

FACT SHEET
CONCERNING REVISED EPA PERMIT APPEAL REGULATION
40 C.F.R. § 124.19

Background

As provided in 40 C.F.R. § 124.19, the Environmental Appeals Board (EAB or the Board) reviews appeals from permits issued under the Resource Conservation and Recovery Act (RCRA), the Underground Injection Control (UIC) program of the Safe Drinking Water Act, the National Pollutant Discharge Elimination System (NPDES) program of the Clean Water Act, the Prevention of Significant Deterioration (PSD) program of the Clean Air Act, and other final permit decisions. The EAB has revised this rule to simplify and make more efficient the review process for permit appeals filed with the EAB. The revised rule incorporates existing EAB practices that are reflected in a number of standing EAB orders and decisions governing EAB procedures, and clarifies practices and procedures in permit appeals before the EAB.

EPA Action

On January 25, 2013, EPA published a final rule revising [40 C.F.R. § 124.19](#), which will become effective 60 days after publication on March 26, 2013.

Under the current rule, a Petitioner is required to file a substantive petition for review demonstrating that review is warranted. The EAB considers that substantive petition, as well as any briefs filed in response to the petition, to determine whether to grant review. If the EAB grants review, the current rule contemplates that a second substantive round of briefing and substantive review occurs. In practice, however, the Board has determined that a second round of briefing generally is unnecessary because in nearly all cases, a decision on the merits can be made based on the substantive briefs already filed. The revised rule clarifies to practitioners that substantive briefing must be submitted at the outset of the appeal and that generally, only one substantive review will occur.

The revised rule further updates the procedures in the regulation by incorporating precedent in EAB decisions, several standing orders, and guidance from the EAB's Practice Manual regarding procedure. Conforming the rule to current practice will provide clarity to practitioners before the EAB, which in turn will make the appeals process more efficient. Simplified and more efficient processes are particularly helpful in PSD and other new source permit appeals, where final Agency decisions are statutorily time-limited.

The provisions governing procedure in the revised rule include the following:

- A requirement that the petitioner notify the permit applicant (if the petitioner is not the permit applicant) and the permit issuer when a petition is filed;
- Filing deadlines for responses to petitions by the permit applicant and the permitting authority;
- Explicit authorization and filing deadlines for interested persons to participate in an appeal by filing an amicus brief;

- Clarification of threshold content requirements that a petitioner must meet to demonstrate that review is warranted, including the identification of the contested permit condition or other specific challenge to the permit decision, petitioner's contentions for why the permit decision should be reviewed, as well as a demonstration that any issue raised in the petition was raised previously during the public comment period (to the extent required) and, if the permit issuer has responded to an issue previously raised, an explanation of why the permit issuer's response to comments was inadequate;
- Specific format requirements and filing procedures for briefs and motions filed with the Board;
- Clarification that the permit issuer may unilaterally withdraw the permit at any time prior to 30 days after the permit issuer files its response; and
- Codification of the EAB's inherent authority to impose procedural sanctions for failure to comply with EAB orders and rules.

Once the revised rule becomes effective, its requirements will be applicable to all new filings in permit appeals filed pursuant to 40 C.F.R. 124.19.

Practitioners before the EAB are advised to review the revised rule to familiarize themselves with the specific revisions and requirements. The EAB has updated its Practice Manual and its Citizens' Guide, both of which are available on the EAB website at www.epa.gov/eab by following the [EAB Guidance Documents link](#).

For Further Information

For more information on the rule revision and to review the rule, visit the EAB website at www.epa.gov/eab.