

## **The EPA's Environmental Appeals Board at Twenty-five: An Overview of the Board's Procedures, Guiding Principles, and Record of Adjudicating Cases**

### **ABSTRACT**

*For twenty-five years, the Environmental Appeals Board has served as an impartial administrative appeals tribunal within the U.S. Environmental Protection Agency. Its primary role is to provide a fair appeals process for resolving environmental permitting and enforcement disputes between EPA and non-EPA stakeholders. Since its creation, the Board has issued over eleven hundred final decisions. In most instances, the Board's involvement has resolved the dispute, thereby promoting efficiency by avoiding protracted and expensive litigation in federal court. This article discusses the history of EPA's Environmental Appeals Board, explains how it operates, and summarizes its docket and adjudication results.*

### **I. Introduction and Background**

The Environmental Appeals Board ("Board") is an appellate tribunal located within the U.S. Environmental Protection Agency ("EPA" or "Agency").\* The Board issues final Agency decisions under all of the major environmental statutes that EPA administers. The Board was established in a 1992 rulemaking to "allow for a broader range of input and perspective in administrative decisionmaking," to "lend[] greater authority to the Agency's decisions," and to "inspire[e] confidence in the fairness of Agency adjudications."<sup>1</sup> The Board's objectives include: (1) ensuring EPA applies legal requirements consistently; (2) providing cost-effective opportunities for review of Agency actions; and (3) resolving appeals efficiently in order to expedite environmental compliance and permitting and avoid protracted review in federal court. Representatives from industry and other stakeholders have historically favored the Board's administrative appeal process as a way to avoid the expense and time required to pursue appeals judicially.<sup>2</sup>

The Board's docket consists primarily of appeals from administrative civil penalty assessments and challenges to environmental permitting decisions. The Board also has jurisdiction to hear other types of appeals and, on occasion, resolves disputes under special delegation by the Administrator. Other types of cases handled by the Board include petitions for reimbursement of costs incurred at hazardous waste sites in response to federal cleanup orders, certain appeals under the Clean Air Act's acid rain program, and challenges to pesticide registration and cancellation proceedings. The Board also reviews and approves proposed consent agreements arising out of

---

\* The Members of the Environmental Appeals Board are Aaron P. Avila, Mary Kay Lynch, Kathie A. Stein, and Mary Beth Ward. This article was prepared by the Members of the Board and Catherine Malinin Dunn, Senior Counsel to the Board, with assistance from Ammie Roseman-Orr and Michelle A. Wenisch, both Senior Counsel to the Board.

<sup>1</sup> Changes to Regulations to Reflect the Role of the New Environmental Appeals Board in Agency Adjudications, 57 Fed. Reg. 5320, 5321-22 (Feb. 13, 1992).

<sup>2</sup> See, e.g., Hazardous Remediation Waste Management, 63 Fed. Reg. 65,874, 65,899 (Nov. 30, 1998) (Preamble to Resource Conservation and Recovery Act Remedial Action Plan Rule).

administrative enforcement actions initiated by EPA Headquarters. Finally, the Board maintains a voluntary Alternative Dispute Resolution program to assist parties in resolving their disputes in whole or in part, without the need for further Board review or federal litigation.

The Board is composed of four Environmental Appeals Judges, each of whom is a career member of the federal government's Senior Executive Service.<sup>3</sup> The Board maintains offices and an administrative courtroom in Washington D.C. and is staffed by experienced environmental attorneys and administrative personnel.

## **II. The Board's Operating Procedures**

The Board is an impartial administrative appeals tribunal within the executive branch of the U.S. government and, as such, is subject to the Administrative Procedure Act ("APA").<sup>4</sup> Most proceedings before the Board are covered by one of two sets of federal regulations promulgated in accordance with the APA: the Consolidated Rules of Practice governing the administrative assessment of civil penalties, codified at 40 C.F.R. part 22,<sup>5</sup> and the Procedures for Decisionmaking applicable to permitting, codified at 40 C.F.R. part 124.<sup>6</sup> Those areas of the Board's jurisdiction

---

<sup>3</sup> The Senior Executive Service ("SES") was established by Title IV of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 402(a), 92 Stat. 1111, 1154 (1978) "to ensure that the executive management of the Government of the United States is responsive to the needs, policies, and goals of the Nation and otherwise is of the highest quality." 5 U.S.C. § 3131 (2012). Members of the SES possess solid leadership and managerial skills, a commitment to public service, and a broad perspective on government. *See* U.S. Office of Personnel Management, *Guide to the Senior Executive Service 2* (Apr. 2014). They serve in key positions across the federal government, just below the top presidential appointees, and constitute a vital link between presidential appointees and the rest of the federal workforce. *Id.*

<sup>4</sup> 5 U.S.C. §§ 551-559 (2012).

<sup>5</sup> Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation / Termination or Suspension of Permits, 40 C.F.R. pt. 22 (2016). Part 22 governs proceedings for the assessment of administrative penalties under the following statutory provisions: section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended ("FIFRA"), 7 U.S.C. § 136l(a); sections 113(d), 205(c), 211(d), and 213(d) of the Clean Air Act, as amended ("CAA"), 42 U.S.C. §§ 7413(d), 7524(c), 7545(d), 7547(d); section 105(a) and (f) of the Marine Protection, Research and Sanctuaries Act, as amended ("MPRSA"), 33 U.S.C. § 1415(a), (f); sections 3008, 9006, and 11005 of the Solid Waste Disposal Act, as amended (often referred to as the Resource Conservation and Recovery Act, "RCRA"), 42 U.S.C. §§ 6928, 6991e, 6992d; sections 16(a) and 207 of the Toxic Substances Control Act, ("TSCA"), 15 U.S.C. §§ 2615, 2647; sections 309(g), 311(b)(6), and 402(a) of the Clean Water Act, as amended ("CWA"), 33 U.S.C. §§ 1319(g), 1321(b)(6), 1342(a); section 109 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9609; section 325 of the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA"), 42 U.S.C. § 11045; sections 1414(g)(3)(B), 1423(c), and 1447 of the Safe Drinking Water Act, as amended ("SDWA"), 42 U.S.C. §§ 300(g)-3(g)(3)(B), 300h-2(c), 300j-6(b); and section 5 of the Mercury-Containing and Rechargeable Battery Management Act, 42 U.S.C. § 14304.

<sup>6</sup> Procedures for Decisionmaking, 40 C.F.R. pt.124 (2016). Part 124 establishes the Agency's procedures for issuing, modifying, revoking and reissuing, or terminating most federal permits issued under the following statutory programs: RCRA, 42 U.S.C. §§ 6901-6992k; the New Source Review program ("NSR"), including the Prevention of Significant Deterioration program ("PSD") under the CAA, 42 U.S.C. §§ 7401-7671q; the Underground Injection Control program ("UIC") under the SDWA, 42 U.S.C. §§ 300f to 300j-26; and the National Pollutant Discharge Elimination System program ("NPDES") under the CWA, 33 U.S.C. §§ 1251-1387. Most of the rules regarding permit appeals are found at 40 C.F.R. § 124.19. In addition, specific

not covered by parts 22 and 124 are covered by various other regulatory authorities.<sup>7</sup> In order to help legal practitioners and the public understand and follow its procedures, the Board has issued a number of guidance documents and standing orders, all of which are available on the Board's website at [www.epa.gov/eab](http://www.epa.gov/eab).<sup>8</sup> EPA has recently made minor amendments to parts 22 and 124 to simplify the administrative processing of cases by expanding the use of electronic filing and service and streamlining the procedures in cases initiated at EPA Headquarters.<sup>9</sup> While the issues that arise in enforcement appeals are distinct from those that arise in petitions for review of a permitting decision, the Board's procedures for handling both types of cases are similar.

Part 22 authorizes any party to appeal an adverse order or ruling by a Presiding Officer in an administrative enforcement proceeding.<sup>10</sup> An initial decision may be appealed by filing a notice of appeal with the Board within thirty days after the initial decision is served.<sup>11</sup> In contrast, an interlocutory ruling is appealable only at the Board's discretion.<sup>12</sup> A party filing a notice of appeal must also submit a legal brief that includes a statement of the issues presented for review, a statement of the nature of the case and the relevant facts (with appropriate references to the record), argument on the issues presented, and a statement of the relief sought.<sup>13</sup> Within twenty days of service of a notice of appeal, any other party or non-party participant may file a response brief, but the scope is limited to issues already raised during the course of the proceeding and to issues

---

procedures apply to PSD permits, *see* 40 C.F.R. §§ 124.41-.42, NPDES permits, *see id.* § 124.51-.66, and RCRA standardized permits, *see id.* §§ 124.31-.33.

<sup>7</sup> Other regulatory provisions authorizing appellate jurisdiction for the Board include 40 C.F.R. § 66.95(c) (CAA § 120 noncompliance penalties); 40 C.F.R. part 85 (CAA § 207(c) automobile recalls); 40 C.F.R. part 71 (CAA Title V permits); 40 C.F.R. part 72 (CAA Title IV permits); 40 C.F.R. § 60.539(h)(2) (CAA § 111 performance standards for wood heaters); 40 C.F.R. part 164 (FIFRA § 6 pesticide registrations); 40 C.F.R. § 222.12(a)(1) (Marine Mammal Protection Act § 102 ocean dumping permits); and 40 C.F.R. § 209.3(k) (Noise Control Act § 11(d) administrative enforcement orders). The Board has also been delegated the authority to take final action on claims made under the Equal Access to Justice Act, 40 C.F.R. § 17.8, take final action in administrative proceedings to impose civil penalties against persons who make false or fraudulent claims or statements to EPA, 40 C.F.R. § 27.48, and review petitions for reimbursement of response costs incurred at hazardous waste sites under section 106(b)(2) of CERCLA, U.S. EPA, *Delegations of Authority* ch. 14-27 (rev. June 27, 2000) (CERCLA Petitions for Reimbursement).

<sup>8</sup> Guidance documents issued by the Board include the following: *A Citizens' Guide to EPA's Environmental Appeals Board*, *The Environmental Appeals Board Practice Manual*, *Revised Guidance on Procedures for Submission and Review of CERCLA Section 106(b) Reimbursement Petitions*, *Consent Agreement and Final Order Procedures*, and *Procedures for Quick Resolution of Administrative Enforcement Cases and Final Order*. The Board has issued standing orders on petitions for review of New Source Review Permits under the Clean Air Act and on electronic filing.

<sup>9</sup> 82 Fed. Reg. 2230, 2231. The amendments are scheduled to take effect May 22, 2017. 82 Fed. Reg. 14,324, 14,324-5 (Mar. 20, 2017).

<sup>10</sup> 40 C.F.R. §§ 22.29, .30. A "Presiding Officer" is "an individual who presides in an administrative adjudication until an initial decision becomes final or is appealed." *Id.* § 22.3. A Presiding Officer is either an Administrative Law Judge or a Regional Judicial Officer. *Id.*

<sup>11</sup> *Id.* § 22.30(a)(1).

<sup>12</sup> *Id.* § 22.29(a).

<sup>13</sup> *Id.* § 22.30(a)(1).

concerning subject matter jurisdiction.<sup>14</sup> If no party appeals an initial decision, the Board may exercise its *sua sponte* authority to review the decision on its own initiative.<sup>15</sup> No filing fee is required to appeal an initial order or an interlocutory ruling.

Part 124 authorizes “any person who filed comments on [a] draft permit or participated in a public hearing on [a] draft permit” to petition the Board for review of the permit decision.<sup>16</sup> A petition for review must be filed within thirty days after service of notice of the issuance of a decision and must identify the contested permit condition or other challenge to the permit decision and clearly set forth the petitioner’s contentions, with appropriate support, as to why the Board should review the decision.<sup>17</sup> A petitioner must demonstrate that each issue raised in the petition was previously raised during the public comment period, or at a public hearing.<sup>18</sup> In order to prevail, a petitioner must show that each challenged permit condition is based on “[a] finding of fact or conclusion of law that is clearly erroneous” or “[a]n exercise of discretion or an important policy consideration that the Environmental Appeals Board should, in its discretion, review.”<sup>19</sup> The EPA Region – or other authority acting on EPA’s behalf – that issued the permitting decision must file a response to a petition for review together with a certified index of the administrative record and relevant portions of the record before the applicable deadline.<sup>20</sup> A permit applicant who did not appeal a permit decision may also file a notice of appearance and respond to a petition, as may a state or tribal authority where a permitted facility is (or is proposed to be ) located.<sup>21</sup> Any other interested person may also participate in the appeal by filing an amicus brief.<sup>22</sup> As is the case with enforcement appeals, there is no fee to file a petition for review.

---

<sup>14</sup> *Id.* § 22.30(a)(2), (c).

<sup>15</sup> *Id.* § 22.30(b). The Board exercises this authority sparingly, generally leaving it to the parties to the dispute to decide whether to appeal. On occasion, however, the Board has exercised this authority to address one or more significant issues.

<sup>16</sup> *Id.* § 124.19(a)(2). The regulations also allow any person to petition for review of any final permit conditions that were changed from the proposed draft permit. *Id.*

<sup>17</sup> *Id.* § 124.19(a)(3), .19(a)(4)(i). The Board revised part 124 in 2013 in order to simplify the review process and make it more efficient, reconciling the regulatory language with what had, over time, become standard Board practice. *See* Revisions to Procedural Rules to Clarify Practices and Procedures Applicable in Permit Appeals Pending Before the Environmental Appeals Board, 78 Fed. Reg. 5281 (Jan. 25, 2013). The changes streamlined the briefing and review process by eliminating the requirement that petitioner had to first file a substantive petition for review followed by a subsequent brief arguing the merits. *Id.* at 5282-8. Nothing in the amended part 124 precludes the Board from ordering additional briefing in any appeal where the Board determines it is warranted. *See* 40 C.F.R. § 124.19(n) (stating that the Board “may do all acts and take all measures necessary for the efficient, fair, and impartial adjudication of issues arising in an appeal under this part”).

<sup>18</sup> *Id.* § 124.19(a)(4)(ii).

<sup>19</sup> *Id.* § 124.19(a)(4)(i).

<sup>20</sup> *Id.* § 124.19(b). A response to a petition involving a new source permitting decision is due within twenty-one days; a response to any other type of petition is due within thirty days. *Id.* § 124.19(b)(1)-(2).

<sup>21</sup> *Id.* § 124.19(b)(3)-(4).

<sup>22</sup> *Id.* § 124.19(e).

Once the Board has received a notice of an enforcement appeal or petition for review of a permit, the Clerk of the Board assigns the matter to a panel of judges using a neutral case assignment system. The Board typically hears matters before it in three-member panels,<sup>23</sup> with the fourth member of the Board available to serve as a settlement judge in the event the parties opt to participate in the Board's Alternative Dispute Resolution program. The panel decides each matter before it "in accordance with applicable statutes and regulations"<sup>24</sup> and considers the standard of review, prior Board precedents, relevant Agency policy, and the evidence in the record. When appropriate, the Board hears oral argument on any or all issues in a proceeding.<sup>25</sup> The regulations specify that the Board shall decide matters by majority vote.<sup>26</sup> The Board issues its opinions in writing, and its decisions constitute final Agency action.<sup>27</sup> With very limited exceptions, the Board's decisions cannot be appealed to the EPA Administrator.<sup>28</sup>

Some matters settle prior to a decision by the Board. The Board has established a voluntary Alternative Dispute Resolution ("ADR") program that it makes available to interested parties to provide a neutral forum to facilitate resolution of issues on appeal in whole or in part. An Environmental Appeals Judge not assigned to the case panel and a Counsel to the Board serve as the neutral mediators for the ADR and provide a confidential assessment of the strengths and weaknesses of each party's case. The program has been highly successful, and, to date, over 90% of the cases that have gone through the program have been resolved without litigation. The Board's ADR program has helped parties achieve a faster resolution of issues, enduring solutions, and broader support for outcomes.

The Board hears appeals brought by many different types of stakeholders, including private businesses, states, municipalities, other federal entities, Native American tribes, individual citizens, citizens groups, as well as components of EPA itself. Any party who appeals a matter to the Board, or who responds to an appeal, is given the opportunity to advocate its case before the Board. Non-Agency parties generally have a statutory right to appeal an adverse Board decision to federal court. Nevertheless, only a small percentage of the eleven hundred final decisions issued by the Board since its creation in 1992 have been appealed to federal court, and most of those were either

---

<sup>23</sup> See *id.* § 1.25(e)(1). In the event of absence or recusal, the Board sits as a panel of two judges. *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* §§ 22.30(d), 124.19(h).

<sup>26</sup> *Id.* § 1.25. The Board has issued most of its decisions unanimously, but occasionally a judge will author a separate concurring or dissenting opinion.

<sup>27</sup> In permit cases, for EPA-issued permits, the Regional Administrator is ultimately responsible for issuing a final permit that is consistent with the Board's determination; for purposes of judicial review, final agency action does not occur until the final permit is issued. *Id.* § 124.19 (l)(2).

<sup>28</sup> In enforcement cases involving another federal agency, the head of that agency can request to confer with the EPA Administrator following a decision by the Board, in which case the Administrator's ultimate decision becomes the final order. *Id.* § 22.31(e)(1).

upheld by the court or settled voluntarily.<sup>29</sup> Overall, less than 1% of the Board's final decisions have been reversed.<sup>30</sup>

### **III. The Core Principles of Environmental Adjudication That the Board Applies**

The Board is guided by a set of core principles that formed the basis for its establishment in 1992. These principles ensure the Board's impartiality and provide for the fair treatment of all interested persons.

#### **A. *Independence***

The Board operates independently from the rest of the Agency in order to keep the Agency's adjudicative process separate from its permitting and enforcement authorities. The four Environmental Appeals Judges are not political appointees: they are career federal employees who are chosen to serve on the Board through a competitive process, and their tenure is not term-limited. By maintaining its independence from the rest of the Agency and remaining free from outside influences, the Board ensures that its decisionmaking is fair and in accordance with the law.

#### **B. *Impartiality***

The Board is an impartial appellate tribunal. Its 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, taking into account Board and judicial case precedent, pertinent EPA policy, and technical guidance. As noted above, the Board has a neutral case assignment system administered by the Clerk of the Board. Stakeholders who appeal decisions to the Board can be assured that the judges will examine all evidence objectively and give equal consideration to legal arguments advanced by each party.

The Board's judges and staff attorneys do not engage in *ex parte* communication. That is, they refrain from discussing the merits of a matter pending before the Board with any interested persons, including those within the Agency as well as external stakeholders. The principle against *ex parte* communication that is embodied in the Administrative Procedure Act and Agency regulations keeps in the public record exchanges between the Board and interested persons and also provides each party with a reasonable opportunity to respond to contrary evidence and opposing

---

<sup>29</sup> The Board's website lists all federal court decisions that have been issued following an appeal from a Board decision and all pending appeals from Board decisions to a federal court. See [www.epa.gov/eab](http://www.epa.gov/eab).

<sup>30</sup> Federal courts have commented favorably on the Board's thorough approach to reviewing Agency decisions. See, e.g., *Upper Blackstone Water Pollution Abatement Dist. v. EPA*, 690 F.3d 9, 29 n.25 (1st Cir. 2012) (upholding the Board's review of a permit decision where the Board had "exhaustively reviewed" the EPA Region's permitting analysis and methodology "in a thorough and exacting 106-page opinion" and "carefully addressed each of the arguments of the parties to [the] appeal, as well as those of seven other entities"); *Resisting Envtl. Destruction on Indigenous Lands v. EPA*, 704 F.3d 743, 752-3 (9th Cir. 2012) (deferring to "the EPA's reasonable construction of the statute, as adopted by the [Board]" and ultimately concluding that the Board's interpretation "is just common sense"); *Pepperell Assocs. V. EPA*, 246 F.3d 15, 29-30 (1st Cir. 2001) (deferring to the Board's reasonable interpretations and findings and noting that the Board addressed the issue of penalty "at length, and its discussion shows that the [Board] adequately considered Pepperell's arguments and had a reasoned basis for its decision").

arguments.<sup>31</sup> The Board thus ensures that no interested person will be allowed to gain an unfair advantage or be permitted to speak or write privately to the Board about the merits of a pending matter.

The judges also avoid any conflict of interest, whether actual or perceived. An Environmental Appeals Judge who faces a personal or professional conflict of interest will recuse him or herself from participating in any Board proceedings in which the conflict may arise. Recusal takes place whenever the judge “in previous employment performed prosecutorial or investigative functions with respect to the case, participated in the preparation or presentation of evidence in the case, or was otherwise personally involved in the case.”<sup>32</sup> By removing themselves from matters that may involve a conflict, the judges avoid putting themselves into situations in which their impartiality may reasonably be questioned or compromised.

### **C. Transparency**

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

The Board maintains an electronic case management system that provides interested persons with a convenient method for filing notices of appeal, legal briefs, and accompanying attachments while also affording the public unlimited and almost immediate access to filings.<sup>33</sup> Most documents may be submitted electronically and will be considered timely if received by 11:59 p.m. Eastern Time on their due date.<sup>34</sup> Paper documents filed with the Board are scanned by

---

<sup>31</sup> See 5 U.S.C. § 557(d)(1). The Consolidated Rules of Practice specifically prohibit *ex parte* communication in the context of enforcement proceedings. “At no time after the issuance of the complaint shall the ... members of the Environmental Appeals Board ... or any other person who is likely to advise these officials on any decision in the proceeding, discuss *ex parte* the merits of the proceeding with any interested person outside the Agency, with any Agency staff member who performs a prosecutorial or investigative function in such proceeding ..., or with any representative of such person.” 40 C.F.R. § 22.8. The Board and its staff observe this same principle against *ex parte* communication with any party in part 124 permitting proceedings.

<sup>32</sup> 40 C.F.R. § 1.25(e)(3); see also *id.* § 22.4(d)(1) (Environmental Appeals Judges may not participate in enforcement proceedings “regarding any matter in which they have a financial interest or have any relationship with a party or with the subject matter [that] would make it inappropriate for them to act”).

<sup>33</sup> The Consolidated Rules of Practice authorize the Board to allow electronic filing “subject to any appropriate conditions and limitations.” 40 C.F.R. § 22.5(a)(1). Pursuant to that authority, the Board has issued two standing orders on electronic filing. See Revised Order Authorizing Electronic Filing in Proceedings Before the Environmental Appeals Board Under 40 C.F.R. Part 22 (Aug. 12, 2013); Revised Order Authorizing Electronic Filing in Proceedings Before the Environmental Appeals Board Not Governed by 40 C.F.R. Part 22 (Aug. 12, 2013), both available at <http://www.epa.gov/eab>.

<sup>34</sup> The Board's standing orders on electronic filing specify that certain information may not be filed electronically, such as confidential business information and private information the disclosure of which would constitute an unwarranted invasion of a person's privacy (for example, social security numbers, birthdates, medical records, personal financial information and other private information).

the Clerk of the Board and added to the online docket so that the public may access them electronically.

The Board's administrative courtroom features updated technology that affords greater access to case proceedings. The courtroom includes video-conferencing capability so that parties unavailable to travel to Washington D.C. for oral argument may participate remotely. All oral arguments are open to the public, and transcripts are made available in the online docket.

The Board issues all decisions in writing, including both final orders and interlocutory decisions. Board decisions provide the public and stakeholders with a thorough explanation of the Board's reasoning and analysis of what are often complex factual records and regulatory frameworks. The Board posts all decisions on its website as soon as they are issued and to date has published over 400 decisions in the bound *Environmental Administrative Decisions* volumes. The public has twenty-four-hour access to decisions that affect their neighborhoods or livelihoods or are otherwise of interest, and legal practitioners can search the Board's case law free of charge. Other items available on the website include regulations governing appeals, standing orders, Board-approved consent agreements, guidance documents and answers to "frequently asked questions."

#### **IV. The Board's Docket and Standards of Review**

The Board's docket is a varied one, but its caseload over the past twenty-five years has consisted primarily of appeals of administrative civil penalty assessments, petitions for review of permit decisions, petitions for reimbursement of costs incurred in response to a federal cleanup order at sites containing hazardous substances, and other matters.

##### **A. Administrative Enforcement Appeals**

The Board's administrative enforcement docket consists of appeals of initial decisions and interlocutory orders issued by a Presiding Officer. In deciding to proceed against an alleged violator of a pollution-control statute – and depending on the nature of the case and the applicable statutory and regulatory provisions – EPA can either take administrative action under its own enforcement authority or proceed judicially by filing a civil or criminal action in federal court.<sup>35</sup>

EPA commences an administrative enforcement proceeding by filing an administrative complaint.<sup>36</sup> Many cases are resolved in short order through the Agency's quick resolution or settlement procedures.<sup>37</sup> The Office of Administrative Law Judges maintains an ADR program as

---

<sup>35</sup> Judicial actions are filed by the U.S. Department of Justice on behalf of EPA. Goals of the Agency's enforcement program can be found on its website at <https://www.epa.gov/enforcement/enforcement-basic-information> (EPA's basic information about enforcement).

<sup>36</sup> 40 C.F.R. §§ 22.13-14. Some enforcement cases are simultaneously commenced and concluded by issuance of a consent agreement. *See id.* §§ 22.13(b), .18(b)(2)-(3). No settlement of a proceeding commenced at EPA Headquarters is final until the Board issues a final order ratifying the parties' consent agreement. *Id.* § 22.18(b)(3); *see, e.g., In re ECCO USA, Inc.*, Docket No. FIFRA-HQ-2016-5022 (EAB Nov. 16, 2016) (Final Order).

<sup>37</sup> *See* 40 C.F.R. § 22.18(a)(1) ("A respondent may resolve the proceeding at any time by paying the specific penalty proposed in the complaint or in complainant's prehearing exchange in full"); *id.* § 22.18(b)(1) ("The Agency encourages settlement of a proceeding at any time if the settlement is consistent with the procedures of the [controlling statute] and applicable regulations"). If the parties agree to settle, the terms are recorded



authorized by 40 C.F.R. § 22.18(d). Those cases that are not resolved quickly proceed to administrative discovery.<sup>38</sup> If a case presents genuine issues of material fact, the Presiding Officer holds an evidentiary hearing and, after reviewing the evidence and considering all arguments, issues a written initial decision.<sup>39</sup> When appropriate, the Presiding Officer also recommends a monetary penalty amount.<sup>40</sup>

Within thirty days after the initial decision is served, any party may appeal an adverse decision to the Environmental Appeals Board.<sup>41</sup> A party appearing before the Board may be represented by legal counsel or appear on its own behalf.<sup>42</sup> If no party appeals an initial decision before the deadline, the Board has the authority to review the decision on its own initiative in a process known as “*sua sponte* review.”<sup>43</sup> If the Board does not receive an appeal before the deadline and does not exercise its *sua sponte* review authority, the initial decision becomes final forty-five days after service of the initial decision without further proceedings.<sup>44</sup>

The scope of an administrative enforcement appeal to the Board is typically limited to issues that were raised during the course of the proceeding below and to issues concerning subject matter jurisdiction.<sup>45</sup> The Board generally reviews factual findings and legal conclusions set forth in an initial decision *de novo*.<sup>46</sup> As a practical matter, though, the Board defers to factual findings made by a Presiding Officer that are based on witness credibility determinations, given that the Presiding Officer was present to hear the testimony and is therefore deemed to be in a better position to weigh the witness’s credibility.<sup>47</sup>

The Board begins its consideration of an appeal by examining whether certain threshold procedural requirements have been satisfied. For example, absent special circumstances, the Board requires adherence to filing deadlines prescribed by the Consolidated Rules of Practice and will

---

in written consent agreements; the Environmental Appeals Board must ratify any consent agreement arising from an enforcement proceeding commenced at EPA Headquarters. *Id.* § 22.18(b)(3).

<sup>38</sup> *Id.* § 22.19.

<sup>39</sup> *Id.* §§ 22.21(b), .27(a).

<sup>40</sup> *Id.* § 22.27(b).

<sup>41</sup> *Id.* § 22.30(a).

<sup>42</sup> *Id.* § 22.10.

<sup>43</sup> *Id.* § 22.30(b).

<sup>44</sup> *Id.* § 22.27(c).

<sup>45</sup> *Id.* § 22.30(c).

<sup>46</sup> The Board “shall adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed.” *Id.* § 22.30(f); see *In re Stevenson*, CWA Appeal No. 13-01, slip op. at 7 (EAB Oct. 24, 2013), 16 E.A.D. \_\_\_\_.

<sup>47</sup> See *In re Chem-Solv, Inc.*, RCRA Appeal. No. 14-02, slip op. at 8-9 (EAB Jan. 26, 2015), 16 E.A.D. \_\_\_\_.

dismiss as untimely an appeal filed after an applicable deadline.<sup>48</sup> If the Board determines that the threshold requirements have been satisfied, it turns to the substantive issues.

Most substantive issues in enforcement appeals fall into two categories: disputes over liability and disputes over penalties. A regulated entity may challenge a Presiding Officer's finding of liability on any number of grounds or may focus solely on the amount of a penalty, arguing that the Presiding Officer failed to follow the applicable statutory criteria or policy guidelines in assessing the penalty amount. The Agency may appeal, for example, if the Presiding Officer either found no liability, erred in determining liability, or assessed a penalty amount lower than the one sought by EPA in the complaint.

In an administrative enforcement proceeding, the Agency must prove, by a preponderance of the evidence, both that a violation occurred and that the relief sought is appropriate.<sup>49</sup> Appeals that challenge the Presiding Officer's finding of liability often focus on whether the Agency satisfied its burden of proof.<sup>50</sup> The Board will remand a case if it finds that a Presiding Officer's findings with respect to liability were deficient.<sup>51</sup> And, where the Agency has failed to carry its burden of proof, the Board will uphold dismissal of the complaint by the Presiding Officer.<sup>52</sup>

Any party may also challenge the penalty amount on appeal. Most pollution control statutes prescribe the maximum dollar amount that may be assessed for a specific violation and identify factors that decisionmakers must consider in assessing a penalty. Some factors apply to the violator while others apply to the violation itself. For example, with respect to the violation itself, the Clean Water Act requires the decisionmaker to consider the nature, circumstances, extent, and gravity of the violation.<sup>53</sup> With respect to the violator, the Clean Water Act requires the decisionmaker to consider the violator's ability to pay, its prior history of violations, its degree of culpability, any economic benefit or savings that result from the violation, and "such other factors as justice may require."<sup>54</sup> EPA has developed various tools for assessing appropriate penalties, including general and statute-specific penalty and settlement policies as well as models for calculating economic benefit and ability to pay.

---

<sup>48</sup> See 40 C.F.R. §§ 22.7(a), (c), .30(a); see, e.g., *In re Polo Dev., Inc.*, CWA Appeal No. 16-01, slip op. at 3-5 (EAB Mar. 17, 2016), 17 E.A.D. \_\_\_\_; *In re B&L Plating, Inc.*, 11 E.A.D. 183, 188-91 (EAB 2003).

<sup>49</sup> 40 C.F.R. § 22.24(a)-(b).

<sup>50</sup> See, e.g., *Chem-Solv*, slip op. at 10-32 (finding ALJ's determination of liability supported by preponderance of the evidence); *In re The Bullen Cos., Inc.*, 9 E.A.D. 620, 632-35 (EAB 2001).

<sup>51</sup> *In re Mountain Vill. Parks, Inc.* 15 E.A.D. 790, 792-93, 798 (EAB 2013); *In re Gen. Motors Auto. – N. Am.*, 14 E.A.D. 1, 74 (EAB 2008) (reversing finding of liability and remanding case after determining that ALJ's interpretation of whether solvent was a "spent" material and therefore a waste was overly inclusive).

<sup>52</sup> See, e.g., *In re Env'tl. Prot. Serv.*, 13 E.A.D. 506, 532-38 (reversing liability on count for violating TSCA where Region failed to establish *prima facie* case of liability); *Bullen Cos.*, 9 E.A.D. at 632 (affirming Presiding Officer's partial dismissal for failure to meet burden); *In re Santacrose*, 4 E.A.D. 586, 594-605 (EAB 1993) (upholding Presiding Officer's dismissal for failure to meet burden).

<sup>53</sup> 33 U.S.C. § 1319(g)(3).

<sup>54</sup> *Id.*

In an initial decision, a Presiding Officer must explain how the penalty assessed corresponds with any applicable penalty criteria.<sup>55</sup> A Presiding Officer has the discretion to assess a penalty that is higher or lower than the amount recommended in the administrative complaint but must set forth in the initial decision the specific reasons for the increase or decrease.<sup>56</sup> If an initial decision does not clearly explain the Presiding Officer's reasoning, or if the record does not support the Presiding Officer's analysis, the Board can either adjust the penalty amount as appropriate or remand the case to the Presiding Officer for further consideration.<sup>57</sup> In the absence of clear error or abuse of discretion in applying penalty factors, though, the Board generally gives deference to the Presiding Officer's recommendation as long as the penalty is within the range of penalties called for in the statute, the regulations, and any applicable penalty policy.<sup>58</sup>

Challenges to administrative enforcement actions sometimes invoke due process concerns, including allegations involving lack of notice. Under the fair notice doctrine, the Agency is expected to provide the regulated community with fair notice of its interpretation of regulatory provisions. The Board has issued a number of decisions holding that the imposition of a civil penalty for a violation of a regulatory provision does not comport with principles of due process if the regulated entity was not provided fair notice of applicable regulatory requirements.<sup>59</sup>

---

<sup>55</sup> 40 C.F.R. § 22.27(b).

<sup>56</sup> *Id.* For default orders, the Presiding Officer may lower the penalty amount assessed but may not raise it. *Id.*

<sup>57</sup> See, e.g., *In re Elementis Chromium*, TSCA Appeal No. 13-03, slip op. at 50-81 (EAB Mar. 13, 2015), 16 E.A.D. \_\_\_\_ (reversing \$2.5 million penalty after determining that under Agency guidance, company was not required to submit epidemiological study to EPA); *In re Friedman*, 11 E.A.D. 302, 339-55 (EAB 2004) (reversing finding of no liability and assessing an appropriate penalty), *aff'd*, No. 2005 U.S. Dist. LEXIS 49598 (E.D. Cal. 2005), *aff'd*, 220 Fed App'x 678 (9th Cir. 2007); *In re Pepperell Assocs.*, 9 E.A.D. 83, 107-18 (EAB 2000) (increasing penalty amount where Presiding Officer erred in applying statutory factors), *aff'd*, 246 F.3d 15 (1st Cir. 2001); *In re Rybond, Inc.*, 6 E.A.D. 614, 638-41 (EAB 1996) (reducing RCRA penalty from \$173,000 to \$25,000 based on facts where lower penalty served as adequate deterrent).

<sup>58</sup> See *In re Peace Indus. Grp. (USA) Inc.*, CAA Appeal No. 16-01, slip op. at 7 (EAB Dec. 22, 2016) (noting that a Presiding Officer must ensure that a proposed penalty is "appropriate under the applicable statute and the penalty policy"); *In re Mountain Vill. Parks, Inc.*, 15 E.A.D. 791, 797 ("A presiding officer's role is not to accept without question the Region's view of the case, but rather to determine an appropriate penalty as required by 40 C.F.R. § 22.27. As part of [a PO's] evaluation, the [PO] must ensure that in the pending case the Region has applied the law and Agency's policies consistently and fairly.") (alteration in original) (quoting *In re John A. Biewer Co. of Toledo, Inc.*, 15 E.A.D. 772, 782 (EAB 2013)); *In re Sultan Chemists, Inc.*, 9 E.A.D. 323, 350 (EAB 2000) ("[W]hen a Presiding Officer assesses a penalty within the range of possibilities provided in the penalty guidelines for a particular statute, we will not substitute our judgment for that of the Presiding Officer absent a showing that the Presiding Officer has committed an abuse of discretion or clear error in assessing the penalty."), *aff'd* 281 F.3d 73 (3d Cir. 2002).

<sup>59</sup> See, e.g., *In re Carbon Injection Sys., LLC*, RCRA Appeal No. 15-01, slip op. at 25-30 (EAB Feb. 2, 2016), 17 E.A.D. \_\_\_\_ (finding company could not be held liable for violating RCRA based on EPA's valid interpretation of statute where EPA, in its regulations, had consistently interpreted the statute in a more restrictive manner); *In re Elementis Chromium, Inc.*, TSCA Appeal No. 13-03, slip op. at 81 (EAB Mar. 13, 2015), 16 E.A.D. \_\_\_\_ (reversing finding of liability and assessment of penalty where ALJ's reasoning was inconsistent with the plain language of EPA guidance document); *In re CWM Chem. Servs., Inc.*, 6 E.A.D. 1, 16-17 (EAB 1995) (stating "it is not enough that [EPA's] interpretation of the regulation be reasonable, the regulation itself must provide the regulated community with adequate notice of conduct required by the agency").

## **B. Permit Review**

The Board has discretion to grant or deny review of a permit decision made by EPA – or by a state, local or tribal authority acting on EPA's behalf under federal law – such as a decision to issue, modify, or deny a permit for the construction or operation of a new or existing facility.<sup>60</sup> Any person who participated in the permit public participation process, either by filing comments on the draft permit or by speaking at a public hearing, may petition the Board for review.<sup>61</sup> In addition, anyone may petition the Board for review of a final permit condition that reflects changes from the draft.<sup>62</sup> A petition for review generally stays the effective date of the permit conditions that are being challenged.<sup>63</sup> In considering a petition for review, the Board first evaluates whether the petitioner has met certain threshold procedural requirements.<sup>64</sup> For example, a petitioner must demonstrate that it participated during the comment period or at the public hearing and that the arguments and issues it raises on appeal were raised earlier, unless the issues or arguments were not reasonably ascertainable at the time.<sup>65</sup> The purpose of limiting issues on appeal to those that were raised during the comment period or at the public hearing is to ensure that the permit issuer had the opportunity either to adjust the final permit in response to concerns identified with the draft permit or to explain why no adjustments were necessary.<sup>66</sup> A petition for review must also be timely, which generally means it has to have been filed within thirty days after the permitting decision was served.<sup>67</sup> If the Board determines that a petitioner has satisfied all threshold procedural obligations, it will then turn to the merits of the petition.<sup>68</sup>

---

<sup>60</sup> 40 C.F.R. § 124.19. See *In re Avenal Power Ctr., LLC*, 15 E.A.D. 384, 394-96 (EAB 2011), *remanded on other grounds sub nom. Sierra Club v. EPA*, 762 F.3d. 971 (9th Cir. 2014). For an example of a petition challenging a permit issued by an authority acting on EPA's behalf, see *In re Ariz. Pub. Serv. Co.*, PSD Appeal No. 16-01 (EAB Sept. 1, 2016), 17 E.A.D. \_\_\_\_ (denying review of a permit issued by a county air quality department under the CAA's PSD program). In such cases, the local or state entity acts directly under federal law, not under state-approved equivalents to federal law such as state implementation plans.

<sup>61</sup> 40 C.F.R. § 124.19(a)(2).

<sup>62</sup> *Id.* If a petition was filed by someone other than the permit applicant, the applicant is eligible to participate in the appeal by filing a notice of appearance and responding to the petition. *Id.* § 124.19(b)(3). Likewise, the state or tribal authority where the facility is located may also file a notice of appearance and respond. *Id.* § 124.19(b)(4).

<sup>63</sup> *Id.* §§ 124.15(b)(2), .16. Permits for new construction are stayed in their entirety pending review. *Id.* § 124.16(a)(1). See also 42 U.S.C. § 7475(a)(1) (prohibiting construction of a major emitting facility under the PSD provisions of the CAA without a permit).

<sup>64</sup> *Id.* § 124.19; see *In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 143 (EAB 2006).

<sup>65</sup> 40 C.F.R. §§ 124.13, .19(a)(4)(ii); see, e.g., *In re City of Attleboro*, 14 E.A.D. 398, 405-06, 444 (EAB 2009); *In re City of Moscow*, 10 E.A.D. 135, 141, 149-50 (EAB 2001).

<sup>66</sup> See *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 250 (EAB 1999) (“The effective, efficient, and predictable administration of the permitting process demands that the permit issuer be given the opportunity to address potential problems with draft permits before they become final.”); see also *In re City of Marlborough*, 12 E.A.D. 235, 244 n.13 (EAB 2005), *appeal dismissed for lack of juris.*, No. 05-2022 (1st Cir. Sept. 30, 2005); *In re Sutter Power Plant*, 8 E.A.D. 670, 687 (EAB 1999).

<sup>67</sup> 40 C.F.R. § 124.19(a)(3).

<sup>68</sup> *In re Guam Waterworks Auth.*, 15 E.A.D. 437, 443 (EAB 2011).

A petitioner bears the burden of persuading the Board that an appeal warrants review.<sup>69</sup> As a general matter, the Board will grant a petition for review only where the petitioner demonstrates that the permitting decision involves a clearly erroneous finding of fact or conclusion of law, or where the Board determines that the decision involves an important policy consideration.<sup>70</sup> In deciding whether to grant review, the Board is guided by the principle set forth in the preamble to the part 124 permitting regulations that the Board's power to review permitting decisions "should be only sparingly exercised" in keeping with EPA's general preference for resolving most permit disputes at the permit-issuer's level.<sup>71</sup> On matters that are fundamentally technical or scientific in nature, the Board typically defers to the permitting authority's expertise, as long as the permit issuer adequately explained and supported its reasoning in the administrative record.<sup>72</sup> However, the Board will remand a permitting decision for further consideration if the administrative record does not adequately support the decision.<sup>73</sup>

When evaluating a permit decision for clear error, the Board examines the administrative record to ascertain whether the permit issuer exercised "considered judgment."<sup>74</sup> The permit issuer must articulate with reasonable clarity the reasons supporting its decision and the significance of crucial facts relied upon in reaching that decision.<sup>75</sup> As a whole, the record must demonstrate that the permit issuer "duly considered the issues raised in the comments" and ultimately adopted an approach that "is rational in light of all information in the record."<sup>76</sup>

---

<sup>69</sup> 40 C.F.R. § 124.19(a)(4); see *In re Russell City Energy Center, LLC*, 15 E.A.D. 1, 15-101 (EAB 2010), *pet. denied sub nom. Chabot-Las Positas Cmty. Coll. Dist. v. EPA*, 482 F. App'x 219 (9th Cir. 2012).

<sup>70</sup> 40 C.F.R. § 124.19(a)(4); see *In re ArcelorMittal Cleveland Inc.*, 15 E.A.D. 611, 628-29 (EAB 2012) (remanding for the Region's reconsideration the decision whether to approve CWA variance and rejecting as erroneous the Region's legal conclusion that the CWA does not permit modification of previously granted variances); *In re City of Palmdale*, 15 E.A.D. 700, 704 (EAB 2012), *appeal voluntarily dismissed sub nom. Simpson v. EPA*, No. 12-74124 (9th Cir. Oct. 28, 2013); *In re MHA Nation Clean Fuels Refinery*, 15 E.A.D. 648, 652 (EAB 2012).

<sup>71</sup> Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); see also *In re Ariz. Pub. Serv. Co.*, PSD Appeal No. 16-01, slip op. at 3 (EAB Sept. 1, 2016), 17 E.A.D. \_\_\_\_.

<sup>72</sup> See *In re Russell City*, 15 E.A.D. at 12; *In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 510, 560-62, 645-47, 668, 670-74 (EAB 2006); *In re NE Hub Partners, LP*, 7 E.A.D. 561, 570-71 (EAB 1998), *review denied sub nom. Penn Fuel Gas, Inc. v. EPA*, 185 F.3d 862 (3d Cir. 1999).

<sup>73</sup> See, e.g., *In re San Jacinto River Auth.*, 14 E.A.D. 688, 710 (EAB 2010) (remanding permit because record did not reflect that the Region exercised "considered judgment" in determining limit was necessary to meet state water quality standards); *In re Austin Powder Co.*, 6 E.A.D. 713, 719-20 (EAB 1997) (remanding permit because Region gave inconsistent explanations for its permit determination, making the rationale for the permit determination unclear).

<sup>74</sup> See, e.g., *In re ESSROC Cement Corp.*, RCRA Appeal No. 13-03, slip op. at 32-44 (EAB July 30, 2014), 16 E.A.D. \_\_\_\_ (remanding permit because Region did not exercise "considered judgment" in setting RCRA permit's mercury limit); *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 417-18 (EAB 1997) (remanding RCRA permit where administrative record regarding basis for mercury and thallium limits was not clear and therefore did not reflect "considered judgment" by the Region).

<sup>75</sup> See *ESSROC*, slip op. at 32; *Ash Grove*, 7 EAD at 417-418.

<sup>76</sup> *In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 342 (EAB 2002); accord *City of Moscow*, 10 E.A.D. at 141, 149-50.

In reviewing a decision that falls within a permit issuer's discretionary authority, the Board applies an abuse of discretion standard.<sup>77</sup> The Board will uphold a permitting authority's reasonable exercise of discretion if the record shows a cogent explanation for the decision.<sup>78</sup> Where the Board finds that a permit issuer abused its discretion, however, the Board will remand the case.<sup>79</sup>

The Board ensures that the processes associated both with a permit decision and with a petition for review follow applicable regulations. For example, the Board is frequently asked to evaluate whether the public was given adequate opportunity to participate in a permitting process. If the Board determines that a permitting authority failed to give required notice about the availability of a draft permit or otherwise failed to allow for meaningful public participation, the Board can remand the permit decision and direct that the problem be cured.<sup>80</sup> The Board also promotes fair consideration of a party's arguments in the appeals process. For example, the Board "generally endeavors to construe liberally the issues presented by a *pro se* petitioner, so as to fairly identify the substance of the arguments being raised," yet the Board "nevertheless 'expect[s] such petitions to provide sufficient specificity to apprise the Board of the issues being raised'".<sup>81</sup>

### **C. Reimbursement for Response Costs Under CERCLA**

In 1994, the EPA Administrator delegated authority to the Board to review petitions for reimbursement of response costs incurred at hazardous waste sites under section 106(b)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").<sup>82</sup>

---

<sup>77</sup> See *Guam Waterworks*, 15 E.A.D. at 443 n.7; *Ash Grove*, 7 E.A.D. at 397 ("acts of discretion must be adequately explained and justified") (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 48 (1983) ("we have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner")).

<sup>78</sup> See, e.g., *City of Attleboro*, 14 E.A.D. at 428, 453 (upholding CWA NPDES permit issued jointly by the state and EPA Region regulating discharges from wastewater treatment facility); *In re Prairie State Generating Co.*, 15 E.A.D. 1 (EAB 2006) (upholding CAA permit issued by state acting on behalf of EPA against numerous citizen challenges to permit for facility co-located at mouth of new underground coal mine).

<sup>79</sup> See, e.g., *In re GSX Servs. of S. Carolina, Inc.*, 4 E.A.D. 451, 453-4 (EAB 1992) (remanding RCRA permit based on abuse of discretion).

<sup>80</sup> See, e.g., *In re Sierra Pac. Indus.*, PSD Appeal Nos. 13-01 to -04, slip op. at 23-48, 16 E.A.D. \_\_\_\_ (EAB July 18, 2013) (finding clear error where the permit issuer failed to hold a public hearing as part of the permitting process); *Russell City*, 14 E.A.D. at 177-78 (finding clear error where the permit issuer failed to provide required notice of and opportunity to comment on the draft permit).

<sup>81</sup> *In re Seneca Res. Corp.*, UIC Appeal Nos. 14-01, 14-02 & 14-03, slip op. at 2-3 n.1 (EAB May 29, 2014), 16 E.A.D. \_\_\_\_ (alteration in the original) (quoting *Sutter Power Plant*, 8 E.A.D. at 687); see also *In re Sammy-Mar LLC*, UIC Permit Appeal No. 15-02, slip op. at 6-7, 9, 11 (EAB Feb. 18, 2016) (denying review of *pro se* petition for UIC permit where Region had provided thorough and well-reasoned responses to petitioner's comments, and petitioner did not address on appeal those responses or show that the permit warranted review); *In re Envtl. Disposal Sys., Inc.*, 12 E.A.D. 254, 292 n.26 (EAB 2005); *In re Envotech, LP*, 6 E.A.D. 260, 268 (EAB 1996).

<sup>82</sup> 42 U.S.C. § 9606(b)(2); U.S. EPA, *Delegations of Authority* ch. 14-27 (Aug. 4, 1994, rev. June 27, 2000) (CERCLA Petitions for Reimbursement).

Section 106(b)(2) allows any person who has complied with a cleanup order issued by a federal agency under section 106(a) to petition for reimbursement of reasonable costs incurred in complying with the order, plus interest.<sup>83</sup> The Board has issued detailed guidance that describes the information that must be included in a petition for reimbursement and discusses the Board's procedures for processing such a petition and evaluating the claim therein.<sup>84</sup> To prevail, a petitioner must demonstrate by a preponderance of the evidence that it has satisfied four statutory prerequisites: compliance with a section 106(b) order, completion of the required action, incurrence of costs, and timely submission of a petition for reimbursement.<sup>85</sup> After considering the merits of a petitioner's claim, the Board issues a final decision as to whether petitioner is entitled to any reimbursement.<sup>86</sup> If the Board determines that a petitioner is entitled to reimbursement of at least some of its costs, the Board conducts further proceedings to determine the appropriate level of reimbursement.<sup>87</sup> To date, the Board has published 20 final decisions either granting or denying CERCLA reimbursement petitions.<sup>88</sup>

## **V. Sharing the Board's Expertise**

The Board serves as a repository of expertise within the federal government on environmental administrative adjudication. Judges and attorneys on the Board are frequently called

---

<sup>83</sup> 42 U.S.C. § 9606(b)(2).

<sup>84</sup> Environmental Appeals Board, *Revised Guidance on Procedures for Submission and Review of CERCLA Section 106(b) Reimbursement Petitions* (Feb. 23, 2012), [https://yosemite.epa.gov/oa/EAB\\_Web\\_Docket.nsf](https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf) (follow "EAB Guidance Documents" hyperlink, then follow "Revised CERCLA 106(b) Guidance" hyperlink).

<sup>85</sup> *Id.* at 5.

<sup>86</sup> *Id.* at 8-9. Previously, the Board had followed a bifurcated process whereby it first issued a preliminary decision and subsequently, after receiving comments from the parties, issued a final decision either denying or granting reimbursement. *Id.* at 2 n.2. After concluding that the preliminary decision step was unnecessary, the Board issued revised guidance in 2012 that streamlined the review process while retaining a full opportunity for the parties to present their arguments and factual information. *Id.* Earlier procedural revisions simplified the requirements for filing an initial petition. Prior to 1996, a petitioner was required to submit, at the time of the petition, evidence showing what costs had been incurred. See Environmental Appeals Board, *Guidance on Procedures for Submitting CERCLA Section 106(b) Reimbursement Petitions and on EPA Review of Those Petitions* 4 (June 9, 1994). In 1996, the Board eliminated that requirement, providing instead that cost documentation need not be submitted until and unless the Board first makes a determination that reimbursement in *some* amount is appropriate, after which the Board will direct petitioner to furnish documentation of all costs so that the Board can determine the appropriate reimbursement amount. See Environmental Appeals Board, *Revised Guidance on Procedures for Submitting CERCLA Section 106(b) Reimbursement Petitions and on EPA Review of Those Petitions* 4, 10 (Oct. 9, 1996).

<sup>87</sup> *Id.* at 9.

<sup>88</sup> See, e.g., *In re Am. Home Mortg. Servicing, Inc.*, 15 E.A.B. 342, 345-48 (EAB 2011) (denying reimbursement where petitioner failed to demonstrate it was the recipient of a CERCLA 106(a) order); *In re Grand Pier Ctr., LLC*, 12 E.A.D. 403, 417-28 (EAB 2005) (denying reimbursement where petitioner failed to demonstrate that it was not liable as the present owner of a facility). But see *In re Solutia, Inc.*, 10 E.A.D. 193, 204 n.12, 217 (EAB 2001) (granting reimbursement where petitioner demonstrated it was not liable for removal action because it did not arrange for disposal of a hazardous substance); *In re The Port Auth. of N.Y. & N.J.*, 10 E.A.D. 61, 82-98 (EAB 2001) (granting partial reimbursement where certain actions of the U.S. Coast Guard were arbitrary and capricious).

on to share their expertise in domestic and international workshops, conferences and seminars world-wide. The Board has developed a multi-day training workshop for judicial officers, covering topics such as principles of adjudicating environmental law, methods for determining appropriate sanctions for noncompliance, and the fundamental importance of the rule of law. The Board has conducted trainings for judges from Asia, Central and South America, Eastern Europe, and the Middle East.

## **VI. Conclusion**

During its first twenty-five years, the Environmental Appeals Board has developed a significant body of administrative law concerning all of the major pollution-control statutes that EPA administers. By operating independently, impartially and transparently, the Board promotes consistency with legal requirements, assures non-Agency stakeholders that they will be treated fairly, and provides a cost-effective process for resolving disputes. The Board carefully considers the factual record and arguments presented in each appeal brought before it, issues its decisions in writing, and posts both its case docket and decisions online where the public can access them. The Board serves as a valuable repository of knowledge and experience about environmental adjudication at the administrative level, and it shares its expertise with legal practitioners, decisionmakers and other tribunals both domestically and internationally. For these reasons, the Board plays a vital role in furthering the Agency's mission to promote and protect a strong and healthy environment.