not specifically provide for motions practice in the context of a permit appeal, except for the standards and timeframe within which a party could file a motion for reconsideration. *See* 40 C.F.R. § 124.19(g) (2012). Nonetheless, the Board regularly considered motions received from parties in a Part 124 proceeding. *See, e.g., In re Desert Rock Energy Co.*, PSD Appeal Nos. 08-03 through 08-06, slip op. at 13-14 & n.15 (EAB Sept. 24, 2009), 14 E.A.D. at \_\_\_ (granting motion for voluntary remand after prior grant of review of air permit); *see also In re Peabody W. Coal Co.*, CAA Appeal No. 10-01, slip op. at 7 (EAB Aug. 13, 2010), 14 E.A.D. \_\_\_ (“In the part 124 context, despite the lack of detailed procedures in the regulations, the Board has exercised broad discretion to manage its permit appeal docket by ruling on motions presented to it for various purposes \* \* \* .”); *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970) (“[I]t is always within the discretion of \* \* \* an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it.”). Part 124 now reflects the Board’s long-established conventions for handling motions practice in permit appeals.

Although the EAB may set a shorter or longer time for a response,<sup>53</sup> a party should file its response to any motion within 15 days after service of the motion. *Id.* § 124.19(f)(3). A response to a motion must set forth with particularity the grounds for opposition and the legal argument necessary to support the motion. *Id.* Any reply to a response must be filed within 10 days after service of the response and the reply may respond only to matters presented in the response; the reply must not introduce any new issues or arguments. *Id.* § 124.19(f)(4).

Parties may file motions electronically, by mail, hand-delivery, or facsimile (if without attachments).<sup>54</sup> 40 C.F.R. § 124.19(i)(2). Motions for an extension of time should be filed sufficiently in advance of the due date as to allow other parties reasonable opportunity to respond and to allow the EAB reasonable opportunity to issue an order. 40 C.F.R. § 124.19(g); *see* [Appendix](#), Template No. 5 (template for motion for extension of time).

#### 9. Oral Argument and Decision

The EAB may hold oral argument on its own initiative or in response to a request from one or more parties. *Id.* § 124.19(h). To request oral argument, a party must include in its substantive brief a statement explaining why oral argument should occur. *Id.* In PSD and other new source review permit appeals, the Board will apply a presumption against oral argument. *See id.*; NSR Standing Order.

Subsequent to oral argument, or to the conclusion of briefing in appeals where there is no oral argument, the EAB will issue a final decision addressing the issues raised in the petition that

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<sup>53</sup> The EAB may act on a motion for a procedural order at any time without awaiting a response. 40 C.F.R. § 124.19(f)(5).

<sup>54</sup> *See supra* Section II.I (general filing requirements). The Clerk of the Board will not accept for filing any facsimile duplicate of a document that has been filed electronically.

the Board concludes are properly preserved for appeal. However, in PSD and new source review appeals, the EAB may summarily dispose of a petition for review, or a specific issue raised in a petition for review, where circumstances warrant. *See* NSR Standing Order (describing use of summary disposition to decline review without issuing a decision, or to summarily affirm a permit reissued after completion of remand proceedings). The Board’s decision may include remanding an issue or issues to the permitting authority for further action.

#### 10. Motions for Reconsideration or Clarification

Under 40 C.F.R. § 124.19(m), a party may file a motion for reconsideration or clarification within 10 days of service of an EAB final order. Motions for reconsideration must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. *Id.*; *see, e.g., In re Town of Ashland Wastewater Treatment Facility*, NPDES Appeal No. 00-15, at 2 (EAB Apr. 9, 2001) (Order Denying Motion for Reconsideration) (quoting *In re S. Timber Prod., Inc.*, 3 E.A.D. 880, 889 (JO 1992)) (“The reconsideration process ‘should not be regarded as an opportunity to reargue the case in a more convincing fashion. It should only be used to bring to the attention of [the Board] clearly erroneous factual or legal conclusions.’”). Motions for clarification must set forth with specificity the portion(s) of the decision for which clarification is sought and the reason(s) clarification is necessary. 40 C.F.R. § 124.19(m). A motion for reconsideration or clarification does not stay the effective date of the final order unless the EAB specifically so orders.<sup>55</sup> *Id.*

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<sup>55</sup> A motion for reconsideration or clarification must be directed to, and decided by, the EAB. 40 C.F.R. § 124.19(m). Any such motion directed to the Administrator rather than the EAB will not be considered, unless the motion relates to a matter the EAB has referred to the Administrator pursuant to 40 C.F.R. § 124.2(a) and for which the Administrator has issued the  
(continued...)

## E. Scope and Standard of Review

### 1. Scope of Review

The EAB's jurisdiction under section 124.19(a) is limited to issues related to the federal permit that are claimed to be erroneous. Part 124 clarifies that the Board's scope of review is limited to "contested permit condition[s] or other specific challenge[s] to the permit decision."<sup>56</sup> 40 C.F.R. § 124.19(a)(4). The EAB does not have authority to rule on matters that are outside the permit process. *In re Federated Oil & Gas of Traverse City*, 6 E.A.D. 722, 725-26 (EAB 1997); *see also In re Tondu Energy Co.*, 9 E.A.D. 710, 716 n.10 (EAB 2001) (stating that the permit appeals process is not the appropriate venue to challenge Agency regulations).

### 2. Standard of Review

There is no appeal as of right from the Regional Administrator's permit decision to the EAB.<sup>57</sup> Rather, under the rules governing permit appeals, the petitioner has the burden of demonstrating that the permit decision warrants review. In particular, the petition must show that the permit condition in question is based on "a finding of fact or conclusion of law that is clearly erroneous," or "an exercise of discretion or an important policy consideration that the [EAB]

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<sup>55</sup>(...continued)  
final order. 40 C.F.R. § 124.19(m).

<sup>56</sup> As noted above, although the former language contained in 40 C.F.R. § 124.19(a) stated that a petitioner could challenge "any condition of a permit decision," *id.* (2012), the Board historically and consistently construed this language to include not only specific permit conditions, but also the permit decision in its entirety, whether based on substantive or procedural defects. *See* Part 124 Revision, 78 Fed. Reg. at 5284 (citing cases); *see supra* note 44. Part 124 clarifies that the Board will review challenges to a permit decision that are not necessarily tied to a specific permit condition, but that are nonetheless within the EAB's scope of review.

<sup>57</sup> *In re Miners Advocacy Council*, 4 E.A.D. 40, 42 (EAB 1992).

should, in its discretion, review.”<sup>58</sup> 40 C.F.R. § 124.19(a)(4). The preamble to 40 C.F.R. § 124.19 states that “this power of review should only be sparingly exercised,” and that “most permit conditions should be finally determined [by the permitting authority] \* \* \* .” 45 Fed. Reg. 33,290, 33,412 (May 19, 1980) (Consolidated Permit Regulations); *accord In re City of Attleboro*, NPDES Appeal No. 08-08, slip op. at 10 (EAB Sept. 15, 2009), 14 E.A.D. \_\_; *In re Jett Black, Inc.*, 8 E.A.D. 353, 358 (EAB 1999); *In re Maui Electric Co.*, 8 E.A.D. 1, 7 (EAB 1998).

#### F. Review Initiated by the EAB

The EAB may decide on its own initiative to review any condition of any RCRA, NPDES, UIC, or PSD permit issued under part 124, provided that it acts within 30 days of the service date of notice of the permit issuer’s action. 40 C.F.R. § 124.19(p).

#### G. Effect of Administrative Appeal on the Conditions of the Permit

The regulations distinguish between an appeal involving an existing facility that is already operating under a permit and an appeal involving a new facility that is applying for its first permit. If the appeal involves a new facility or new injection well, new source, new discharger, or recommencing discharger, the permit applicant will be without a permit pending final agency action and may not proceed under the permit during that time period.<sup>59</sup> 40 C.F.R. § 124.16(a)(1). If the appeal involves a RCRA, UIC, or NPDES permit for an existing facility, the facility may

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<sup>58</sup> See, e.g., *In re Guam Waterworks Auth.*, NPDES Appeal Nos. 09-15 & 09-16, slip op. at 9 & n.7 (EAB Nov. 16, 2011).

<sup>59</sup> See *In re Wastewater Treatment Facility of Union Twp.*, NPDES Appeal No. 00-27, at 2 (EAB Oct. 19, 2000) (Order Denying Request Not to Stay Permit) (“[T]here is no statutory or regulatory authority allowing a new discharger to commence discharging while its NPDES permit is on appeal \* \* \*”).

continue to operate under the uncontested conditions of the old permit and under those uncontested conditions of the new permit that are severable from the contested conditions. *Id.*

The effect of any contested permit conditions and the effect of any uncontested conditions that are not severable from contested conditions under a RCRA, UIC, or NPDES permit is stayed pending final agency action. 40 C.F.R. § 124.16(a)(2)(i). Upon receipt of a petition for review, the Regional Administrator will notify the EAB, the applicant, and all other interested persons which permit conditions are uncontested (and severable from any contested provisions). *Id.*

§ 124.16(a)(2)(ii). These uncontested and severable conditions shall become fully effective thirty days after the date of the Regional Administrator's notification. *See id.* § 124.16(a)(2)(i). If review of the permit is denied, the permit will become effective as provided in 40 C.F.R.

§ 124.19(l)(2)(i). If the permit is for a new facility, the permit applicant will be without a permit pending resolution of the appeal and final agency action. *Id.* § 124.16(a)(1).

PSD permit decisions are treated differently under the regulations from other permit decisions that are subject to EAB review. *See id.* § 124.16(a). For such permits, construction of new or significantly modified facilities cannot begin until a final permit is issued by the Regional Administrator (or delegated state agency) following EAB review. CAA § 165(a); 42 U.S.C. § 7475(a); *see generally In re Shell Offshore, Inc.*, 13 E.A.D. 357, 364-65 (EAB 2007); NSR Standing Order.

#### H. Stays of Permit Appeals Pending Settlement Negotiations

An appeal is not automatically stayed during settlement negotiations between the permitting authority and the applicant. However, upon request of the parties or on its own initiative, the EAB may stay further briefing during settlement negotiations. The EAB offers an alternative dispute

resolution (“ADR”) program for parties who seek the assistance of the EAB in reaching a mutually agreeable solution. Information about the ADR program is available in section II.J of this Manual, and on the EAB’s website at [www.epa.gov/eab](http://www.epa.gov/eab).<sup>60</sup> If protracted settlement negotiations are contemplated, the EAB may remand the permit to the Region for the purpose of pursuing a settlement outside the appeals process, without prejudice to either party’s right to request reinstatement of the appeal if that should prove necessary.

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<sup>60</sup> Parties may pursue settlement on their own accord. The EAB’s ADR program is one option parties may pursue in attempting to settle a proceeding.

## V. OTHER EAB APPEALS

### A. Introduction

Although most enforcement appeals to the EAB are governed by the CROP (*see supra* Section III) and most permit appeals to the EAB are governed by 40 C.F.R. part 124 (*see supra* Section IV), some administrative appeals are authorized by other regulations. These categories of appeals are briefly described below. Practitioners should consult the applicable statute and regulations for further information regarding these appeals.

### B. Clean Air Act (“CAA”) Enforcement Appeals

#### 1. CAA § 120

A decision of the Presiding Officer assessing a noncompliance penalty under CAA § 120, 42 U.S.C. § 7420, may be appealed to the EAB pursuant to 40 C.F.R. § 66.95(c). *See also* 40 C.F.R. § 66.3(g) (delegating authority to the EAB to issue final decisions in appeals under 40 C.F.R. part 66).

#### 2. CAA § 207(c)

A decision of the Presiding Officer under 40 C.F.R. part 85 (EPA-ordered automobile recalls for failure to meet emissions standards under CAA § 207(c), 42 U.S.C. § 7541(c)) may be appealed to the EAB pursuant to 40 C.F.R. § 85.1807(u). *See also* 40 C.F.R. § 85.1807(a)(6) (delegating authority to the EAB to issue final decisions in appeals under 40 C.F.R. part 85).

### C. CAA Permit Appeals

#### 1. Title V Operating Permits

Title V of the 1990 amendments to the CAA (*see* 42 U.S.C. §§ 7661-7661f) requires certain stationary sources of air pollution to obtain permits from state air pollution agencies and



requires EPA to establish a federal permit program where no state program exists. CAA § 502(d)(3), 42 U.S.C. § 7661a(d)(3). EPA has established procedures for a federal operating permit program under Title V of the CAA amendments at 40 C.F.R. part 71.

Section 71.11(l) provides for appeal to the EAB from a federal Title V operating permit decision. Section 71.10(i) provides for an appeal to the EAB from a Title V operating permit that was issued by a state, tribal, local, or other authority pursuant to a *delegation* of authority from EPA. *See, e.g., In re Peabody W. Coal Co.*, 12 E.A.D. 22, 27-29 (EAB 2005). However, a permit issued by a state with an EPA-authorized state program may not be appealed to the EAB.

An Administrator's denial of a request that a permit be revised, revoked and reissued, or terminated may be informally appealed to the EAB, pursuant to 40 C.F.R. § 71.27(a)(2).

## 2. Acid Rain Program

Title 40 C.F.R. part 72 establishes permit requirements under EPA's Acid Rain Program pursuant to Title IV of the CAA. Section 78.3(b)(1) provides for an appeal to the EAB from certain acid rain permit decisions listed at 40 C.F.R. § 78.1(a). *See, e.g., In re Indianapolis Power & Light Co.*, 6 E.A.D. 23, 27 (EAB 1995); *see also* 40 C.F.R. § 78.1(c). Section 78.20 sets forth the appeals procedure under part 78.

## 3. Standards of Performance for Residential Wood Heaters

A decision of the Presiding Officer to deny an application for certification, or revoke a certification, for a residential wood heater, under 40 C.F.R. § 60.539, or a decision to deny or revoke a certification for laboratory accreditation under 40 C.F.R. § 60.533, may be appealed to the EAB pursuant to 40 C.F.R. § 60.539(h)(2). *See, e.g., In re Woodkiln, Inc.*, 7 E.A.D. 254, 256 (EAB 1997).

D. Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”)  
Non-Enforcement Proceedings

EPA regulations at 40 C.F.R. part 164 govern hearings in FIFRA proceedings arising from: (1) refusal to register a pesticide; (2) cancellation of a pesticide registration; (3) change of classification of a pesticide; (4) suspension of a pesticide registration; and (5) other hearings convened pursuant to FIFRA § 6, 7 U.S.C. § 136d. An appeal to the EAB of an initial decision is authorized by 40 C.F.R. §§ 164.101-.103. The EAB is required to issue a final Agency decision within 90 days from an initial decision issued at the close of a hearing or from the filing of an accelerated decision. 40 C.F.R. § 164.103. Special rules apply to expedited hearings, *see* 40 C.F.R. §§ 164.120-.123, and modifications of previous cancellation and suspension orders, *see* 40 C.F.R. §§ 164.130-.133.

E. Equal Access to Justice Act

The Administrator has delegated authority to the EAB to take final action on claims made under the Equal Access to Justice Act. 40 C.F.R. § 17.8; *see, e.g., In re Bricks, Inc.*, 11 E.A.D. 796, 797 (EAB 2004); *see generally* 40 C.F.R. part 17 (Implementation of the Equal Access to Justice Act in Administrative Proceedings).

F. Fraudulent Claims Against EPA

The Administrator has delegated authority to the EAB to take final action in administrative proceedings to impose civil penalties against persons who make false or fraudulent claims or statements to EPA. 40 C.F.R. § 27.48; *see also id.* § 27.1. A defendant who has filed a timely answer in a civil penalty action for making such a claim or statement may appeal an adverse decision to the EAB pursuant to 40 C.F.R. § 27.39(a). *See generally* 40 C.F.R. pt. 27.

G. Ocean Dumping Permits

A decision of the Presiding Officer to deny an application for an ocean dumping permit pursuant to section 102 of the Marine Protection, Research, and Sanctuaries Act of 1972, as amended, 33 U.S.C. § 1412, may be appealed to the EAB. 40 C.F.R. § 222.12(a)(1).

H. Noise Control Act

A decision of the Presiding Officer under the Noise Control Act of 1972, 42 U.S.C. § 4910, may be appealed to the EAB pursuant to 40 C.F.R. § 209.3(k).

## VI. CERCLA SECTION 106(b) PETITIONS FOR REIMBURSEMENT

### A. Introduction

The EAB issues final decisions granting or denying petitions for reimbursement submitted under section 106(b)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”), 42 U.S.C. § 9606(b)(2). Section 106(b)(2) allows any person who has complied with an order issued under section 106(a) of the statute to petition for reimbursement of the reasonable costs incurred in complying with the order, plus interest.<sup>61</sup> To establish a claim for reimbursement, a petitioner must demonstrate that it was not liable for response costs under CERCLA section 107(a) or that the selection of the ordered response action was arbitrary, capricious, or otherwise not in accordance with law.<sup>62</sup>

There are no federal regulations governing CERCLA reimbursement proceedings. EAB has issued a detailed guidance document, “Revised Guidance on Procedures for Submission and Review of CERCLA Section 106(b) Reimbursement Petitions” (Feb. 23, 2012) (“CERCLA Guidance”) (available on the Board’s Web site at [www.epa.gov/eab](http://www.epa.gov/eab)), describing the information

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<sup>61</sup> If the petitioner has not complied with the terms of the order, the petition will be denied. *See Emp’rs Ins. of Wausau v. Clinton*, 848 F. Supp. 1359, 1368 (N.D. Ill. 1994) *aff’d*, 52 F.3d 656 (7th Cir. 1995), *cert. denied*, 516 U.S. 1042 (1996) (establishing the proposition); *In re Findley Adhesives, Inc.*, 5 E.A.D. 710, 716, 718 & n.23 (EAB 1995).

<sup>62</sup> The constitutionality of the reimbursement procedure established in section 106(b)(2) was upheld in *Emp’rs Ins. of Wausau v. Browner*, 848 F. Supp. 1369, 1374-78 (N.D. Ill. 1994), *aff’d*, 52 F.3d 656 (7th Cir. 1995), *cert. denied*, 516 U.S. 1042 (1996) (consolidated on appeal to the 7th Circuit with the district court case cited in the immediately preceding footnote).

that petitioners are expected to submit and the procedures that the EAB intends to follow in evaluating section 106(b) petitions.<sup>63</sup>

Persons who believe they may be eligible to assert a claim under section 106(b) should refer to the guidance document for further discussion of the applicable procedures, which are summarized in the following paragraphs.

B. Procedure for Submitting CERCLA Reimbursement Petitions

1. Filing Requirements

By statute, a claimant must file a petition for reimbursement “within 60 days after completion of the required action.” *See* CERCLA § 106(b)(2)(A), 42 U.S.C. § 9606(b)(2)(A); *see also In re Grand Pier Ctr., LLC*, 12 E.A.D. 403, 407 n.7 (EAB 2003) (characterizing the 60-day deadline as a “prerequisite” that must be satisfied before the Board will consider the merits of the petition). Petitions for reimbursement and other pleadings may be filed electronically. *See* Section II.I.1 (containing information about the EAB’s requirements for electronic filing). For the purpose of determining a petitioner’s compliance with the statutory 60-day deadline for filing a petition, the EAB will look at the postmark date if the petition was sent to the Board by certified mail, or to the date of receipt by the EAB if the petition was transmitted electronically, by hand-delivery or by any other mail service. *See* CERCLA Guidance at 2.

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<sup>63</sup> Certain federal agencies other than EPA also have the authority to issue orders under section 106(a). Reimbursement claims based on orders issued by agencies other than EPA must be filed with the EAB. While such petitions are not specifically addressed in the CERCLA Guidance, procedures similar to those set forth in the CERCLA Guidance will apply to any such claims. *See In re Katania Shipping Co.*, 8 E.A.D. 294, 298-300 & n.3 (EAB 1999).

Except for a petition for reimbursement that is sent by certified mail,<sup>64</sup> the postmark date of a pleading is not determinative of the time a pleading was filed. Pleadings must be *received* at the EAB's offices by the specified filing date. If the EAB establishes a briefing schedule by order, any date the EAB specifies for filing a pleading is the date by which it must be received, unless otherwise specified in the order. Section II.I.2 contains further information about addressing mail sent to the EAB.

## 2. EAB Review Procedures

Upon receipt of a petition, the EAB will issue a letter to the appropriate EPA Regional Office (or federal agency, if the claim is based on an order issued by a federal agency other than EPA)<sup>65</sup> soliciting a written response to the petition. If the Region contends that one or more of the threshold requirements for consideration of the petition have not been met, the Region must submit a limited response to the petition raising any such contentions within 30 days of the EAB's letter soliciting a response. These threshold eligibility requirements relate to: (1) whether the administrative order in question is subject to section 106(b)(2); (2) whether the order has been complied with; (3) whether the required action has been completed, and; (4) whether the petition is timely. *See, e.g., In re Grand Pier Ctr., LLC*, 12 E.A.D. 403, 407 n.7 (EAB 2005). The petitioner will then be given an opportunity to respond to the Region's contentions regarding threshold requirements. After these issues have been briefed, the EAB will either rule on any threshold issue raised by the Region or defer its ruling until the merits have been briefed.

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<sup>64</sup> *See* CERCLA Guidance at 2-3.

<sup>65</sup> *See supra* n.59.

If the Region finds that the petitioner has met the threshold eligibility requirements, the Region shall submit a response addressing the merits of the petitioners' claims within 60 days after the date of the EAB's letter soliciting a response to the petition. The EAB will then evaluate the merits of the petitioner's claim. When evaluating a petition for reimbursement, the EAB may, in its discretion, request supplemental briefing, direct the parties to present oral argument, or refer particular factual questions to a hearing officer for the purpose of conducting an evidentiary hearing. After considering the merits of the petitioner's claim, the Board will issue its final decision on whether the petitioner is entitled to any reimbursement.<sup>66</sup> If the EAB determines that the petitioner is entitled to reimbursement of at least some of its costs of compliance, further proceedings will be held to determine the appropriate level of reimbursement. *See, e.g., In re Solutia, Inc.*, 10 E.A.D. 193, 204 n.12, 217 (EAB 2001); *In re Port Auth. of N.Y.*, 10 E.A.D. 61, 98 (EAB 2001). Any final decision by the EAB denying a reimbursement petition in whole or in part may be appealed by the petitioner to the appropriate U.S. district court as provided in CERCLA § 106(b)(2)(B), 42 U.S.C. § 9606(b)(2)(B).

### 3. Stay of CERCLA Petition for Reimbursement Pending Settlement Negotiations

The parties may discuss the possibility of settlement between the filing of the petition for reimbursement and the filing of a response. A petition for reimbursement is not automatically stayed during settlement negotiations between the Regional EPA office and the petitioner.

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<sup>66</sup> Under the previous procedures that governed review of petitions for reimbursement, the EAB would first issue a Preliminary Decision and would then issue a Final Decision after receiving comments from the parties on the Preliminary Decision. The Board has concluded that the Preliminary Decision step is unnecessary because the parties will have a full opportunity to present their arguments and factual information to the Board under the revised, streamlined procedures set forth in the CERCLA Guidance.

However, upon request of the parties, the EAB may stay further briefing during settlement negotiations. The EAB offers an alternative dispute resolution (“ADR”) program for parties who seek the assistance of the EAB in reaching a mutually agreeable resolution. Information about the EAB’s ADR program is available in section II.J of this Manual, and on the EAB’s website at [www.epa.gov/eab](http://www.epa.gov/eab).



## **APPENDIX**

### **Pleading Templates**

The Environmental Appeals Board has developed templates for filings in EAB proceedings. These templates are solely for the guidance of participants in these proceedings. The EAB will accept documents that do not conform to these templates, provided that all applicable regulatory requirements are satisfied.

The templates, which are set forth below, are as follows:

1. Notice of Appeal under 40 C.F.R. part 22
2. Appeal Brief under 40 C.F.R. part 22
3. Petition for Review of Permit Decision under 40 C.F.R. part 124
4. Motion for Leave to File Reply Brief under 40 C.F.R. parts 22 or 124
5. Motion for Extension of Time under 40 C.F.R. parts 22 or 124
6. Request for Oral Argument under 40 C.F.R. part 22
7. CERCLA Section 106(b) Reimbursement Petition
8. Certificate of Service

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

\_\_\_\_\_ )  
In re: )  
 )  
[named Respondent below] )  
 )  
Dkt. No. [docket number below] )  
\_\_\_\_\_ )

**NOTICE OF APPEAL**

\_\_\_\_\_ [name of appellant] (“Appellant”) seeks review of a decision of Administrative Law Judge [or other Presiding Officer]<sup>1</sup> \_\_\_\_\_ [name], issued \_\_\_\_\_ [date], assessing a civil penalty of \$ \_\_\_\_\_, for violations of section[s] \_\_\_\_\_ of \_\_\_\_\_ [name of statute], \_\_\_ U.S.C. \_\_\_\_\_. An appeal brief is attached.

[name]  
[address]  
[telephone number]  
[fax number, if any]

Date: \_\_\_\_\_

Attorney for Appellant

\_\_\_\_\_  
<sup>1</sup>The Presiding Officer is an Administrative Law Judge except where the regulations allow a Regional Judicial Officer to serve as the Presiding Officer. 40 C.F.R. § 22.3.

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

---

In re: )  
          ) )  
[named Respondent below] )  
          ) )  
Dkt. No. [docket number below] )  
          ) )

---

**APPEAL BRIEF**

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[case name and citation] .....

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[title and section of statute] .....

Regulations

[title and section of regulation] .....

\* \* \*

INTRODUCTION

\_\_\_\_\_ appeals from an Initial Decision of \_\_\_\_\_ [the Administrative Law Judge or other Presiding Officer] assessing a civil penalty of \$\_\_\_\_\_ for violations of [title and section of statute]. Judge \_\_\_\_\_ [or “The Presiding Officer”] found that \_\_\_\_\_ had violated section[s] \_\_\_\_\_ [and \_\_\_\_\_ ] on \_\_\_\_\_ occasions, by \_\_\_\_\_. For the reasons stated below, the Administrative Law Judge [or “the Presiding Officer”] erred in his [her] conclusion that [indicate nature of alleged error(s), i.e., erroneous liability determination, erroneous penalty assessment, or both].

\* \* \*

ISSUES PRESENTED FOR REVIEW

[Succinctly state each issue with respect to which Appellant alleges error.]

A. \_\_\_\_\_

B. \_\_\_\_\_

\* \* \*

FACTUAL AND PROCEDURAL BACKGROUND

[Describe relevant facts, citing to the record before the Administrative Law Judge (or other Presiding Officer) as appropriate, and reference relevant procedural history.]

## ARGUMENT

[Set forth with particularity each argument that the Administrative Law Judge (or other Presiding Officer) erred in his/her Initial Decision]

A. \_\_\_\_\_

B. \_\_\_\_\_

## ALTERNATIVE FINDINGS OF FACT

[To the extent that Appellant is arguing that the Administrative Law Judge (or other Presiding Officer) erred in one or more findings of fact, appellant should set forth with particularity its proposed alternative findings.]

\* \* \*

## ALTERNATIVE CONCLUSIONS OF LAW

[To the extent that appellant is arguing that the Administrative Law Judge (or other Presiding Officer) erred in one or more conclusions of law, appellant should set forth with particularity its proposed alternative findings.]

\* \* \*

CONCLUSION

[State the relief sought through the appeal.]

Respectfully submitted

---

[name]  
[address]  
[telephone number]  
[fax number, if any]

Attorney for Appellant

Date: \_\_\_\_\_

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

---

In re: )  
          ) )  
[name of permittee] )  
          ) )  
Permit No. \_\_\_\_\_ )  
          ) )

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PETITION FOR REVIEW



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INTRODUCTION

Pursuant to 40 C.F.R. § 124.19(a), \_\_\_\_\_ [name of petitioner] (“Petitioner” or “\_\_\_”) petitions for review of the conditions of \_\_\_\_\_ [type of permit] Permit No. 00-0000 (“the Permit”), which was issued to \_\_\_\_\_ (“Permittee” or “\_\_\_”) on \_\_\_\_\_, by \_\_\_\_\_. [If the permit was a Clean Air Act Prevention of Significant Deterioration permit issued pursuant to an EPA delegation, include the following: The State of \_\_\_\_\_ is authorized to administer the Prevention of Significant Deterioration permit program pursuant to a delegation of authority by the United States Environmental Protection Agency.] The permit at issue in this proceeding authorizes \_\_\_\_\_ to \_\_\_\_\_. Petitioner contends

that certain conditions are based on clearly erroneous findings of fact and conclusions of law. Specifically, petitioner challenges the following permit conditions:

- (1) \_\_\_\_\_
- (2) \_\_\_\_\_

### FACTUAL AND STATUTORY BACKGROUND

[Describe nature of activity being permitted and circumstances leading to issuance of permit.]

\* \* \*

### THRESHOLD PROCEDURAL REQUIREMENTS

Petitioner satisfies the threshold requirements for filing a petition for review under 40 C.F.R. part 124, to wit:

1. Petitioner has standing to petition for review of the permit decision because it participated in the public comment period on the permit. *See* 40 C.F.R. § 124.19(a). [If petitioner commented in writing, attach a copy of the comments or cite the administrative record. If petitioner commented at a public hearing, reference the date, time, and place of the hearing.]

2. The issues raised by Petitioner in its petition were raised during the public comment period and therefore were preserved for review. [Cite administrative record or other evidence.]

\* \* \*

ARGUMENT

[Petitioner should set forth with particularity its arguments pertaining to each permit condition with respect to which petitioner seeks review, citing relevant case law in support of any legal arguments. The argument(s) must also explain why the permitting authority's treatment of the issues in its Response to Comments document issued after the public comment period was deficient or erroneous.

\* \* \*

CONCLUSION

[Summarize the relief sought]

---

[name]  
[address]  
[telephone number]  
[fax number, if any]

Attorney for Appellant

Date: \_\_\_\_\_

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

	)	
In re:	)	
	)	_____ Appeal No. _____
[name or Appellant (part 22) or	)	[Appeal No. assigned by EAB Clerk]
Permittee (part 124)]	)	
	)	

MOTION FOR LEAVE TO FILE REPLY BRIEF

\_\_\_\_\_ (“Appellant” or “Petitioner” ) moves for leave to file a reply to the briefs submitted in the above-captioned matter. Petitioner filed its Notice of Appeal [Petition for Review] on \_\_\_\_\_. \_\_\_\_\_ filed its response on \_\_\_\_\_.

In support of its motion, Petitioner states that the response brief raises new issues that Petitioner did not previously have the opportunity to address. Specifically, [state nature of new issues and/or any other justification for leave to file a reply brief].

\_\_\_\_\_

Date: _____	[name] [address] [telephone number] [fax number, if any] Attorney for Appellant [Petitioner]
-------------	--

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

	)	
In re:	)	
	)	_____ Appeal No. _____
[name or Appellant (part 22) or Permittee (part 124)]	)	[Appeal No. assigned by EAB Clerk]
	)	

MOTION FOR EXTENSION OF TIME

\_\_\_\_\_ requests that the Environmental Appeals Board (“EAB”) grant a \_\_\_\_\_ day extension of time to file its response to the Notice of Appeal [or Petition for Review] filed on behalf of \_\_\_\_\_ in the above-captioned matter. \_\_\_\_\_ seeks this additional time because [provide justification (e.g., scheduling conflict for movant’s counsel, need to coordinate with other governmental entities, etc.)].

Movant’s counsel believes that a \_\_\_\_\_ day extension will allow Movant to provide an adequate response to \_\_\_\_\_ and will not prejudice the Appellant [or Petitioner]. Movant represents that Opposing Counsel does not oppose the motion. [See Letter from \_\_\_\_\_ to \_\_\_\_\_, [date], attached hereto.]

For the reasons set forth above, \_\_\_\_\_ respectively requests that its Motion for Extension of Time to respond to the \_\_\_\_\_ be granted and that the EAB extend the deadline for \_\_\_\_\_'s response to \_\_\_\_\_.

Respectively submitted,

\_\_\_\_\_  
[name]  
[address]  
[telephone number]  
[fax number, if any]

Date:

Attorney for Appellant [Petitioner]

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

	)	
In re:	)	
	)	_____ Appeal No. _____
[name or Appellant (part 22) or Permittee (part 124)]	)	[Appeal No. assigned by EAB Clerk]
	)	

**REQUEST FOR ORAL ARGUMENT**

\_\_\_\_\_ hereby requests that the EAB order oral argument in the above-captioned matter.

Oral argument would assist the Board in its deliberations on the issues presented by the case for the following reasons: [provide justification for oral argument (e.g., the issues presented are of first impression for the Board or of a nature or complexity such that oral argument would materially assist in their resolution.)]

---

[name]  
[address]  
[telephone number]  
[fax number, if any]

Date: \_\_\_\_\_

Attorney for Appellant [Petitioner]

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

\_\_\_\_\_  
In re: \_\_\_\_\_,  
\_\_\_\_\_  
Petitioner.

PETITION FOR REIMBURSEMENT OF COSTS



## INTRODUCTION

\_\_\_\_\_ (“Petitioner”) submits this petition for reimbursement pursuant to section 106(b) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (“CERCLA”), 42 U.S.C. § 9606(b)(2). Petitioner requests reimbursement of \$\_\_\_\_\_ in costs incurred in complying with an Administrative Order (“AO”) issued by \_\_\_\_\_ pursuant to section 106(b) of CERCLA, 42 U.S.C. § 9606(b), on \_\_\_\_\_ [date], requiring Petitioner [and others] to perform a response action at the \_\_\_\_\_ site in \_\_\_\_\_ (AO attached as Exhibit \_\_).<sup>1</sup> \_\_\_\_\_ issued a notice of completion of the response action on \_\_\_\_\_. As explained below, Petitioner is entitled to reimbursement under CERCLA § 106(b) because [explain basis for reimbursement (i.e., petitioner is not a liable party under CERCLA § 107(b), the response action directed by the AO was arbitrary and capricious, or both)].

Petitioner meets the statutory and regulatory threshold requirements for reimbursement:

1. Petitioner complied fully with the terms of the AO.
2. This petition is being filed within 60 days after completion of the response action, as required by CERCLA § 106(b)(2)(a).
3. Petitioner incurred response costs in complying with the AO.

\* \* \*

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<sup>1</sup>A copy of the AO must be attached to the petition.

## FACTUAL AND PROCEDURAL BACKGROUND

[Describe, *inter alia*, the site of the response action, Petitioner's relationship to the site, the circumstances surrounding issuance of the AO to Petitioner, the nature of the response action undertaken.]

\* \* \*

## SUMMARY OF ARGUMENT

[State in summary form the grounds for reimbursement.]

\* \* \*

## ARGUMENT

[State in detail the grounds for reimbursement, citing legal and factual support as appropriate.]

\* \* \*

CONCLUSION

For the foregoing reasons, Petitioner requests reimbursement of approximately \$\_\_\_\_\_, the precise amount of which will be documented for the Board following the determination of Petitioner's entitlement to reimbursement.

[name]  
[address]  
[telephone number]  
[fax number, if any]

Attorney for Petitioner

[name of facility]  
[address of facility]

Date: \_\_\_\_\_

APPENDIX

[Petitioner should include as attachments the AO, evidence of satisfaction of the AO, and all affidavits and other appropriate evidence needed to support factual assertions in the petition.]

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing \_\_\_\_\_ in the matter of \_\_\_\_\_, \_\_\_\_ Appeal No. \_\_\_\_\_, were served by United States First Class Mail on the following persons, this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_:

[name]  
[address]

[name]  
[address]

\_\_\_\_\_  
[name]  
[address]  
[telephone number]  
[fax number, if any]

Attorney for Appellant

Date: \_\_\_\_\_