



GUIDE TO THE  
U.S. ENVIRONMENTAL PROTECTION AGENCY'S  
**ENVIRONMENTAL  
APPEALS BOARD**



MARCH 2023

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# I. Introduction

The U.S. Environmental Protection Agency's Environmental Appeals Board is an impartial administrative tribunal that resolves appeals of certain environmental disputes arising under the major environmental statutes the Agency administers. The Board's caseload consists primarily of permitting and enforcement appeals between EPA and non-EPA stakeholders. For certain matters, an appeal to the Board is a prerequisite for federal court review. Unlike federal court, there is no cost to file an appeal with the Board. You also do not need to be represented by legal counsel to participate in a matter before the Board.

This Guide provides an overview of the Environmental Appeals Board and the appeals process. The Guide:

- (1) Provides important information about the Board, including its role and composition;
- (2) Discusses the types of matters that come before the Board and the primary steps that occur in permit and enforcement appeals;
- (3) Includes an overview of the Board's Alternative Dispute Resolution program;
- (4) Provides information about the EAB's decisionmaking process; and
- (5) Contains an Appendix with sample templates for documents that are commonly filed with the Board.

This Guide provides general guidance only. To participate effectively in a proceeding before the Environmental Appeals Board, you should read the specific laws and regulations that apply to your case. You should also consult the Board's Standing Orders, which govern practice before the Board and are available on the Board's website at [www.epa.gov/eab](http://www.epa.gov/eab). The sample templates included in the Appendix to this Guide are provided for reference only. Submissions to the Board do not need to conform to the format of these templates provided the submissions meet all applicable legal requirements. In the event of any discrepancy between this Guide and the statutory and regulatory provisions relevant to an appeal, the statutes and regulations govern.

Decisions of the Board and additional information are available on the Environmental Appeals Board's website, [www.epa.gov/eab](http://www.epa.gov/eab), as well as in bound volumes entitled "Environmental Administrative Decisions" or "E.A.D." The "Board Decisions" link on the website contains the Board's final decisions, as well as significant interim orders. Users can sort the Board's decisions by statute, case type, or alphabetically by case name, or use the search function to find cases of interest. Filings for each active docket, as well as dockets for cases closed since January 1, 2006, are accessible through the "EAB Dockets" link on the website. Further, the website includes, among other things, links to regulations that govern appeals to the Board, information about the Board's Alternative Dispute Resolution program, answers to frequently asked questions, and information about the Board's Electronic Filing System.

## II. Important Information About the Environmental Appeals Board

Established by regulation in 1992, the Environmental Appeals Board (“EAB” or “the Board”) is an impartial appellate tribunal within the U.S. Environmental Protection Agency (“EPA” or “the Agency”) that resolves administrative appeals of certain environmental disputes.<sup>1</sup> The Board hears appeals under all of the major environmental statutes that the Agency administers including the Clean Water Act, the Clean Air Act, the Resource Conservation and Recovery Act, the Safe Drinking Water Act, the Toxic Substances Control Act, the Federal Insecticide, Fungicide, and Rodenticide Act, and the Comprehensive Environmental Response, Compensation, and Liability Act.<sup>2</sup> The EPA Administrator has delegated to the Board the authority to hear these appeals,<sup>3</sup> and EPA regulations specify who may appeal and what types of issues may be raised on appeal to the Board.<sup>4</sup>

### A. Role of the Board

The Board’s primary role is to resolve disputes between EPA and private entities, governmental entities, including Tribes, and/or members of the public concerning certain types of actions taken by EPA. Most of the matters that come to the Board involve appeals of federal environmental permitting decisions or administrative enforcement actions. For permitting and enforcement matters, EPA regulations require that a party exhaust its administrative remedies by first filing an appeal with the Board before a matter can be appealed to federal court.<sup>5</sup>

A permitting case ordinarily reaches the Board after an EPA official makes a permitting decision and someone (either the permit applicant or another interested individual or entity) objects to that decision and appeals it to the Board. In some instances, the Board hears appeals of permitting decisions by state or local authorities that have been delegated the authority to issue federal environmental permits.<sup>6</sup>

An enforcement case begins with an EPA office filing an administrative complaint against an individual or entity alleging a violation of an environmental law or regulation. That administrative complaint is filed with an EPA Presiding Officer (who is either an Administrative Law Judge or a Regional Judicial Officer). An enforcement matter ordinarily reaches the Board once the Presiding Officer has issued a decision and a party adversely affected by that decision appeals the decision to the Board.

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<sup>1</sup> 57 Fed. Reg. 5320 (Feb. 13, 1992) (amending 40 C.F.R. pts. 1, 3, 17, 22, 27, 57, 60, 66, 85, 86, 114, 123, 124, 164, 209, 222, 223, 233 & 403 to reflect role of EAB in EPA adjudication); *see also* 40 C.F.R. § 1.25(e)(2). The Code of Federal Regulations (“C.F.R.”) is the official compilation of regulations (rules) promulgated by executive departments and agencies of the federal government and is available at [eCFR.gov](https://www.ecfr.gov).

<sup>2</sup> Summaries of these federal environmental laws are available on EPA’s website, [www.epa.gov/laws-regulations/laws-and-executive-orders](https://www.epa.gov/laws-regulations/laws-and-executive-orders).

<sup>3</sup> 57 Fed. Reg. 5320-21; *see also* 40 C.F.R. § 1.25(e)(2).

<sup>4</sup> *See generally* 40 C.F.R. pts. 22 & 124.

<sup>5</sup> 40 C.F.R. §§ 22.27(d), 124.19(f).

<sup>6</sup> *See, e.g., In re Tucson Elec. Power*, 17 E.A.D. 675, 680 (EAB 2018) (appeal of a federal permit issued under the Clean Air Act by a local air quality permitting authority under delegation from EPA); *In re Ariz. Pub. Servs. Co.*, 17 E.A.D. 323, 329 (EAB 2016) (same).



The Board also rules on, among other things, petitions for reimbursement of costs incurred in complying with cleanup orders under the Comprehensive Environmental Response, Compensation, and Liability Act and challenges to pesticide registration matters under the Federal Insecticide, Fungicide, and Rodenticide Act. Most matters that come before the Board are reviewed “on the record,” meaning that the Board reviews the record that was before the decisionmaker during the proceeding below.

Appeals to the Board are typically assigned to a panel of three Environmental Appeals Judges, with one judge assigned as the lead for the case.<sup>7</sup> Occasionally, a matter is assigned to only two Environmental Appeals Judges.<sup>8</sup> Once the panel has reviewed the administrative record and the documents filed by the parties and, in some cases, held oral argument, the Board issues a final written decision.<sup>9</sup> Within 10 days of that decision, any party can file a motion seeking reconsideration of the Board’s decision.<sup>10</sup> The applicable statute’s judicial review provisions address the actions that can be challenged in federal court and when and where to file such a challenge.<sup>11</sup>

## **B. Composition of the Board**

The Board consists of four Environmental Appeals Judges appointed by the EPA Administrator.<sup>12</sup> Each judge is a career EPA employee in the United States government’s Senior Executive Service. Staff Counsel advise the EAB judges and assist in reviewing administrative records, analyzing applicable law and Agency policy, and preparing written opinions. The Clerk of the Board and the Administrative Specialist provide further support to the Board and are available to answer general questions from the public about the appeal process and the Board’s procedures. They can be reached by email at [Clerk\\_EAB@epa.gov](mailto:Clerk_EAB@epa.gov) or phone at 202-233-0122.

## **C. Core Principles**

In rendering decisions, the Environmental Appeals Judges are guided by the core principles of independence, impartiality, transparency, and public access. The Board is independent of all Agency components outside the immediate office of the Office of the EPA Administrator, and this keeps the Agency’s adjudicative process separate from its permitting and enforcement authorities. The Board judges are neutral decisionmakers who analyze each matter based on the merits and decide the outcome based on the law as it applies to the factual record. In making these decisions, the judges consider EAB and judicial case precedent and pertinent EPA policy and technical guidance. When appropriate, the Board hears oral argument to help in its evaluation of a matter.

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<sup>7</sup> See 40 C.F.R. § 1.25(e).

<sup>8</sup> *Id.* Note: the abbreviation “*id.*” is short for “*ibid*” and indicates a citation back to the authority that was cited either previously in the same footnote or in the immediately preceding footnote.

<sup>9</sup> See 40 C.F.R. §§ 22.30(f) (EAB decision in an appeal from an initial decision in an enforcement case), 124.19(l) (EAB decision in an appeal of a permitting decision).

<sup>10</sup> See 40 C.F.R. §§ 22.32 (motion for reconsideration in enforcement case), 124.19(m) (motion for reconsideration in permitting appeal).

<sup>11</sup> See, e.g., Clean Water Act § 509(b), 33 U.S.C. § 1369(b) (judicial review of permitting actions under Clean Water Act).

<sup>12</sup> 40 C.F.R. § 1.25(e)(1).

In accordance with its commitment to fairness and transparency, the Board's judges and staff do not engage in one-sided communications with any party about the merits of a pending case. In legal terms, this means that the EAB does not engage in "*ex parte*" communications. Accordingly, neither the judges nor Board staff will discuss the substance of a pending matter unless a representative of each of the parties in the case is also present, either in person or virtually. The Clerk of the Board is available to answer general, non-case specific questions about EAB procedures, including how to file a document using the Board's electronic filing system. The EAB staff and judges do not provide legal advice to the public.



*EPA Administrative Courtroom*

Public trust in the impartiality of the Board's decisionmaking process is essential, and transparency is vital for strengthening and maintaining that trust. Transparency fosters accountability and provides assurance for the regulated community, stakeholders, and the general public that EPA provides a fair, effective, and consistent process for considering administrative appeals. The Board's electronic case

management system promotes transparency by providing interested persons with a convenient method for filing notices of appeal, legal briefs, and accompanying attachments while also affording the public almost immediate access to these filings without charge.

Further, the Board promotes public access and participation by all interested parties. An interested party can view the Board's oral arguments by accessing a link on the Board's website and anyone can review the Board's written decisions online. Following oral argument, the Board posts written transcripts of the argument. Further, the EAB review process allows for greater participation opportunities for all stakeholders. Unlike federal court, there is no filing fee to appeal a matter to the Board. Also, an interested person does not need to be represented by an attorney to file an appeal with the Board. A person also may participate in certain Board proceedings as an "*amicus curiae*," which means "friend of the court or tribunal." Although an *amicus curiae* is not a party to the case, it can, for example, file briefs in a pending matter to provide input to the Board on issues of importance.<sup>13</sup>

In adhering to these core principles, the Board promotes consistency in the application of legal requirements, assures all stakeholders that they will be treated fairly, and provides a cost-effective process for resolving disputes promptly.

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<sup>13</sup> See 40 C.F.R. § 124.19(e) (participation by *amicus curiae* in permitting appeals).

### III. Administrative Appeals to the Board

EPA's regulations specify who can appeal or otherwise raise a matter to the EAB and what types of issues can be raised.<sup>14</sup> This section provides an overview of the types of appeals and other matters that the EAB hears. Such matters are brought by various stakeholders, including private businesses, states, municipalities, other federal entities, Tribes, individuals, public interest groups, as well as components of the EPA. This section also addresses how to file an appeal or other matter with the EAB. Finally, this section details the primary steps that typically occur in administrative permit and enforcement appeals, the Board's two most common types of appeals.

#### A. Types of Matters that Come to the Board

Most matters brought to the Board are appeals from federal permitting decisions and administrative enforcement decisions. There are, however, several other types of matters that can be raised to the Board, the most common of which are discussed briefly below in Section III.A.3.

##### 1. Permit Appeals

A permit appeal is a challenge to a permitting decision, such as a decision issuing, renewing, modifying, or terminating an environmental permit or license, or denying a permit application. These types of challenges are referred to throughout this document as a "permit challenge" or "permit appeal." The Board hears permit challenges where EPA serves as the permitting authority. The Board can also hear a challenge to a permitting decision made by a state, local, or Tribal authority where that authority is acting on EPA's behalf as its delegate under federal law to issue federal environmental permits.<sup>15</sup> The EAB does not hear appeals arising from EPA-approved state or otherwise independent programs.<sup>16</sup>

In a permit challenge, the permit holder or applicant (also known as the "Permittee") or any other interested party that objects to a permitting decision and meets certain threshold requirements, as discussed below, may file an appeal asking the EAB to review the permitting decision. The formal request for Board review is referred to as a "petition for review." For example, a permit applicant may challenge emission limits (restrictions on the amount of pollutants to be discharged) in a permit for being too stringent, whereas a member of the public

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<sup>14</sup> See generally 40 C.F.R. pts. 22 & 124.

<sup>15</sup> See, e.g., *In re Tucson Elec. Power*, 17 E.A.D. 675, 680 (EAB 2018) (appeal of a federal permit issued under the Clean Air Act by a local air quality permitting authority under delegation from EPA); *In re Ariz. Pub. Servs. Co.*, 17 E.A.D. 323, 329 (EAB 2016) (same).

<sup>16</sup> The Board's authority to hear permit appeals does not extend to state-issued permits. See, e.g., *In re Nate Pully, d/b/a Yellow Stone Creek*, NPDES Appeal No. 21-02, at 2-3 (EAB Aug. 18, 2021) (Order Dismissing Petition for Lack of Jurisdiction). For state-issued environmental permits, there is typically a state administrative process in which the public can participate. Please refer to the applicable state law for the requirements of that administrative process. You also may want to check the website of the relevant state environmental permitting agency for information on state-issued environmental permits.



may argue that those same permit terms are too lenient.<sup>17</sup> The issues raised in permit challenges before the Board vary greatly and may include arguments alleging that the permitting authority (also referred to as the “permit issuer”) failed to provide public notice and an opportunity to comment on the permit provisions, or that the permit provisions do not meet statutory or regulatory requirements and/or are not supported by the underlying administrative record.<sup>18</sup>

EPA regulations set forth certain threshold requirements that anyone interested in filing a permit appeal with the EAB must meet.<sup>19</sup> These threshold requirements are addressed below in Section III.C.2. EPA regulations also specify the deadline for filing a permit appeal with the EAB and the types of issues that may be appealed.<sup>20</sup> To initiate a permit appeal, you must file a petition for review with the EAB by the deadline established in the applicable regulations. Most permit appeals that come to the Board are governed by the regulations at 40 C.F.R. part 124, which require a petition for review to be filed with the Board within 30 days after the permit issuer serves notice of the final permitting decision.<sup>21</sup>

Under EPA regulations, the party challenging the permitting decision (the “Petitioner”) needs to explain why the Board should conclude that the permitting decision is based on a finding of fact or conclusion of law that is clearly erroneous, or why the permitting decision constitutes an abuse of discretion warranting Board review.<sup>22</sup> The EAB reviews the administrative record and the arguments made in written briefs and at oral argument, if one is held, and issues a final written decision.<sup>23</sup> For more detail on the typical steps that occur in an administrative permit appeal case, see Section III.C.

## **2. Enforcement Appeals**

An enforcement appeal is a challenge to a decision issued by an EPA Presiding Officer (who is either an Administrative Law Judge or a Regional Judicial Officer) in an administrative enforcement proceeding. Typically, an EPA office begins an administrative enforcement proceeding by filing a complaint alleging that a person or other entity violated an environmental law or regulation. The complaint generally proposes a monetary penalty for the violation(s) and, where necessary, seeks an order requiring the entity to take corrective action to remedy the violation(s) and come into compliance with the law or regulation.<sup>24</sup>

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<sup>17</sup> The party challenging the permit action is called the “Petitioner” and the permit issuer is the “Respondent.” When the permit issuer is an EPA Region, EAB decisions often refer to the permit issuer as “the Region” as opposed to “the Respondent.”

<sup>18</sup> An administrative record is a collection of documents on which the permit issuer based the final permitting decision. The administrative record includes, for example, the draft permit, any public comments on the draft permit, EPA’s responses to significant public comments (also known as the “response to comments document”), and the permit fact sheet.

<sup>19</sup> 40 C.F.R. § 124.19(a).

<sup>20</sup> *Id.* § 124.19(a)(3).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* § 124.19(a)(4)(i)(A)-(B).

<sup>23</sup> Final agency action occurs when the final permitting decision is issued by the Regional Administrator or delegate following a Board decision. *Id.* § 124.19(l)(2).

<sup>24</sup> *See id.* § 22.14(a) (content of complaint).

The EPA office initiating the enforcement action is called the “Complainant,” and the entity charged with violating the law is called the “Respondent.” For example, an enforcement complaint may allege that a company (Respondent) violated the Federal Insecticide, Fungicide, and Rodenticide Act by selling pesticides that do not meet labeling requirements. The alleged violator (Respondent) may dispute the charges in the complaint and/or the amount of the proposed penalty. Consistent with EPA’s Part 22 regulations, the Presiding Officer requires the parties to brief the issues and sometimes holds a hearing.<sup>25</sup> After considering the parties’ written arguments and any evidence introduced at a hearing, the Presiding Officer issues a decision, called the “Initial Decision,” resolving all outstanding issues in the proceeding.<sup>26</sup>

An Initial Decision can be challenged by either the Complainant (the EPA office) or the Respondent (the alleged violator) by filing an appeal with the EAB within 30 days after the Initial Decision was served.<sup>27</sup> For example, a Presiding Officer may find that the alleged violator did, in fact, violate the law, but may impose a penalty different than the one sought by the Complainant.<sup>28</sup> In this case, both the Complainant and the Respondent might appeal the Initial Decision to the EAB. In such an appeal, the Respondent could challenge the Presiding Officer’s findings and conclusions about liability for the violations at issue, the amount of the penalty, or both, and the Complainant could challenge the Presiding Officer’s findings related to the penalty. EPA regulations specify the deadline for filing an appeal with the EAB and the types of issues that may be appealed.<sup>29</sup>

The Board generally reviews factual findings and legal conclusions set forth in an Initial Decision “*de novo*,” which means that the EAB takes a fresh look at the findings and conclusions and determines whether to adopt, modify, or set them aside.<sup>30</sup> The EAB may, however, choose to defer, for example, to a Presiding Officer’s factual findings that are based on the testimony of witnesses, because the Presiding Officer had the opportunity to observe and evaluate the credibility of the witnesses first-hand. After its review of the matter, the EAB issues a final written decision. Section III.D below details the typical steps that occur in an administrative enforcement appeal.

If no one appeals an Initial Decision, the EAB has discretion to review the decision on its own initiative—which is referred to as “*sua sponte*” review.<sup>31</sup> The Board has exercised its *sua sponte* review authority where, for example, the penalty amount in the Initial Decision appeared inconsistent with the administrative record and relevant law.<sup>32</sup> The Board initiates *sua sponte* review of an Initial Decision by issuing an order notifying the parties and identifying next steps.<sup>33</sup>

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<sup>25</sup> See *id.* §§ 22.14, .15, .21, .26.

<sup>26</sup> *Id.* §§ 22.3, .27.

<sup>27</sup> *Id.* § 22.30(a)(1)(i).

<sup>28</sup> Under the regulations, the Presiding Officer may impose a different penalty than the one proposed by EPA, but if this occurs, the Initial Decision needs to provide the specific reasons for the increase or decrease and ensure consistency with the penalty criteria in the relevant law and applicable Agency penalty policy. *Id.* § 22.27(b).

<sup>29</sup> *Id.* § 22.30(a)(1), (c).

<sup>30</sup> *Id.* § 22.30(f).

<sup>31</sup> *Id.* §§ 22.27(c)(4), .30(b).

<sup>32</sup> See, e.g., *In re Peace Indus. Grp.*, 17 E.A.D. 348 (EAB 2016).

<sup>33</sup> 40 C.F.R. § 22.30(b).

If no one appeals the Initial Decision and the Board declines to exercise *sua sponte* review, the Initial Decision becomes a final EPA decision after the designated time period in the governing regulations, usually 45 days from the time the Initial Decision is served on the parties.<sup>34</sup>

### **3. Other Matters that Come to the Board**

The Board also has the authority to hear other types of matters including the following.

#### *Comprehensive Environmental Response, Compensation, and Liability Act Reimbursement Petitions*

The Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) authorizes EPA (and certain other federal agencies) to issue orders requiring a person or entity to clean up a property where hazardous substances have been released into the environment.<sup>35</sup> A recipient of a CERCLA cleanup order may petition the EAB to recover certain costs incurred as part of the cleanup by filing a petition for reimbursement. Significantly, a petition for reimbursement cannot be filed until the person challenging the cleanup order has fully complied with that order and the cleanup is complete.<sup>36</sup> CERCLA also requires that the party seeking reimbursement file the petition “within 60 days after completion of the required action.”<sup>37</sup>

The Board has issued a Standing Order regarding petitions for reimbursement, and that order incorporates the four prerequisites under CERCLA section 106(b) required for the Board to consider the petition.<sup>38</sup> Those prerequisites are that the party filing the petition for reimbursement: (1) demonstrate, with supporting evidence, that it complied with the cleanup order issued under CERCLA section 106(a), (2) demonstrate, with supporting evidence, that it completed the action required by the cleanup order, (3) document that it incurred costs in complying with the requirements of the cleanup order and what those costs were, and (4) timely submit the petition for reimbursement to the EAB.<sup>39</sup>

After considering a petition for reimbursement, the Board issues an order either granting or denying reimbursement.<sup>40</sup> If the Board issues an order granting reimbursement, the Board will request additional briefing to aid in its determination of the appropriate amount of reimbursement. Following that briefing and review of the record, the Board issues a final order determining reasonable costs and authorizing payment.

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<sup>34</sup> *Id.* § 22.27(c); *see also id.* § 22.27(d) (“Where a respondent fails to appeal an initial decision to the Environmental Appeals Board pursuant to § 22.30 and that initial decision becomes a final order pursuant to [40 C.F.R. § 22.27(c)], respondent waives its rights to judicial review.”).

<sup>35</sup> 42 U.S.C. § 9606(a).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*; Standing Order on Procedures for Petitions for Reimbursement Submitted Under Section 106(b)(2)(A) of the Comprehensive Environmental, Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9606(b)(2)(A) (EAB July 7, 2020) (available on the EAB website at [www.epa.gov/eab](http://www.epa.gov/eab) under “Standing Orders & Procedures”).

<sup>40</sup> Final orders denying reimbursement may be appealed to the appropriate federal district court within 30 days of receipt. *See* 42 U.S.C. § 9606(b)(2)(B).

If you are considering filing a petition for reimbursement with the Board, please refer to the EAB's Standing Order on Procedures for Petitions for Reimbursement Submitted Under Section 106(b)(2)(A) of the Comprehensive Environmental, Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9606(b)(2)(A) (EAB July 7, 2020) (available on the EAB website, [www.epa.gov/eab](http://www.epa.gov/eab), under "Standing Orders & Procedures").

#### *Clean Air Act Acid Rain Regulation Decisions*

The EAB also reviews certain appeals under the Clean Air Act's acid rain program. See the regulations set forth at [40 C.F.R. part 78](#) for more information.

#### *Pesticide Registration and Cancellation/Suspension Proceedings Under the Federal Insecticide, Fungicide, and Rodenticide Act*

The EAB reviews challenges to pesticide registration and cancellation or suspension proceedings under the Federal Insecticide, Fungicide, and Rodenticide Act. The EAB procedures for these types of appeals are outlined in the EAB Standing Order Governing Procedures for Registration-Related Appeals under the Federal Insecticide, Fungicide, and Rodenticide Act (EAB July 8, 2022) (available on the EAB website at [www.epa.gov/eab](http://www.epa.gov/eab) under "Standing Orders and Procedures").

#### *Equal Access to Justice Act*

The Equal Access to Justice Act allows a Respondent who prevails in an action brought by a federal agency to recover its legal fees and expenses unless the agency's position was substantially justified or if special circumstances would make an award unjust.<sup>41</sup> Where the Administrator is authorized to resolve claims under the Equal Access to Justice Act, the Administrator has delegated that authority to the Board.<sup>42</sup>

#### *Consent Agreement and Final Order Approval*

Sometimes, administrative enforcement cases are resolved through a voluntary agreement between the parties to settle claims. Where EPA and the alleged violator agree to settle the claims at issue in the enforcement complaint, the parties prepare a consent agreement and proposed final order reflecting the terms of that settlement (collectively known as a "CAFO"). The Board has authority to review and approve CAFOs arising out of administrative enforcement actions initiated by EPA Headquarters.<sup>43</sup>

### **B. Filing a Matter with the Board**

EPA's regulations set forth the procedures for filing an appeal or other matter with the Board. For most permit appeals, the rules governing appeals to the EAB are found in [40 C.F.R.](#)

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<sup>41</sup> 5 U.S.C. § 504(a)(1); 28 U.S.C. § 2412(d)(2)(A).

<sup>42</sup> 40 C.F.R. § 17.8; see generally *In re Bricks, Inc.*, 11 E.A.D. 796, 797 (EAB 2004) (reversing Administrative Law Judge's award of attorney's fees under the Equal Access to Justice Act, finding that EPA was substantially justified in bringing its complaint against the company), *pet. for review denied*, 426 F.3d 918 (7th Cir. 2005).

<sup>43</sup> Procedures for reviewing CAFOs are outlined in the EAB's Consent Agreement and Final Order Procedures document (available on the EAB website at [www.epa.gov/eab](http://www.epa.gov/eab) under "Standing Orders & Procedures").

[part 124](#). For most administrative enforcement appeals, the regulations are found in [40 C.F.R. part 22](#) and are commonly known as the “Consolidated Rules of Procedure,” or “CROP.” Links to these regulations can also be found on the EAB’s website at [www.epa.gov/eab](http://www.epa.gov/eab).

To participate effectively in a Board proceeding, you should read the specific statute (or statutes) and regulations that apply to your case. You should also consult the Board’s Standing Orders, which govern practice before the Board and are available on the EAB website.

All parties and other interested persons are encouraged to file documents with the Board by using the EAB’s Electronic Filing System (“e-Filing System”) which is accessible on the Board’s website at [www.epa.gov/eab](http://www.epa.gov/eab).<sup>44</sup> A document filed through the Board’s e-Filing System is deemed 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. Instructions for using the e-Filing System are available on the Board’s website under the “Electronic Filing” link. Pursuant to the Board’s Standing Orders Authorizing Electronic Filing, the use of the e-Filing System fulfills the signature requirements imposed by applicable regulations.<sup>45</sup> Further, registration is required to use the e-Filing System, and anyone planning to use the system is advised to allow sufficient time for registration. Questions regarding use of the e-Filing system may be directed to the Clerk of the Board by email at [Clerk\\_EAB@epa.gov](mailto:Clerk_EAB@epa.gov) or phone at 202-233-0122. Other technical questions regarding login and password issues may be directed to the EPA Help Desk at 1-866-411-4372, option 3.

Under the regulations, filing documents by U.S. mail or hand delivery or courier (including delivery by a commercial delivery service) is also permissible.<sup>46</sup> Documents sent through the U.S. Postal Service (except by U.S. Express Mail) to the Clerk of the Board are to be addressed to the EAB’s mailing address:

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

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<sup>44</sup> As explained at the “Electronic Filing” link on the Board’s website, sending a document directly to the Board via email, rather than through the Board’s Electronic Filing System, does not constitute electronic filing unless otherwise specified by the Board.

<sup>45</sup> Revised Order Authorizing Electronic Filing in Proceedings Before the Environmental Appeals Board Under 40 C.F.R. Part 22 (EAB Aug. 12, 2013); Revised Order Authorizing Electronic Filing in Proceedings Before the Environmental Appeals Board not Governed by 40 C.F.R. Part 22 (EAB Aug. 12, 2013) (both available on the EAB website at [www.epa.gov/eab](http://www.epa.gov/eab) under “Standing Orders & Procedures”); *see also* 40 C.F.R. § 124.19(i)(2)(i).

<sup>46</sup> The regulations authorize filing by facsimile (fax machine) in very limited circumstances and only for certain types of filings. *See* 40 C.F.R. §§ 124.19(i)(2) (allowing facsimile delivery of motions and responses to motions if no attachments are included), 22.5(a) (allowing EAB to authorize filing by facsimile subject to appropriate limitations and conditions).



Documents delivered in person by courier or otherwise (including delivery by U.S. Express Mail or a by commercial delivery service) are to be sent to the EAB's hand-delivery address:

Clerk of the Board  
U.S. Environmental Protection Agency  
Environmental Appeals Board  
WJC East Building  
1201 Constitution Avenue, N.W., Room 3332  
Washington, D.C. 20004

Under EPA regulations at 40 C.F.R. parts 22 and 124, a document is filed when it is *received* by the Clerk of the Board at the address specified for the particular method of delivery.<sup>47</sup> Thus, if a document is sent to the Board's mailing address, it is considered filed when the Clerk *receives* the document at the mailing address noted above, and if a document is sent to the Board's hand-delivery address, it is considered filed when the Clerk *receives* the document at the Board's hand-delivery address. A document is not considered timely if it is merely postmarked by the filing deadline.<sup>48</sup>

EPA regulations also require that all filings made to the EAB be served on (that is, sent to) all other parties to the appeal.<sup>49</sup> Service requirements are outlined in EPA's regulations and discussed briefly in the sections below. The Board has authorized the use of email to fulfill service obligations.<sup>50</sup>

Finally, any document uploaded to the Board's e-Filing System will be available to the public online. As explained in the Board's e-Filing procedures, filers should not upload documents containing material claimed to be confidential business information or private information the disclosure of which would constitute an unwarranted invasion of a person's privacy, such as social security numbers, birth dates, medical records, or personal financial information.<sup>51</sup> Please see the Board's website for information on how to file materials containing such information.

If you have general, non-case-specific questions, such as technical questions on how to e-File a document, contact the Clerk of the Board. As noted above, the EAB judges and staff,

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<sup>47</sup> *E.g.*, 40 C.F.R. §§ 22.5(a)(1), 124.19(i).

<sup>48</sup> 40 C.F.R. §§ 22.5(a)(1), 124.19(i). However, pursuant to the Board's Standing Order, CERCLA Section 106(b) petitions for reimbursement must be postmarked no later than the 60th day after the date of completion of the required cleanup action. Standing Order on Procedures for Petitions for Reimbursement Submitted Under Section 106(b)(2)(A) of the Comprehensive Environmental, Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9606(b)(2)(A) (EAB July 7, 2020).

<sup>49</sup> *E.g.*, 40 C.F.R. §§ 22.5(b)(1)-(2), 124.19(i)(3)(ii).

<sup>50</sup> Revised Order Authorizing Electronic Service of Documents in Permit and Enforcement Appeals (EAB Sept. 21, 2020) (available on the EAB website at [www.epa.gov/eab](http://www.epa.gov/eab) under "Standing Orders & Procedures").

<sup>51</sup> See Revised Order Authorizing Electronic Filing in Proceedings Before the Environmental Appeals Board under 40 C.F.R. Part 22 (EAB Aug. 12, 2013) and Revised Order Authorizing Electronic Filing in Proceedings Before the Environmental Appeals Board not Governed by 40 C.F.R. Part 22 (EAB Aug. 12, 2013) (both available on the EAB website at [www.epa.gov/eab](http://www.epa.gov/eab) under "Standing Orders & Procedures").

including the Clerk of the Board, do not engage in *ex parte* communications (one-sided communications) about the merits or substance of a case with any party to an appeal.

### **C. Overview of the Steps in the Administrative Permit Appeal Process**

A permit appeal involves a challenge to a final permitting decision, such as the issuance or modification of an environmental permit, by a permitting authority.<sup>52</sup> This section provides an overview of the administrative permitting process, discusses important requirements to meet prior to filing an appeal with the EAB, and details the steps that typically occur in a permit appeal before the EAB.

#### **1. The Environmental Protection Agency's Administrative Permitting Process**

The environmental laws that EPA administers address a wide range of threats to human health and the environment.<sup>53</sup> For example, certain environmental laws require a permit or license before a person or entity—such as an individual, company, or municipality—may release or discharge pollutants into the environment. Under these laws, a person must apply for and obtain a permit (or license) that authorizes the release and specifies the amount of a pollutant that can be released into the environment and the conditions under which such release can occur.<sup>54</sup>

The permitting process begins when a person or entity files a permit application seeking authorization to release or discharge pollutants in a particular manner. The permit applicant (Permittee) provides information with its permit application detailing, among other things, information about the site or source to be permitted, including the relevant processes and the type and quantity of the pollutants to be released or discharged.

The permitting authority, typically an EPA regional office,<sup>55</sup> issues a draft permit and opens a public comment period. When it issues the draft permit, the permitting authority makes available certain background documents. For example, under EPA's Part 124 regulations, the permitting authority is required to prepare either a statement of basis which briefly describes the conditions of the draft permit and their basis, or a fact sheet which, among other things, sets forth the factual background and technical and legal basis for the draft permit terms. The permitting authority also makes available the administrative record supporting the draft permit.<sup>56</sup> The permitting authority may schedule a public hearing.<sup>57</sup> Anyone can submit comments on the draft

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<sup>52</sup> See 40 C.F.R. §§ 124.15, .19(a).

<sup>53</sup> This section provides a general description of a typical permitting process that is not intended to encompass all statutory and regulatory requirements that may apply to a specific permit.

<sup>54</sup> *E.g.*, Clean Water Act §§ 301, 402, 42 U.S.C. §§ 1311, 1342.

<sup>55</sup> In other instances, the permitting authority is a state, local, or Tribal body that has been delegated authority by EPA to issue federal environmental permits. As discussed above, the EAB is authorized to hear appeals of delegated federal permitting decisions. In some circumstances, the permitting authority is an EPA headquarters office.

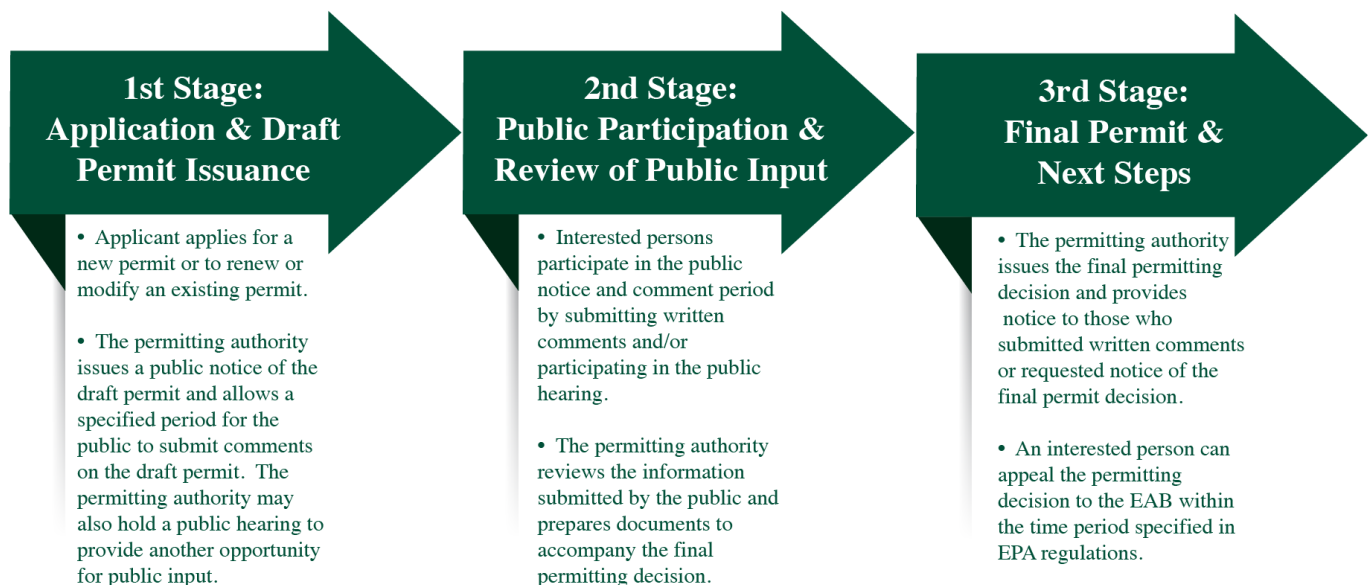
<sup>56</sup> 40 C.F.R. §§ 124.6-.10.

<sup>57</sup> Under the Part 124 regulations, the permit issuer *shall* hold a public hearing whenever it finds “a significant degree of public interest” in the draft permit and *may* hold a public hearing in its discretion, for example, when it finds a hearing “might clarify one or more issues involved in the permit decision.” *Id.* § 124.12(a)(1), (2). For draft

permit during the comment period, and anyone can attend and speak at a public hearing if one is scheduled. Comments on the draft permit should be as specific as possible, and typically only those issues that were raised during the comment period (or at a public hearing) may be raised on appeal to the Board.<sup>58</sup>

After the public comment period ends and the permitting authority has considered the feedback received and made any revisions to the draft permit, as warranted, the permitting authority issues the final permit with a response to comments document that responds to significant comments received on the draft permit.<sup>59</sup> As the Board has repeatedly held, the response to comments document should contain the permit issuer’s final rationale for its decisions, which “ensures that interested parties have an opportunity to adequately prepare a petition for review.”<sup>60</sup> At the time a final permit is issued, the permitting authority, in accordance with the governing regulations, provides notice of that decision to interested parties that participated in the permitting process.<sup>61</sup> The administrative record for the final permit includes the documents and materials on which the permit issuer based the final permitting decision.<sup>62</sup>

## General Steps in an EPA Administrative Permitting Process Where Permit Applicant Applies for a New Permit or Seeks to Renew or Modify An Existing Permit



permits issued under the Resource Conservation and Recovery Act only, the permit issuer *shall* hold a public hearing whenever it “receives written notice of opposition to a draft permit and a request for a hearing within 45 days of public notice [of issuance of the draft permit].” *Id.* § 124.12(a)(3).

<sup>58</sup> *Id.* §§ 124.13, .19(a)(4)(ii). The issue being appealed to the Board need not have been raised by the person who files the appeal as long as it was raised by someone during the comment period.

<sup>59</sup> *Id.* §§ 124.15, .17.

<sup>60</sup> *In re Springfield Water & Sewer Comm’n*, 18 E.A.D. 430, 491 (EAB 2021) (quoting *In re Indeck-Elwood, L.L.C.*, 13 E.A.D. 126, 147 (EAB 2006)).

<sup>61</sup> 40 C.F.R. § 124.15.

<sup>62</sup> *Id.* § 124.18.

## **2. Prerequisites for Participating in a Permit Appeal Before the Board**

The Board hears permit appeals where EPA serves as the permitting authority. As discussed above, the Board also hears appeals of permitting decisions by state, local, or Tribal authorities that have been delegated the authority to issue federal environmental permits. In these circumstances, once the permitting authority has issued a final permitting decision, such as a denial of a permit application or issuance of a permit, an interested person can seek to challenge that decision by filing a petition for review with the EAB.

Certain prerequisites need to be met in order to appeal a permitting decision to the EAB.<sup>63</sup> With limited exceptions, only those who participated in the permitting process by submitting comments on the draft permit or participating in a public hearing on the draft permit may appeal the permitting decision.<sup>64</sup> Participating during the permitting process is critically important because doing so not only preserves your opportunity to file an appeal with the EAB, it also allows you to raise any concerns or objections regarding the draft permit directly to the permit issuer, who can then determine whether any modifications to the permit terms are warranted.

The regulatory requirement that you participate during the permitting stage in order to appeal also ensures that only those who have a sufficient interest in the permitting action may appeal. A limited exception to this requirement applies when a party demonstrates that the terms of the final permit have changed from those in the draft permit.<sup>65</sup> In this situation, you would need to explain why the issues being raised on appeal to the Board were not reasonably ascertainable during the comment period and, as such, could not have been raised during the public comment period.<sup>66</sup>

To challenge a permitting decision, you need to ensure the specific issues you intend to appeal to the EAB were first raised during the comment period, or at a public hearing on the draft permit, either by you or someone else.<sup>67</sup> The petition for review should identify the specific aspects of the permitting decision being challenged.<sup>68</sup> The EPA regulations further require that you set forth clearly in the petition for review, with legal and factual support, your arguments for why the Board should review the permitting decision.<sup>69</sup> The petition needs to explain why the Board should conclude that the permitting decision is based on a finding of fact or conclusion of law that is clearly erroneous, or why the permitting decision constitutes an abuse of discretion warranting Board review.<sup>70</sup> Further, if the petition raises an issue that the permit issuer addressed in its response to comments document, the petition must explain why the

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<sup>63</sup> See *id.* § 124.19(a).

<sup>64</sup> *Id.* § 124.19(a)(2).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* § 124.19(a)(2), (4)(ii). The Board has also allowed challenges to permitting decisions based on allegations of procedural error, such as a permitting authority's alleged deficiencies in satisfying public notice requirements. See, e.g., *In re Russell City Energy Ctr.*, 14 E.A.D. 159, 177-78 (EAB 2008) (remanding a Prevention of Significant Deterioration permit due to permitting authority's noncompliance with the 40 C.F.R. § 124.10 requirements to provide adequate notice of issuance of draft permit and the opportunity to comment).

<sup>67</sup> 40 C.F.R. § 124.19(a)(4)(ii).

<sup>68</sup> *Id.* § 124.19(a)(4)(i).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* § 124.19(a)(4)(i)(A)-(B).

permit issuer's response to the comment was clearly erroneous or otherwise warrants review.<sup>71</sup> For permit challenges based on technical issues, the Board generally expects the party challenging the permitting decision to reference "studies, reports, or other materials that provide relevant, detailed, and specific facts and data about permitting matters that were not adequately considered by a permit issuer."<sup>72</sup>

### **3. Key Steps That Occur in a Permit Appeal to the Board**

Below is a summary of the typical steps that occur in an administrative permit appeal to the EAB. Most of the permit appeals that come to the Board are governed by the regulations at 40 C.F.R. part 124, which set forth requirements relevant to each step of the appeal process. The Part 124 regulations govern permits issued under the Resource Conservation and Recovery Act,<sup>73</sup> the Underground Injection Control program under the Safe Drinking Water Act, Prevention of Significant Deterioration permits under the Clean Air Act, and National Pollutant Discharge Elimination System permits under the Clean Water Act.<sup>74</sup>

## **Steps in an Administrative Permit Appeal**

1. A member of the public files and serves a petition for review.
2. Permit issuer and other participants file and serve response briefs.
3. Petitioner files and serves reply brief, and further briefing is completed (if requested).
4. Participants file motions as needed.
5. Oral argument may occur.
6. EAB deliberates and issues a final decision.

Although this section provides a general overview of the steps involved in a permit appeal, you should refer to the regulations for the specific requirements that must be met when filing a permit appeal with the Board. Section 124.19 of the regulations is a critical provision, as it sets forth who can file a petition for review challenging a permitting decision, when the

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<sup>71</sup> *Id.* § 124.19(a)(4)(ii).

<sup>72</sup> *In re Env'tl. Disposal Sys., Inc.*, 12 E.A.D. 254, 291 (EAB 2005); *see also In re City of Keene*, 18 E.A.D. 720, 745 (EAB 2022).

<sup>73</sup> Although the Part 124 regulations govern most permitting decisions issued under the Resource Conservation and Recovery Act, the Consolidated Rules of Practice ("CROP"), 40 C.F.R. pt. 22, apply to others, including the termination of a permit under section 3008(a)(3) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(a)(3).

<sup>74</sup> 40 C.F.R. § 124.1(a). EPA issues both individual and general National Pollutant Discharge Elimination System permits under the Clean Water Act. *See generally* Clean Water Act § 402, 42 U.S.C. § 1342; 40 C.F.R. pt. 122. An individual permit is issued to a specific discharger, whereas a general permit is written to cover multiple dischargers with, for example, similar operations and types of discharges. The Board hears challenges to individual, but not general, National Pollutant Discharge Elimination System permits. *Id.* § 124.19(o) (providing that challenges to the conditions in a National Pollutant Discharge Elimination System general permit can be filed in court, not with the EAB).



petition must be filed, the required content of the petition, and what additional briefs can be filed.

The EAB decides the merits of the permit appeal based on the parties' filings (e.g., petition for review, permit issuer's response, and reply brief) and its review of the administrative record. The EAB also considers briefs submitted by amicus curiae.<sup>75</sup> If the EAB determines that additional briefing is necessary in a case, it may order the parties to file such briefs.<sup>76</sup> The Board also may hear oral argument in a case, either in response to a request from a party or on its own initiative.<sup>77</sup>

### *Step 1: A Member of the Public Files and Serves a Petition for Review*

An individual or entity challenging a permitting decision (known as the "Petitioner") begins the appeal process by filing a petition for review with the EAB and serving copies of the petition for review. A petitioner should raise all issues and challenges to the permitting decision in the petition for review.<sup>78</sup> Under the Part 124 regulations, new issues and arguments cannot be raised in a reply brief, see step 3 below, and thus it is critical that all issues for resolution be raised in the petition for review.<sup>79</sup>

### *Checklist of Items to Consider When Preparing and Submitting a Petition for Review*

- ☐ What is the deadline for filing a petition for review with the EAB?
  - The petition for review must be filed with the EAB within the timeline established by the applicable statute and regulation.<sup>80</sup>
  - For permits challenged under the Part 124 regulations, a petition for review is due to the EAB within 30 days after the permit issuer serves notice of the final permitting decision.<sup>81</sup>
  - Under the Part 124 regulations, anyone who participates in a permit proceeding, either by filing written comments or

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<sup>75</sup> *Id.* § 124.19(e) ("Any interested person may file an amicus brief in any appeal pending before the Environmental Appeals Board under [section 124.19]").

<sup>76</sup> *Id.* § 124.19(n).

<sup>77</sup> *Id.* § 124.19(h).

<sup>78</sup> *Id.* § 124.19(a)(4).

<sup>79</sup> *Id.* § 124.19(a)(4), (c)(2).

<sup>80</sup> Deadlines for filing a petition for review (and other materials) with the Board are primarily set forth in EPA's regulations. *Id.* § 124.19(a)(3). CERCLA and the Federal Insecticide, Rodenticide, and Fungicide Act also include requirements related to filing challenges to certain actions that fall within the Board's delegated authority. *See generally* CERCLA § 106(b)(2)(a), 42 U.S.C. § 9606(b)(2)(A); Federal Insecticide, Rodenticide, and Fungicide Act § 6, 7 U.S.C. § 136d.

<sup>81</sup> 40 C.F.R. § 124.19(a)(3).

participating in a hearing, will be considered an interested party and receive notice of the final permitting decision.<sup>82</sup>

- The Part 124 regulations include specific rules for how to calculate the 30-day time period depending on how a document was served.<sup>83</sup> For example, when a party is served by U.S. mail, the regulations provide that an additional three (3) days shall be added to the prescribed regulatory timeframe for filing responsive documents with the Board.<sup>84</sup> The regulations further provide: “The prescribed period for acting after being served is not expanded by 3 days when service is by personal delivery, facsimile, or email.”<sup>85</sup> Further, if the 30-day period to file the petition for review falls on a weekend or legal holiday, the due date, under the regulations, would be the next working day.<sup>86</sup>
- The EAB requires strict adherence to the filing deadlines in the regulations. The filing requirements for a petition for review serve an important role as they help bring repose and certainty to the administrative process. The Board will not excuse a late-filed petition for review unless it finds special circumstances justify the untimeliness.<sup>87</sup>

☐ What items should be addressed in the petition for review?

- Under the regulations, a party challenging the permitting decision (Petitioner) must demonstrate in the petition for review that they (1) participated in the draft permit’s public comment period by, for example, submitting written comments or participating in a public hearing, and (2) that the issues they are now challenging on appeal were raised during the public comment period.<sup>88</sup> The regulations further require the Petitioner to demonstrate, by providing specific

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<sup>82</sup> *Id.* § 124.15(a). Part 124 also sets forth requirements and filing deadlines to facilitate the expeditious resolution of time-sensitive Prevention of Significant Deterioration and New Source Review permits under the Clean Air Act. *See, e.g., id.* § 124.19(b)(a), (c)(1), (e), (h) (setting forth requirements specific to the filing of response, reply and amicus briefs and the presumption against oral argument for Prevention of Significant Deterioration and other new source permit appeals). If your appeal involves this type of permit, please refer to the Part 124 regulations and the Board’s Revised Order Governing Petitions for Review of Clean Air Act New Source Review Permits (Sept. 21, 2020) (available on the EAB website at [www.epa.gov/eab](http://www.epa.gov/eab) under “Standing Orders & Procedures”).

<sup>83</sup> *Id.* § 124.20(d).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> 40 C.F.R. § 124.20(c).

<sup>87</sup> *See, e.g., In re Avon Custom Mixing Servs., Inc.*, 10 E.A.D. 700, 703 n.6 (EAB 2002) (special circumstances found when the petition arrived late due to mail being rerouted in response to anthrax contamination concerns).

<sup>88</sup> 40 C.F.R. § 124.19(a)(2), (4).

citations to the administrative record, that each issue being raised in the petition was raised previously.<sup>89</sup>

- As discussed above, there are limited exceptions to the requirement that a party challenging a permitting decision on appeal participate in the administrative permit proceeding. If a Petitioner seeks to raise an issue that was not raised previously to the permit issuer, the petition for review has to explain why such issues were not required to be raised during the public comment period.<sup>90</sup>
  - The Part 124 regulations require the Petitioner to provide legal and factual support for their position as to why the permit should be reviewed.<sup>91</sup> The regulations also require that the petition for review demonstrate why the factual or legal basis underlying the challenged provisions is clearly erroneous, or why the permitting decision constitutes an abuse of discretion warranting Board review.<sup>92</sup> Further, the regulations require that where the permit issuer responded to an issue in the response to comments document, the petition must explain why the permit issuer's response to the comment was clearly erroneous or otherwise warrants review by the EAB.<sup>93</sup> It is not sufficient to simply repeat arguments made in public comments without addressing how the permit issuer responded to those arguments and explaining why that response is clearly erroneous or otherwise warrants review.<sup>94</sup>
- ☐ Beyond sending the petition for review to the Clerk of the Board, who else should get a copy?
- The relevant permitting regulations contain certain service requirements which require the Petitioner to serve (i.e., send) the permit issuer and permit applicant (or permittee, unless the Petitioner is the permittee) a copy of the petition for review.<sup>95</sup>
  - Permissible methods of service include email, U.S. mail, and any reliable commercial delivery service.
  - The regulations also call for the party filing the petition for review to provide proof of service by appending a "certificate of service" to the

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<sup>89</sup> *Id.* § 124.19(a)(4)(ii).

<sup>90</sup> *Id.* ("For each issue raised that was not raised previously, the petition must explain why such issues were not required to be raised during the public comment period as provided in § 124.13.").

<sup>91</sup> *Id.* § 124.19(a)(4)(i).

<sup>92</sup> *Id.* § 124.19(a)(4)(i)(A)-(B).

<sup>93</sup> *Id.* § 124.19(a)(4)(i)-(ii).

<sup>94</sup> *Id.* § 124.19(a)(4)(ii).

<sup>95</sup> *Id.* § 124.19(i)(3)(ii).

petition for review.<sup>96</sup> This certificate identifies how and on what date you sent the document to the other party(ies). See the Appendix to this Guide for a sample certificate of service.

- ☐ What other things should you consider as you prepare your petition for review?
  - Have you met the prerequisites for filing a petition for review outlined above?
  - Have you reviewed the relevant regulations, including the content and length requirements for a petition for review?
  - Have you reviewed the requirements for filing documents with the EAB? The Board encourages parties to file documents using the Board's Electronic Filing (e-Filing) System. See the EAB website for more information on electronic filing.

### *Step 2: Permit Issuer and Other Participants File and Serve Response Briefs*

Once the petition for review has been filed and an appeal number designated by the Clerk of the Board, the Board uses a neutral assignment system to assign the case to a panel of three EAB judges. The permit issuer then files a response brief that responds to the issues raised in the petition for review. The permit issuer is also responsible for filing the certified index to the administrative record, which is a list of the documents upon which the permit issuer relied in making its final permitting decision, and the relevant portions of the administrative record, such as the response to comments document and final permit.<sup>97</sup> Once filed, the petition for review, response brief, certified index, and relevant portions of the administrative record filed with the Board are available on the EAB's website, [www.epa.gov/eab](http://www.epa.gov/eab).<sup>98</sup> When an EPA Region is the permit issuer, the administrative record, or portions thereof, are often also available on the Region's website.

In those situations where the Permittee is not the Petitioner and wishes to participate in the appeal process, the Permittee may file a notice of appearance and response brief with the Board.<sup>99</sup> A state or Tribal authority where the permitted facility is located or proposed to be located can also participate by filing a notice of appearance and response brief.<sup>100</sup>

Finally, any interested person or party—known as an “amicus curiae”—may file a response brief (referred to as an amicus brief). Under the Part 124 regulations, in most permit

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<sup>96</sup> *Id.* § 124.19(i)(4).

<sup>97</sup> *Id.* § 124.19(b). For appeals of a Prevention of Significant Deterioration or New Source Review permit issued under the Clean Air Act, the response brief and certified index are due within 21 days after service of the petition for review. *Id.* For all other Part 124 permit appeals, the response brief and certified index are due within 30 days after service of the petition. *Id.*

<sup>98</sup> Available on the EAB website at [www.epa.gov/eab](http://www.epa.gov/eab) under “EAB Dockets” at “Active Dockets.”

<sup>99</sup> 40 C.F.R. § 124.19(b)(3).

<sup>100</sup> *Id.* § 124.19(b)(4).

appeals, the deadline for filing an amicus brief is 15 days after the permit issuer files its response brief.<sup>101</sup>

### *Step 3: Petitioner Files and Serves Reply Brief and Further Briefing is Completed (if requested)*

After the response briefs have been filed, the Petitioner usually has the option to file a reply brief to respond to arguments made in the response briefs. In Prevention of Significant Deterioration permit appeals, the regulations provide that the Petitioner must request permission to file a reply brief and make a showing as to why the brief is needed, but in other permit appeals the Petitioner may file a reply brief without requesting permission.<sup>102</sup> A Petitioner cannot raise new issues or arguments in their reply brief, so it is important to ensure all issues and arguments are raised in the petition for review.<sup>103</sup> In some cases, the EAB may order additional briefing where it decides that further development of specific issues or arguments in the appeal would help the Board decide the case.<sup>104</sup>

### *Step 4: Participants File Motions (as needed)*

During the appeal process, any party can file a motion seeking an order for specific relief.<sup>105</sup> For example, a party may file a motion to request more time to file a brief or to seek a stay of the case.

The Part 124 regulations also provide specific requirements concerning the filing of motions. One important requirement is that before filing a motion, a party must contact the other party or parties in the case to ask whether they oppose the motion.<sup>106</sup> The motion should (1) indicate that the moving party reached out to all other parties to identify their positions on the motion, and (2) specify whether the other parties concur with or object to the motion.<sup>107</sup> See Appendix for template motion for extension of time. Under the Part 124 regulations, any party may file a response within 15 days after service of the motion.<sup>108</sup> The regulations further provide that the party that filed the motion may reply within 10 days after service of the response.<sup>109</sup> The Board will consider the motion and issue an order in response.<sup>110</sup>

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<sup>101</sup> *Id.* § 124.19(e). Downstream states that are affected by discharges made by a Permittee in another state can file amicus briefs with the Board. See *In re Springfield Water & Sewer Comm'n*, 18 E.A.D. 430, 436 (EAB 2021) (Connecticut filed amicus briefs opposing the petition for review challenging a permit issued to a facility in Massachusetts).

<sup>102</sup> *Id.* § 124.19(c)(1).

<sup>103</sup> *Id.* § 124.19(a)(4), (c)(2).

<sup>104</sup> *Id.* § 124.19(n).

<sup>105</sup> *Id.* § 124.19(f).

<sup>106</sup> *Id.* § 124.19(f)(2).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* § 124.19(f)(3).

<sup>109</sup> *Id.* § 124.19(f)(4).

<sup>110</sup> Under the Part 124 regulations, the Board can act at any time on a motion for a procedural order, such as a motion for extension of time, without awaiting a response. *Id.* § 124.19(f)(6).



### *Step 5: Oral Argument May Occur*

Any party can request in their substantive brief (petition for review or response brief), that the EAB hold an oral argument.<sup>111</sup> The EAB has the discretion to grant or deny the request and can schedule oral argument on its own initiative even if no party requests it.<sup>112</sup> Oral argument is typically held after the briefing of the case has been completed (that is, after the petition for review, response brief, and reply brief (if applicable) have been filed). As set forth in EPA’s regulations, there is a presumption against oral argument in Prevention of Significant Deterioration permit cases because of the statutory deadline for issuing a final decision.<sup>113</sup>

At oral argument, the EAB judges will ask questions to help with the Board’s evaluation of the case. Any party or member of the public interested in attending an oral argument, in person or virtually, who requires an accommodation due to a disability should notify the Clerk of the Board at least one week prior to oral argument. The Clerk of the Board can be reached by emailing [Clerk\\_EAB@epa.gov](mailto:Clerk_EAB@epa.gov) or phone at 202-233-0122. Additional information about oral argument is available on the EAB website, [www.epa.gov/eab](http://www.epa.gov/eab), under “Frequently Asked Questions.”

### *Step 6: EAB Deliberates and Issues a Final Decision*

The EAB reviews the permit issuer’s decision under the legal standard set forth in the relevant regulations. For permits governed by the regulations at 40 C.F.R. part 124, the EAB evaluates whether the underlying permitting decision is based on a finding of fact or conclusion of law that is clearly erroneous or an abuse of discretion warranting Board review.<sup>114</sup> The EAB may decide to (1) issue an order denying review of the petition for review, or (2) remand (i.e., send back for further action) the permit or portions of the permit to the permit issuer and require the permit issuer to correct the legal error, whether that error is procedural or substantive.<sup>115</sup> An example of a procedural error would be the permit issuer’s failure to provide the public an opportunity to comment as required by the statute or regulations.

Once the EAB reviews the briefs submitted by the parties, relevant documents in the administrative record, and transcript from the oral argument (if applicable), it will issue a written decision (or order). Once the EAB issues that decision, consistent with the Part 124 regulations, it serves a copy of the decision on each party in the case by, for example, email, U.S. mail, or any reliable commercial delivery service.<sup>116</sup> EAB decisions are available on the EAB website at

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<sup>111</sup> *Id.* § 124.19(h).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* § 124.19(a)(4)(i).

<sup>115</sup> In considering whether to grant or deny a petition for review, the Board is guided by the preamble to the regulations authorizing appeals under Part 124, in which the Agency stated that the Board’s power to grant review “should be only sparingly exercised,” and that “most permit conditions should be finally determined at the [permit issuer’s] level.” Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *see, e.g., In re City of Keene*, 18 E.A.D. 720, 723 (EAB 2022) (setting forth principles of Board review in case challenging provisions of a Clean Water Act National Pollutant Discharge Elimination System permit).

<sup>116</sup> *Id.* § 124.19(i)(3)(iii).

[www.epa.gov/eab](http://www.epa.gov/eab). They are also available through widely used electronic databases. The “EAB Dockets” portion of the EAB’s website also includes the filings for cases closed after January 1, 2006, including portions of the administrative record filed with the Board.

## Summary of Permit Appeal Process before the EAB

### 1st Stage: Filings and Motions

- The challenger, known as Petitioner, files a petition for review.
- The permit issuer files a response brief. If the Permittee is not the Petitioner, Permittee can file a notice of appearance and response brief if it chooses. Other interested parties, like amicus curiae, can also file response briefs.
- Parties file motions, as needed.
- Petitioner may file a reply brief to respond to the response brief(s).

### 2nd Stage: Oral Argument & Deliberations

- Parties can include a request for oral argument in their substantive briefs.
- If the EAB decides to hold oral argument, it issues a scheduling order.
- Oral argument is held.
- The EAB panel deliberates the issues.

### 3rd Stage: EAB Decision

- The EAB issues a final decision
- Parties may file a motion for reconsideration or clarification.

Following issuance of the Board’s decision, any party may, within 10 days after service of that decision, file a motion with the Board for reconsideration or clarification of its decision. The Part 124 regulations include content requirements for such motions.<sup>117</sup> For example, if a party files a motion for reconsideration of an EAB permit appeal decision, such a motion should identify the matters claimed to be erroneously decided and the nature of the alleged errors.<sup>118</sup> A party should not regard a motion for reconsideration as an opportunity to reargue the case in a more convincing fashion.<sup>119</sup> Under the regulations, motions for clarification must describe with

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<sup>117</sup> *Id.* § 124.19(m).

<sup>118</sup> *Id.*

<sup>119</sup> See *In re Town of Newmarket Wastewater Plant*, NPDES Appeal No. 12-05, at 1-2 (EAB Jan. 7, 2014) (Order Denying Motion for Reconsideration); see also *In re City of Taunton Dep’t of Pub. Works*, NPDES Appeal No. 15-08, at 1-2 (EAB June 16, 2016) (Order Denying Motion for Reconsideration).

specificity the portion of the decision for which clarification is sought and the reason a clarification is needed.<sup>120</sup> If no motions for reconsideration or clarification are filed and/or once such motions are decided, the permitting authority (often the EPA Regional Administrator or their delegate) will take appropriate next steps.<sup>121</sup> This process could include revisions to the permit or other procedural steps if any portion of the permit was remanded by the EAB. The Board's decision becomes part of the administrative record for the underlying EPA final action.

#### **D. Overview of the Steps in the Administrative Enforcement Appeal Process**

##### **1. The Environmental Protection Agency's Administrative Enforcement Process**

As discussed more fully above in Section III.A.2, an administrative enforcement action is initiated by an EPA office filing a complaint against a person, corporation, governmental body, or other organization that is alleged to have violated an environmental law or regulation. The complaint generally proposes a monetary penalty for the alleged violation and sometimes requires the alleged violator to take action to remedy the violation. An EPA Presiding Officer (either an Administrative Law Judge or a Regional Judicial Officer) resolves the administrative enforcement matter in the first instance by issuing an Initial Decision.<sup>122</sup> That decision can then be appealed to the EAB.<sup>123</sup> Below are the typical steps that occur in an administrative enforcement appeal to the EAB.

Parties may challenge an Initial Decision in an administrative enforcement case for different reasons. For example, they may dispute whether a violation of the law occurred or whether the relief sought is appropriate.<sup>124</sup>

##### **2. Key Steps That Occur in an Enforcement Appeal to the Board**

The regulations that apply to most administrative enforcement appeals, the "Consolidated Rules of Procedure" or "CROP," are found in 40 C.F.R. part 22. Although this section provides a general overview of the steps involved in an administrative enforcement appeal, you should refer to the regulations for the specific requirements that must be met when filing an administrative enforcement appeal with the Board.

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<sup>120</sup> 40 C.F.R. § 124.19(m).

<sup>121</sup> *Id.* § 124.19(l).

<sup>122</sup> *Id.* § 22.27(a).

<sup>123</sup> *Id.* § 22.30(a)(1).

<sup>124</sup> The regulations at 40 C.F.R. part 22 also allow for "interlocutory appeals," which are appeals taken to the EAB before the Administrative Law Judge or Regional Hearing Officer issues the Initial Decision. The regulations provide specific timing and other requirements for interlocutory appeals. *See id.* § 22.29.

## Steps in an Administrative Enforcement Appeal

1. Appellant files and serves a notice of appeal and appellate brief.
2. Participants file and serve response briefs.
3. Participants file motions as needed.
4. Oral argument may occur.
5. EAB deliberates and issues a final decision.

### *Step 1: Appellant Files and Serves a Notice of Appeal and Appellate Brief*

The party challenging the Initial Decision and filing the appeal (known as the Appellant) can be either the person against whom the enforcement proceeding was brought (the Respondent), or the EPA office that filed the enforcement complaint. The Appellant initiates an administrative enforcement appeal by filing a notice of appeal and appellate brief with the EAB and serving copies of these documents on the other parties in the case.

Section 22.30 of the regulations is a critical provision, as it sets forth who can file a notice of appeal and appellate brief, when that notice of appeal and appellate brief are to be filed, what the required content is, and what additional briefs can be filed in the matter.

### *Checklist of Items to Consider When Preparing and Submitting a Notice of Appeal and Appellate Brief*

- ☐ What is the deadline for filing a notice of appeal and appellate brief with the EAB?
  - Under the Part 22 regulations, the notice of appeal and appellate brief are to be filed with the EAB within 30 days after the date the Initial Decision is served.<sup>125</sup>
  - The Part 22 regulations include specific rules for how to calculate the 30-day time period in which to file the administrative enforcement appeal, and that calculation

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<sup>125</sup> *Id.* § 22.30(a)(1)(i).

depends on how the Initial Decision was served on the parties (e.g., service by email versus first class mail).<sup>126</sup>

- For example, where the Initial Decision is served on all parties by email, under the Part 22 regulations, the notice of appeal and appellate brief are due 30 days thereafter. Where, by contrast, the Initial Decision is served by first class mail, the parties have an additional three (3) days (or a total of 33 days from the date of service) to file the notice of appeal and appellate brief with the EAB.<sup>127</sup> Further, where the filing deadline falls on a weekend or federal holiday, the due date for the notice of appeal and appellate brief, under the regulations, is the next business day.<sup>128</sup>
- The Board encourages parties to file documents using the Board's Electronic Filing (e-Filing) system. See instructions for electronic filing on the EAB's website.<sup>129</sup>
- If you elect to send your filing by U.S. Mail or deliver it by hand, courier, or commercial delivery service, it is important to remember that the regulations require the notice of appeal and appellate brief to be *received* by the Clerk of the EAB by the regulatory filing deadline.<sup>130</sup>
- If a timely notice of appeal is filed by a party, any other party may also file a notice of appeal and accompanying appellate brief (also referred to as a "cross-appeal") on any issue within 20 days after the date on which the first notice of appeal was filed.<sup>131</sup>
- The EAB requires strict adherence to the filing deadlines in the regulations. The filing requirements help bring repose and certainty to the administrative process. The EAB will not excuse a late-filed notice of appeal and appellate brief unless it finds special circumstances justify the untimeliness.<sup>132</sup>

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<sup>126</sup> *Id.* § 22.7(c) ("Where a document is served by U.S. mail, EPA internal mail, or commercial delivery service, including overnight or same-day delivery, 3 days shall be added to the time allowed by these Consolidated Rules of Practice for the filing of a responsive document.").

<sup>127</sup> *Id.* §§ 22.30(a)(1)(i), .7(c).

<sup>128</sup> *Id.* § 22.7(a).

<sup>129</sup> See Revised Order Authorizing Electronic Filing in Proceedings Before the Environmental Appeals Board Under 40 C.F.R. Part 22 (EAB Aug. 12, 2013) (available on the EAB website at [www.epa.gov/eab](http://www.epa.gov/eab) under "Standing Orders & Procedures").

<sup>130</sup> 40 C.F.R. § 22.5(a)(1).

<sup>131</sup> *Id.* § 22.30(a)(1)(iv).

<sup>132</sup> See, e.g., *In re Avon Custom Mixing Servs., Inc.*, 10 E.A.D. 700, 703 n.6 (EAB 2002) (special circumstances found when petition arrived late due to mail being rerouted in response to anthrax contamination concerns).



- What items should be addressed in the notice of appeal and appellate brief?
  - The relevant regulations (e.g., 40 C.F.R. part 22) specify the information that must be included in the notice of appeal and appellate brief and the scope of issues that may be raised on appeal.<sup>133</sup>
  - The Part 22 regulations require that the notice of appeal identify the Initial Decision, or part of the Initial Decision, being appealed. Further, the regulations provide that the appellate brief should, among other things, summarize the issues on appeal, provide argument on those issues, and identify the specific relief sought from the EAB.<sup>134</sup>
  - Under the Part 22 regulations, the issues that can be raised on appeal include those raised during the course of the proceeding before the EPA Presiding Officer (Administrative Law Judge/Regional Hearing Officer) or by the Initial Decision, and issues concerning subject matter jurisdiction.<sup>135</sup> Further, under the Part 22 regulations, if the EAB determines that issues raised, but not appealed by the parties, should be argued, it notifies the parties in writing.<sup>136</sup>
- Beyond sending the notice of appeal and appellate brief to the Clerk of the Board, who else should get a copy?
  - The regulations governing administrative enforcement appeals (40 C.F.R. part 22) contain service requirements, which require the Appellant to serve (i.e., send) all other parties and non-party participants a copy of the notice of appeal and appellate brief.<sup>137</sup>
  - Permissible methods of service include email, U.S. mail, any reliable commercial delivery service, or, if agreed to by the parties, facsimile (fax machine).<sup>138</sup> Under the regulations, a party who consents to service by facsimile is required to file with the Board its acknowledgment of consent to service by facsimile.<sup>139</sup> Such an acknowledgment is not required for service by email, as the Board has issued Standing Orders authorizing service by email.<sup>140</sup>

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<sup>133</sup> 40 C.F.R. § 22.30(c).

<sup>134</sup> *Id.* § 22.30(a)(1)(iii).

<sup>135</sup> *Id.* § 22.30(c).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* § 22.30(a)(1)(ii).

<sup>138</sup> *Id.* § 22.5(b)(2).

<sup>139</sup> *Id.*

<sup>140</sup> Revised Order Authorizing Electronic Service of Documents in Permit and Enforcement Appeals (EAB Sept. 21, 2020) (available on the EAB website at [www.epa.gov/eab](http://www.epa.gov/eab) under “Standing Orders & Procedures”).

- The regulations also call for the party filing the notice of appeal and appellate brief to provide proof of service, also called a “certificate of service,” to be appended to the notice of appeal and appellate brief.<sup>141</sup> This certificate identifies how and on what date you sent the documents to the party(ies) and non-party participants. See the Appendix to this Guide for a sample certificate of service.
- What other things should you consider as you prepare a notice of appeal and appellate brief?
  - Have you reviewed the relevant regulations including the content and length requirements for the notice of appeal and appellate brief?
  - Have you reviewed the requirements for filing documents with the Board? The Board encourages parties to file documents using the Board’s Electronic Filing (e-Filing) System. See the EAB’s website for more information on electronic filing.

### *Step 2: Participants File and Serve Response Briefs*

Once a notice of appeal and appellate brief have been filed and an appeal number designated by the Clerk of the Board, the Board uses a neutral assignment system to assign the case to a panel of three EAB judges. Under the regulations, the response brief is limited to the scope of the issues raised in the appellate brief.<sup>142</sup> The notice of appeal and appellate brief will be publicly available on the EAB’s website, [www.epa.gov/eab](http://www.epa.gov/eab).<sup>143</sup> If either side wants to file additional briefs after the appellate and response briefs are filed, they need to request permission from the EAB.<sup>144</sup> See Appendix for template motion seeking leave to file a reply brief in an enforcement appeal.

The Part 22 regulations also allow any person who is not a party to a proceeding to request permission to file a non-party response brief.<sup>145</sup> The requesting party should identify its interest in the matter and the relevance of the brief to the issues in the proceeding.<sup>146</sup>

### *Step 3: Participants File Motions (as needed)*

During the appeal process, any party can file a motion seeking an order for specific relief.<sup>147</sup> For example, a party may file a motion to request more time to file a brief or to seek a stay of the case.

<sup>141</sup> 40 C.F.R. § 22.5(a)(3).

<sup>142</sup> *Id.* § 22.30(a)(2).

<sup>143</sup> Available on the EAB website at [www.epa.gov/eab](http://www.epa.gov/eab) under “EAB Dockets” at “Active Dockets.”

<sup>144</sup> 40 C.F.R. § 22.30(a)(2).

<sup>145</sup> *Id.* § 22.11(b).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* §§ 22.16, .30(e).

The regulations include specific requirements concerning the filing of motions.<sup>148</sup> One important requirement is that before filing a motion, a party must contact the other party or parties in the case to ask whether they oppose the motion.<sup>149</sup> The motion should (1) indicate that the moving party reached out to all other parties to identify their positions on the motion, and (2) specify whether the other parties concur or object to the motion.<sup>150</sup> See Appendix for template motion for extension of time. Under the Part 22 regulations, any party may file a response within 15 days after service of the motion.<sup>151</sup> The regulations further provide that the party that filed the motion may reply within 10 days after service of the response.<sup>152</sup> The panel assigned to the case will consider the motion and issue an order in response.

#### ***Step 4: Oral Argument May Occur***

Any party can include a request for oral argument in their substantive brief (such as an appellate or response brief).<sup>153</sup> The EAB has the discretion to grant or deny the request and can schedule oral argument on its own initiative even if no party requests it.<sup>154</sup> Oral argument is typically held after the briefing of the case (notice of appeal, appellate brief, response brief(s), and any reply brief) is complete.

At oral argument, the EAB judges will ask questions to help with their evaluation of the case. Any party or member of the public interested in attending an oral argument, in person or virtually, who requires an accommodation due to a disability should notify the Clerk of the Board at least one week prior to oral argument. The Clerk of the Board can be reached by emailing [Clerk\\_EAB@epa.gov](mailto:Clerk_EAB@epa.gov) or phone at 202-233-0122. Additional information about oral argument is available on the EAB website, [www.epa.gov/eab](http://www.epa.gov/eab), under “Frequently Asked Questions.”

#### ***Step 5: EAB Deliberates and Issues a Final Decision***

When preparing its decision, the EAB reviews the briefs submitted by the parties, the relevant documents in the administrative record (which includes records from the proceeding before the Administrative Law Judge/Regional Judicial Officer), and the transcript from the oral argument (if applicable).

As noted above, the EAB reviews the Administrative Law Judge’s or Regional Judicial Officer’s Initial Decision using a “*de novo*” standard, meaning the EAB has the authority to reach its own determination as to whether the Respondent is liable for the violations charged in the Complaint, irrespective of the Presiding Officer’s (Administrative Law Judge’s/Regional

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<sup>148</sup> *Id.* §§ 22.16, .30(e).

<sup>149</sup> *Id.* § 22.30(e)(1).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* §§ 22.30(e), .16(b).

<sup>152</sup> *Id.* § 22.16(b).

<sup>153</sup> *Id.* § 22.30(d).

<sup>154</sup> *Id.*

Judicial Officer's) findings.<sup>155</sup> The regulations governing most administrative enforcement appeals, the CROP, provide that each matter in controversy be established by a preponderance of the evidence.<sup>156</sup> This standard is met "when a factfinder determines particular facts to be 'more likely true than not.'"<sup>157</sup> The regulations further provide that the Complainant has "the burdens of presentation and persuasion" regarding liability (i.e., that the alleged violation occurred) and the appropriateness of the relief being sought.<sup>158</sup> In general terms, the Complainant's "burden of presentation" means that it is the Complainant's obligation (burden of proof) in the first instance to present factual evidence demonstrating that the alleged violation occurred and that the relief sought is appropriate. The burden then shifts to the Respondent to present any defenses to the allegations set forth in the complaint that a violation occurred and whether the relief sought is appropriate. The Respondent bears the burdens of presentation and persuasion for any affirmative defense(s) raised.<sup>159</sup>

The EAB may decide to (1) uphold the Initial Decision; (2) fully or partially reverse and remand (or send back for further action) the Initial Decision to the Administrative Law Judge/Regional Judicial Officer who issued it; (3) reverse the Initial Decision and issue a new decision; or (4) modify the Initial Decision or uphold it on different grounds than the ones relied upon by the Administrative Law Judge/Regional Judicial Officer.

Once the EAB issues a final written decision in the form of an order resolving the appeal, it will serve a copy of that decision on each party in the case by email, U.S. mail, or any reliable commercial delivery service.<sup>160</sup> Under the Part 22 regulations, within 10 days of service of the final order, any party to the appeal can file a motion for reconsideration with the EAB.<sup>161</sup> The regulations set forth content requirements for such motions, which include identifying the matters claimed to have been erroneously decided and the nature of the alleged errors.<sup>162</sup> The filing of a motion for reconsideration does not stay the effective date of the Board's final order, but the Board has authority to stay the effective date if it determines a stay is appropriate.<sup>163</sup>

EAB decisions are available on the EAB website at [www.epa.gov/eab](http://www.epa.gov/eab). They are also available through widely used electronic databases. The "EAB Dockets" portion of the EAB's

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<sup>155</sup> *Id.* § 22.30(f) (establishing that Board shall "adopt, modify, or set aside" Administrative Law Judge's findings of fact and conclusions of law or exercise of discretion).

<sup>156</sup> *Id.* § 22.24(b).

<sup>157</sup> *In re VSS Int'l, Inc.*, 18 E.A.D. 372, 378 (EAB 2020) (quoting *In re Stevenson*, 16 E.A.D. 151, 158 (EAB 2013) (citing cases)).

<sup>158</sup> 40 C.F.R. § 22.24(a); *see also In re New Waterbury, Ltd.*, 5 E.A.D. 529, 536-43 (EAB 1994) (discussing the burden on the complainant in an administrative enforcement proceeding under the Administrative Procedure Act, as well as under Part 22).

<sup>159</sup> 40 C.F.R. § 22.24(a); *see In re Gen. Motors Auto. – N. Am.*, 14 E.A.D. 1, 54-55 (EAB 2008) (describing burden of proof for affirmative defenses); *see also Pac. Coast Fed'n of Fishermen's Ass'ns v. Glaser*, 937 F.3d 1191, 1197 (9th Cir. 2019) (holding that once plaintiff establishes its prima facie case, burden of proving defenses such as statutory exception is on defendant, not on plaintiff).

<sup>160</sup> 40 C.F.R. § 22.6.

<sup>161</sup> *Id.* § 22.32.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

website includes the filings in cases closed after January 1, 2006, including portions of the administrative record filed with the Board.

## Summary of Enforcement Appeal Process before the EAB

### 1st Stage: Filings and Motions

- The challenger, known as the Appellant, files a notice of appeal and appellate brief challenging the Initial Decision.
- The other party, known as the Respondent, files a response brief. Any person who is not a party to a proceeding may request permission to file a non-party response brief.
- Parties file motions as needed.

### 2nd Stage: Oral Argument & Deliberation

- Parties can include a request for oral argument in their substantive briefs.
- If the EAB decides to hold oral argument, it issues a scheduling order.
- Oral argument is held.
- The EAB panel deliberates the issues.

### 3rd Stage: EAB Decision

- The Board issues a final decision.
- Parties may file a motion for reconsideration.

## IV. The Board's Alternative Dispute Resolution Program

The Board has a well-established, Alternative Dispute Resolution (“ADR”) program available at no cost to assist parties in appeals before the Board in resolving their disputes with the help of a neutral third party. Participation in the EAB’s ADR program is completely voluntary and is conducted in compliance with the confidentiality provisions of the Administrative Dispute Resolution Act of 1996 (“ADRA”).<sup>164</sup>

### A. Benefits of the Board's Alternative Dispute Resolution Program

The primary purpose of the Board’s ADR program is to provide the parties with an early neutral evaluation of their positions and to give them a confidential forum in which to explore settlement. The Board established its ADR program in recognition of the many benefits associated with the use of ADR and the successes experienced by other federal agencies and federal courts (including appellate courts) in settling contested matters through ADR. Resolving conflict through the use of ADR can have many benefits including (1) better environmental outcomes through faster resolution of disputes; (2) more creative, enduring, and satisfying solutions; and (3) broader stakeholder support. The Board has resolved complex multi-party matters through its ADR program.

### Benefits of the Board's ADR Program

- Better environmental outcomes through faster resolution of disputes
- More creative, enduring, and satisfying solutions
- Broader stakeholder support

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<sup>164</sup> 5 U.S.C. §§ 571-584 (the confidentiality provisions are found at 5 U.S.C. § 574).



## **B. The Board's Alternative Dispute Resolution Process**

The Board has an ADR information sheet on its website at [www.epa.gov/eab](http://www.epa.gov/eab) (under "Alternative Dispute Resolution (ADR)"), which outlines the Board's ADR process. This section provides a general overview of that process.

In appropriate cases, the Board offers parties the option to participate in ADR once an appeal is filed. The Clerk of the Board sends a letter or email extending the offer to participate in the ADR program. If all parties agree to participate, the Clerk assigns an EAB Judge to serve as the Settlement Judge. The EAB Settlement Judge serves as both a neutral evaluator and a mediator. Counsel to the EAB may also participate as a neutral co-mediator ("EAB Settlement Counsel").

Once the EAB Settlement Judge has been assigned, the Board typically issues an order staying (pausing) proceedings in the appeal for sixty days (or in some cases a shorter period of time) to allow the ADR process to proceed. Following issuance of the stay order, the EAB Settlement Judge or EAB Settlement Counsel contacts the parties to schedule the initial ADR meeting. The parties also sign a participation agreement in which they affirm that they understand how the EAB's ADR process works, including the confidentiality requirements, and that they will participate in good faith.

Prior to the initial ADR session, the EAB Settlement Judge asks each party to submit a brief written statement stating their position on each issue in dispute. This statement is not shared with the other party. At the initial ADR meeting, the EAB Settlement Judge and the EAB Settlement Counsel explain the ADR process, including issues of confidentiality. Although, in most instances, the EAB Settlement Judge will begin the initial ADR session meeting with all parties together, the EAB Settlement Judge and EAB Settlement Counsel will also meet separately with each of the parties to discuss their case in confidence. Consistent with the confidentiality agreement, the Settlement Judge (and any participating counsel from the Board) may not disclose anything revealed to them in confidence through the ADR process.

At or following the initial meeting, the Settlement Judge provides each party with an early neutral evaluation, which is a confidential oral assessment of the strengths and weaknesses of each party's case. Thereafter, the EAB Settlement Judge and EAB Settlement Counsel provide appropriate assistance to the parties to facilitate their efforts at reaching a mutually agreeable resolution.

If a mutually agreeable resolution is not reached, a party seeks to terminate the ADR process, or the EAB Settlement Judge determines that the ADR process has not made substantial progress, the matter will be returned to the Board's active docket for resolution. If the matter is returned to the active docket, neither the EAB Settlement Judge nor any counsel from the Board who took part in the ADR may participate, in any way, in the Board's resolution of the issues in the case.

## V. Overview of the Board's Decisionmaking Process

### A. The Board's Final Decision

The Board decides each matter before it “in accordance with applicable statutes and regulations”<sup>165</sup> and considers the standard of review, prior Board precedent, the administrative record, and briefs and arguments presented to it at oral argument. Panels are usually composed of three EAB judges, and the panel decides the matter by majority vote.<sup>166</sup> The panel's final written decision or order reflects the views and reasoning of the judges on the panel.<sup>167</sup> The final order generally includes a syllabus, statement of the case, identification of the issues raised on appeal, statutory and regulatory framework, factual summary, and analysis of the issues presented.

Once the EAB issues a final order in a matter, EPA regulations at 40 C.F.R. parts 22 and 124 provide that any party to the appeal can file a motion for reconsideration within 10 days of the EAB's service of the order on the parties.<sup>168</sup> Under those regulations, a motion for reconsideration of a final order must set forth the matters that the party believes the EAB erroneously decided as well as the nature of those errors.<sup>169</sup> For certain appeals, including permit appeals governed by 40 C.F.R. part 124, parties can also file motions for clarification to identify the portion of the decision for which clarification is sought and explain why a clarification is necessary.<sup>170</sup> Although the Part 22 regulations do not specifically address motions for clarification, a party could reasonably assert in a motion for reconsideration that a portion of the final order is not clear and explain why a clarification is needed.

When a permitting decision is remanded by the Board, the permit issuer will address any issues identified by the Board and take action, as appropriate. Under EPA's Part 124 regulations, final agency action on a permit occurs after administrative review procedures before the EAB have been exhausted and the permit issuer subsequently issues a final permitting decision.<sup>171</sup>

When the Board remands in an enforcement case, the Presiding Officer will address any issues identified by the Board and take action, as appropriate. These steps are a prerequisite to any final agency action subject to judicial review. Where, however, the Board issues a final

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<sup>165</sup> 40 C.F.R. § 1.25(e)(1).

<sup>166</sup> *Id.* Under the regulations, due to absence or recusal, a panel can consist of two EAB judges. If the EAB sits as a panel of two members on a case and there is a tie vote, the matter is referred to the Administrator to break the tie. *Id.*

<sup>167</sup> A judge may write a concurring opinion, where, for example, one judge agrees with the conclusion reached by the majority but has different reasons supporting that conclusion. A judge also can issue a dissenting opinion, which is a separate opinion written by a judge who disagrees with the conclusion reached by the majority. The Board also has the discretion under the regulations to refer a case or motion to the Administrator for resolution. *Id.* §§ 22.4(a)(1), 124.2(a).

<sup>168</sup> *Id.* §§ 22.32, 124.19(m).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* § 124.19(m).

<sup>171</sup> *Id.* § 124.19(l).

order adopting the Presiding Officer's Initial Decision, without remanding it, the Board's order is final and may be directly appealed to federal court.<sup>172</sup>

Any party challenging an EPA final agency action in federal court should refer to the relevant statute for information on which federal court can hear the appeal, the time within which an appeal must be filed, and the standard of review that the court must apply.<sup>173</sup> In environmental administrative enforcement cases where a final order is issued to another federal agency or department, the head of that agency or department can request in writing a conference with the EPA Administrator. In this circumstance, the regulations require that the federal agency or department serve a copy of such written request with the parties of record within 30 days of issuance of the final order.<sup>174</sup> The Administrator will review the request and issue a decision.<sup>175</sup>

The EAB issues both "published" and "unpublished" final orders. Generally, the EAB designates most final orders as published. Decisions that are unpublished are often ones for which the law is well-settled, or where the circumstances are so unique that the decision would be of limited interest to persons beyond the immediate parties to the case. Published decisions are initially issued as slip opinions and later published in the bound volumes of the Environmental Administrative Decisions (E.A.D.), which is the EAB's reporter. Both published and unpublished decisions are available on the Board's website at [www.epa.gov/eab](http://www.epa.gov/eab) under "Board Decisions."<sup>176</sup> Published EAB decisions issued since March 1992 can be found in the E.A.D. The Board's decisions are also available through widely-available legal databases.

Further, the EAB's website has a search function that allows users to search for cases of interest. The website allows EAB published decisions to be sorted by statute, type of case, alphabetically by case name, or chronologically. Finally, the website includes a list of EAB decisions that have been reviewed, or are pending review, by federal courts.

## **B. Relevance of Prior Board Decisions**

When deciding a case, the EAB generally adheres to the reasoning it applied in previous cases that involved similar legal issues or factual circumstances. This general approach is known by the legal term of "precedent," which refers to a principle or rule established in a previous legal case. Lawyers refer to this principle of decisionmaking by the phrase, "*stare decisis*," which means "to stand by things decided." When a decisionmaking body like the EAB gives its prior decisions precedential value, members of the regulated communities can rely on those decisions to guide their conduct. Moreover, they can be assured of a fair decisionmaking process in which people who conduct themselves in the same way under similar circumstances are treated the same way by the legal system.

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<sup>172</sup> *Id.* § 22.27(d); *see also* 40 C.F.R. pt. 23.

<sup>173</sup> *See, e.g.,* Clean Water Act § 509(b), 33 U.S.C. § 1369(b) (judicial review of permitting actions under Clean Water Act).

<sup>174</sup> 40 C.F.R. § 22.31(e)(1).

<sup>175</sup> *Id.*

<sup>176</sup> Unpublished decisions issued since November 1996, are also available on the EAB's website, [www.epa.gov/eab](http://www.epa.gov/eab) under "Board Decisions."

The EAB treats its final decisions as precedential, irrespective of whether the decision is published in the Environmental Administrative Decisions (E.A.D.). EPA addressed this point in a preamble to the 2021 final rule revising Parts 22 and 124, stating:

Whether a decision is categorized [by the EAB] as “published” versus “unpublished” is also not determinative of whether a party will rely on a case or cite a case to the Board. Consistent with the foundational legal principle of *stare decisis*, the Board generally follows its own prior applications of law where the same factual and legal principles are presented. The use of a system of precedential decisions makes the decisional process more transparent and consistent for all, including the public.<sup>177</sup>

Individuals or groups participating in a case before the EAB or deciding whether to file a case before the EAB should read carefully other EAB decisions that address similar issues. The EAB’s prior decisions can help parties understand what arguments to make based on how the EAB has decided similar issues in the past. Parties should point to specific EAB decisions in their briefs or other filings that support their arguments and explain why the EAB’s reasoning in these opinions applies to their case. At the same time, parties should address similar opinions that do not support their case and explain why their case is different and why the reasoning in those opinions should not apply to their legal or factual circumstances.

### **C. Board Decisions Related to Public Access and Executive Order 12898 on Environmental Justice**

The Board has consistently protected the public’s right to participate in the administrative process consistent with statutory and regulatory requirements. For example, in the case of *In re Russell City Energy Center*, a pro se Petitioner challenged a Clean Air Act permit, alleging that the permit issuer failed to provide it and other stakeholders certain forms of public notice that were required by the regulations. The Board agreed and remanded the permit, requiring the permit issuer to re-notice the draft permit in accordance with the notice provisions in the applicable regulations.<sup>178</sup> In another example, *In re GSP Merrimack L.L.C.*, the Board remanded a Clean Water Act permit because the Region clearly erred by failing to provide adequate notice of a new permit condition that allowed the Permittee to establish compliance with an effluent limit by showing it was operating at a reduced capacity. The Board found that the Region failed to give interested parties an opportunity to provide meaningful comments on the capacity limitation in the final permit and therefore failed to provide adequate notice.<sup>179</sup>

Since the issuance of Executive Order 12898 on Environmental Justice, the EAB has played an important role in the context of reviewing permitting decisions to resolve allegations that the permit issuer did not meet its obligations with respect to environmental justice in its

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<sup>177</sup> 86 Fed. Reg. 31,172, 31,175 (June 11, 2021).

<sup>178</sup> *In re Russell City Energy Ctr.*, 14 E.A.D. 159 (EAB 2008); see also *In re Sierra Pac. Indus.*, 16 E.A.D. 1 (EAB 2013) (finding that EPA clearly erred in not providing the public an opportunity for a hearing on the draft permit consistent with regulatory requirements), *pet. for review denied sub nom. Helping Hand Tools v. EPA*, 848 F.3d 1185 (9th Cir. 2016).

<sup>179</sup> *In re GSP Merrimack, L.L.C.*, 18 E.A.D. 524 (EAB 2021); see also *In re Rockgen Energy Ctr.*, 8 E.A.D. 536 (EAB 1999) (remanding permitting decision because permitting authority failed to publish a response to comments document until one month after publication of final permit).

permitting decision. For example, the EAB has remanded permit cases where the record did not support a finding that the permitting authority reasonably considered the contested environmental justice issues in the permitting process.<sup>180</sup> A list of Board decisions addressing Executive Order 12898 can be found on the EAB website at [www.epa.gov/eab](http://www.epa.gov/eab) under “Board Decisions.”

## Tips for Participating in EAB Proceedings

Check the regulations to ensure you do not miss applicable deadlines for filing documents with the Board.

In a petition for review challenging a permitting decision:

- Identify the specific aspects of the permitting decision you are challenging;
- Be specific about the relief you are seeking;
- Demonstrate why the factual or legal basis underlying the challenged permit conditions is clearly erroneous or why the permitting decision constitutes an abuse of discretion warranting Board review;
- Demonstrate that each issue raised in the petition for review was raised previously during the public comment period (or explain why it was not required to be raised);
- If the petition raises an issue that the permit issuer addressed in its response to comments document, explain why that response was clearly erroneous or otherwise warrants review; and
- Identify any prior Board decisions that support your position and distinguish prior Board decisions that do not support your position.

In an appellate brief challenging an enforcement decision:

- State the issues presented for appeal, the nature of the case, and the relevant facts;
- Be specific about the relief you are seeking;
- Explain why the Board should grant your relief;
- Provide legal and factual support for your position; and
- Identify any prior Board decisions that support your position and distinguish prior Board decisions that do not support your position.

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<sup>180</sup> *In re Muskegon Dev. Co.*, 17 E.A.D. 740 (EAB 2019) (remanding underground injection control permitting decision, in part, because the Board was “unable to determine whether the Region appropriately evaluated the environmental justice implications of the permitting action”); *In re Shell Gulf of Mexico, Inc.*, 15 E.A.D. 103, 148-61 (EAB 2010) (remanding two Outer Continental Shelf Prevention of Significant Deterioration permits, in part, due to permit issuer’s limited scope of analysis of impact of emissions on environmental justice communities in the affected area).

## VI. Appendix

### SAMPLE TEMPLATES

The Board has developed the following sample templates for documents that are routinely filed in Board proceedings. These templates are provided for guidance only. Submissions to the Board do not need to conform to the format in these sample templates, but all submissions must meet all relevant statutory and regulatory requirements and comply with any applicable Standing Order(s) issued by the Board.

This Appendix includes the following templates:

1. Notice of Appeal
2. Motion for Extension of Time
3. Notice of Appearance at Oral Argument
4. Certificate of Service

The footnotes included at the bottom of the sample templates provide informational guidance to the drafter only and should not be included in any actual filing to the Board.

Finally, please be aware that documents uploaded to the Board's electronic filing system will be available to the public online. Do not upload any material claimed to be confidential business information ("CBI") or other private information the disclosure of which would constitute an unwarranted invasion of a person's privacy, such as social security numbers, birthdates, medical records, or personal financial information. To submit such information, please see the instructions on the EAB website at [www.epa.gov/eab](http://www.epa.gov/eab) under "Electronic Filing."



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

_____	)	
In re [INSERT NAME OF	)	
RESPONDENT]	)	Appeal No. _____ <sup>181</sup>
	)	
[INSERT DOCKET NUMBER]	)	
_____	)	

**NOTICE OF APPEAL**

[INSERT NAME OF APPELLANT<sup>182</sup>] seeks review of a decision that [INSERT NAME OF ADMINISTRATIVE LAW JUDGE OR REGIONAL JUDICIAL OFFICER] issued on [INSERT DATE] assessing a civil penalty of \$[INSERT AMOUNT] and [IF APPROPRIATE, INSERT REFERENCE TO ANY OTHER FORM OF RELIEF GRANTED IN THE INITIAL DECISION] for violations of [INSERT NAME OF STATUTE OR REGULATION].

An appellate brief is attached.

Respectfully submitted,

DATE: [INSERT DATE]

[INSERT SIGNATURE OR E-SIGNATURE]

[INSERT NAME  
MAILING ADDRESS  
TELEPHONE NUMBER  
EMAIL ADDRESS]

<sup>181</sup> Leave the space following "Appeal No." blank. The Clerk of the Board will assign the appeal number once the notice of appeal and appellate brief have been filed.

<sup>182</sup> The "Appellant" is the party filing the appeal. The Appellant can be one or more individuals, businesses, organizations, or other entities.

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

<hr/>	)	
In re [INSERT CASE NAME]	)	
	)	Appeal No. [INSERT NUMBER]
[INSERT EITHER DOCKET	)	
NUMBER or	)	
PERMIT NUMBER] <sup>183</sup>	)	

**MOTION FOR EXTENSION OF TIME**

[INSERT NAME OF MOVING PARTY] requests that the Environmental Appeals Board grant a [INSERT NUMBER] day extension of time, until [INSERT DATE], to file [NAME OF DOCUMENT THAT IS DUE] in the above-captioned matter.<sup>184</sup>

[INSERT NAME OF MOVING PARTY] seeks this extension for the following reason(s). [INSERT EXPLANATION AS TO WHY THE EXTENSION IS NEEDED].

[INSERT NAME OF MOVING PARTY] has consulted with [INSERT NAME OF OTHER PARTY OR PARTIES] and has been informed that [INSERT NAME OF OTHER PARTY OR PARTIES AND INDICATE WHETHER EACH CONCURS WITH OR OBJECTS TO] this motion for extension of time.

Respectfully submitted,

DATE: [INSERT DATE]

[INSERT SIGNATURE OR E-SIGNATURE]

[INSERT NAME  
MAILING ADDRESS  
TELEPHONE NUMBER  
EMAIL ADDRESS]

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<sup>183</sup> For enforcement appeals, insert the docket number. For permit appeals, insert the permit number.

<sup>184</sup> If applicable, indicate whether the motion includes a request for an extension of time to file any related filings, such as the certified index to the administrative record and relevant portions of the administrative record that the Part 124 regulations require the permit issuer to file along with its response to a petition for review. *See* 40 C.F.R. § 124.19(b).

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

_____	)	
In re [INSERT CASE NAME]	)	
	)	Appeal No. [INSERT NUMBER]
[INSERT EITHER DOCKET	)	
NUMBER or	)	
PERMIT NUMBER] <sup>185</sup>	)	

**NOTICE OF APPEARANCE AT ORAL ARGUMENT**

Appearing on behalf of [INSERT PARTY NAME] at oral argument before the Environmental Appeals Board in this matter will be [INSERT NAME OF PERSON(S) WHO WILL PRESENT ORAL ARGUMENT].

Respectfully submitted,

DATE: [INSERT DATE]

[INSERT SIGNATURE OR E-SIGNATURE]

[INSERT NAME  
MAILING ADDRESS  
TELEPHONE NUMBER  
EMAIL ADDRESS]

<sup>185</sup> For enforcement appeals, insert the docket number. For permit appeals, insert the permit number.

**CERTIFICATE OF SERVICE<sup>186</sup>**

I certify that copies of the foregoing [INSERT TITLE OF DOCUMENT] in the matter of [INSERT CASE NAME and APPEAL NUMBER] were sent to the following persons in the manner indicated.

By [INSERT METHOD BY WHICH THE DOCUMENT WAS SENT, SUCH AS BY EMAIL, U.S. MAIL, or OTHER RELIABLE COMMERCIAL DELIVERY SERVICE]

[INSERT NAME OF EACH PERSON BEING SERVED, INCLUDING SERVICE ADDRESS, WHETHER BY MAIL, EMAIL, or OTHERWISE]

DATE: [INSERT DATE]

[INSERT SIGNATURE OR E-SIGNATURE]

[INSERT NAME OF PERSON WHO  
SERVED THE DOCUMENT]

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<sup>186</sup> Parties are required to inform the Board and all other parties to the case promptly if the mailing address or other contact information of the individual authorized to receive service has changed. *See* 40 C.F.R. §§ 22.5(c)(4) (enforcement matters), 124.19(i)(3)(i) (permit matters).



[www.epa.gov/eab](http://www.epa.gov/eab)