

**A CITIZENS' GUIDE**  
**TO**  
**EPA'S ENVIRONMENTAL APPEALS BOARD**



January 2013

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

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# Introduction

This Guide provides a brief description of how our environmental laws protect you and your community and an overview of the role of the U.S. Environmental Protection Agency's (EPA) Environmental Appeals Board (EAB) in assuring that these laws are administered consistently and fairly. The Guide also provides general information about the procedures the EAB follows in making decisions. It is intended principally for anyone without formal legal training who is involved in matters pending before the EAB. If you are involved in a legal matter before the EAB, or would like to participate in a legal matter pending before the EAB, this Guide can answer some of your questions about the EAB and direct you to sources of more detailed information.

This Guide provides only general guidance about the EAB and its procedures. For you to be able to participate effectively in an EAB proceeding, reading the specific statutes and regulations that apply to your case is a must, as is consulting the EAB's standing orders and Practice Manual, which contain additional information about EAB procedures and model forms for appeal documents.

The EAB's Web site at [www.epa.gov/eab](http://www.epa.gov/eab) includes EAB decisions and additional information about the EAB, such as answers to Frequently Asked Questions about EAB procedures. The Web site also contains a link to "EAB Dockets," which provides electronic access to most documents filed in cases currently pending before the EAB and EAB cases closed after January 1, 2006. EAB Dockets also contains a list of EAB cases closed before January 1, 2006. More information about the online EAB dockets is available on [page 16](#) of this Guide.

The EAB allows participants in EAB proceedings to file submissions electronically, subject to conditions that are stated in the Board's standing orders on electronic filing (available by following the "Standing Orders" link on the EAB Web page) and any subsequent rules and revisions. Additional guidance for electronic filing is described in the EAB Practice Manual. You can find information about the EAB's electronic filing system in the "[How and Where Should I File Documents with the EAB](#)" section of this Guide, on [page 19](#), or on the EAB Web site.

EPA's Web site at [www.epa.gov](http://www.epa.gov) contains a wealth of information about EPA, including "plain English" guides to the laws that EPA administers and a description of the activities of each of EPA's program offices.

## How Do Environmental Laws Protect Me and My Community?



The federal environmental laws protect you and your community by identifying and addressing risks to our health and our natural environment – the air, water, and land. EPA is responsible for leading the effort to implement most of these laws. EPA:

- conducts research to identify environmental risks and ways to minimize or avoid these risks;
- imposes limitations on the release of certain pollutants into the environment;
- regulates certain activities that may pose a risk to our health or the environment, or both; and
- takes enforcement actions against violators of environmental laws, including actions to impose financial penalties on violators.

# What Are the Major Environmental Laws that EPA Administers?

## Overview

The environmental laws that EPA carries out address a wide range of actual and potential threats to the environment. These laws set forth Congress' goals for safeguarding our air, land, and water, and establish a legal framework for achieving these goals. They give EPA the authority, and in many cases, impose a duty on EPA, to develop and issue regulations that implement the laws' requirements. EPA's regulations spell out the activities that the Agency oversees and rules of conduct for persons who are involved in those activities. The laws are published in the United States Code. EPA's environmental regulations are published in title 40 of the Code of Federal Regulations (CFR). You can find the U.S. Code and the CFR on the Internet at <http://www.gpo.gov/fdsys/> and at most law libraries.

Congress intends that the states play a significant role in carrying out the federal environmental laws and has authorized the states, with EPA approval, to implement many specific environmental programs. The EAB hears only cases that concern federal laws and programs and not those arising from approved state and independent programs.

## Clean Air Act

The purpose of the Clean Air Act (CAA) is to protect and improve the quality of our air by limiting emissions of air pollutants. The CAA directs EPA to identify air pollutants, to study the causes of air pollution, to evaluate the impact of air pollutants on our health, and to adopt national air quality standards for air pollutants that may endanger public health or welfare. The CAA also includes certain licensing or permitting requirements, including, for example, the requirement that major sources of air pollution (such as factories and power plants) obtain preconstruction permits that set limits on the amount of each regulated pollutant the facility may emit.

The states play a leading role in regulating air pollution. Under Title V of the Clean Air Act, operating permits are required for certain sources of air pollution, and in most cases, state and local permitting authorities issue these operating permits. The Clean Air Act authorizes EPA, or a state program approved by EPA, to issue preconstruction permits under the federal Prevention of Significant Deterioration (PSD) program. The PSD program is designed to protect the quality of the air in those areas of the United States where the air quality already meets or exceeds national standards (attainment areas).

The EAB is authorized to review challenges to federal PSD and operating permits issued by EPA or by a state, local, or tribal permitting authority to which EPA has delegated its permitting authority. The EAB's authority under the CAA also includes reviewing Agency decisions issued under the "acid rain" regulations. The EAB also reviews appeals from EPA-initiated administrative penalty cases brought against persons whom EPA believes have violated the Clean Air Act or regulations issued under the Clean Air Act.

## Clean Water Act

The purpose of the Federal Water Pollution Control Act, commonly known as the Clean Water Act (CWA), is to protect United States waters from pollutants. The states have the primary responsibility for protecting U.S. waters. However, EPA (or a state approved for this purpose) has the responsibility to administer the CWA's National Pollution Discharge Elimination System (NPDES) permit program, which regulates discharges of pollutants into regulated waters. The EAB has the authority to review challenges to NPDES permits issued by EPA. The EAB also reviews appeals from administrative penalty cases brought by EPA against persons whom EPA believes have violated the Clean Water Act in some way.



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

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (also called Superfund) has two major purposes: first, to ensure that releases of hazardous substances are cleaned up promptly; and second, to require those people or companies who generated, transported, and disposed of the hazardous substances improperly to pay for the cleanup. Among other things, CERCLA authorizes EPA (and certain other federal agencies) to issue orders requiring a person or group of people to undertake specific actions to prevent or minimize a threat from the release of a hazardous substance or to clean up hazardous substances that already have been released.

Anyone who receives a cleanup order and who believes that he or she should not be held responsible for cleanup costs may petition the EAB to recover any cleanup costs he or she expended. However, a person who challenges a cleanup order must comply promptly and fully with the cleanup order first, and may not petition for reimbursement until the cleanup has been completed.

The EAB's procedures for CERCLA reimbursement proceedings are spelled out in the EAB's CERCLA guidance document, which is available on the EAB Web site. The EAB also reviews appeals from administrative penalty cases brought by EPA against persons who have violated a CERCLA cleanup order or other CERCLA requirements.

## **Emergency Planning and Community Right to Know Act**

The purpose of the Emergency Planning and Community Right to Know Act (EPCRA) is to minimize the impact of chemical releases that pose threats to public health and the environment, and to provide information to the public about hazardous chemicals in their communities. EPCRA includes a requirement that certain facilities that manufacture, use, or store toxic chemicals file reports on their releases of toxic chemicals into the environment. The EAB reviews appeals from administrative penalty cases brought by EPA against persons whom EPA believes have violated EPCRA in some way.

## Federal Insecticide, Fungicide, and Rodenticide Act

The purpose of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) is to prevent pesticides from causing unreasonable harm to our health or the environment. Every pesticide that is sold or distributed in the U.S. must be registered with EPA. The pesticide registrant must provide information to EPA that supports its claim that the chemicals used in the pesticide will not pose an unreasonable risk to people or the environment. Pesticides must have labels that explain how to use them and that contain warnings about the risks they pose. Certain particularly dangerous pesticides only may be applied by a government-certified applicator. The certification requirement is intended to ensure that the applicator will use the pesticide in a way that minimizes any risk to our health and the environment.



EPA enforces the requirements of FIFRA by assessing civil penalties against individuals, companies, or organizations that violate its requirements. The EAB reviews appeals from administrative penalty cases brought by EPA against persons who EPA believes have violated FIFRA in some way. The EAB also reviews appeals pursuant to 40 C.F.R. part 164, which include proceedings arising from refusals to register a pesticide, cancellations of pesticide registrations, changes of pesticide classifications, suspensions of registrations, and other hearings under FIFRA section 6.

## **Resource Conservation and Recovery Act**

The Resource Conservation and Recovery Act (RCRA) protects our land as a valuable natural resource by reducing land disposal of hazardous wastes and by minimizing the risks posed by hazardous waste disposal. RCRA authorizes EPA to regulate hazardous wastes from “cradle to grave” (that is, from the point of generation to the point of disposal). Most notably, RCRA authorizes EPA to impose stringent requirements on facilities that treat, store, or dispose of hazardous waste by means of a permit program. The EAB has the authority to review challenges to the terms of EPA-issued permits. The EAB also reviews appeals from administrative penalty cases brought by EPA against persons whom EPA believes have violated RCRA in some way.

## **Safe Drinking Water Act**

The purpose of the Safe Drinking Water Act (SDWA) is to safeguard the nation's drinking water supply. The underground injection control (UIC) program under the SDWA protects actual and potential sources of drinking water from hazardous substances by requiring that any injection of pollutants that may impact a drinking water source comply with the terms of a federal permit. The EAB has the authority to review challenges to the terms of UIC permits. The EAB also reviews appeals from administrative penalty cases brought by EPA against persons who EPA believes have violated the SDWA in some way.

## **Toxic Substances Control Act (TSCA)**

The purpose of the Toxic Substances Control Act (TSCA) is to safeguard against unreasonable risks of harm to our health or the environment from toxic chemicals. TSCA does this by regulating the use, storage, and disposal of toxic chemicals. It authorizes EPA to require the testing of certain chemical substances and to require manufacturers and processors of those chemical substances to maintain records and submit reports to EPA. TSCA also incorporates the Lead Disclosure Rule, which requires notification and disclosure of certain lead-based paint information. EPA enforces the requirements of TSCA by imposing civil penalties on individuals, companies, or organizations that violate its requirements. The EAB reviews appeals from administrative penalty cases brought by EPA against persons whom EPA believes have violated TSCA in some way.

## What is the Role of the Environmental Appeals Board?

The EAB, which was created in 1992, functions as an administrative appeals court within EPA. It consists of Environmental Appeals Judges and a staff of lawyers and administrative support personnel who assist them.

The EAB's primary role is to resolve certain types of disputes between members of the public, or private or governmental entities, and EPA (or state) offices that arise from the application of federal environmental laws. Both the environmental laws and EPA's regulations specify who may raise an issue to the EAB and what types of issues may be raised. The EAB primarily decides cases involving challenges to the terms of federal environmental permits and cases involving challenges to EPA's assessment of financial penalties for violations of the environmental laws. An enforcement case will not ordinarily reach the EAB until an EPA Administrative Law Judge or other presiding officer has issued a decision on the matter and someone who is adversely affected by that decision appeals the decision to the EAB. In the permitting context, a matter ordinarily reaches the EAB after a senior EPA official (or, in some permit cases, a state agency official with delegated authority to issue federal environmental permits) issues a permit decision and someone appeals that permit decision.

The EAB also rules on petitions that members of the public (typically private or government entities) submit to the EAB seeking reimbursement of costs they incurred in complying with a cleanup order that EPA or another federal agency previously had issued under CERCLA. The EAB has developed guidelines for these cases and explains them in a [CERCLA guidance document](#) that is available on the EAB's Web site.

## The EAB's Decisionmaking Process

The EAB decides cases using a formal process that is largely governed by EPA regulations. Although the EAB is part of EPA, it is independent of the EPA offices who are parties to the cases. This independence allows the EAB to make fair decisions for or against any party to the appeal, including the underlying EPA office. The EAB gives equal consideration to the legal arguments made by members of the public and their counsel and the legal arguments made by EPA lawyers. The EAB will not communicate with one party to a case that is pending before the EAB without the other party being present. This is to assure the EAB's impartiality in its cases. EAB staff attorneys are available, however, to answer general, non-case-specific questions about EAB procedures that are not answered in this Guide or on the EAB Web site. EAB staff attorneys do not provide legal advice to the public and will not discuss the particulars of any matter before the Board.

Generally, a panel of three Environmental Appeals Judges considers and decides each case filed with the EAB. The EAB makes each decision by majority vote. The EAB issues a decision in each case it decides in which it explains the reasoning behind its decision. The decision typically contains a discussion of the factual background of the case, the applicable law, the issues raised by the case, and the EAB's rulings on all issues raised by the parties. The text of all EAB decisions appears on the EAB Web site. In addition, the most significant EAB decisions issued between March 1992 and July 2008 appear in bound volumes of the "Environmental Administrative Decisions" (E.A.D.). Additional information on how to access EAB decisions is available on [page 39](#) of this Guide.

The judges on the panel try to reach a decision that reflects the views and reasoning of all three judges. However, a judge may write a concurring opinion (a separate opinion written by

a judge who agrees with the conclusion reached by the majority but who wishes to state different reasons for reaching that conclusion) or a dissenting opinion (a separate opinion written by a judge who disagrees with the conclusion reached by the majority).

The EAB's decision is EPA's final decision on the dispute and is binding on the parties to the dispute, unless the decision is reversed by a federal court. Except for cases involving penalty assessments against other federal agencies, EAB decisions cannot be appealed to the EPA Administrator. A party (other than EPA) who is dissatisfied with the EAB's decision may appeal that decision to a federal court. The EAB's Web site lists all federal court decisions that have been issued following an appeal from an EAB decision and all pending appeals from EAB decisions to a federal court.

## EAB Dockets

The “EAB Dockets” section of the Web site categorizes all cases filed with the EAB into either “Active Dockets,” [Closed Dockets \(since January 1, 1996\)](#), or Closed Dockets (March 1992 through December 31, 2005). [Active Dockets](#) contains an index of all filings in cases that are pending before the EAB and allows you to view and print most of the documents that have been filed in these cases. [Closed Dockets \(since January 1, 1996\)](#) lists all cases closed after January 1, 2006 and allows you to read and print most of the documents that have been filed in those cases. [Closed Dockets \(March 1992 through December 31, 2005\)](#) contains a list of all cases that were closed between March 1992, when the EAB was created, and January 1, 2006. It does not contain an index of filed documents. Please see the Clerk of the Board section on [page 18](#) of this Guide to obtain copies of other documents filed with the EAB that are not available online.

## EAB Decisions Are Followed in Later Cases

When the EAB issues a decision, it follows the decisions that it previously issued in cases that have similar factual circumstances and raise similar legal issues. The EAB's earlier decisions serve as "precedents" for the pending case. This means that the EAB will decide a pending case in the same way that it decided the earlier cases, if the factual circumstances and legal issues are substantially similar. If there are significant differences that require the EAB to reach a different result, the EAB will explain those differences in its opinion. Lawyers refer to this principle of decisionmaking by a Latin 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 these 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 will be treated the same way by the legal system. If you are participating in an EAB case or are deciding whether to file a case before the EAB, you should read carefully other Board decisions that address issues similar to yours, as the Board's earlier rulings may apply to your case.

## Clerk of the Board

The Clerk of the Environmental Appeals Board maintains the EAB's dockets, the administrative system for tracking matters that are pending before the Board. The Clerk also maintains records of closed cases. The discussion on [page 16](#) of this Guide provides information about these dockets.

The Clerk is available to answer your questions about procedures for filing documents with the EAB. The Clerk can be reached by telephone at (202) 233-0122 from 8:30 a.m. to 12 p.m. and from 1 p.m. to 4:30 p.m. Monday through Friday (excluding Federal holidays).

You may read any document that was filed in an EAB proceeding at the Clerk's office or on the EAB's Web site, provided that the document does not contain confidential business information. You may not make copies of documents, but you may ask the Clerk to make copies for you.

Please call the Clerk to make an appointment if you would like to read or obtain copies of any documents. Usually, there will be a charge of 15 cents per page for copies of documents. You also may read most documents that have been filed in pending cases, and cases that were closed after January 1, 2006, by accessing the EAB's "electronic reading room" using the link to [EAB Dockets](#) on the EAB Web site.

## How and Where Should I File Documents with the EAB?

You may file documents with the EAB electronically, by mail, in person, and in limited circumstance, by facsimile.

Information and instructions on how to file your documents electronically are available [Electronic Filing](#) section on the EAB Web site. The Board will consider a document that was filed electronically to be timely if the electronic receipt for the filed document shows that it was received by 11:59 p.m. Eastern Time on the day the document is required to be filed with the Board.

All documents sent through the U.S. Postal Service (including Express Mail) MUST be addressed to the EAB's mailing address:

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

All documents that you hand-carry in person or that you arrange to have delivered by courier or a non-U.S. Postal Service carrier (such as Federal Express) MUST be delivered to the EAB's hand-delivery address:

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

Every envelope or package, whether mailed or hand-delivered, should bear a complete and accurate return address in the upper left hand corner, and should clearly state the case name and any case number (if the Clerk of the Board has assigned one) in the lower left hand corner.

If you file a hard copy of your document, in most cases it is not enough to have merely mailed the document by the deadline. If you hand carry or use a courier service to file your petition, it will be considered filed when the Clerk *receives* the document at the EAB hand-delivery address. If you send your petition through the U.S. Postal Service, it will be considered filed when the Clerk *receives* the document at the EAB *mailing* address. Documents received after 4:30 p.m. will be date-stamped (and thus considered filed) on the following day.

## Enforcement Appeals and Permit Appeals

The two most common types of cases appealed to the EAB, and the two types of cases in which members of the public are most likely to be involved, are administrative enforcement appeals and permit appeals. Because they occur most frequently, this Guide provides an overview and discussion of each. This Guide also describes the steps that typically occur in both types of cases. To familiarize yourself with both the procedures and the format and content requirements applicable to your appeal, you also should review the Board's [Practice Manual](#), the [Standing Orders](#), and the [regulations governing appeals to the EAB](#), which are located in title 40 of the Code of Federal Regulations. Part 22 of title 40 (40 C.F.R. Part 22) applies to administrative enforcement appeals, and 40 C.F.R. Part 124.19 governs most permit appeals.

### ***Appeals from Administrative Enforcement Decisions***

An EAB enforcement appeal is a formal challenge to a decision that an EPA Administrative Law Judge (ALJ) or other presiding officer issued in an administrative enforcement proceeding. Typically, an EPA Regional Office (or occasionally an EPA headquarters office) begins an enforcement proceeding by filing a Complaint charging that a person (which can include a corporation or government entity) violated an environmental law or regulation. The Complaint proposes the amount of the financial penalty that EPA should assess for the violation and, where necessary, what actions EPA believes the person should take to remedy the violation. The EPA office that filed the Complaint is called the "Complainant." The person who is charged with the violation is called the "Respondent." A Complaint may charge, for example, that the Respondent violated FIFRA by selling pesticides that were not labeled with adequate instructions for use. As another example, a Complaint may charge that the

Respondent violated RCRA by improperly disposing of hazardous waste. The Respondent may dispute the charges in the Complaint, and/or the amount of the proposed financial penalty, by filing an Answer.

After the Answer has been filed, the case is assigned to a presiding officer, usually an ALJ or a Regional Judicial Officer, who reviews the written legal arguments (called “briefs”) that both parties submit. If the presiding officer thinks that the case presents genuine factual issues that are material to a decision in the case, he or she will schedule a hearing, during which each side may present witnesses and introduce documentary evidence. The presiding officer then issues a decision that resolves the issues in the case, based on the parties’ briefs and the evidence introduced at the hearing. The presiding officer’s decision is called an “Initial Decision.”

Within the timeframe specified in the regulations, both the Complainant and the Respondent have the right to file an appeal with the EAB from the Initial Decision, challenging the presiding officer’s conclusions regarding liability for the violations or the amount of the penalty, or both. The Respondent may argue that he or she did not violate the law or that the presiding officer assessed too high a financial penalty for the violation. The Complainant may argue that the presiding officer acted in error when he or she concluded that the Respondent did not violate the law, or may argue that the presiding officer should have assessed a higher penalty. The general steps in the enforcement appeals process are described beginning on [page 23](#) of this Guide. If no one files an appeal, the Initial Decision becomes a final EPA decision, unless the EAB decides on its own initiative to review the decision.

## ***What Are the Steps in an Administrative Enforcement Appeal?***

### **Step 1: Appellant Files a Notice of Appeal with the EAB**



A person who is dissatisfied with an ALJ's or other presiding officer's Initial Decision files a Notice of Appeal with the Clerk of the EAB. The Clerk logs in the appeal and assigns it an appeal number. The "appellant" (party filing the appeal) may be the person against whom the proceeding was brought (the Respondent) or may be the EPA office that filed a Complaint against the Respondent (the Complainant). The "appellee" is the party against whom the appeal is filed. In some cases, both parties may file appeals. The Notice of Appeal must comply with federal regulations that govern enforcement appeals, known as the Consolidated Rules of Practice, or "CROP." The CROP is published in the Code of Federal Regulations at title 40, part 22 (40 C.F.R. pt. 22). Some of the CROP's requirements related to notices of appeal are summarized below.

The Clerk of the EAB must receive a Notice of Appeal within 30 days from the date the Initial Decision was served. The EAB enforces this deadline strictly. Under EPA's regulations, the Initial Decision may be served personally, by mail, or by a commercial delivery service. The regulations contain specific rules for how to calculate the 30-day period of time in which to file your appeal, depending on how the Initial Decision was served. Hard copies of the Notice of Appeal must be addressed to either EPA's mailing address or to its hand-delivery address. You must allow sufficient time for the Clerk to receive your Notice of Appeal before the 30-day filing deadline. In addition to reading the regulations, follow the instructions in the "[How and Where Should I File Documents with the EAB?](#)" section on [page 19](#) of this Guide to ensure that you timely file your Notice of Appeal.

The CROP does not prescribe a specific form for a Notice of Appeal. However, the regulations do specify the information that must be included and the types of issues that may be raised. The CROP also contains instructions for the form and content of the appellate brief, the document that contains the factual and legal arguments that support the Notice of Appeal. The EAB's Practice Manual contains forms for a Notice of Appeal and appellate brief that you can use as models in drafting your own Notice of Appeal and appellate brief.

## **Step 2:      Other Participants File Briefs Responding to the Notice of Appeal**

Once a party files an appeal, any other participant in the case may file a response to the appellate brief. The response brief must be limited to the arguments that were raised in the appellate brief and must be filed within the time period allowed by the regulations. If either side wants to file additional briefs, it first must request permission from the EAB. A party who is not the Appellant also may file an additional notice of appeal (called a cross-appeal) on any issue in the case, within 20 days after the first notice of appeal was served.

## **Step 3:      Oral Argument**

You may request oral argument in your appeal or your response to an appeal. The EAB may grant your request or may schedule an oral argument on its own initiative. See [page 35](#) of this Guide for more information about oral arguments before the EAB.

## **Step 4:      The EAB Deliberates the Issues**

The Clerk of the Board assigns the case to a three-judge panel, one of whom serves as lead judge and prepares the EAB's written decision in the case. The EAB considers briefs that were submitted by the participants and also reviews relevant portions of the Administrative

Record. The Administrative Record consists of the transcript of any hearing held by the ALJ and any documents submitted to the ALJ.

The CROP provides that the Complainant has “the burdens of presentation and persuasion,” both as to liability and as to the appropriateness of the penalty. In general terms, the Complainant’s “burden of presentation” means that it is the Complainant’s obligation in the first instance to present factual evidence that a violation occurred and to demonstrate why the recommended penalty amount is appropriate. The Complainant’s “burden of persuasion” means that it is the Complainant’s obligation to present evidence and arguments that are more persuasive than those of the Respondent in order for the ALJ or the EAB to decide in the Complainant’s favor. The EAB’s review of an Initial Decision is “*de novo*,” meaning the EAB has the authority to set aside the ALJ’s factual findings and legal conclusions and to reach its own determination as to whether the Respondent is liable for the violations charged in the Complaint. In practice, the EAB ordinarily will defer to the ALJ’s factual findings, especially if the factual issues involve the testimony of witnesses, because the ALJ will have had an opportunity to observe them and evaluate their credibility.

The CROP authorizes the EAB to set aside the ALJ’s recommended penalty amount and to make its own determination of an appropriate civil penalty. However, the EAB has stated in its decisions that it will not ordinarily substitute its judgment as to an appropriate penalty amount for the judgment of the ALJ unless the ALJ has made a clear error in applying any applicable penalty guidelines, has not given convincing reasons for deviating from them, or has not explained the penalty assessment.

## **Step 5:      The Parties May Discuss Settlement**

EPA encourages settlements, and the EAB ordinarily will grant a request to stay (postpone) a proceeding if settlement discussions are taking place. Such requests are granted upon a written motion to the Board setting forth the reasons for the request.

The EAB has established an alternative dispute resolution program to assist parties in resolving disputes before the Board. Participation in the EAB's alternative dispute program is voluntary. More information about the EAB's alternative dispute resolution program is available in the "[Resolving Disputes Informally](#)" section of this Guide on [page 33](#).

## **Step 6:      The EAB Issues a Decision**

After reviewing the relevant materials, the EAB may decide to (1) affirm the ALJ or other presiding officer's decision; (2) reverse and remand (send back for further action) the ALJ's or other presiding officer's decision; or (3) reverse the ALJ's or other presiding officer's decision and issue a new decision. The EAB issues its decision and then serves a copy of the decision by mail to each party in the case. If the EAB determines that the decision addresses a new issue or explains the EAB's reasoning in a way not previously articulated, the EAB will issue the decision as a published decision. All other EAB decisions are issued as unpublished decisions. All decisions — published and unpublished — are available on the EAB Web site at [www.epa.gov/eab](http://www.epa.gov/eab). Individual copies of EAB decisions also may be obtained from the Clerk of the Board and are commercially available through LexisNexis<sup>®</sup> and Westlaw<sup>®</sup>.

The EAB's decision is final and may not be appealed to the EPA Administrator except in limited cases involving another federal agency. However, any party other than EPA has a right

to appeal the EAB's decision to a federal court. The particular environmental statute at issue determines the court in which the appeal must be filed and the standard of review that the court must apply.

### ***Appeals from Permit Decisions***

A permit appeal is a challenge to a decision issuing or modifying an environmental permit or license, or denying a permit application. The permittee (permit holder) or permit applicant, or any other interested person who objects to some aspect of the permit decision and who meets certain threshold requirements summarized below, may file a petition asking the EAB to review a permit decision. The permit applicant or permittee typically argues that particular permit provisions – discharge limitations or monitoring requirements, for example – are too restrictive. A private citizen (or a group of citizens) other than the permittee who files an appeal typically argues that the terms of the permit are too lenient to provide adequate protection for the environment or that the permit should not be issued at all.

Even if you meet all of the prerequisites for filing a petition, the EAB has the discretion not to decide your petition. The Board typically will review a permit decision only if you demonstrate that the permit issuer made a “clearly erroneous” finding of fact or legal conclusion, or that your issue concerns an exercise of EPA discretion or an important policy consideration that the EAB in its discretion should review.

The EAB typically will make a final decision on the merits of the appeal based on the petition, the permit issuer's response, the permit applicant (if not the petitioner), and the timely-filed briefs of any other participant. Additionally, the Board may consider “amicus curiae” (which means “friend of the court”) briefs filed by any interested person. Because additional briefing is at the Board's discretion, all substantive arguments must be included in your petition for review,

and the EAB encourages participants to provide all necessary support for all of their arguments at the time the petition for review is submitted. The EAB's resolution of a permit appeal case may result in a denial of review of the petition, or the EAB may rule in the petitioner's favor and overturn the permit or return the permit to the permit issuer for further action.

## ***What Are the Steps in a Permit Appeal?***

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

A member of the public or an organization that objects to a permit decision files a petition with the Clerk of the Board asking the EAB to review the permit decision. The party filing the petition is known as the "petitioner." The petition must comply with the requirements in the regulations that govern permit appeals. Most permit appeals are governed by regulations that are published in title 40 Code of Federal Regulations, part 124 (40 C.F.R. Part 124).



There are several threshold requirements that a petitioner must meet. A petition to review a permit decision must be filed before the deadline established by the regulations. For permit appeals governed by part 124, a petition must be filed with the EAB within 30 days after notice of a final permit decision is served. In addition to reading part 124.19, follow the instructions in the "[How and Where Should I File Documents with the EAB?](#)" section on [page 19](#) of this Guide to ensure that you timely file your petition.

In most circumstances, the petitioner also must satisfy several other prerequisites before the EAB will consider the issues the petition raises. First, the petitioner must have participated in the process during which the permit issuer reviewed the permit application and issued a draft permit for public comments, either by speaking at a public hearing or by submitting written

comments on the draft permit. This regulatory requirement is intended to ensure that the petitioner has a sufficient interest in the permit to be allowed to file an appeal. Second, the petitioner only may raise the specific issues that were raised during the Region's permit review process (by the petitioner or another commenter). This regulatory requirement is intended to ensure that the permit issuer had an opportunity to consider the petitioner's arguments and to respond to them during the comment period on the draft permit. A limited exception to these threshold requirements may be when there has been a significant change between the draft and final permit, with no opportunity prior to the appeal for the petitioner to have participated in the public process. Please review the permit appeal regulatory requirements at title 40 of the Code of Federal Regulations, section 124.19, for specific information.

It is important that permit processes be predictable and come to conclusion in a reasonable time. Allowing issues to be raised for the first time on appeal would not contribute to these objectives. Therefore, if you have concerns about a pending permit, you should participate in the public comment period on the draft permit. The comment period provides an important opportunity for you to raise objections to the draft permit and to provide the permit issuer with any pertinent information that supports those objections. Your participation during the comment period preserves your opportunity to file an appeal if you are dissatisfied with the permit decision. Your objections should be as specific as possible because you typically may only raise on appeal an objection that you or another commenter specifically raised during the public comment period.

Your petition to the EAB to review the permitting decision must identify the permit conditions you are contesting or any other specific challenge you have to the permit decision. You must set forth clearly, with legal and factual support, your contentions for why the permit decision should be reviewed. In most cases, you also must show that your contentions were

raised earlier in the permitting process, prior to your appeal, and why the permit issuer's responses to those earlier contentions were inadequate.

## **Step 2:      Response Briefs are Filed**

The Clerk of the Board logs in the appeal and assigns it an appeal number. The permit issuer, permit applicant (if the permit applicant is not the petitioner), and the State or Tribal authority where the permitted facility or site is or is proposed to be located then will have the opportunity to respond to the petition. Additionally, any interested person may file a brief as "amicus curiae," or friend of the court. If the EAB determines that additional briefing is necessary to make its decision, the EAB may order the parties, including the petitioner, to file additional briefs.

## **Step 3:      Oral Argument**

A party may request an oral argument. The EAB may grant that motion for an oral argument, or it may schedule an oral argument on its own initiative. There is a presumption against oral arguments in Prevention of Significant Deterioration and other new source permit cases because of the expedited statutory deadline for issuing a final decision. See [page 35](#) of this Guide for more information about oral arguments before the EAB.

## **Step 4:      The Parties May Discuss Settlement**

EPA encourages settlements, and the EAB ordinarily will grant a request to stay (postpone) a proceeding if settlement discussions are taking place. Such requests are granted upon a written motion to the Board setting forth the reasons for the request.

The EAB has established an alternative dispute resolution program to assist parties in resolving disputes before the Board. Participation in the EAB's alternative dispute program is

voluntary. More information about the EAB's alternative dispute resolution program is available in the "[Resolving Disputes Informally](#)" section of this Guide on [page 33](#).

### **Step 5:      The EAB Deliberates the Issues**

The Clerk of the Board assigns the case to a panel of three judges, one of whom serves as lead judge for purposes of issuing any orders and/or preparing the written opinion the EAB will issue after it decides the issues in the case. The EAB reviews the briefs submitted by the parties and the documents in the administrative record. Where there has been an oral argument, the EAB takes into account the points made during the argument.

### **Step 6:      The EAB Issues a Decision**

After reviewing all the relevant materials, the EAB may (1) issue an order denying review of the petition; (2) issue a decision on the merits of the appeal and not require a remand (sending back) of the proceedings to the permit issuer; or (3) remand the permit to the permit issuer, requiring the permit issuer to adjust permit terms or to provide a better explanation for a permit condition that has been challenged. After the appeals process is complete, the permitting authority issues the final permit decision.

The EAB issues its final decision by mail and then serves a copy of the decision to each party in the case. If the EAB determines that the decision addresses a new issue or explains the EAB's position in a way not previously articulated, the EAB will issue the decision as a published decision. All other EAB decisions are issued as unpublished decisions. All decisions — published and unpublished — are available on the EAB Web site at [www.epa.gov/eab](http://www.epa.gov/eab). Individual copies of EAB decisions also may be obtained from the Clerk of the Board and are commercially available through LexisNexis<sup>®</sup> and Westlaw<sup>®</sup>.

When the EAB issues one of the decisions described above, the EAB's decision may not be appealed to the EPA Administrator. However, any party other than EPA has a right to appeal the EAB's decision to a federal court *after* the EAB decision is issued and the permit issuer issues the final permit decision. The particular environmental statute at issue determines the court in which the appeal must be filed and the standard of review that the court must apply.

## Resolving Disputes Informally

The EAB encourages parties to explore alternative methods of resolving their disputes without a formal legal proceeding before the Board. The EAB's Alternative Dispute Resolution (ADR) program offers parties a way to settle a dispute with the help of an EAB judge who serves as a neutral mediator. Participation is voluntary, and the process is confidential. Learn about the EAB's ADR program by visiting the [Alternative Dispute Resolution page](#) on the EAB Web site ([www.epa.gov/eab](http://www.epa.gov/eab)) or by addressing your questions to the Clerk of the Board by telephone or email.



## Can I Represent Myself or Do I Need to Hire a Lawyer?

You may represent yourself in a proceeding before the EAB. The regulations do not require that you be represented by a lawyer. If you decide to represent yourself, the EAB judges will make every effort to give full weight to your arguments, even if you do not express them using legal terminology. However, you will be required to comply with statutory and regulatory deadlines and other legal requirements that apply to your case.

The Clerk of the Board and the staff attorneys to the EAB are available to answer any questions you have about EAB procedures. Staff attorneys do not provide legal advice to the public and will not discuss the particulars of matter before the Board, so they cannot discuss the merits of your particular case with you or give you guidance on how to argue your case.

It may be in your interest, however, to have a lawyer represent you, particularly if your case involves complex legal issues. A lawyer may be better able to understand the specialized language used in legal arguments and will be familiar with the legal research tools that help find relevant EAB and court opinions issued in other cases. A lawyer also may be able to give you advice as to which of your arguments are likely to be persuasive.

Before you decide whether or not to hire a lawyer, you may want to read some of the EAB's decisions in cases that are similar to your own and decide whether you will be comfortable and effective as a "*pro se* litigant" (a participant who represents himself).

## Should I Ask for an Oral Argument or Should I Rely Solely on My Written Brief?

An oral argument is a hearing conducted by the EAB at which each party is given the opportunity to explain further its positions. An appellate hearing of this kind is not an opportunity to present additional evidence or witness testimony in your case. Generally on appeal, the evidence considered is limited to the evidence that informed the decision being appealed. An appellate oral argument is an opportunity for you or your advocate to explain why the legal position you have taken in your briefs is the correct one.

Oral arguments typically take place in the U.S. EPA Administrative Courtroom, 1201 Constitution Avenue, NW, U.S. EPA East Building, Washington, D.C., and are open to the public. A schedule of oral arguments may be obtained from the Board Web site at the [Upcoming Oral Arguments](#) link or from the Clerk of the Board. If you would like to attend a particular oral argument, please contact the Clerk of the Board at least one week before the argument. This advance notice is required for security reasons so that attendees' names may be placed on an admittance list to the hearing room.

The EAB can arrange for one or both parties in a case to participate in an oral argument using EPA's videoconferencing equipment, without traveling to Washington. The Clerk of the Board can provide additional information about videoconferencing.

If you think that an oral argument will benefit your case, you should request one as part of your appeal or file a motion requesting that the EAB schedule one. Your motion will be more effective if you explain which issues you would like to discuss at an argument and why you think that an oral presentation would be helpful to the EAB in resolving them. The decision whether to hold an argument is within the EAB's discretion. The EAB generally will hold an argument where

it is persuaded that an oral presentation will help it to understand better the issues raised in the briefs, and contribute to an improved decisionmaking process. There is a presumption against oral arguments in Prevention of Significant Deterioration and other new source permit cases because of the expedited statutory timeframe for issuing a final decision.

The EAB may schedule an oral argument on its own initiative in the absence of a request by one of the parties. If so, the order scheduling oral argument usually will specify the particular issues on which the EAB would like to hear argument.

# Where Can I Learn More About the EAB?

## EAB ON THE INTERNET



The EAB Web site, [www.epa.gov/eab](http://www.epa.gov/eab), is the best source of information about the most current EAB procedures and about recent EAB decisions. The Web site includes:

- **EAB Dockets.** [EAB Dockets](#), which you can reach by means of a link on the EAB Web site, consists of [Active Dockets](#), consisting of an index to documents filed in cases pending before the EAB, and the complete text of most documents; [Closed Dockets \(since January 1, 2006\)](#), consisting of an index to documents filed in cases closed after January 1, 2006, and the complete text of most documents; and [Closed Dockets \(March 1992 through December 1, 2005\)](#), consisting of a list of cases that were closed before January 1, 2006.
- **Regulations Governing Appeals.** Links to the full text of [regulations that govern EAB cases](#) and information on revisions made in 2013 to title 40 of Code of Federal Regulations part 124, section 19 (40 CFR § 124.19).
- **Standing Orders.** The Board's [standing orders](#) govern practice before the EAB.
- **EAB Guidance Documents.** The Board's [Guidance Documents](#) Web page includes the Practice Manual, the Revised Guidance on Procedures for Submission and Review of CERCLA Section 106(b) Reimbursement Petitions, and this Citizens' Guide. The EAB Practice Manual contains information about the statutes, regulations, and standing orders that govern practice before the EAB, and the procedures followed by the EAB in resolving disputes. An Appendix to

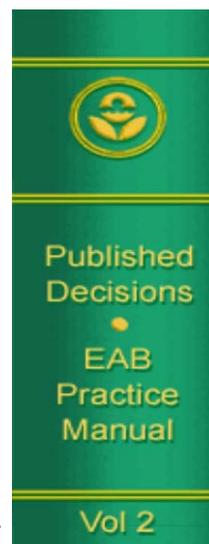
the Practice Manual contains sample documents that you can use as guidance in preparing the documents you submit to the EAB. The Revised Guidance on Procedures for Submission and Review of CERCLA Section 106(b) Reimbursement Petitions explains the EAB's procedures for CERCLA reimbursement proceedings.

- **EAB Published Decisions.** The Web site contains the complete text of all of the [published decisions](#) the EAB has issued. It also contains lists of EAB published decisions that are arranged alphabetically, chronologically and by statute. You also can use the "search" function to search for a particular topic the EAB has addressed in a published decision.
- **EAB Unpublished Final Orders.** The Web site contains the text of [unpublished final orders](#) the EAB has issued since November 1996.
- **Frequently Asked Questions.** The Web site contains answers to [frequently asked questions](#) about EAB procedures.
- **Tables of Subsequent History of EAB Opinions.** The Web site contains a table of [EAB Decisions Reviewed by the Federal Courts](#) that contains information about EAB decisions that have been affirmed or reversed by a federal district court or federal circuit court of appeals. The companion table lists appeals from [EAB decisions that are pending in federal court](#).
- **Alternative Dispute Resolution.** The Web site contains information about the EAB's voluntary [Alternative Dispute Resolution \(ADR\) program](#).

## Where Can I Read the Decisions the EAB Has Issued?

The full text of the EAB's decisions appears on the EAB's Web site.

In addition, the EAB's published decisions issued between March 1992 and June 2008 appear in a series of bound volumes titled Environmental Administrative Decisions (E.A.D.). Copies of the E.A.D. are available at hundreds of "federal depository libraries." These libraries, which are located throughout the United States, provide access to a large number of federal publications. Trained librarians are available at these libraries to help members of the public find and use documents. The Web site <http://catalog.gpo.gov/fdlpdir/FDLPdir.jsp> contains a list of federal depository libraries.



The EAB has adopted an official form of citation for its opinions. A form of citation is a standardized way to reference a legal opinion. A published decision of the EAB should be cited by reference to the E.A.D. volume and page where it appears and the year the decision was issued. As an example, *In re ConocoPhillips, Inc.*, 13 E.A.D. 768 (EAB 2008), refers to an opinion the EAB issued in 2008 that can be found in volume 13 of the E.A.D., beginning on page 768. Prior to publication of a published decision, the Board issues a slip opinion, or individual Board decision that is published separately soon after it is rendered, which may be cited by reference to the appeal number assigned to the case by the Clerk of the Board, a notation that it is a slip opinion, and the complete date of the opinion. An example of a citation to a published decision that has not yet been published in a compilation is *In re Bear Lake Props.*, UIC Appeal No. 11-03, slip op. (June 28, 2012). An unpublished opinion should be cited by reference to the appeal number assigned to the case by the Clerk of the Board, and the complete date of the opinion. An example of a citation to an order the EAB does not intend for publication is *In re American Airlines, Inc.*, RCRA Appeal No. 10-01 (EAB Apr. 4, 2011) (Order

Dismissing Petition for Review). Additional information about citing EAB opinions can be found in the EAB Practice Manual.

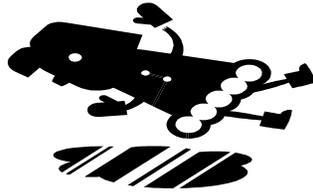
## How Can I Be An Effective Participant in an EAB Proceeding?

- ✓ Comply strictly with all EAB deadlines for submitting documents. Review the [“How and Where Should I File Documents with the EAB?”](#) section of this Guide beginning on [page 19](#) to ensure you timely file documents.
  
- ✓ Read all relevant EAB opinions. The EAB’s decisions serve as “precedents” for future EAB decisions. If you will be participating in a case pending before the EAB, or are trying to decide whether to appeal to the EAB, reading these opinions will help you evaluate the persuasiveness of your arguments. If you find opinions that support your case, you should reference them in your brief and explain why the EAB’s reasoning in the opinion also applies to your case. Make sure your legal brief addresses the key arguments the other party raises.
  
- ✓ Consult the templates in the appendix to the EAB Practice Manual for forms that you can use as a model in drafting documents you file with the EAB. The templates include, for example, a sample Notice of Appeal and a sample Petition for Review of a Permit Decision.
  
- ✓ In an enforcement case:
  - Read the regulations at 40 CFR part 22, which govern enforcement proceedings before the EAB. Do not rely solely on EPA guidance documents because they do not have the force of law.
  
  - State the relief you want. Your arguments will be more effective if you clearly state what you want the EAB to do. Let the Board know whether

you want the EAB to reverse a finding of liability as to all the charges in the complaint or only as to some of the charges. If you want the EAB to reduce the penalty you were assessed, state what you would consider an appropriate penalty and why.

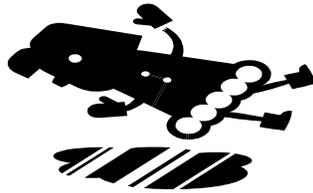
- Direct the EAB to the factual evidence in the record (documents or testimony by witnesses) that supports your argument.
- Explain why the decision you are appealing is based on a legal error.
  - ❖ Does the decision conflict with previously-issued decisions of the EAB?
  - ❖ Does the decision conflict with a statute or regulations?
- ✓ In a permit case:
  - Read the regulations at 40 C.F.R. part 124, and in particular section 124.19, which govern permit proceedings before the EAB. Do not rely solely on EPA guidance documents, which do not have the force of law.
  - Participate actively in the permit proceeding before the permit has been issued. Raise all of your concerns about a permit during the public comment period on the draft permit so that the permit issuer has an opportunity to address them. Issues that could have been raised during the public comment period but were not raised are waived and cannot be appealed later. Be specific in your comments or concerns.

- In your petition for review, identify the specific permit conditions or other specific problem with the permit decision that you are challenging.
- Clearly set forth the factual and legal support for why the Board should review the permit.
- Identifying the specific findings of fact or conclusions of law that you challenge and explain why they are clearly erroneous.
- Identify the comment or comments on the draft permit where you or another commenter raised the issue you are now raising on appeal, and provide specific references to the Administrative Record.
- If the permit issuer responded to your issue in its response to comments, identify the response and explain why the permit issuer's response to public comments did not provide an adequate answer to the concerns raised by the public comments.
- If your issue was not raised in public comments, explain why it could not have been raised at that time.
- As appropriate, propose alternative permit conditions to the conditions that you oppose.



## COMMON PITFALLS TO AVOID

- ⊖ **Missing the filing deadline for your notice of appeal or petition for review of a permit decision**
- ⊖ **Not pointing out relevant EAB decisions that support your position**
- ⊖ **Avoiding references to relevant EAB decisions that do not support your position, instead of distinguishing your case from other cases**
- ⊖ **In a permit proceeding:**
  - ☛ **Not participating actively in the comment period on the draft permit**
  - ☛ **Not explaining why the permit issuer's response to comments on the draft permit did not adequately address your concerns**



## Conclusion

The EAB hopes that you have found this Guide to be a useful introduction to the administrative appeals process of the U.S. Environmental Protection Agency. If there are additional topics that you believe should be addressed in this Guide, please direct your ideas to the Clerk of the Board, using the contact information on [page 18](#). Your suggestions are welcome.