

Revised Guidance on Procedures for Submission and Review of
CERCLA Section 106(b) Reimbursement Petitions

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Environmental Appeals Board

This document is intended solely as guidance and is not determinative of the issues addressed. The policies and procedures in this guidance do not constitute a rulemaking by the Agency and may not be relied on to create a substantive or procedural right or benefit enforceable at law by any person. The Agency may take action at variance with this guidance.

I. INTRODUCTION

This document sets forth guidance regarding petitions for reimbursement submitted under section 106(b)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9606(b)(2), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA). This guidance describes the contents of reimbursement petitions and the procedures that EPA uses in adjudicating reimbursement petitions.

Section 106(b)(2) allows any person who has complied with an administrative order issued by EPA or another federal agency under section 106(a) of CERCLA to petition for reimbursement of the reasonable costs incurred in complying with the order, plus interest. To establish a claim for reimbursement, a petitioner must demonstrate that it was not liable for response costs under CERCLA section 107(a), or that EPA's selection of the ordered response action was arbitrary and capricious or was otherwise not in accordance with law. The full text of sections 106(a) and 106(b)(2) is set forth as an appendix to this guidance.

The President's authority to implement CERCLA section 106(b) was delegated to the EPA Administrator by Executive Order 12580 (January 23, 1987). The authority to receive, evaluate, and make determinations regarding petitions for reimbursement submitted pursuant to section 106(b) has been delegated to EPA's Environmental Appeals Board ("EAB"). See EPA Delegations Manual, Delegation of Authority 14-27 ("Petitions for Reimbursement") (rev. June 27, 2000).¹

There are no regulatory procedures for reviewing CERCLA § 106(b) reimbursement petitions. However, the EAB has developed procedures for reviewing these petitions. They are set forth in this guidance document. This guidance supersedes the "Revised Guidance on Procedures for Submitting CERCLA Section 106(b) Reimbursement Petitions and on EPA Review of Those Petitions," issued by the EAB on November 10, 2004 and is effective immediately. The procedures described in this guidance will be applied to all petitions submitted on or after the date this guidance is issued.² The EAB will also apply these procedures, to the extent the EAB determines it to be practicable and nonprejudicial to any party, to petitions that were submitted before the date of issuance of this guidance but not yet decided by the EAB.

II. FILING PROCEDURES, SERVICE PROCEDURES, AND DEADLINES

Section 106(b)(2) of CERCLA provides that a person seeking reimbursement must "petition * * * for reimbursement" within 60 days after completion of the

¹ Certain federal agencies other than EPA also have the authority to issue CERCLA § 106(a) orders. See Exec. Order No. 12580, 52 Fed. Reg. 2923 (Jan. 23, 1987). Reimbursement claims based on orders issued by these agencies must also be filed with the EAB. The procedures set forth in this guidance apply to those claims.

² Under the previous procedures that governed review of petitions for reimbursement, the EAB would first issue a Preliminary Decision and would then issue a Final Decision after receiving comments from the parties on the Preliminary Decision. The Board has concluded that the Preliminary Decision step is unnecessary and the parties will have a full opportunity to present their arguments and factual information to the EAB under the revised, streamlined procedures set forth in this guidance.

required action. A petitioner must submit its petition and supporting documents to the EAB by filing the document(s) either electronically, by mail, or by hand delivery as described below. For additional information, see the EAB's Practice Manual which can be found on the EAB's website at www.epa.gov/eab.

A. Filing Methods

1. Electronic Filing. Documents that are filed electronically must be submitted using the EAB's electronic filing system, subject to any appropriate conditions and limitations imposed by order of the EAB. All documents filed electronically must include the full name of the person filing below the signature line. Compliance with EAB electronic filing requirements constitutes compliance with applicable signature requirements.

For the purpose of determining whether a petitioner has complied with the statutory 60-day deadline, EPA requires that a petition filed electronically be received by the EAB not later than the 60th day after the date of completion of the required action.

2. Filing by U.S. Mail. Documents that are sent by U.S. Postal Service (except by U.S. Express Mail) must be sent to the official mailing address of the Clerk of the Environmental Appeals Board at: Mail Code 1103B, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW, Washington, DC 20460. The original and two copies of each document must be filed. The person filing the documents must include a cover letter to the Clerk of the Environmental Appeals Board clearly identifying the documents that are being submitted, the name of the party on whose behalf the documents are being submitted, as well as the name of the person filing the documents, his or her address, telephone number and, if available, fax number and e-mail address.

For the purpose of determining whether a petitioner has complied with the statutory 60-day deadline, EPA requires that a petition sent by mail be postmarked not later than the 60th day after the date of completion of the required action.

3. Filing by Hand Delivery. Documents delivered by hand or courier (including deliveries by U.S. Express Mail) must be delivered to: Clerk of the Environmental Appeals Board, Environmental Appeals Board, U.S. Environmental Protection Agency, Ronald Reagan Building, EPA Mail Room, 1300 Pennsylvania Avenue, NW, Washington, DC 20004. The original and two copies of each document must be filed. The person filing the documents must include a cover letter to the Clerk of the Environmental Appeals Board clearly identifying the documents being submitted, the name of the party on whose behalf the documents are being submitted, as well as the name of the person filing the documents, his or her address, telephone number and, if available, fax number and e-mail address.

A petition that is delivered by hand or courier must be received by the Clerk of the Board at its hand-delivery address not later than the 60th day after the date of completion of the required action. If the 60-day time period for filing the petition with EPA expires on a Saturday,

Sunday, or federal legal holiday, the period will be extended to include the next business day.

B. Service Requirements

At the time it files the petition, the petitioner shall also send a copy of its petition and supporting documents, including attachments, to the EPA Regional Office (or a federal agency, if other than EPA) that issued the underlying administrative order. Once an appeal is docketed, every document filed with the Environmental Appeals Board must be served on all other parties. Service must be by first class mail, or by any reliable commercial delivery service. Upon agreement by the parties, service may be made by facsimile or electronic means.

C. Proof of Service

A certificate of service must be appended to each document filed stating the names of persons served, the date and manner of service, as well as the electronic, mailing, or hand delivery address, or facsimile number, as appropriate.

III. CONTENTS OF THE PETITION

A. Required Information

A petition must include the following information:

- the petitioner's full name, title, and address;
- the name, title, address, telephone number, fax number, and email address of any agent or attorney authorized to represent the petitioner (or, if the petitioner is not represented, the petitioner's own address, telephone number, fax number, and email address);
- the name and address of the facility at which the response action was implemented; and
- the U.S. EPA docket number for the section 106(a) order, if issued by EPA.

A complete copy of the Section 106(a) order must also accompany the petition as an attachment.

The petition must be signed by the petitioner or by an attorney representing the petitioner. If the petitioner is not a natural person (e.g., if the petitioner is a corporation), the petition must be signed by the petitioner's attorney or by an agent or officer of the petitioner who is qualified to act as a signatory. For purposes of this requirement, a "qualified" agent or officer means one who satisfies the definition provided in 40 C.F.R. § 270.11(a). The EAB may at any time require any factual

assertion contained in a petition to be substantiated by an affidavit based on the affiant's personal knowledge of the matter asserted.

B. Statutory Prerequisites for Obtaining Review on the Merits (Threshold Issues)

CERCLA § 106(b) establishes four prerequisites for obtaining review of a reimbursement petition on the merits, and the petitioner must demonstrate that it satisfies all four of them. The EAB will not address the merits of a petition unless the petitioner has first demonstrated that it has satisfied these prerequisites. The four prerequisites are:

- 1) Compliance With the Section 106(a) Order: The petition must state that the petitioner has complied with the underlying Section 106(a) order and must be accompanied by evidence supporting that statement.
- 2) Completion of the Required Action: The petition must state that the action has been completed and must be accompanied by evidence supporting that statement.
- 3) Timeliness of the Petition: The petition must state the date on which the action required by the section 106(a) order was completed, so that the EAB can determine whether the petition is timely.
- 4) Incurrence of Costs: A reimbursement petition must contain a demonstration that the petitioner incurred costs in connection with the section 106(a) order and must contain an estimate of the total costs the petitioner is claiming. The petition need not contain a demonstration that the costs were reasonable. The EAB will ordinarily not consider any dispute concerning the reasonableness of the costs incurred until after it decides that reimbursement of some amount should be awarded. However, the EAB may request cost information at any time after the petition was filed if it deems that such information may be useful in determining either threshold eligibility issues or a petitioner's entitlement to reimbursement on the merits.

C. Statements of Grounds for Reimbursement

The petition must set forth all legal arguments, factual contentions (including contentions, if any, regarding technical or scientific matters), and supporting evidence on which the petitioner relies in support of its claim for reimbursement.³ Except as may be permitted by the EAB for good cause shown, and except as specifically provided in Sections III.B(4) and IV.F of this guidance (describing procedures for submitting cost-related information), a petitioner may not raise any issues during the petition review process that

³ A petition must be promptly amended as appropriate to correct or clarify any statements therein that are no longer true or that are determined not to have been true when made.

were not identified in the petition, and may not submit any evidence or information during the petition review process that was not identified in the petition, unless the petitioner demonstrates in a motion to the EAB that: (1) for new issues, such issues were not reasonably ascertainable as of the date the petition was filed; or (2) for new evidence or information, the petitioner could not reasonably have known of its existence, or could not reasonably have anticipated its relevance or materiality, as of the date the petition was filed.

The petition must explicitly state, as to each claim set forth therein, whether the claim arises under CERCLA § 106(b)(2)(C) or under CERCLA § 106(b)(2)(D), or both. Both subparagraph 106(b)(2)(C) and subparagraph 106(b)(2)(D) expressly place the burden of proof on the petitioner. Section 106(b)(2)(D) provides for the reimbursement of "reasonable response costs incurred by the petitioner pursuant to the portions of the order found to be arbitrary and capricious or otherwise not in accordance with law" (emphasis added). Therefore, when making a claim under section 106(b)(2)(D), the petitioner must be specific in identifying the portion of EPA's order that it seeks to challenge.

D. Required Attachments

A copy of the Section 106(a) administrative order on which the petitioner's claim is based must accompany the petition as an attachment. In addition, all other documents on which the petitioner relies in support of its claim must also be submitted as attachments to the petition, except for documents to be relied on solely as evidence of the costs incurred or as evidence of their reasonableness.⁴ Each of the attachments must be separately identified, and the relevance of each attachment to the petitioner's claim briefly explained, in the body of the petition.

IV. EAB PROCEDURES FOR PROCESSING SECTION 106(b) PETITIONS

A. Response to the Petition

Upon receiving a petition for reimbursement, the EAB will send a letter to the appropriate EPA Regional office⁵ that issued the Section 106 order (with a copy to the petitioner) soliciting a response ("Response") to the petition. The Region shall file either a limited response under Section IV.A.1, asserting that petitioner has not met one or more prerequisites for obtaining review or a response on the merits in accordance with Section IV.A.2.

⁴ Copies of such cost-related documents need only be submitted after the Board issues a Final Decision and Order Granting Reimbursement. See Section IV.F, infra.

⁵ All references to the Region or regional office in Section IV of this Guidance also apply to the federal agency that issued the order in those cases where the order was not issued by EPA.

1. Limited response addressing prerequisites for obtaining review

If the Region contends that one or more of the four statutory prerequisites for obtaining review have not been met, the Region shall raise those contentions by submitting a motion to dismiss the petition without reaching the merits of petitioner's claim. The motion should address only the petitioner's alleged failure to meet one or more of the prerequisites for obtaining review. The Region shall file its pleading within thirty days after the date of the EAB's letter soliciting a response to the petition.⁶ The petitioner will then have twenty days from the date the Region's motion is filed to file a reply to the motion.

If the Region has filed a pleading moving to dismiss the petition for failure to meet one or more of the prerequisites for obtaining review, and after the petitioner has had the opportunity to respond, the EAB may rule on any or all of the prerequisite issues or may defer ruling on them until it rules on the merits. The Region's filing of a responsive pleading in the nature of a motion to dismiss does not waive any of the Regions's arguments with respect to the merits of the petitioner's claims. The EAB's dismissal of a petition as premature on the ground that the petitioner has not completed the response action is without prejudice to the petitioner's refileing a petition for reimbursement at a subsequent time.

2. Response on the merits

If the Region does not contend that the petitioner failed to satisfy one or more of the statutory prerequisites, the Region must submit a response addressing the merits of the petitioner's claims. The Region's response must be received by the Clerk of the Board within sixty days after the date of the EAB's letter soliciting a response to the petition (unless a later date is specified by the EAB). The Region's submission of a response addressing the merits of the petitioner's claims in no way limits the EAB's authority to reject the petition for failure to satisfy one or more of the statutory prerequisites described in Section III.B of this guidance.

3. Certified index and copies of documents

The Region's response must be accompanied by (1) a certified index to the administrative record that the Region compiled in connection with the issuance of the underlying CERCLA § 106(a) order; and (2) copies of all documents that are relied on in the responsive pleading and that have not already been submitted by the petitioner.

⁶ The Region may request a limited extension of time if necessary to verify whether a petitioner has completed the response action. The Region is encouraged to make any such request as far in advance of the filing deadline as possible.

B. Additional Briefing

The EAB may at any time require the petitioner and/or the Region to provide such supplemental briefing as the Board may deem necessary for an informed resolution of the issues presented. Briefs other than those expressly required by the EAB may be submitted only with leave of the EAB.

C. Evidentiary Hearing

CERCLA § 106(b) does not require that EPA provide an evidentiary hearing on a reimbursement petition. However, the EAB may, in its discretion, order an evidentiary hearing with respect to any issue of fact that it considers material to the resolution of the petition. The EAB will designate an EPA employee who has had no prior involvement in the matter under review to serve as a hearing officer and to issue a recommended decision to the EAB with respect to the issues addressed at the hearing. Both the Region and the petitioner will be expected to participate in the evidentiary hearing. A party's failure to participate may cause adverse inferences or conclusions to be drawn against that party with respect to any matter to be addressed at the proceedings.

D. Oral Argument

The EAB may, in its discretion, schedule oral argument with respect to one or more specified issues, either in response to a request by a party or on its own initiative. It will notify the parties in writing of the place, time, and date of the argument, and, as appropriate, the issues to be addressed. Oral arguments ordinarily take place at the EPA Administrative Courtroom, EPA East Building, Room 1152, 1201 Constitution Avenue, N.W., Washington, D.C. Parties may participate using EPA's videoconferencing system. The EAB's Practice Manual and the EAB's website site provide further information on oral arguments.

E. Stays and Withdrawals

The EAB may exercise its discretion to stay action on a petition at any time, either while settlement discussions or judicial actions are proceeding or for other good cause.

A petitioner may elect to withdraw its petition or to withdraw its claim from a petition submitted jointly with other petitioners. Whenever a petitioner withdraws a claim for reimbursement, the petitioner will be permitted to refile that claim only if the 60-day statutory deadline (measured from the date of completion of the required action) has not yet expired.

F. EAB Decision

The EAB will issue either a Final Decision and Order Granting Reimbursement or a Final Order Denying Reimbursement. It will issue a Final Decision and Order Granting Reimbursement if it determines that a petitioner is entitled to reimbursement of all or any portion of the costs claimed in the

petition. It will issue a Final Decision and Order Denying Reimbursement only if it determines that no portion of the costs claimed by the petitioner should be reimbursed.

Final Order Denying Reimbursement: A Final Order Denying Reimbursement is the Agency's final decision with respect to the petitioner's claim. Under CERCLA § 106(b)(2)(B), a petitioner who wishes to file an action in the appropriate federal district court challenging a Final Order Denying Reimbursement, must do so within thirty days of receipt of that Final Order. See 42 U.S.C § 9606(b)(2)(B).

Final Decision and Order Granting Reimbursement: A Final Decision and Order Granting Reimbursement does not constitute the Agency's final action on the petition because the EAB must still determine the amount of reimbursement to be awarded. When issuing a Final Decision and Order Granting Reimbursement, therefore, the EAB will also direct the petitioner to file a brief with supporting documentation of all reasonable costs that it incurred in implementing the order.⁷ The Region will then be afforded an opportunity to respond and challenge particular cost items (as unreasonable or otherwise not recoverable), and the petitioner will be permitted to reply to those challenges, in accordance with a briefing schedule established by the EAB.⁸

Final Decision Determining Reimbursable Costs and Authorizing Payment: After the cost issues have been briefed, the EAB will issue a Final Decision Determining Reimbursable Costs and Authorizing Payment. A Final Decision Determining Reimbursable Costs and Authorizing Payment represents the Agency's final decision with respect to the petitioner's claim. Under CERCLA § 106(b)(2)(B), a petitioner who wishes to file an action in the appropriate federal district court challenging a Final Decision Determining Reimbursable

⁷ Petitioner may reference documents in the record.

⁸ Section 106(b)(2)(A) of the statute expressly limits reimbursement from the Fund to "reasonable" costs (plus interest). The petitioner shall submit evidence of the costs actually incurred, which evidence shall include, at a minimum, itemized invoices and proof of their payment in full. The EAB may also require a demonstration that those costs are reasonable, particularly in cases where the Region argues that specific cost items are not reasonable. While not all factors bearing on the reasonableness of a petitioner's costs can be articulated in this guidance, they would typically include: bidding procedures used for a particular project and the number of bids received; reasons for selecting a contractor other than the lowest bidder; cost estimates provided by prospective contractors and the circumstances surrounding any later deviations from those estimates; and the reasons for any unforeseen expansion of a particular project or unforeseen delay in its completion, to the extent that such expansion or delay resulted in additional costs. Petitioners should retain documents and other evidence bearing on such matters, and should be prepared to submit such evidence to the EAB upon request.

Costs and Authorizing Payment, must do so within thirty days of receipt of the Board's Final Decision.

The EAB's Final Orders Denying Reimbursement, Final Decisions and Orders Granting Reimbursement, and Final Decisions Determining Reimbursable Costs and Authorizing Payment are available on the EAB's website at www.epa.gov/eab. These decisions may also be available through such services as LEXIS® and WESTLAW®.

The EAB encourages litigants to use the official form of citation for EAB opinions, as set forth in the EAB's Practice Manual.

V. FURTHER INFORMATION

For further information concerning the matters addressed in this guidance, contact the Clerk of the Board, Environmental Appeals Board (Mail Code 1103B). U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, N.W., Washington, DC 20460, (202) 233-0110. The office hours of the Clerk of the Board are 8:30 a.m. to 12:00 p.m. and 1:00 p.m. to 4:30 p.m., Monday through Friday (excluding federal holidays).

APPENDIX

CERCLA Section 106(a) provides:

In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

CERCLA Section 106(b)(2) provides:

(A) Any person who receives and complies with the terms of any order issued under subsection (a) of this section may, within 60 days after completion of the required action, petition the President for reimbursement from the Fund for the reasonable costs of such action, plus interest. Any interest payable under this paragraph shall accrue on the amounts expended from the date of expenditure at the same rate as specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26.

(B) If the President refuses to grant all or part of a petition made under this paragraph, the petitioner may within 30 days of receipt of such refusal file an action against the President in the appropriate United States district court seeking reimbursement from the Fund.

(C) Except as provided in subparagraph (D), to obtain reimbursement, the petitioner shall establish by a preponderance of the evidence that it is not liable for response costs under section 9607(a) of this title and that costs for which it seeks reimbursement are reasonable in light of the action required by the relevant order.

(D) A petitioner who is liable for response costs under section 9607(a) of this title may also recover its reasonable costs of response to the extent that it can demonstrate, on the administrative record, that the President's decision in selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with law. Reimbursement awarded under this subparagraph shall include all reasonable response costs incurred by the petitioner pursuant to the portions of the order found to be arbitrary and capricious or otherwise not in accordance with law.

(E) Reimbursement awarded by a court under subparagraph (C) or (D) may include appropriate costs, fees, and other expenses in accordance with subsections (a) and (d) of section 2412 of Title 28.