



# The Environmental Appeals Board

## Practice Manual

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**This document is solely intended as guidance. The policies and procedures in this guidance do not constitute a rulemaking by the Agency, and may not be relied on to create a substantive or procedural right or benefit enforceable at law by any person.**

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## I. INTRODUCTION

The Environmental Appeals Board (“EAB” or “Board”) of the U.S. Environmental Protection Agency (“EPA” or “Agency”) is a permanent, impartial, four-member body that is independent of all Agency components outside the immediate Office of the Administrator.<sup>1</sup> It is the final Agency decisionmaker on administrative appeals under all major environmental statutes that EPA administers. *See* 40 C.F.R. § 1.25(e). The EAB was created on March 1, 1992, to recognize the growing importance of EPA adjudicatory proceedings as a mechanism for implementing and enforcing the environmental laws and to “inspir[e] confidence in the fairness of Agency adjudications.”<sup>2</sup> Changes to Regulations to Reflect the Role of the New Environmental Appeals Board in Agency Adjudications, 57 Fed. Reg. 5320, 5322 (Feb. 13, 1992); *see also* S. Rep. No. 103-257, 103d Cong. 2d Sess. 86 (1994). Practice before the EAB is primarily governed by federal regulations.

This Manual provides general descriptions of the regulatory framework for EAB proceedings and provides guidance to litigants on matters related to practice before the EAB that

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<sup>1</sup> EPA is headed by an Administrator who is appointed by the President. The EAB is a component office within the Office of the Administrator. It “is not part of any other office in the Agency and answers only to the Administrator of the Agency.” *In re Marine Shale Processors, Inc.*, 5 E.A.D. 751, 795 (EAB 1995), *aff’d*, 81 F.3d 1371 (5th Cir. 1996), *cert. denied*, 519 U.S. 1055 (1997). When the EAB is the decisionmaker in an enforcement proceeding, it is expressly prohibited by regulation from engaging in *ex parte* discussion on the merits of the proceeding, after the complaint has been filed, with Agency staff members who performed a prosecutorial or investigative function in that proceeding (or a factually related proceeding) or with any interested person outside EPA. *See* 40 C.F.R. § 22.8.

<sup>2</sup> Prior to March 1992, EPA’s Chief Judicial Officer or, in some cases, a Judicial Officer, decided civil penalty appeals, pursuant to a delegation of authority from the Administrator. The Administrator decided permit appeals based on the recommendation of the Chief Judicial Officer or a Judicial Officer.

are not expressly covered by regulation. However, “[a]n EPA guidance document does not have the force of law,” and therefore this Manual should not be relied on as dispositive of the matters it addresses. *In re V-1 Oil Co.*, 8 E.A.D. 729, 748 (EAB 2000). Practitioners should always consult the applicable statute and regulations for the specific substantive and procedural requirements under any authority described in this Manual. In the event of any discrepancy between this Manual and the regulations, the regulations govern.

Appendix 6 to this Manual provides templates for filings in EAB proceedings. These templates are solely for the guidance of participants in EAB proceedings. Submissions need not conform to them provided that all applicable regulatory requirements have been satisfied.

The EAB provides additional information about its procedures in A Citizens’ Guide to the Environmental Appeals Board and in its responses to Frequently Asked Questions (“FAQs”), both of which are on the EAB’s Web site at [www.epa.gov/eab](http://www.epa.gov/eab). The Clerk of the Board, and the attorneys who serve as counsel to the EAB, are available to answer questions from litigants and the general public about the appeals process. However, questions about the subject matter or status of a particular matter pending before the EAB cannot be answered. *See, e.g.*, 40 C.F.R. § 22.8 (barring *ex parte* discussion of the merits of any proceeding before the EAB). Persons with questions about the appeals process may call the Clerk of the Board at (202) 233-0122. Calls will be referred to the appropriate person.

The EAB has issued many decisions that interpret the federal regulations governing appeals procedures, some of which are referenced in this Manual. The full text of all formal EAB decisions (*see* Section II.E.1), and all final EAB orders (*see* Section II.E.3) issued after November 1996 can be accessed on the EAB Web site at [www.epa.gov/eab](http://www.epa.gov/eab).

## II. GENERAL

### A. Functions and Powers of the EAB

Title 40 C.F.R. § 1.25(e)(1) establishes the EAB as “a permanent body with continuing functions” that “shall decide each matter before it in accordance with applicable statutes and regulations.” Section 1.25(e)(2) provides that:

The Environmental Appeals Board shall exercise any authority expressly delegated to it in this title. With respect to any matter for which authority has not been expressly delegated to the Environmental Appeals Board, the Environmental Appeals Board shall, at the Administrator’s request, provide advice and consultation, make findings of fact and conclusions of law, prepare a recommended decision, or serve as the final decisionmaker, as the Administrator deems appropriate.

The Agency has prescribed rules that govern the EAB’s proceedings, as detailed in the following section.

### B. EAB Jurisdiction

The jurisdiction of the EAB is established primarily by regulation. The majority of the EAB’s cases are appeals from administrative enforcement decisions (mostly civil penalty cases) and appeals from permit decisions. Appeals from administrative enforcement decisions are governed primarily by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (“CROP”), codified at 40 C.F.R. part 22. Appeals from permit decisions are governed primarily by the procedures codified at 40 C.F.R. part 124. However, the following permit proceedings are governed by the CROP rather than the part 124 regulations:

(1) revocation or suspension of a permit under sections 105(a) and (f) of the Marine Protection, Research, and Sanctuaries Act (“MPRSA”), as amended, 33 U.S.C. § 1415(a) and (f), and 40 C.F.R. § 22.1(a)(3);

(2) termination of an EPA-issued National Pollutant Discharge Elimination System (“NPDES”) permit under Clean Water Act § 402(a), 33 U.S.C. § 1342(a), and 40 C.F.R. § 22.1(a)(6); and

(3) the termination of an EPA-issued permit, under Resource Conservation Recovery Act (“RCRA”) § 3008(a), 42 U.S.C. § 6928(a)(3), and the suspension or revocation of authority to operate pursuant to RCRA § 3005(e), 42 U.S.C. § 6925(e), and 40 C.F.R. § 22.1(a)(4).

The EAB is also authorized to hear appeals under other statutory and regulatory authorities. These categories of appeals are addressed briefly in Section V.

In addition to its express regulatory authority, the EAB has authority delegated by the EPA Administrator (“Administrator”). For example, the EAB considers petitions for reimbursement of costs incurred in complying with cleanup orders issued under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”), 42 U.S.C. §§ 9601-9675. *See* Delegation of Authority 14-27 (“Petitions for Reimbursement”). As noted in Section II.A, the EAB may also be requested by the Administrator, on a specific matter, to “provide advice and consultation, make findings of fact and conclusions of law, prepare a recommended decision, or serve as the final decisionmaker, as the Administrator deems appropriate.” 40 C.F.R. § 1.25(e)(2); *see, e.g., In re Tennessee Valley Auth.*, 9 E.A.D. 357, 368 (EAB 2000).

### C. Environmental Appeals Judges and Staff

The Environmental Appeals Board consists of four Environmental Appeals Judges who are Senior Executive Service (“SES”)-level career Agency attorneys. Under the internal procedures governing the EAB’s organization, the four judges serve as co-equals. There is no Chief Judge or equivalent. At any given time, one judge serves as the lead judge for administrative matters, a position that rotates among the judges on an annual basis. Decisions regarding case priorities are made by the EAB as a whole. Cases are randomly assigned to panels comprised of three judges, who decide each matter by majority vote.<sup>3</sup> 40 C.F.R. § 1.25(e). Concurring and dissenting opinions may be issued. The EAB is assisted in carrying out its responsibilities by a number of staff attorneys (“Counsel to the Board”), the Clerk of the Board (“Clerk”), a staff assistant, and a secretary.

### D. Judicial Review; Final Agency Action

The Administrative Procedure Act (“APA”) provides a right of judicial review of “Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court \* \* \* .” 5 U.S.C. § 704. In most cases, the decision of the EAB constitutes final agency action and may be appealed to a federal court. A final decision constitutes the “consummation of the agency’s decision-making process” and is determinative of the rights of the parties.<sup>4</sup> The decisions of the EAB cannot be appealed to the Administrator.<sup>5</sup> Moreover, there is

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<sup>3</sup> Two EAB members constitute a quorum if a three-member panel cannot be convened. If the EAB sits as a panel of two members, and there is a tie vote, the matter can be referred to the Administrator to break the tie. 40 C.F.R. § 1.25(e)(1).

<sup>4</sup> *City of San Diego v. EPA*, 242 F.3d 1097, 1101 (9th Cir. 2001). According to the U.S. Supreme Court, agency action is “final” if it constitutes “the ‘consummation of the agency’s

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no provision for review by the Administrator on his or her initiative. Although the EAB has the authority to refer a matter on appeal to the Administrator on its own initiative,<sup>6</sup> that authority is intended to be exercised only in exceptional cases. As such, most EAB decisions are final agency actions that may be appealed to a federal court. *See* Sections III.C (enforcement appeals) and IV.C (permit appeals) of this Manual for additional information. In some cases, however, the EAB may issue a remand order or an interlocutory decision that requires further action from the Presiding Officer (enforcement appeals) or the permitting authority (permit appeals). The EAB may require the parties to appeal contested portions of any decision on remand to the EAB in order to exhaust all administrative remedies. *See, e.g.*, 40 C.F.R. § 124.19(f)(1)(iii).

Under the APA, a federal court will only review the EAB’s decision to determine whether it was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). *See Pepperell Assoc. v. EPA*, 246 F.3d 15, 22 (1st Cir. 2001) (“To the extent that the EAB’s decision reflects a gloss on its interpretation of the governing EPA regulations, a reviewing court must also afford those policy judgments substantial deference, deferring to them unless they are arbitrary, capricious, or otherwise ‘plainly’ impermissible.”); *see also Martex Farms, S.E. v. EPA*, No. 08-1311, at 4 (1st Cir. Mar. 5, 2009) (stating that the court

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<sup>4</sup>(...continued)  
 decision-making process” and if it determines “rights or obligations.” *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

<sup>5</sup> Title 40 § 22.31(e) of the C.F.R. provides the sole exception. It applies to any final EAB order issued to a federal agency after an appeal. In such a circumstance, the federal agency may request a conference with the Administrator following the issuance of the EAB’s final order. The Administrator’s decision becomes the final order in the matter.

<sup>6</sup> *See* 40 C.F.R. § 22.4(a) (enforcement cases); *id.* § 124.2 (permit cases).

reviews the EAB's penalty assessment with "heightened deference"); *Catalina Yachts, Inc. v. EPA*, 112 F. Supp. 2d 965, 967 (C.D. Cal. 2000), *aff'g In re Catalina Yachts, Inc.*, 8 E.A.D. 199 (EAB 1999).

#### E. Final EAB Decisions and Orders

All final EAB decisions and final EAB orders may be cited in EAB proceedings at any time after issuance, using the forms of citation set forth below.

##### 1. Formal EAB Decisions

The EAB designates many of its decisions as formal EAB decisions. These decisions are initially issued as slip opinions; they are subsequently reformatted as formal decisions and assigned a volume and page number in a series of bound volumes titled Environmental Administrative Decisions ("E.A.D.").<sup>7</sup> Each volume of the E.A.D. contains a subject index and reference tables. Volumes 8 and 13 contain five-year consolidated subject indexes. Currently the E.A.D. contains decisions issued by the EAB through June 2008. Additional volumes will be issued as warranted.

The complete text of any formal EAB decision may be accessed electronically at the EAB's Web site, [www.epa.gov/eab](http://www.epa.gov/eab), or by contacting the Clerk of the Board. *See* Section II.K. The full text of these decisions is also commercially available through LEXIS<sup>®</sup> and WESTLAW<sup>®</sup>.

The EAB has adopted an official form of citation for its formal decisions. A formal EAB

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<sup>7</sup> Individual volumes of the E.A.D. may be purchased from the U.S. Superintendent of Documents by calling (202) 512-1800 or by accessing its website at <http://bookstore.gpo.gov/>. Volumes 1-3 contain three hundred selected opinions that were issued by EPA's Administrator, Chief Judicial Officer and Judicial Officers between March 1972 and March 1992, before the creation of the EAB.

decision should be cited by E.A.D. volume and page number, indicating the EAB as the decisionmaker and the year the decision was issued. An example of a citation to an EAB decision that appears in volume 12 of the E.A.D. is as follows:

*In re Envtl. Disposal Sys., Inc.*, 12 E.A.D. 254 (EAB 2005)

An example of a citation to a specific page of that opinion is as follows:

*In re Envtl. Disposal Sys., Inc.*, 12 E.A.D. 254, 281 (EAB 2005)

The EAB has also adopted an official form of citation for a slip opinion that has not yet been reported.<sup>8</sup> A slip opinion should be cited by its EAB appeal number, indicating the EAB as the decisionmaker and the complete date on which the decision was issued. An example of a citation to a slip opinion is as follows:

*In re Ram, Inc.*, RCRA (9006) Appeal Nos. 08-01 & 08-02 (EAB July 10, 2009)

An example of a citation to a specific page of that opinion is as follows:

*In re Ram, Inc.*, RCRA (9006) Appeal Nos. 08-01 & 08-02, slip.op. at 8 (EAB July 10, 2009)

Final EAB decisions in CERCLA § 106(b) cases should be cited using the form of citation for formal EAB decisions. The EAB's Preliminary Decisions in CERCLA § 106(b) cases may be cited using the form of citation for Final EAB Orders (*see infra* Section II.E.3). *See* Appendix 1 (discussing preliminary decisions).

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<sup>8</sup> When the EAB itself cites a slip opinion, the citation also indicates the volume of the E.A.D. in which the opinion will appear, as, for example, *In re Desert Rock Energy Co.*, PSD Appeal Nos. 08-03 through 08-06 (EAB Sept. 24, 2009), 14 E.A.D. \_\_\_. Litigants citing a slip opinion are not expected to indicate the volume number in which the opinion will appear.

## 2. Pre-EAB Decisions

Enforcement decisions that were issued by EPA's Chief Judicial Officer ("CJO") or by a Judicial Officer ("JO"), and permit decisions that were issued by the Administrator prior to the creation of the EAB, may be cited in EAB proceedings, although citations to EAB cases standing for the same point, if any, are preferable. Selected pre-EAB decisions have been published in volumes 1-3 of the E.A.D. If the decision appears in the E.A.D., it should be cited by volume and page number, indicating the decisionmaker (i.e., Adm'r, CJO, or JO) and the year the opinion was issued. An example of a citation to a pre-EAB decision is as follows:

*In re Boliden-Metech, Inc.*, 3 E.A.D. 439 (CJO 1990).

An example of a citation to a specific page of that decision is as follows:

*In re Boliden-Metech, Inc.*, 3 E.A.D. 439, 451 (CJO 1990).

## 3. Final EAB Orders

The EAB also issues final orders that are dispositive of the outcome of the case but that the EAB does not designate as formal EAB decisions. These orders may be cited in proceedings before the EAB, indicating the appeal number and complete date, as follows:

*In re Gateway Generating Station*, PSD Appeal No. 09-02 (EAB Sept. 15, 2009)  
(Order Dismissing Petition for Review)

Final EAB orders that were issued subsequent to November 1996 may be accessed at the EAB's Web site located at [www.epa.gov/eab](http://www.epa.gov/eab). Copies of other EAB orders may be obtained from the Clerk of the Board. *See infra* Section II.K.

F. Service of EAB Decisions

The EAB serves its decisions upon the parties by U.S. Postal Service mail. EAB decisions and orders are served when they are placed in the mail.

G. Subsequent Histories of Final EAB Decisions and Final EAB Orders in Federal Court

The EAB maintains two tables on its Web site that contain information relating to the subsequent history of final EAB decisions and final EAB orders that have been appealed to the federal district and circuit courts of appeal, titled EAB Decisions Reviewed by the Federal Courts and EAB Decisions Pending Federal Review.

H. Oral Argument

Oral argument takes place in the EPA Administrative Courtroom, located at the U.S. Environmental Protection Agency, EPA East Building, Room 1152, 1201 Constitution Avenue, N.W., Washington, D.C. Proceedings are open to the public, however, for security purposes, advance notice is required to gain entry into the EPA building where the Courtroom is located. Persons interested in attending oral argument are encouraged to contact the Clerk of the Board sufficiently in advance of the oral argument to allow the Clerk reasonable opportunity to notify appropriate security personnel (i.e., not less than one business day prior to the scheduled argument). The EAB has installed audio-visual equipment in the courtroom that permits participation in oral argument via video conference at the Board's discretion. A schedule of oral arguments may be obtained from the Clerk of the Board. The schedule is also available on the EAB's Web site at [www.epa.gov/eab/oral.htm](http://www.epa.gov/eab/oral.htm).

I. General Filing Requirements

General filing requirements are described in this section. For additional filing

requirements, consult Sections III.D for enforcement appeals, Section IV.D for permit appeals, and Section VI and Appendix 1 for CERCLA § 106(b) reimbursement proceedings.

Documents in EAB proceedings may be filed by mail (either through the U.S. Postal Service (“USPS”) or a non-USPS carrier), hand-delivery, or electronically through EPA’s Central Data Exchange (CDX) system. The EAB does not accept notices of appeal, petitions for review, or briefs submitted by facsimile. The EAB will accept motions and responses to motions filed by facsimile provided that they do not contain attachments.

The EAB uses different addresses for different methods of paper delivery. *See* Section I.2. Parties are on notice that filing pleadings with the USPS may result in a delay in delivery caused by USPS mail-screening procedures, including a sterilization procedure that is randomly applied to mail delivered to the U.S. government. Delivery of mail addressed to federal government zip code 20460 may be delayed as long as 10-12 days and delivery of mail addressed to federal government zip code 20005 may be delayed as long as 6-7 days. The Board will exercise its discretion, on a case-by-case basis, whether to excuse a party for failing to meet a filing deadline solely because of a delay caused by mail-screening procedures.

1. Electronic Filing

- a. E-Filing Authorized

All submissions in proceedings before the EAB may be filed electronically, subject to any appropriate conditions and limitations imposed by the EAB. *See* Order Authorizing Electronic Filing in Proceedings Before the Environmental Appeals Board Under 40 C.F.R. Part 22 (Jan. 28, 2010) and Order Authorizing Electronic Filing in Proceedings Before the Environmental Appeals Board Not Governed by 40 C.F.R. Part 22 (Jan. 28, 2010). Additional information on electronic

filing is provided online at [www.epa.gov/eab](http://www.epa.gov/eab). Parties who would like to file a document or documents electronically must first access the CDX system at <http://cdx.epa.gov> and register with CDX.<sup>9</sup>

b. Timeliness of Submissions

EPA's CDX system will provide the party submitting the document and the Clerk of the Board with an electronic receipt that shows the date and time of filing. The Board will consider a document that was filed electronically to be timely if the electronic receipt generated by CDX shows that the document was received by 11:59 p.m. Eastern Time on the day the document is required to be filed with the Board.

A party experiencing problems with the CDX system may call CDX before 6 p.m. Eastern Time to obtain filing assistance. If the problem is caused by an equipment malfunction of CDX, and CDX is unable to resolve the problem, the party should promptly notify the Clerk of the Board and make alternative filing arrangements. A party experiencing problems with CDX after 4:30 p.m. Eastern Time, when the Clerk's office closes, should notify the Clerk on the next business day, and provide any supporting evidence of such problems, such as a printed copy of an error message or screen print of an error page. The EAB will verify reported outages with CDX.

"It is a petitioner's responsibility to ensure that filing deadlines are met, and the Board will generally dismiss petitions for review that are received after a filing deadline." *In re AES Puerto Rico, L.P.*, 8 E.A.D. 324, 329 (EAB 1999), *aff'd sub nom. Sur Contra La Contaminacion v. EPA*, 202 F.3d 443 (1st Cir. 2000). A party filing electronically assumes the risk at all times of filing

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<sup>9</sup> Registration with CDX fulfills any regulatory signature requirements that might otherwise apply to filings with the EAB. Litigants filing electronically should still type or print their full name below the signature line.

problems caused by its own errors in using CDX. It is within the Board's discretion, on a case-by-case basis, to accept a late filing under special circumstances. A filing problem not attributable to a malfunction of CDX will not normally be considered a special circumstance justifying late filing. Thus, any party filing electronically is advised to allow sufficient time in advance of the filing deadline to correct any such error.

c. Requirements for Paper Copies of Electronic Submissions

A party filing a document electronically is not required to submit a paper copy to the EAB, except as set forth in this paragraph. A party filing electronically any single document that exceeds 50 pages (including the certificate of service, table of contents, and table of authorities, but excluding exhibits and attachments), must deliver to the EAB or place in the mail a paper copy of the document for the EAB's records within one business day of the date of the electronic filing. *See infra* Section II.I.2 (providing EAB addresses). A party filing electronically any exhibits or attachments in support of a brief or motion that in total exceed 50 pages must deliver to the EAB or place in the mail a paper copy of the entire set of exhibits or attachments within one business day of the date of the electronic filing. However, the official filing date remains the date the EAB receives the electronic filing. A paper copy required under this paragraph must be accompanied by a signed certification that it is identical to the electronic submission.<sup>10</sup> Litigants filing exhibits that

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<sup>10</sup> For purposes of this requirement only, if the paper copy is sent via U.S. mail, the timeliness of the submission will be determined by the postmark. If the paper copy is delivered by courier or commercial delivery service, the timeliness of the submission will be determined by when the courier or commercial delivery service took possession of the document. If a document is delivered by hand, the timeliness of the submission will be determined by the date stamp placed on the document when it is received by the Board. The EAB may exclude from the record any electronically filed document, or set of exhibits or attachments, that does not comply with the foregoing requirement. For more information, see the EAB's Frequently Asked Questions and  
(continued...)

they want to be viewed in color should either provide the EAB with a hard copy of the color exhibit or electronically file a scanned color copy.

d. Duplicate Facsimiles Not Accepted

The Clerk will not accept for filing any facsimile duplicate of a document that has been filed electronically.

e. CBI Claims

A party waives any claim that the document contains Confidential Business Information if that document is filed electronically.

2. Paper Filing

a. EAB Mailing Address

ALL documents that are sent through the USPS, except by USPS Express Mail, MUST be addressed to the EAB's mailing address, which is:

U.S. Environmental Protection Agency  
Clerk of the Board, Environmental Appeals Board (MC 1103B)  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460-0001

Documents sent to the EAB's hand-delivery address (below) through the USPS (except for USPS Express Mail) will be returned to the sender and will not be considered filed.

Express Mail is a service of the USPS. All USPS Express Mail will be delivered first to EPA headquarters and then re-delivered to the EAB's hand-delivery address. Parties who send

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<sup>10</sup>(...continued)

Electronic Filing web pages, located on its website at [www.epa.gov/eab](http://www.epa.gov/eab).

documents by USPS Express Mail should allow for the possibility of delay in delivery caused by this extra step in the delivery process.

b. EAB Hand-Delivery Address

Documents that are hand-carried in person, or delivered via courier, USPS Express Mail, or a non-USPS carrier such as UPS or Federal Express MUST be addressed to:

U.S. Environmental Protection Agency  
Clerk of the Board, Environmental Appeals Board  
1341 G Street, N.W., Suite 600  
Washington, D.C. 20005

Documents that are hand-carried may be delivered to the Clerk of the Board from 8:30 a.m. to 12:00 p.m. and 1:00 p.m. to 4:30 p.m., Monday through Friday (excluding federal holidays). The Clerk can be reached by telephone at (202) 233-0122 during office hours.

c. Case Name and Case Identifier on Envelope or Outside Packaging

Any envelope or other packaging containing documents sent to the EAB's mailing address or hand-delivery address, as prescribed above, should bear a complete and accurate return address in the upper left hand corner. The envelope or packaging should also clearly state the case name and case identifier in the lower left hand corner. In all instances, if an appeal has already been filed with the Clerk of the Board, the case name and case identifier are the name and appeal number assigned to the matter by the Clerk. If an appeal has not yet been filed: (a) for enforcement cases, state the name of the non-EPA party and the docket number (e.g., Dkt. No. CWA-02-0000) of the proceeding below; (b) for permit appeals, state the name of the permittee or facility and the permit number (e.g., NPDES Permit No. ID-0000-00); and (c) for CERCLA reimbursement petitions, state the name of the clean-up site.

d. Timeliness of Submissions Filed by Mail

The postmark date of a pleading filed by mail is not determinative of timeliness either in enforcement or permit proceedings. Pleadings must be *received* at the EAB's office (not EPA headquarters) by 4:30 p.m. on the specified filing date. Documents that are delivered after 4:30 p.m. will be date-stamped on the following day. If the EAB establishes a briefing schedule by order, any date the EAB specifies for filing a pleading means the date by which it must be *received*, unless otherwise specified in the order.

Specific deadlines for submissions in enforcement and permit proceedings are described in Sections III.D.1.a and IV.D.2.a, respectively. As further discussed in those sections, the EAB has held that it will strictly construe deadlines for filing appeals. Deadlines for petitions for reimbursement filed pursuant to CERCLA § 106(b) are set forth in the Revised Guidance on Procedures for Submission and Review of CERCLA Section 106(b) Reimbursement Petitions (Nov. 10, 2004), contained in Appendix 1 of this Manual.<sup>11</sup>

3. Required Information for All Filings

Documents filed with the EAB in a proceeding shall contain the name, address, telephone number, and email address (if available) of the person filing the pleading. Parties shall promptly notify the Clerk of the Board, the Regional Hearing Clerk, and all parties to the proceeding, of any changes in this information. In a permit proceeding governed by 40 C.F.R. § 124.19, the name of the case and the docket number should also appear on the document. A signature<sup>12</sup> (in blue ink for

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<sup>11</sup> See Section VI.B of this Manual for general information about deadlines for filing CERCLA reimbursement petitions.

<sup>12</sup> Registration with CDX fulfills any regulatory signature requirements that might  
(continued...)

those not filing electronically) by the party filing or by the party's attorney or duly authorized representative is also required.

#### 4. Format and Length of Filed Documents

The EAB prefers that all documents be typed and double-spaced on 8 ½ x 11 paper, that the pages of each document be numbered, and that each document contain the sender's email address and facsimile number, if available. The parties are strongly encouraged to limit briefs to 50 pages (including the certificate of service, table of contents, and table of authorities). "To assure the efficient use of Agency resources," the EAB has the discretion to reject a brief on the ground that it is unduly long. *In re Rocky Well Service, Inc.*, SDWA Appeal Nos. 08-03 & 08-04, at 1 (EAB Dec. 15, 2008) (Order Rejecting Brief Because of Excessive Length and Requiring Revised Brief).

#### J. Alternative Dispute Resolution

The EAB encourages parties to pursue all avenues of dispute resolution and is implementing its own alternative dispute resolution ("ADR") program to assist parties in resolving disputes before the Board. ADR has been successfully used by other federal agencies and by federal courts (including appellate courts) in settling contested matters. ADR refers to voluntary techniques for resolving conflict with the help of a neutral third party. The EAB's pilot program will focus primarily on penalty cases as well as CERCLA § 106(b) petitions for reimbursement, and will offer parties the option of participating in ADR with the assistance of an EAB Judge acting as a neutral evaluator/mediator. Questions regarding the program may be addressed to the

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<sup>12</sup>(...continued)

otherwise apply to filings with the EAB. Litigants filing electronically should still type or print their full name below the signature line.

Clerk of the Board. *See* Section II.K (containing contact information for the Clerk of the Board).

For more information about the pilot ADR program visit the EAB's website at [www.epa.gov/eab](http://www.epa.gov/eab).

#### K. Clerk of the Board

The Clerk of the Board ("Clerk") maintains the EAB's docket at 1341 G Street, N.W., Suite 600, Washington, D.C. 20005. The docket can be accessed on the EAB's web site located at [www.epa.gov/eab](http://www.epa.gov/eab). The Clerk's office is open from 8:30 a.m. to 12:00 p.m. and from 1:00 p.m. to 4:30 p.m. Monday through Friday (excluding federal holidays). The Clerk can be reached by telephone at (202) 233-0122 during office hours.

Subject to the provisions of law restricting the public disclosure of confidential information, any person may inspect and copy, at that address, any document that was filed in any proceeding before the EAB. *See* 40 C.F.R. § 22.9 (stating the rule on inspecting and copying documents in enforcement proceedings). An appointment with the Clerk should be made to inspect or copy documents. The EAB provides the first 100 pages of copies at no charge. Beyond that, the cost of duplication of documents is \$.15 per page, or \$.30 per double-sided page. However, duplication costs may be waived when the total fee amounts to less than \$14.00. Non-confidential documents filed in a case that is pending before the EAB can be found on the EAB's website at [www.epa.gov/eab](http://www.epa.gov/eab) (click on "EAB Dockets" and then click on "Active Dockets").

#### L. EAB Web Site

The EAB Web site contains extensive information about the EAB and its procedures.

Information that is available on the EAB's website includes:

1. EAB Dockets
2. EAB Formal Decisions (complete text)

3. EAB Final Orders Issued Since November 1996 (complete text)
4. EAB Decisions Reviewed by the Federal Courts (Table 1)
5. EAB Decisions Pending Federal Court Review (Table 2)
6. Frequently Asked Questions (“FAQs”)
7. Upcoming Oral Arguments
8. EAB Standing Orders and Guidance Documents
9. Electronic Filing
10. Alternative Dispute Resolution (ADR)

### III. APPEALS UNDER THE CONSOLIDATED RULES OF PRACTICE (CROP), 40 C.F.R. PART 22

#### A. Introduction

This section describes the rules of practice for EAB proceedings governed by the Consolidated Rules of Practice (“CROP”), codified at 40 C.F.R. part 22. In general, the CROP describes the EAB’s role as follows:

The Environmental Appeals Board rules on appeals from the initial decisions, rulings and orders of a Presiding Officer<sup>[13]</sup> in proceedings under [the CROP]; acts as Presiding Officer until the respondent files an answer in proceedings under [the CROP] commenced at EPA Headquarters; and approves settlements of proceedings under [the CROP] commenced at EPA Headquarters.

40 C.F.R. § 22.4(a)(i). The EAB has the discretion to resolve issues that are not expressly addressed in the CROP pursuant to 40 C.F.R. § 22.1(c).<sup>14</sup> *See In re Zaclon, Inc.*, 7 E.A.D. 482, 490 n.7 (EAB 1998).

Although the Federal Rules of Civil Procedure do not apply to EPA administrative proceedings, the EAB may look to them for guidance in interpreting the CROP. *See, e.g., In re Euclid of Va., Inc.*, 13 E.A.D. 616, 657-58 (EAB 2008); *In re Zaclon, Inc.*, 7 E.A.D. 482, 490 n.7 (EAB 1998); *In re Lazarus, Inc.*, 7 E.A.D. 318, 330 n.25 (EAB 1997); *see also Puerto Rico*

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<sup>13</sup> A Presiding Officer is an EPA Administrative Law Judge in most proceedings under the CROP. However, where the complaint is premised on Subpart I of the CROP (*see infra* Section III.B), which establishes procedures not subject to section 554 of the APA, 5 U.S.C. § 554, the Presiding Officer is a Regional Judicial Officer. *See* 40 C.F.R. § 22.51.

<sup>14</sup> Section 22.1(c) provides that “[q]uestions arising at any stage of the proceeding which are not addressed in these Consolidated Rules of Practice shall be resolved at the discretion of the \* \* \* Environmental Appeals Board \* \* \*.” *See also* 40 C.F.R. § 22.4(a)(2) (The EAB has the authority to “do all acts and take all measures as are necessary for the efficient, fair and impartial adjudication of issues arising in a proceeding \* \* \* .”).

*Aqueduct & Sewer Auth. v. U.S. EPA*, 35 F.3d 600, 608 (1st Cir. 1994) (stating EPA’s view that federal rules “may inform administrative practice in appropriate situations”).

B. Scope of the CROP

The CROP applies to most EPA administrative enforcement proceedings and to certain proceedings for the revocation, suspension, or termination of a permit. Section 22.1 lists the types of proceedings that are covered by the CROP as follows:

- (1) The assessment of any administrative civil penalty under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. 136l(a));
- (2) The assessment of any administrative civil penalty under sections 113(d), 205(c), 211(d), and 213(d) of the Clean Air Act (CAA), as amended (42 U.S.C. §§ 7413(d), 7524(c), 7545(d), 7547(d));
- (3) The assessment of any civil penalty or for the revocation or suspension of any permit under section 105(a) and (f) of the Marine Protection, Research, and Sanctuaries Act, as amended (33 U.S.C. § 1415(a), (f));
- (4) The issuance of a compliance order or the issuance of a corrective action order, the termination of a permit pursuant to section 3008(a)(3), the suspension or revocation of authority to operate pursuant to section 3005(e), or the assessment of any civil penalty under sections 3008, 9006, and 11005 of the Solid Waste Disposal Act, as amended (42 U.S.C. §§ 6925(d), 6925(e), 6928, 6991e, 6992d), except as provided in 40 C.F.R. part 24;
- (5) The assessment of any administrative civil penalty under sections 16(a) and 207 of the Toxic Substances Control Act (15 U.S.C. §§ 2615(a), 2647);
- (6) The assessment of any Class II penalty under sections 309(g) and 311(b)(6), or termination of any permit issued pursuant to section 402(a) of the Clean Water Act, as amended (33 U.S.C. §§ 1319(g), 1321(b)(6), 1342(a));
- (7) The assessment of any administrative penalty under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. § 9609);

- (8) The assessment of any administrative civil penalty under section 325 of the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA), (42 U.S.C. § 11045);
- (9) The assessment of any administrative civil penalty under sections 1414(g)(3)(B), 1423(c), and 1447(b) of the Safe Drinking Water Act as amended (42 U.S.C. §§ 300g-3(g)(3)(B), 300h-2c, 300j-6(b)), or the issuance of any order requiring both compliance and the assessment of any administrative penalty under SDWA § 1423(c).
- (10) The assessment of any administrative civil penalty or the issuance of any order requiring compliance under section 5 of the Mercury-Containing and Rechargeable Battery Management Act (42 U.S.C. § 14304).

Subpart I of the CROP establishes procedures for specified adjudicatory proceedings that are not subject to section 554 of the APA. Pursuant to 40 C.F.R. § 22.50(b), an adverse ruling in a proceeding governed by Subpart I may be appealed to the EAB to the same extent as other decisions under the CROP.

### C. Judicial Review; Final Agency Action

Non-EPA parties typically have a right to obtain judicial review of an EAB decision issued under the CROP. The right to judicial review is typically governed by the particular environmental statute that is the subject of the litigation, or by the APA if the statute itself does not speak to it.<sup>15</sup>

Pursuant to the APA, the right to judicial review does not arise until there has been final Agency action on the matter, *see supra* Section II.D. Generally, once the EAB issues a ruling, the EAB's final order constitutes final agency action for purposes of judicial review. 40 C.F.R. § 22.31(a).<sup>16</sup> A party dissatisfied with the EAB's decision may file a motion for reconsideration

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<sup>15</sup> *See, e.g.*, Clean Air Act § 307(b)(1), 42 U.S.C. § 7607(b)(1); Toxic Substances Control Act § 16(a), 15 U.S.C. § 2615(a); Clean Water Act § 509, 33 U.S.C. § 1369.

<sup>16</sup> As noted above, the Board has the discretion pursuant to section 22.4(a)(1) to refer a  
(continued...)

with the EAB within 10 days of service of the order. *Id.* § 22.32. A motion for reconsideration will not stay the effective date of the order unless a stay is specifically ordered by the EAB. *Id.* There is a high bar for granting motions for reconsideration. The EAB will grant a motion for reconsideration to correct an obvious error, a mistake of law or fact, or a change in the applicable law. *See, e.g., In re Capozzi, Inc.*, RCRA (3008) Appeal No. 02-01, at 3 (EAB Oct. 16, 2003) (Order Denying Motion for Reconsideration). However, “the filing of a motion for reconsideration should not be regarded as an opportunity to reargue the case in a more convincing fashion.” *In re Pyramid Chem. Co.*, RCRA (3008) Appeal No. 03-03, at 2 (EAB Nov. 8, 2004) (Order Denying Motion for Reconsideration).

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<sup>16</sup>(...continued)

matter to the Administrator. In addition, when the EAB issues a final order to a department, agency, or instrumentality of the United States, that entity may request a conference with the Administrator within 30 days of service of the EAB order. 40 C.F.R. § 22.31(e). In that instance, the Administrator’s decision constitutes final agency action for purposes of appeal. *Id.* Aside from such a timely request for a conference with the Administrator from a federal facility pursuant to 40 C.F.R. § 22.31(e), a motion directed to the Administrator will not be considered unless it relates to a matter that the EAB has referred to the Administrator pursuant to section 22.4(a), or is a motion to disqualify pursuant to section 22.4(d). *See* 40 C.F.R. § 22.4(a), (d).

D. Appeals Procedure<sup>17</sup>

1. Notice of Appeal and Appeal Brief

a. Deadline for Filing

Any party may appeal the Presiding Officer's decision (the "Initial Decision") within 30 days from service of that decision. 40 C.F.R. § 22.30. A Notice of Appeal is considered filed when received by the EAB. 40 C.F.R. § 22.5(a). *See supra* Section II.I.2.d. Provisions relating to computation of time for purposes of meeting that deadline are governed by 40 C.F.R. § 22.7, which provides:

The [EAB] \* \* \* may grant an extension of time for filing any document: upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties; or upon its own initiative. *Any motion for an extension of time shall be filed sufficiently in advance of the due date so as to allow other parties reasonable opportunity to respond and to allow the \* \* \* Environmental Appeals Board reasonable opportunity to issue an order.*

40 C.F.R. § 22.7(b) (emphasis added).

The EAB applies the regulatory deadline for filing a Notice of Appeal strictly, and will dismiss a late appeal in most cases. The EAB does not excuse a late-filed appeal unless it finds special circumstances to justify the untimeliness. *In re B&L Plating, Inc.*, 11 E.A.D. 183, 190 (EAB 2003); *see also In re Outboard Marine Corp.*, 6 E.A.D. 194, 196 (EAB 1995). The EAB may extend the deadline for filing the appeal brief if good cause is shown and there is no prejudice to opposing parties. *See In re B & B Wrecking and Excavating, Inc.*, 4 E.A.D. 16, 17 (EAB 1992);

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<sup>17</sup> An Initial Decision becomes the final agency decision 45 days after service unless, within the time frame specified in the regulation, either party moves to reopen the hearing, appeals the decision to the EAB, or moves to set aside a default order that constitutes an Initial Decision. 40 C.F.R. § 22.27(c). The EAB may also elect to review the Initial Decision on its own initiative, in which case the Initial Decision would not become final agency action. *Id.*

*see also In re Guam Waterworks Auth.*, NPDES Appeal Nos. 09-15 & 09-16, at 4 (EAB Nov. 3, 2009) (Order Granting Motion in the Alternative to Timely File Summary Petitions with Extension of Time to File Supplemental Briefs); *In re City & Cnty. of Honolulu*, NPDES Appeal No. 09-01, at 2-3 (EAB Feb. 2, 2009) (Order Granting Alternative Motion for Extension of Time to File Petitions for Review). The CROP emphasizes that any motion for an extension of time shall be filed sufficiently in advance of the due date so as to allow other parties reasonable opportunity to respond and to allow the EAB reasonable opportunity to issue an order. 40 C.F.R. § 22.7(b); *see also In re MGP Ingredients of Illinois, Inc.*, PSD Appeal No. 09-03, at 4 (Jan. 8, 2010) (Order Imposing Sanctions, Setting Final Deadline for Filing Response and Scheduling Status Conference).

b. Form and Content

Section 22.5(c) of the CROP contains requirements for documents that are filed with the EAB. There is no specific form for a Notice of Appeal. The regulations do provide that the Notice of Appeal should contain: (1) a caption that indicates the name of the case and the docket number; (2) the name, address, and telephone number of the person who is authorized to receive service relating to the proceeding; (3) a signature by the party or its representative;<sup>18</sup> and (4) a certificate of service. 40 C.F.R. § 22.5(c)(4). Parties are required by the regulations to notify the EAB and all parties of any changes in the information provided.

The Notice of Appeal should be accompanied by an appeal brief. Specifications for the contents of an appeal brief are set forth at 40 C.F.R. § 22.30(a), which provides that:

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<sup>18</sup> When filing electronically, registration with CDX fulfills the signature requirement at 40 C.F.R. § 22.5(c)(3). Litigants filing electronically should still type or print their full name below the signature line.

The appellant's brief shall contain tables of contents and authorities (with page references), a statement of the issues presented for review, a statement of the nature of the case and the facts relevant to the issues presented for review (with appropriate references to the record), argument on the issues presented, a short conclusion stating the precise relief sought, alternative findings of fact, and alternative conclusions regarding issues of law or discretion.

Legal briefs and memoranda that exceed twenty pages in length (excluding attachments) must also contain a table of contents and a table of authorities with page references. *Id.* § 22.5(c)(2). The regulations provide that the EAB may exclude from the record any pleading or document that does not comply with the regulatory requirements. *Id.* § 22.5(c)(5).

c. Motions

All motions shall be in writing, state the grounds therefor with particularity, set forth the relief sought, and be accompanied by any supporting documentation. 40 C.F.R. § 22.16. A motion shall state whether the opposing party concurs or objects to granting the request set forth in the motion.<sup>19</sup> Unless the EAB sets a shorter or longer time for a response, a party's response to any written motion must be filed within 15 days after service of the motion. *Id.*

Motions may be filed by mail, hand-delivery, facsimile (if without attachments), or electronically.<sup>20</sup> Motions for an extension of time shall be filed sufficiently in advance of the due date as to allow other parties reasonable opportunity to respond and to allow the EAB reasonable opportunity to consider whether to issue an order. *Id.* § 22.7(a)-(b). Because a Presiding Officer is not assigned to the case until the answer is filed, a motion for extension of time within which to

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<sup>19</sup> If the requestor cannot determine the position of the opposing party on the motion after making a reasonable effort to do so, the requestor shall represent that fact in its pleading.

<sup>20</sup> *See supra* Section II.I.1.d. The Clerk will not accept for filing any facsimile duplicate of a document that has been filed electronically.

file an answer shall be made to the EAB for cases initiated at EPA Headquarters and to the Regional Administrator for cases initiated in a Region. *Id.* § 22.16(c).

d. Non-party Participation

Any person who is not a party to a proceeding may move for leave to intervene or to file a non-party brief. 40 C.F.R. § 22.11. A person requesting to intervene in a proceeding after the exchange of information pursuant to 40 C.F.R. § 22.19(a) occurs shall not be granted permission to intervene without showing good cause for failing to file a request before the exchange of information. *Id.* § 22.11(a).

2. Filing and Service Requirements

a. Filing

The CROP sets forth basic filing requirements for paper filings in EAB proceedings, and further provides that the EAB may authorize by order the facsimile or electronic filing of any document, in lieu of paper filing, under appropriate conditions and limitations. *Id.* § 22.5(a)(1). The EAB has issued an order authorizing parties to file documents electronically in proceedings under the CROP. *See supra* Section II.I.1.

The CROP requires an original and one copy of any filing, *id.* § 22.5(a)(1), but when a litigant chooses to file a paper copy, rather than an electronic copy, of a notice of appeal and accompanying appeal brief, litigants should submit the original document signed in blue ink along with any supporting documentation. The EAB's requirement for the submission of one paper copy for certain electronic filings is discussed at Section II.I.c.

The EAB has not authorized the filing of documents by facsimile, except that motions and responses to motions that do not include attachments, may be filed by facsimile. Upon filing a

motion by facsimile, the sender should, within 24 hours, place in the mail or hand-deliver the original copy of the motion to the EAB. The Clerk of the Board will not include in the record any facsimile duplicate of a motion or response to motion that is filed electronically. *See supra* Section II.I.1.d.

b. Service

The CROP sets forth requirements for service of documents. *See* 40 C.F.R. § 22.5(b).

3. Cross Appeals

If a timely Notice of Appeal has been filed, any other party may file a Notice of Appeal on any issue within 20 days after the date on which the first Notice of Appeal was served.

*Id.* § 22.30(a)(i).

E. Scope and Standard of EAB Review

1. Scope of Review

A party's right of appeal to the EAB is "limited to those issues raised during the course of the proceeding and by the initial decision, and to issues concerning subject matter jurisdiction."

*Id.* § 22.30(c).

2. Standard of Review

The CROP provides for *de novo* review of both the factual and legal conclusions of the Presiding Officer.<sup>21</sup> 40 C.F.R. § 22.30(f) (The EAB "shall adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed"); *see In re Ram, Inc.*, RCRA (9006) Appeal Nos. 08-01 & 08-02, slip op. at 10 (EAB July 10, 2009),

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<sup>21</sup> *See* APA, 5 U.S.C. § 557(b) ("On appeal from \* \* \* the initial decision, the agency has all the power [that] it would have in making the initial decision except as it may limit the issues on notice or by rule.").

14 E.A.D. \_\_\_; see also *In re Billy Yee*, 10 E.A.D. 1, 10 (EAB 2001) (stating that “[t]he Board generally reviews the Presiding Officer’s factual and legal conclusions on a *de novo* basis \* \* \*”). However, the EAB will generally give deference to findings of fact based upon the testimony of witnesses because the Presiding Officer is in a position to assess their credibility.<sup>22</sup> Moreover, the EAB has ordinarily not reversed decisions based on minor pleading deficiencies.<sup>23</sup>

The EAB applies the “preponderance of the evidence” standard established by 40 C.F.R. § 22.24(b). See *In re The Bullen Cos.*, 9 E.A.D. 620, 632 (EAB 2001). The regulation provides that:

(a) The complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate. Following complainant’s establishment of a prima facie case, respondent shall have the burden of presenting any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief. The respondent has the burdens of presentation and persuasion for any affirmative defenses.

(b) Each matter of controversy shall be decided by the Presiding Officer upon a preponderance of the evidence.

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<sup>22</sup> “When a Presiding Officer has ‘the opportunity to observe the witnesses testify and to evaluate their credibility, his factual findings are entitled to considerable deference \* \* \* .’” *In re Chempace Corp.*, 9 E.A.D. 119, 134 (EAB 2000) (citing *In re Echevarria*, 5 E.A.D. 626, 638 (EAB 1994)); see also *In re Ram, Inc.*, RCRA (9006) Appeal Nos. 08-01 & 08-02, slip op. at 10, 14 E.A.D. \_\_\_; *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998). The EAB has also given deference to presiding officers on decisions regarding the admissibility of evidence, *In re Great Lakes Div. of Nat’l Steel Corp.*, 5 E.A.D. 355, 368 (EAB 1994), and decisions regarding discovery, *In re Billy Yee*, 10 E.A.D. 1, 10 (EAB 2001).

<sup>23</sup> The Board “adheres to the generally accepted legal principle that ‘administrative pleadings are liberally construed and easily amended.’” *In re Port of Oakland*, 4 E.A.D. 170, 205 (EAB 1992) (citing *Yaffe Iron & Metal Co. v. U.S. Env’tl. Prot. Agency*, 774 F.2d 1008, 1012 (10th Cir. 1985), *aff’g In re Yaffe Iron & Metal Co.*, TSCA Appeal No. 81-2 (Aug. 9, 1982)); accord *In re Env’tl. Prot. Servs., Inc.*, 13 E.A.D. 506, 560-61 & n.67; *In re Wego Chem. & Mineral Corp.*, 4 E.A.D. 513, 525 n.11 (EAB 1993).

40 C.F.R. § 22.24. The EAB has stated that the “preponderance of the evidence” standard requires that “a fact finder should believe that his factual conclusion is more likely than not.” *In re Euclid of Va., Inc.*, RCRA (9006) Appeal Nos. 06-05 & 06-06, slip op. at 13 (EAB Mar. 11, 2008), 14 E.A.D. \_\_\_; *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998).

#### F. Review Initiated by the EAB

The EAB has 45 days from the date the Initial Decision was served upon the parties to determine whether to review an initial decision on its own initiative, pursuant to 40 C.F.R. § 22.30(b).<sup>24</sup> The EAB uses this authority sparingly.

#### G. Interlocutory Appeals

Interlocutory appeals to the EAB are governed by 40 C.F.R. § 22.29. A motion requesting that the Presiding Officer certify the order or ruling to the EAB for review must be made to the Presiding Officer within ten days after service of the order from which the appeal is requested.<sup>25</sup> A certified interlocutory appeal is likely to be accepted by the EAB if: (1) the order or ruling involves an important question of law or policy concerning which there are substantial grounds for difference of opinion; and (2) either an immediate ruling will advance the termination of the

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<sup>24</sup> The EAB may review a decision on its own initiative after the 45-day deadline if it has granted an extension of time to file an appeal that will extend the filing deadline beyond the 45-day deadline for such review. *See, e.g., In re Zaclon, Inc.*, RCRA Appeal No. 07-03, at 2 n.1 (EAB Aug. 21, 2007) (Order Granting Complainant’s Second Motion for Extension of Time to File Notice of Appeal); *In re Rhee Bros., Inc.*, FIFRA Appeal No. 06-02, at 2 n.1 (EAB Oct. 18, 2006) (Order Granting Region III’s Motion for Extension of Time to File Appeal Brief).

<sup>25</sup> If certification is denied, the party may move for interlocutory review directly to the EAB within ten days of the Presiding Officer’s refusal to certify. 40 C.F.R. § 22.29(c). A party does not waive any rights of appeal by not pursuing an interlocutory appeal. *See In re Wego Chem. & Mineral Corp.*, 4 E.A.D. 513, 529-30 & n.16 (EAB 1993).

proceeding, or review after the final order is issued will be inadequate or ineffective.<sup>26</sup>

Upon certification, the EAB has 30 days to take action on the interlocutory appeal, or the appeal will be dismissed automatically without further action by the EAB. As a matter of practice, when the EAB intends to review a matter that has been certified, it will typically issue an order to that effect within the 30-day period and, if appropriate, provide a schedule for briefs or oral argument. The EAB is not required to issue a substantive ruling within 30 days.

#### H. Appeals from Default Orders

A default order issued by the Presiding Officer pursuant to 40 C.F.R. § 22.17 may be appealed to the EAB. *See, e.g., In re Four Strong Builders, Inc.*, 12 E.A.D. 762, 765-66 (EAB 2006); *In re Rybond, Inc.*, 6 E.A.D. 614, 615-16 (EAB 1996); *see also In re Ag-Air Flying Servs., Inc.*, FIFRA Appeal No. 06-01, at 6 (EAB Sept. 1, 2006) (Final Decision and Order). When the order appealed from is a default order, the EAB may not assess a civil penalty in an amount that is higher than the amount proposed in the complaint or in the motion for default (whichever amount is smaller). 40 C.F.R. § 22.30(f). In all other respects, appeals from default orders are governed by the same procedures as appeals from Initial Decisions. *See In re Prod. Plated Plastics, Inc.*, 5 E.A.D. 101, 103-04 (EAB 1994).

#### I. Confidential Business Information (CBI)

A person who wishes to assert a business confidentiality claim with regard to any information contained in a pleading or document to be filed in a proceeding under the CROP must assert that claim at the time the pleading or document is filed. 40 C.F.R. § 22.5(d). Filing requirements for CBI are set forth at 40 C.F.R. § 22.5(d)(2) and (3). Any pleading or document

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<sup>26</sup> *See generally In re CWM Chem. Servs., Inc.*, 6 E.A.D. 1, 10 (EAB 1995).

that has been filed without a claim of confidentiality shall be available to the public for inspection and copying. A party filing a document electronically waives any claim that the document contains confidential business information. *See supra* Section II.I.1.e.

#### J. Federal Facilities

Currently, EPA has authority to assess fines and penalties against federal facilities in violation of environmental statutes including, but not limited to, the Clean Air Act, 42 U.S.C. §§ 7401 - 7671q, the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. §§ 6901 - 6992k, and the Safe Drinking Water Act, 42 U.S.C. §§ 300f - 300j-26. Office of Enforcement and Compliance Assurance, U.S. EPA, EPA-315-B-98-011, *The Yellow Book: Guide to Environmental Enforcement and Compliance at Federal Facilities* at V-1 (1999) (“Yellow Book”), available at <http://www.epa.gov/compliance/resources/publications/civil/federal/yellowbk.pdf>. The Yellow Book contains summaries of EPA’s statute-specific policies and guidance for federal facilities, and provides an overview of enforcement authorities and the enforcement process. *Id.* at V-1, V-3.

Under the Clean Air Act, the procedures set forth in the CROP, including the opportunity for an appeal to the EAB, apply when EPA issues a penalty order against a Federal agency.<sup>27</sup> *See* 42 U.S.C. §§ 7413(d), 7524(c), 7545(d)(1); *see also* Yellow Book at II-10 to -11, V-3 to -4.

The Federal Facility Compliance Act of 1992 amended RCRA, and confirmed that RCRA’s waiver of immunity subjects federal facilities to all available enforcement tools, including administrative orders and penalties, and it specifically authorizes administrative enforcement

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<sup>27</sup> The authority to assess administrative penalties or issue compliance orders against Federal agencies under the Clean Air Act was confirmed in 1997, when the Office of Legal Counsel within the Department of Justice issued an opinion verifying EPA’s authority to do so. Office of Legal Counsel, U.S. Dep’t of Justice, *Administrative Assessment of Civil Penalties Against Facilities Under the Clean Air Act* (July 16, 1997) (Yellow Book App. B).

actions. 42 U.S.C. § 6961(a)-(b); *see also* Yellow Book at II-79, II-87, V-4 to -5. Agency procedures governing RCRA administrative enforcement actions, including the opportunity for an appeal to the EAB, apply to federal agencies, with the exception, consistent with the statutory requirement at 42 U.S.C. § 6961(b)(2), that the federal agency may request a conference with the Administrator within thirty days of service of the EAB's final decision. *See* 40 C.F.R. § 22.31(e). If the request is timely, a decision by the Administrator becomes the final order of the Agency. *Id.*

The Safe Drinking Water Act (“SDWA”) amendments of 1996 clearly express EPA’s administrative authority over federal agencies with respect to, among other things, compliance orders and penalty provisions. *See* 42 U.S.C. §§ 300g-3(g), 300j-6; *see also* Yellow Book at II-102 to -03. The CROP governs the assessment of civil administrative penalties and the issuance of compliance orders against federal facilities under the SDWA. SDWA §§ 1414(g)(3)(B), 1423(a), 1447(b), 42 U.S.C. §§ 300g-3(g)(3)(B), 300h-2(a), 300j-6(b); 40 C.F.R. § 22.1(a)(9). Upon exhaustion of procedures under the CROP, a federal entity subject to a penalty may request the opportunity to confer with the Administrator. 42 U.S.C. 300j-6(b); *see* Yellow Book at V-9. The Administrator’s obligation to provide an opportunity to confer applies only in connection with EPA-issued orders, not those orders issued by a state with primary enforcement authority under the SDWA. Office of Enforcement and Compliance Assurance, U.S. EPA, *Guidance on Federal Facility Penalty Order Authority Under the Safe Drinking Water Act, as amended in 1996*, at 6-7 & n.8 (May 28, 1998) (“SDWA Guidance”). The SDWA Guidance also states that even in the absence of a statutory provision requiring it, a federal agency may have the opportunity to confer with an appropriate Regional official who has the authority to issue compliance orders under the SDWA. *See* SDWA Guidance at 4-5; Yellow Book at V-9.

### K. EAB Approval of Certain Prehearing Settlements

The parties may discuss the possibility of settlement during the 30-day time period between the filing of the complaint and the filing of the answer. In fact, the rules expressly recognize that the Agency “encourages settlement of proceedings.” 40 C.F.R. § 22.18(b). Further information about the EAB’s alternative dispute resolution (“ADR”) program is available in section II.J of this Manual, and on the EAB’s website at [www.epa.gov/eab](http://www.epa.gov/eab).<sup>28</sup> The EAB may, on motion, extend the deadline for filing an answer to an EPA Headquarters-initiated complaint while settlement negotiations are in progress. *See supra* Section III.I.1 (stating additional information about motions to extend the deadline for filing an answer).

If an action settles before the hearing begins, the parties are required to prepare both a consent agreement and a proposed final order,<sup>29</sup> which are known collectively as a “CAFO.” A consent agreement does not finally resolve the action until a final order is signed by the Regional Administrator, or if the proceeding is initiated at Headquarters, the EAB. *See* Appendix 4.

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<sup>28</sup> Parties are free to pursue settlement on their own accord. The EAB’s ADR program is one option parties may pursue in attempting to settle a proceeding.

<sup>29</sup> *See* 40 C.F.R. § 22.18(b)(2).

#### IV. PERMIT APPEALS UNDER 40 C.F.R. PART 124

##### A. Introduction

This part of the Manual addresses the rules of practice in proceedings governed by 40 C.F.R. part 124 (“Part 124 ”).<sup>30</sup> This covers appeals from most categories of permit decisions issued by EPA. Part 124 generally defines the EAB role as follows:

The Administrator delegates authority to the Environmental Appeals Board to issue final decisions in RCRA, PSD, UIC, or NPDES permit appeals filed under this subpart, including informal appeals of denials of requests for modification, revocation and reissuance, or termination of permits under Section 124.5(b). An appeal directed to the Administrator, rather than to the Environmental Appeals Board, will not be considered.

40 C.F.R. § 124.2(a).

##### B. Scope of Part 124

Part 124 sets forth procedures that affect permit decisions issued by EPA under the 1984 Hazardous and Solid Waste Amendments to the Resource Conservation Recovery Act (“RCRA”),<sup>31</sup> the National Pollutant Discharge Elimination System (“NPDES”) program under the Clean Water Act,<sup>32</sup> the Underground Injection Control (“UIC”) program under the Safe Drinking Water Act,<sup>33</sup> and the Prevention of Significant Deterioration (“PSD”) program under the Clean Air

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<sup>30</sup> Part 124 was revised effective June 14, 2000. *See* Amendments to Streamline the National Pollutant Discharge Elimination System Program Regulations: Round Two, 65 Fed. Reg. 30,886, 30,888, 30,894-95, 30,900-91 (May 15, 2000). The revised regulations change the procedure for appealing from NPDES permit decisions and from certain RCRA permit decisions. See note 36 below for a brief description of these regulatory changes.

<sup>31</sup> 42 U.S.C. §§ 6901-6992k.

<sup>32</sup> 33 U.S.C. § 1342.

<sup>33</sup> 42 U.S.C. § 300h to 300h-7.

Act.<sup>34</sup> See 40 C.F.R. § 124.19(a). Part 124 also creates an informal appeals procedure for appeals from denials of certain requests for modification, revocation, and reissuance of NPDES, UIC, or RCRA permits.<sup>35</sup> A few categories of permit decisions issued by EPA are governed by the CROP, 40 C.F.R. part 22, or by statute-specific regulations rather than by Part 124. General information about these procedures can be found in Sections II and III of this Manual.

Section 124.19(a) authorizes appeals to the EAB from *federally-issued* RCRA, UIC, PSD, and NPDES permit decisions.<sup>36</sup> The EAB generally does not have authority to review state-issued permits; such permits are reviewable only under the laws of the state that issued the permit.<sup>37</sup> See

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<sup>34</sup> 42 U.S.C. §§ 7470-7492. Section 328(a) of the Clean Air Act, 42 U.S.C. § 7627(a), establishes permit requirements to control air pollution from outer continental shelf (“OCS”) sources. 40 C.F.R. § 55.1. The Part 124 procedures used to issue PSD permits are also used to issue OCS permits. *Id.* § 55.6(a)(3).

<sup>35</sup> See 40 C.F.R. § 124.5 (containing further information regarding these procedures); see also *In re Waste Technologies Indus.*, 5 E.A.D. 646, 655 & n.13 (EAB 1995).

<sup>36</sup> Prior to regulatory changes that were implemented in June 2000, any person challenging an EPA-issued NPDES permit was required to file a request with the Regional Administrator for an evidentiary hearing pursuant to 40 C.F.R. pt. 124 subpt. E (“Subpart E”), regardless of whether the challenge raised legal or factual issues. 40 C.F.R. § 124.91 (1998). Section 124.91 provided a right of appeal from the Regional Administrator’s decision after an evidentiary hearing and also provided a right of appeal from the denial (in whole or in part) of the request for an evidentiary hearing. As amended, the Subpart E evidentiary hearing procedure for NPDES permit appeals has been eliminated, and replaced with a direct right of appeal of a permit decision to the EAB. For further discussion of the regulatory change and the transition to the new framework, see Amendments to Streamline the National Pollutant Discharge Elimination System Program Regulations: Round Two, 65 Fed. Reg. 30,886, 30,887 (May 15, 2000). See also *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12, 16-18 (1st Cir. 2006) (upholding EPA’s decision to eliminate formal evidentiary hearings from the NPDES permitting process).

<sup>37</sup> Similarly, the EAB does not have jurisdiction to review state certification decisions under section 401 of the Clean Water Act, 33 U.S.C. § 1341, even though such certifications may determine certain conditions of a federally-issued permit. See, e.g., *In re City of Fitchburg*,  
(continued...)

*In re BP Cherry Point*, 12 E.A.D. 209, 214 (EAB 2005) (“[T]he Board lacks authority to review conditions of a state-issued permit that are adopted solely pursuant to state law.”); *In re Great Lakes Chem. Corp.*, 5 E.A.D. 395, 396 (EAB 1994) (EAB has no authority to review conditions imposed under a state RCRA program); *see also In re Gateway Generating Station*, PSD Appeal No. 09-02, at 10, n.6 (EAB Sept. 15, 2009) (Order Dismissing Petition for Review) (“In general, the Board’s jurisdiction to review state-issued permits is limited to those elements of the permit that find their origin in the federal PSD program \* \* \*”). Note also that the conditions of a general NPDES permit (which imposes restrictions on a class of facilities, in contrast to a specific permit that imposes restrictions on an individual facility) are not appealable to the EAB. 40 C.F.R. § 124.19(a).

The EAB has jurisdiction to review PSD permits issued by states that administer permit programs under a *delegation* from EPA (in contrast to PSD permits issued by states pursuant to an EPA-approved state implementation plan (SIP)). The PSD permits issued pursuant to a federal delegation of authority are considered federally-issued permits for purposes of review by the EAB. *See* 40 C.F.R. § 124.41 (stating that when EPA has delegated authority to administer regulations to another agency, the term “EPA” shall mean the delegate agency and the term “Regional Administrator” shall mean the chief administrative officer of the delegate agency); *see also In re Desert Rock Energy Co., LLC*, PSD Appeal Nos. 08-03 through 08-06, slip op. at 58-59 (EAB Sept. 24, 2009), 14 E.A.D. \_\_\_; *In re Seminole Electric Coop., Inc.*, PSD Appeal No. 08-09,

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<sup>37</sup>(...continued)

5 E.A.D. 93, 97 (EAB 1994). Rather, “the proper forum to review the appropriateness of a state’s certification is the state court \* \* \*.” *Roosevelt Campobello Int’l Park Commission v. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982).

slip op. at 10 (EAB Sept. 22, 2009), 14 E.A.D. \_\_\_\_; *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 168-69 (EAB 2000). However, where such a permit combines PSD requirements and non-PSD requirements, only the PSD part of the permit is reviewable by the EAB. *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 110 n.5 (EAB 1997).

### C. Judicial Review; Final Agency Action

Judicial review of permit decisions is typically governed by the particular environmental statute that is the subject of the litigation, or by the APA if the statute itself does not speak to it.<sup>38</sup> Under Agency regulations, an appeal to the EAB is a “prerequisite to the seeking of judicial review of the final agency action.” 40 C.F.R. § 124.19(e). For purposes of judicial review, “final agency action occurs when a final \* \* \* permit decision is issued by EPA and agency review procedures \* \* \* are exhausted,” *id.* § 124.19(f)(1), that is when either: (1) the EAB issues a final decision denying review; (2) the EAB issues a final decision on the merits that does not include a remand; or (3) “the remand procedures are completed and the remand order [does] not require appeal of the remand decision to exhaust administrative remedies.”<sup>39</sup> *See* 40 C.F.R. § 124.19(f)(1)(i)-(iii); *see generally* Section IV.D.1. When federal court review of a permit decision is available, it is based on the administrative record.

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<sup>38</sup> *See, e.g.*, Clean Air Act § 307(b), 42 U.S.C. § 7607(b); Clean Water Act § 509(b)(1), 33 U.S.C. § 1369(b)(1); RCRA § 7006, 42 U.S.C. § 6976; Public Health Service Act § 1448, 42 U.S.C. § 300j-7.

<sup>39</sup> *In re Desert Rock Energy Co.*, PSD Appeal Nos. 08-03 through 08-06, slip op. at 31-32 (EAB Sept. 24, 2009), 14 E.A.D. \_\_\_\_.

## D. Appeals Procedure

### 1. Overview

Part 124 regulations outline a two-track process for the EAB's consideration of permit appeals.<sup>40</sup> During the first stage of the appeals process, any person who filed comments on a draft permit or participated in a public hearing on the permit may petition the EAB to review any condition of the permit. A petition for review should include all of the arguments alleging any procedural deficiencies, or substantive deficiencies in the permit's terms. The EAB then considers the petition, and any response brief received, and issues a decision either declining review or granting the petition and, where appropriate, remanding the permit for further review. The EAB may determine, in the alternative, to issue a formal grant of review. 40 C.F.R. § 124.19(c). In that instance, public notice of the grant of review is given and any interested person may file an amicus brief. *Id.* The EAB establishes a briefing schedule, reviews the briefs submitted by the petitioner and any interested persons (including the permit issuer), and issues a decision.

In the interest of prompt and informed resolution of permit appeals the EAB, in practice, endeavors to resolve as many cases as possible through the first-track process described above. That process is briefly described here.

Upon receipt of a petition for review, the EAB sends a letter to the permit issuer requesting that the permit issuer review the petition and respond to petitioner's contentions. *See* Appendices 2 & 3; *see also* Section IV.D.5 ("Response to Petition"). If the petition is filed by someone other than the permit applicant or permittee, the EAB will generally grant a request by the permit applicant or permittee to respond to the petition. After considering the response, the EAB

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<sup>40</sup> *See* 40 C.F.R. § 124.19.

conducts a thorough analysis of the issues raised by the petition to determine whether the permit suffers any deficiencies in the permit terms or permit-issuance process that would merit the Board's exercising its discretion to grant review. If the EAB identifies no deficiencies in the permit terms or permit-issuance process warranting a grant of review, the EAB will deny review without qualification. If the EAB identifies any deficiencies in the permit terms or permit-issuance process warranting a grant of review, it may grant the petition and remand the permit to the permit issuer with instructions to correct the deficiencies. Since the EAB frequently issues a decision that is dispositive of the matter based on the petitioner's brief and the responses thereto,<sup>41</sup> a petition for review should set forth, in detail, all of the issues and all of the arguments in petitioner's favor. Further information about the contents of a petition for review is provided below in Sections IV.D.2.b through IV.D.2.e.

In the event that the EAB identifies deficiencies in the permit terms or permit-issuance process with the permit on appeal, such as issues of national significance, the EAB may determine that broader participation by interested parties is warranted, and therefore issue a formal grant of review under 40 C.F.R. § 124.19(c).

## 2. Petition for review

### a. Clean Air Act New Source Review "NSR" Program

The EAB recently issued a standing order that adopts certain procedures intended to facilitate quick resolution of petitions requesting review of permits issued under the Clean Air Act

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<sup>41</sup> See, e.g., *In re City of Marlborough*, 12 E.A.D. 235, 253 n.23 (EAB 2005) ("Although 40 C.F.R. § 124.19 contemplates that additional briefing typically will be submitted upon a grant of review, a direct remand without additional submissions is appropriate where, as here, it does not appear as though further briefs on appeal would shed light on the issue.").

New Source Review (“NSR”) Program. *See* Order Governing Petitions for Review of Clean Air Act New Source Review Permits at 1-2 (Apr. 19, 2011). Petitioners should consult the EAB’s order, available on its website at [www.epa.gov/eab](http://www.epa.gov/eab), for further information regarding petitions for review of NSR permit decisions. Among other things, the EAB’s order states that petitions for review in NSR appeals may not exceed 14,000 words. *See id.* at 4 & n.5 (explaining that a petition or response brief should include a statement of compliance with the word limitation, and that in lieu of a word limitation, parties may instead comply with a 30-page limit).

b. Deadline for filing

A petition for review of any condition of a RCRA, UIC, NPDES, or PSD permit decision must be filed with the EAB within 30 days of issuance of the final permit decision. 40 C.F.R. § 124.19(a). The 30-day period begins with the service of notice of the permit decision, unless a later date is specified in that notice.<sup>42</sup> 40 C.F.R. § 124.19(a). When the permitting authority serves the notice by mail, service is deemed to be completed when the notice is placed in the mail, not when it is received. However, to compensate for the delay caused by mailing, the 30-day deadline for filing a petition is extended by three days if the final permit decision being appealed was served on the petitioner by mail. *Id.* § 124.20(d).

Petitions are deemed filed when received by the Board, and the Board will generally dismiss petitions for review that are received after a filing deadline. *See, e.g., In re AES Puerto Rico L.P.*, 8 E.A.D. 324, 329 (EAB 1999), *aff’d sub nom. Sur Contra La Contaminacion v. EPA*, 202 F.3d 443 (1st Cir. 2000).

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<sup>42</sup> *See, e.g., In re Envotech, L.P.*, 6 E.A.D. 260, 264-65 (EAB 1996).

c. Content

The petitioner bears the burden of demonstrating that the Region based the permit decision on a clearly erroneous finding of fact or conclusion of law or that the Board should exercise its discretion to review an important policy matter or an exercise of discretion by the permit issuer. 40 C.F.R. § 124.19(a); *see, e.g., In re City of Attleboro*, NPDES Appeal No. 08-08, slip op. at 10 (Sept. 15, 2009), 14 E.A.D. \_\_\_\_\_. The petition should contain all supporting argumentation. Petitioners should be aware that “[a] petition for review under § 124.19 is not analogous to a notice of appeal that may be supplemented by further briefing. Although additional briefing may occur in the event formal review is granted, the discretion to grant review is to be sparingly exercised, and therefore, \* \* \* a petition for review must specifically identify disputed permit conditions and demonstrate why review is warranted.” *In re LCP Chemicals - N.Y.*, 4 E.A.D. 661, 665 n.9 (EAB 1993).

Petitions for review must meet a minimum standard of specificity. To meet this requirement, “a petitioner must demonstrate with specificity in the petition why the Region’s prior response to those objections is clearly erroneous or otherwise merits review.” *In re Westborough*, 10 E.A.D. 297, 305 (EAB 2002). A petitioner must support its allegations with solid evidence that the permit issuer clearly erred in its decision, as “the Board will not entertain vague or unsubstantiated claims.” *In re City of Attleboro*, NPDES Appeal No. 08-08, slip op. at 61 (Sept. 15, 2009), 14 E.A.D. \_\_\_\_\_.<sup>43</sup> For permit challenges based on technical issues, the Board

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<sup>43</sup> The Board has held that “mere allegations of error” are not enough to warrant review. *See Attleboro*, slip op. at 32, 45, 61, 74, 14 E.A.D. \_\_\_\_; *In re Arecibo & Aguadilla Reg’l Wastewater Treatment Plants*, 12 E.A.D. 97, 136 n.71 (EAB 2005) (quoting *In re New Eng. Plating Co.*, 9 E.A.D. 726, 737 (EAB 2001)); *In re Carlota Copper Co.*, 11 E.A.D. 692, 720

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expects a petitioner to present “references to studies, reports, or other materials that provide relevant, detailed, and specific facts and data about permitting matters that were not adequately considered by a permit issuer.” *Attleboro*, slip op. at 32, 14 E.A.D. \_\_\_ (citing *In re Envntl. Disposal Sys., Inc.*, 12 E.A.D. 254, 291 (EAB 2005)).

d. Requirement That Petitioner Has Participated in the Comment Period (“Standing” to Seek Review)

Only those persons who participated in the permit process leading up to the permit decision, either by filing comments on the draft permit or by participating in the public hearing, may appeal a permit decision. 40 C.F.R. § 124.19(a); accord *In re Christian Cnty. Generation, LLC*, 13 E.A.D. 449, 457-60 (EAB 2008); *In re Avon Custom Mixing Servs., Inc.*, 10 E.A.D. 700, 704-05 (EAB 2002). As the EAB explained in its opinion in *In re EcoEléctrica, L.P.*, 7 E.A.D. 56, 63 n.9 (EAB 1997), a petitioner “has standing to seek review of [a] permit decision by virtue of its acknowledged participation in the public hearing on the permit.” A person who has not filed comments or participated in a hearing on the draft permit may, however, petition for review with respect to the “changes from the draft to the final permit decision.”<sup>44</sup> 40 C.F.R. § 124.19(a).

A petitioner with standing may raise any issues that are eligible for review under the regulations, even if the petitioner did not raise or previously comment on that particular issue. These regulatory requirements are described below in Section IV.D.2.e.

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<sup>43</sup>(...continued)  
(EAB 2004).

<sup>44</sup> A discussion of “standing” requirements also appears in *In re Am. Soda, L.L.P.*, 9 E.A.D. 280, 288-89 (EAB 2002); *In re Commonwealth Chesapeake Corp.*, 6 E.A.D. 764, 770 (EAB 1997); *In re Envotech, L.P.*, 6 E.A.D. 260, 266-67 (EAB 1996); *In re Beckman Prod. Servs.*, 5 E.A.D. 10, 16-17 (EAB 1994).

e. Requirement That Issues Were Raised During the Comment Period

The petitioner has the obligation to demonstrate that any issues raised in the petition were previously raised by someone (either petitioner or another commenter) during the public comment period (including any public hearing), provided that they were “reasonably ascertainable” at that time. 40 C.F.R. § 124.13; *see* 40 C.F.R. § 124.19.<sup>45</sup> The purpose of this requirement is to give the permitting authority the opportunity to hear and respond to objections to permit conditions before the permit is issued.<sup>46</sup>

3. Motions

Although the regulations do not specifically provide for motions practice in the context of a permit appeal,<sup>47</sup> the Board regularly considers motions received from parties in a Part 124

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<sup>45</sup> Section 124.13 provides that a person “must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period (including any public hearing) under section 124.10.” 40 C.F.R. § 124.13. The EAB has construed this requirement in several cases. *See, e.g., In re Christian Cnty. Generation, LLC*, 13 E.A.D. 449, 457-60; *In re Shell Offshore, Inc.*, OCS Appeal Nos. 07-01 & 07-02, slip op. at 52-53 & n.55 (EAB Sept. 14, 2007), 13 E.A.D. \_\_; *In re Sierra Pac. Indus.*, 11 E.A.D. 1, 6-8 (EAB 2003); *In re City of Phoenix*, 9 E.A.D. 515, 524-25 (EAB 2000).

<sup>46</sup> *See In re Ash Grove Cement Co.*, 7 E.A.D. 387, 431 (EAB 1997) (“The purpose of the response to comments and any supplementation of the administrative record at that time is to ensure that interested parties have full notice of the basis for final permit decisions and can address any concerns regarding the final permit in an appeal to the Board pursuant to 40 C.F.R. section 124.19.”); *see also In re Sierra Pac. Indus.*, 11 E.A.D. 1, 8 (EAB 2003); *In re City of Phoenix*, 9 E.A.D. 515, 526 (EAB 2000) (“In NPDES proceedings, as well as other permit proceedings, the broad purpose behind the requirement of raising an issue during the public comment period is to alert the permit issuer to potential problems with a draft permit and to ensure that the permit issuer has an opportunity to address the problems before the permit becomes final.”).

<sup>47</sup> The only discussion of motions practice within part 124 is found in 40 C.F.R. § 124.19(g), which sets forth the standards and timeframe within which a party may file a motion for reconsideration of a final order issued by the Board.

proceeding. *E.g., In re Peabody W. Coal Co.*, CAA Appeal No. 10-01, slip op. at 5-8 (EAB Aug. 13, 2010), 14 E.A.D. \_\_\_\_ (“In the part 124 context, despite the lack of detailed procedures in the regulations, the Board has exercised broad discretion to manage its permit appeal docket by ruling on motions presented to it for various purposes \* \* \* .”); *see also Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S 532, 539 (1970) (“[I]t is always within the discretion of \* \* \* an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it.”).<sup>48</sup> Motions are required to be in writing, stating the grounds therefor with particularity, and setting forth the relief sought. Motions shall be accompanied by any necessary supporting documentation. A motion shall state whether the opposing party concurs or objects to granting the request set forth in the motion.<sup>49</sup> Although the EAB may set a shorter or longer time for a response, a party should file its response to any written motion within 10 days after service of the motion.

Parties may file motions by mail, hand-delivery, facsimile (if without attachments), or electronically.<sup>50</sup> Motions for an extension of time should be filed sufficiently in advance of the due date as to allow other parties reasonable opportunity to respond and to allow the EAB reasonable

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<sup>48</sup> By contrast, the Consolidated Rules of Practice (“CROP”) at 40 C.F.R. part 22, which govern enforcement appeals, specifically assign to the Board discretionary authority to rule on motions, *see* 40 C.F.R. § 22.16, as well as set forth standards regarding the contents and timely filing of motions. While the CROP do not apply to permit appeals under Part 124, and the Board retains its discretion to manage its permit appeals docket, section 22.16 of the CROP is a useful reference for the Board and for parties engaged in permit appeal proceedings.

<sup>49</sup> If the requestor cannot determine the position of the opposing party on the motion after making a reasonable effort to do so, the requestor shall represent that fact in its pleading.

<sup>50</sup> *See supra* Section II.I.1.d. The Clerk will not accept for filing any facsimile duplicate of a document that has been filed electronically.

opportunity to issue an order.

#### 4. Non-Party Participation

Part 124 does not specifically address non-party participation or non-party briefs in permit appeal proceedings, except where review has been granted. In other circumstances, the Board exercises its discretion, where appropriate, to allow intervention and/or non-party briefing. The Board typically allows permittees not already a party to the proceeding to participate as intervenors. *See, e.g., In re USGen New Eng., Inc.*, NPDES Appeal No. 03-12, at 7 & n.13 (Feb. 20, 2004) (Order Granting Review), *perm. remanded sub nom. In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490 (EAB 2006); *see also id.* at 7-8 & n.12 (denying two requests to intervene but simultaneously granting leave to file an amicus brief, and also granting three non-parties' motions to file amicus briefs); *In re Desert Rock Energy Co.*, PSD Appeal Nos. 08-03 through 08-06, at 2-3 (Oct. 14, 2008) (granting instrumentality of the Navajo Nation's motion for leave to participate and conservation group's motion for leave to file an amicus curiae brief); *In re Dist. Of Columbia Water & Sewer Auth.*, NPDES Appeal Nos. 05-02 & 07-10 through 07-12, at 2 (EAB July 27, 2007) (granting a non-party leave to file a brief); *In re Dist. Of Columbia Water & Sewer Auth.*, NPDES Appeal 07-12, at 2-3 (EAB June 15, 2007) (granting intervenor status to permittee); *In re Four Corners Power Plant*, NPDES Appeal No. 01-06, at 1-2 (EAB Feb. 20, 2001) (granting motion to intervene and file a brief of a tribe whose authority to regulate water quality was at issue); *In re NPDES Permit for Wastewater Treatment Facility of Union Twp., Mich.*, NPDES Appeal Nos. 00-26 & 00-28, at 3, 7 (EAB Jan. 23, 2001) (same).

In proceedings where the Board grants review, the Board must give public notice of its decision, and "shall state that any interested person may file an amicus brief." 40 C.F.R.

§ 124.19(c); *see also In re Desert Rock Energy Co.*, PSD Appeal Nos. 08-03 through 08-06, at 5-6 (Jan. 22, 2009) (granting review based on “a number of issues of significant regional interest, with potential tribal and interstate implications”); *In re Deseret Power Elec. Coop.*, PSD Appeal No. 07-03, at 2-3 (Nov. 21, 2007) (granting review to allow briefing and argument from interested persons on a matter of potential national significance); *In re USGen New Eng., Inc.*, NPDES Appeal No. 03-12, at 5-6 (Feb. 20, 2004), *perm. remanded sub nom. In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490 (EAB 2006) (citing a legal issue of first impression, significant regional interest, potential interstate implications, and the relatively complex and unique nature of some issues when granting review).

#### 5. Filing and Service Requirements

The regulations do not set forth filing requirements for petitions to review a permit decision. The EAB will accept documents filed electronically or on paper. *See supra* Section II.I. When a petitioner chooses to forgo electronic filing and instead files on paper, the petitioner should provide an original petition signed in blue ink, a supporting brief, and any supporting documentation. The EAB’s requirement for the submission of one paper copy for certain electronic filings is discussed at Section II.I.c.

Motions that do not include attachments may be filed with the EAB by facsimile. Upon filing a motion by facsimile, the sender should, within 24 hours, place in the mail or hand-deliver the original copy of the motion to the EAB. The EAB may, on a case-by-case basis, authorize facsimile filing of any other document. However, the EAB will not ordinarily authorize the filing

of a brief by facsimile.<sup>51</sup>

#### 6. Notice to Permittee of Appeal

Petitions for review may be filed by someone other than the permittee. In such cases, the regulations do not require notice to the permittee until the EAB has decided whether or not to grant formal review. *See* 40 C.F.R. § 124.10(a)(iv), (c)(1)(i).<sup>52</sup> In practice, however, the EAB will provide a permittee with notice that a petition for review has been filed concerning the permittee's permit at the same time that the EAB requests a response from the permit issuer and will ordinarily grant a timely request by the permittee to participate in the proceeding and respond to the petition for review.

#### 7. Responses to Petition

Upon receipt of a petition, the EAB routinely requests a response from the permitting authority whose permit decision has been challenged, addressing all procedural and substantive challenges to the permit. 40 C.F.R. § 124.19; *see* Appendices 2 & 3. A copy of the request is sent to the petitioner. The EAB's request typically gives the permitting authority 45 days to file its response.<sup>53</sup>

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<sup>51</sup> The Clerk will not accept for filing any facsimile duplicate of a document that has been filed electronically. *See supra* Section II.I.1.d.

<sup>52</sup> The regulations provide that the permitting authority shall give public notice, including notice to the permittee, that review has been granted. 40 C.F.R. § 124.19(c). The regulations further provide that, after review has been granted, any interested person (including the permittee) may participate in the proceeding by filing an amicus brief, also known as a "friend of the court" brief. *Id.*

<sup>53</sup> However, when the appeal concerns a PSD or other new source permit, the EAB requests that the permitting authority file a response within 15 days if the permitting authority believes that the petition in its entirety may be appropriate for summary disposition. If the

(continued...)

The EAB also asks the permitting authority to file with the Clerk of the Board, and to serve upon the petitioner, a certified index of all documents in the administrative record of the permit decision as well as copies of those parts of the record that pertain to the matters raised in the petition. The permitting authority should provide the petitioner and the Clerk of the Board with a certificate of service showing the date and method of service.

After the permitting authority's response has been filed, the EAB normally does not require further briefing before issuing a decision whether to grant review. However, petitioners or other interested persons may, upon motion explaining why a reply brief is necessary, seek leave to file a reply brief. Motions for leave to file a reply brief should be filed as soon as possible upon receipt of the permitting authority's response, since the timeliness of the motion may be a factor in the Board's consideration of whether to grant the motion. If a reply brief has been filed, the EAB may similarly, upon motion, allow the filing of a surreply brief.

#### 8. Oral Argument and Decision

Following briefing, the EAB may direct the parties to present oral argument on specified issues. The EAB will then issue a final decision addressing all issues raised in the petition that the Board concludes are properly preserved for appeal. The Board's decision may include remanding an issue or issues to the permitting authority for further action.

#### 9. Motions for Reconsideration or Clarification

Under 40 C.F.R. § 124.19(g), a party that is adversely affected by an EAB final order may

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<sup>53</sup>(...continued)

permitting authority is not seeking summary disposition, the EAB requests a response within 30 days. *See* Appendix 3 ("EAB Request for Regional Response to Petition for Review of PSD Permit Decision under 40 C.F.R. part 124").

seek reconsideration.<sup>54</sup> Such motions will not be granted absent a showing that the EAB has made a clear error, such as a mistake of law or fact. *See, e.g., In re Dist. of Columbia Water and Sewer Auth.*, NPDES Appeal Nos. 05-02, 07-10, 07-11, and 07-12, at 2 (EAB Apr. 23, 2008) (Order Denying Motion for Reconsideration). “The reconsideration process ‘should not be regarded as an opportunity to reargue the case in a more convincing fashion. It should only be used to bring to the attention of [the Board] clearly erroneous factual or legal conclusions.’” *In re Town of Ashland Wastewater Treatment Facility*, NPDES Appeal No. 00-15, at 2 (EAB Apr. 9, 2001) (Order Denying Motion for Reconsideration) (quoting *In re S. Timber Products, Inc.*, 3 E.A.D. 880, 889 (JO 1992)).

The rules do not expressly provide for motions for clarification. However, the EAB will entertain a motion for clarification filed promptly after issuance of the EAB final order where the moving party can demonstrate that an aspect of the EAB’s decision is ambiguous.<sup>55</sup>

#### E. Scope and Standard of Review

##### 1. Scope of Review

The EAB’s jurisdiction under section 124.19(a) is limited to issues related to the “conditions” of the federal permit that are claimed to be erroneous. The EAB does not have authority to rule on matters that are outside the permit process. *In re Federated Oil & Gas of Traverse City*, 6 E.A.D. 722, 725-26 (EAB 1997); *see also In re Tondu Energy Co.*, 9 E.A.D. 710,

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<sup>54</sup> A motion to reconsider must be filed within 10 days of service of the final order. 40 C.F.R. § 124.19(g).

<sup>55</sup> Where a motion for clarification seeks a modification of some aspect of the decision, however, the EAB has treated it as a motion for reconsideration subject to the 10-day filing deadline for such motions. *In re Adcom Wire Co.*, RCRA Appeal No. 92-2, at 2 (EAB July 22, 1994) (Order on Adcom’s Motion for Clarification).

716 n.10 (EAB 2001) (the permit appeals process is not the appropriate venue to challenge Agency regulations).

## 2. Standard of Review

There is no appeal as of right from the Regional Administrator's permit decision to the EAB.<sup>56</sup> Rather, under the rules governing permit appeals, the petitioner has the burden of demonstrating that the permit decision warrants review. In particular, the petition must show that the permit condition in question is based on "a finding of fact or conclusion of law which is clearly erroneous," or "an exercise of discretion or an important policy consideration which the [EAB] should, in its discretion, review."<sup>57</sup> 40 C.F.R. § 124.19(a). The preamble to 40 C.F.R. § 124.19 states that "this power of review should only be sparingly exercised," and that "most permit conditions should be finally determined [by the permitting authority] \* \* \* ." 45 Fed. Reg. 33,290, 33,412 (May 19, 1980) (Consolidated Permit Regulations); *accord In re City of Attleboro*, NPDES Appeal No. 08-08, slip op. at 10 (EAB Sept. 15, 2009), 14 E.A.D. \_\_; *In re Jett Black, Inc.*, 8 E.A.D. 353, 358 (EAB 1999); *In re Maui Electric Co.*, 8 E.A.D. 1, 7 (EAB 1998).

### F. Review Initiated by the EAB

The EAB may decide on its own initiative to review any condition of any RCRA, NPDES, UIC, or PSD permit issued under part 124, provided that it acts within 30 days of the service date of notice of the permit issuer's action. 40 C.F.R. § 124.19(b).

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<sup>56</sup> *In re Miners Advocacy Council*, 4 E.A.D. 40, 42 (EAB 1992).

<sup>57</sup> *See, e.g., In re City of Jacksonville*, 4 E.A.D. 150, 152 (EAB 1992).

G. Effect of Administrative Appeal on the Conditions of the Permit

The regulations distinguish between an appeal involving an existing facility that is already operating under a permit and an appeal involving a new facility that is applying for its first permit. If the appeal involves a new facility or new injection well, new source, new discharger, or recommencing discharger, the permit applicant will be without a permit pending final agency action and may not proceed under the permit during that time period.<sup>58</sup> 40 C.F.R. § 124.16(a)(1). If the appeal involves a RCRA, UIC, or NPDES permit for an existing facility, the facility may continue to operate under the uncontested conditions of the old permit and under those uncontested conditions of the new permit that are severable from the contested conditions. *Id.*

The effect of any contested permit conditions and the effect of any uncontested conditions that are not severable from contested conditions under a RCRA, UIC, or NPDES permit is stayed pending final agency action. 40 C.F.R. § 124.16(a)(2)(i). The EAB will notify the Regional Administrator that a petition has been filed. Upon receipt of such notification, the Regional Administrator will notify the EAB, the applicant, and all other interested persons which permit conditions are uncontested (and severable from any contested provisions). *Id.* § 124.16(a)(2)(ii). These uncontested and severable conditions shall become fully effective 30 days after the date of the Regional Administrator's notification. *See id.* § 124.16(a)(2)(i). If review of the permit is denied, the permit will become effective as provided in 40 C.F.R. § 124.19(f)(1). If review is

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<sup>58</sup> *See In re Wastewater Treatment Facility of Union Twp.*, NPDES Appeal No. 00-27, at 2 (EAB Oct. 19, 2000) (Order Denying Request Not to Stay Permit) (“[T]here is no statutory or regulatory authority allowing a new discharger to commence discharging while its NPDES permit is on appeal \* \* \*”).

granted, and the permit is for a new facility, the permit applicant will be without a permit pending resolution of the appeal and final agency action. *Id.* § 124.16(a)(1).

PSD permit decisions are treated differently under the regulations from other permit decisions that are subject to EAB review. *See id.* § 124.16(a). For such permits, construction of new or significantly modified facilities cannot begin until a final permit is issued by the Regional Administrator (or delegated state agency) following EAB review. *See generally In re Shell Offshore, Inc.*, 13 E.A.D. 357, 364-65 (EAB 2007).

#### H. Stays of Permit Appeals Pending Settlement Negotiations

An appeal is not automatically stayed during settlement negotiations between the permitting authority and the applicant. However, the EAB may, upon request of the parties or on its own initiative, stay further briefing during settlement negotiations. Further information about the EAB's alternative dispute resolution ("ADR") program is available in section II.J of this Manual, and on the EAB's website at [www.epa.gov/eab](http://www.epa.gov/eab).<sup>59</sup> If protracted settlement negotiations are contemplated, the EAB may remand the permit to the Region for the purpose of pursuing a settlement outside the appeals process, without prejudice to either party's right to request reinstatement of the appeal if that should prove necessary.

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<sup>59</sup> Parties are free to pursue settlement on their own accord. The EAB's ADR program is one option parties may pursue in attempting to settle a proceeding.

## V. OTHER EAB APPEALS

### A. Introduction

Although most enforcement appeals to the EAB are governed by the CROP (*see supra* Section III) and most permit appeals to the EAB are governed by 40 C.F.R. part 124 (*see supra* Section IV), some administrative appeals are authorized by other regulations. These categories of appeals are briefly described below. Practitioners should consult the applicable statute and regulations for further information regarding these appeals.

### B. Clean Air Act (“CAA”) Enforcement Appeals

#### 1. CAA § 120

A decision of the Presiding Officer assessing a noncompliance penalty under CAA § 120, 42 U.S.C. § 7420, may be appealed to the EAB pursuant to 40 C.F.R. § 66.95(c). *See also* 40 C.F.R. § 66.3(g) (delegating authority to the EAB to issue final decisions in appeals under 40 C.F.R. part 66).

#### 2. CAA § 207(c)

A decision of the Presiding Officer under 40 C.F.R. part 85 (EPA-ordered automobile recalls for failure to meet emissions standards under CAA § 207(c), 42 U.S.C. § 7541(c)) may be appealed to the EAB pursuant to 40 C.F.R. § 85.1807(u). *See also* 40 C.F.R. § 85.1807(a)(6) (delegating authority to the EAB to issue final decisions in appeals under 40 C.F.R. part 85).

### C. CAA Permit Appeals

#### 1. Title V Operating Permits

Title V of the 1990 amendments to the CAA (*see* 42 U.S.C. §§ 7661-7661f) requires certain stationary sources of air pollution to obtain permits from state air pollution agencies and

requires EPA to establish a federal permit program where no state program exists. CAA § 502(d)(3), 42 U.S.C. § 7661a(d)(3). EPA has established procedures for a federal operating permit program under Title V of the CAA amendments at 40 C.F.R. part 71.

Section 71.11(l) provides for appeal to the EAB from a federal Title V operating permit decision. Section 71.10(i) provides for an appeal to the EAB from a Title V operating permit that was issued by a state, tribal, local, or other authority pursuant to a *delegation* of authority from EPA. *See, e.g., In re Peabody W. Coal Co.*, 12 E.A.D. 22, 27-29 (EAB 2005). However, a permit issued by a state with an EPA-authorized state program may not be appealed to the EAB.

An Administrator's denial of a request that a permit be revised, revoked and reissued, or terminated may be informally appealed to the EAB, pursuant to 40 C.F.R. § 71.27(a)(2).

## 2. Acid Rain Program

Title 40 C.F.R. part 72 establishes permit requirements under EPA's Acid Rain Program pursuant to Title IV of the CAA. Section 78.3(b)(1) provides for an appeal to the EAB from certain acid rain permit decisions listed at 40 C.F.R. § 78.1(a). *See, e.g., In re Indianapolis Power & Light Co.*, 6 E.A.D. 23, 27 (EAB 1995); *see also* 40 C.F.R. § 78.1(c). Section 78.20 sets forth the appeals procedure under part 78.

## 3. Standards of Performance for Residential Wood Heaters

A decision of the Presiding Officer to deny an application for certification, or revoke a certification, for a residential wood heater, under 40 C.F.R. § 60.539, or a decision to deny or revoke a certification for laboratory accreditation under 40 C.F.R. § 60.533, may be appealed to the EAB pursuant to 40 C.F.R. § 60.539(h)(2). *See, e.g., In re Woodkiln, Inc.*, 7 E.A.D. 254, 256 (EAB 1997).

D. Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”)  
Non-Enforcement Proceedings

EPA regulations at 40 C.F.R. part 164 govern hearings in FIFRA proceedings arising from: (1) refusal to register a pesticide; (2) cancellation of a pesticide registration; (3) change of classification of a pesticide; (4) suspension of a pesticide registration; and (5) other hearings convened pursuant to FIFRA § 6, 7 U.S.C. § 136d. An appeal to the EAB of an initial decision is authorized by 40 C.F.R. §§ 164.101-.103. The EAB is required to issue a final Agency decision within 90 days from an initial decision issued at the close of a hearing or from the filing of an accelerated decision. 40 C.F.R. § 164.103. Special rules apply to expedited hearings, *see* 40 C.F.R. §§ 164.120-.123, and modifications of previous cancellation and suspension orders, *see* 40 C.F.R. §§ 164.130-.133.

E. Equal Access to Justice Act

The Administrator has delegated authority to the EAB to take final action on claims made under the Equal Access to Justice Act. 40 C.F.R. § 17.8. *See, e.g., In re Cutler, In re Bricks, Inc.*, 11 E.A.D. 796, 797 (EAB 2004); *see generally* 40 C.F.R. part 17 (Implementation of the Equal Access to Justice Act in Administrative Proceedings).

F. Fraudulent Claims Against EPA

The Administrator has delegated authority to the EAB to 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; *see also id.* § 27.1. A defendant who has filed a timely answer in a civil penalty action for making such a claim or statement may appeal an adverse decision to the EAB pursuant to 40 C.F.R. § 27.39(a). *See generally* 40 C.F.R. pt. 27.

### G. Ocean Dumping Permits

A decision of the Presiding Officer to deny an application for an ocean dumping permit pursuant to section 102 of the Marine Protection, Research, and Sanctuaries Act of 1972, as amended, 33 U.S.C. § 1412, may be appealed to the EAB. 40 C.F.R. § 222.12(a)(1).

### H. Noise Control Act

A decision of the Presiding Officer under the Noise Control Act of 1972, 42 U.S.C. § 4910, may be appealed to the EAB pursuant to 40 C.F.R. § 209.3(k).

## VI. CERCLA SECTION 106(b) PETITIONS FOR REIMBURSEMENT

### A. Introduction

The EAB issues final decisions granting or denying petitions for reimbursement submitted under section 106(b)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”), 42 U.S.C. § 9606(b)(2). Section 106(b)(2) allows any person who has complied with an order issued under section 106(a) of the statute to petition for reimbursement of the reasonable costs incurred in complying with the order, plus interest.<sup>60</sup> To establish a claim for reimbursement, a petitioner must demonstrate that it was not liable for response costs under CERCLA section 107(a) or that the selection of the ordered response action was arbitrary, capricious, or otherwise not in accordance with law.<sup>61</sup>

There are no federal regulations governing CERCLA reimbursement proceedings. EAB has issued a detailed guidance document, “Revised Guidance on Procedures for Submission and Review of CERCLA Section 106(b) Reimbursement Petitions” (Nov. 10, 2004) (“CERCLA Guidance”), *see* Appendix 1, describing the information that petitioners are expected to submit and the procedures that the EAB intends to follow in evaluating section 106(b) petitions.<sup>62</sup>

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<sup>60</sup> If the petitioner has not complied with the terms of the order, the petition will be denied. *See Emp’rs Ins. of Wausau v. Clinton*, 848 F. Supp. 1359, 1368 (N.D. Ill. 1994); *aff’d*, 52 F.3d 656 (7th Cir. 1995), *cert. denied*, 516 U.S. 1042 (1996) (establishing the proposition); *In re Findley Adhesives, Inc.*, 5 E.A.D. 710, 716, 718 & n.23 (EAB 1995).

<sup>61</sup> The constitutionality of the reimbursement procedure established in section 106(b)(2) was upheld in *Emp’rs Ins. of Wausau v. Browner*, 848 F. Supp. 1369, 1374-78 (N.D. Ill. 1994), *aff’d*, 52 F.3d 656 (7th Cir. 1995), *cert. denied*, 516 U.S. 1042 (1996) (consolidated on appeal to the 7th Circuit with the district court case cited in the immediately preceding footnote).

<sup>62</sup> Certain federal agencies other than EPA also have the authority to issue orders under section 106(a). Reimbursement claims based on orders issued by agencies other than EPA must  
(continued...)

Persons who believe they may be eligible to assert a claim under section 106(b) should refer to the guidance document for further discussion of the applicable procedures, which are summarized in the following paragraphs.

B. Procedure for Submitting CERCLA Reimbursement Petitions

1. Filing Requirements

By statute, a claimant must file a petition for reimbursement “within 60 days after completion of the required action.” *See* CERCLA § 106(b)(2)(A), 42 U.S.C. § 9606(b)(2)(A); *see also In re Grand Pier Ctr., LLC*, 12 E.A.D. 403, 407 n.7 (EAB 2003) (characterizing the 60-day deadline as a “prerequisite” that must be satisfied before the Board will consider the merits of the petition). Petitions for reimbursement and other pleadings may be filed electronically. *See* Section II.I.1 (containing information about the EAB’s requirements for electronic filing). For the purpose of determining a petitioner’s compliance with the statutory 60-day deadline for filing a petition, the EAB will look at the postmark date if the petition was sent to the Board by certified mail, or to the date of receipt by the EAB if the petition was transmitted electronically, by hand-delivery or by any other mail service. *See* CERCLA Guidance at 2.

Except for a petition for reimbursement that is sent by certified mail,<sup>63</sup> the postmark date of a pleading is not determinative of the time a pleading was filed. Pleadings must be *received* at the EAB’s offices by the specified filing date. If the EAB establishes a briefing schedule by order, any

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<sup>62</sup>(...continued)

be filed with the EAB. While such petitions are not specifically addressed in the CERCLA Guidance, procedures similar to those set forth in the CERCLA Guidance will apply to any such claims. *See In re Katania Shipping Co.*, 8 E.A.D. 294, 298-300 & n.3 (EAB 1999).

<sup>63</sup> *See* CERCLA Guidance at 2-3.

date the EAB specifies for filing a pleading is the date by which it must be received, unless otherwise specified in the order. Section II.I.2 contains further information about addressing mail sent to the EAB.

## 2. EAB Review Procedures

Upon receipt of a petition, the EAB will issue a letter to the appropriate EPA Regional Office (or federal agency, if the claim is based on an order issued by a federal agency other than EPA)<sup>64</sup> soliciting a written response to the petition. If the Region contends that one or more of the threshold requirements for consideration of the petition have not been met, the Region must submit a limited response to the petition raising any such contentions within 30 days of the EAB's letter soliciting a response. These threshold eligibility requirements relate to: (1) whether the administrative order in question is subject to section 106(b)(2); (2) whether the order has been complied with; (3) whether the required action has been completed, and; (4) whether the petition is timely. *See, e.g., In re Grand Pier Ctr., LLC*, 12 E.A.D. 403, 407 n.7 (EAB 2005). The petitioner will then be given an opportunity to respond to the Region's contentions regarding threshold requirements. After these issues have been briefed, the EAB will either rule on any threshold issue raised by the Region or defer its ruling until the merits have been briefed.

If the Region finds that the petitioner has met the threshold eligibility requirements, the Region shall submit a response addressing the merits of the petitioners' claims within 60 days after the date of the EAB's letter soliciting a response to the petition. The EAB will then evaluate the merits of the petitioner's claim. When evaluating a petition for reimbursement, the EAB may, in its discretion, request supplemental briefing, direct the parties to present oral argument, or refer

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<sup>64</sup> *See supra* n.62.

particular factual questions to a hearing officer for the purpose of conducting an evidentiary hearing. In most cases, however, the EAB will issue a proposed disposition of the petition in the form of a preliminary decision based on the petition, the regional officer's response to the petition, and the underlying administrative record. The preliminary decision will be accompanied by a schedule providing both parties with an opportunity to submit comments. A final decision on whether the petitioner is entitled to any reimbursement will be issued after consideration of the parties' comments.<sup>65</sup> If the EAB determines that the petitioner is entitled to reimbursement of at least some of its costs of compliance, further proceedings will be held to determine the appropriate level of reimbursement. *See, e.g., In re Solutia, Inc.*, 10 E.A.D. 193, 204 n.12, 217 (EAB 2001); *In re Port Auth. of N.Y.*, 10 E.A.D. 61, 98 (EAB 2001). Any final decision by the EAB denying a reimbursement petition in whole or in part may be appealed by the petitioner to the appropriate U.S. district court as provided in CERCLA § 106(b)(2)(B), 42 U.S.C. § 9606(b)(2)(B).

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<sup>65</sup> The EAB has issued a final decision without first issuing a preliminary decision. *In re Glidden Co.*, 10 E.A.D. 738, 754 n.15 (EAB 2002). The EAB dismissed the petitions for reimbursement as premature on the ground that petitioners had not completed the required response action and therefore had not satisfied a statutory prerequisite for reimbursement. *Id.* at 754. The EAB explained that, "because today's order does not involve a final disposition, but a dismissal without prejudice to refile, the Board is not issuing a preliminary decision." *Id.* at 754 n.15.

## **APPENDICES**

1. Revised Guidance on Procedures for Submission and Review of CERCLA Section 106(b) Reimbursement Petitions (Nov. 10, 2004)
2. EAB Request for Regional Response to Petition for Review of RCRA, UIC, or NPDES Permit Decisions under 40 C.F.R. part 124
3. EAB Request for Regional Response to Petition for Review of PSD Permit Decision under 40 C.F.R. part 124
4. EAB Consent Agreement and Final Order (“CAFO”) Procedures
5. Memorandum from Administrator to Environmental Appeals Board titled “Expedited Administrative Review of Appeals of RCRA Permit Denials Filed by Interim Status Hazardous Waste Combustion Facilities” (Mar. 16, 1994)
6. Pleading Templates

# **Appendix 1: Revised Guidance on Procedures for Submission and Review of CERCLA Section 106(b) Reimbursement Petitions**

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

Date: February 23, 2012  
Environmental Appeals Board

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

## I. INTRODUCTION

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

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

The President's authority to implement CERCLA section 106(b) was delegated to the EPA Administrator by Executive Order 12580 (January 23, 1987). The authority to receive, evaluate, and make determinations regarding petitions for reimbursement submitted pursuant to section 106(b) has been delegated to EPA's Environmental Appeals Board ("EAB"). See EPA Delegations Manual, Delegation of Authority 14-27 ("Petitions for Reimbursement") (rev. June 27, 2000).<sup>66</sup>

There are no regulatory procedures for reviewing CERCLA § 106(b) reimbursement petitions. However, the EAB has developed procedures for reviewing these petitions. They are set forth in this guidance document. This guidance supersedes the "Revised Guidance on Procedures for Submitting CERCLA Section 106(b) Reimbursement Petitions and on EPA Review of Those Petitions," issued by the EAB on November 10, 2004 and is effective immediately. The procedures described in this guidance will be applied to all petitions submitted on or after the date this guidance is issued.<sup>67</sup> The EAB will also apply these procedures, to the extent the EAB determines it to be practicable and nonprejudicial to any party, to petitions that were submitted before the date of issuance of this guidance but not yet decided by the EAB.

## II. FILING PROCEDURES, SERVICE PROCEDURES, AND DEADLINES

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

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<sup>66</sup> Certain federal agencies other than EPA also have the authority to issue CERCLA § 106(a) orders. See Exec. Order No. 12580, 52 Fed. Reg. 2923 (Jan. 23, 1987). Reimbursement claims based on orders issued by these agencies must also be filed with the EAB. The procedures set forth in this guidance apply to those claims.

<sup>67</sup> Under the previous procedures that governed review of petitions for reimbursement, the EAB would first issue a Preliminary Decision and would then issue a Final Decision after receiving comments from the parties on the Preliminary Decision. The Board has concluded that the Preliminary Decision step is unnecessary and the parties will have a full opportunity to present their arguments and factual information to the EAB under the revised, streamlined procedures set forth in this guidance.

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

A. Filing Methods

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

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

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

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

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

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

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

B. Service Requirements

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

C. Proof of Service

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

III. CONTENTS OF THE PETITION

A. Required Information

A petition must include the following information:

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

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

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

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

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

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

C. Statements of Grounds for Reimbursement

The petition must set forth all legal arguments, factual contentions (including contentions, if any, regarding technical or scientific matters), and supporting evidence on which the petitioner relies in support of its claim for reimbursement.<sup>68</sup> Except as may be permitted by the EAB for good cause shown, and except as specifically provided in Sections III.B(4) and IV.F of this guidance (describing procedures for submitting cost-related information), a petitioner may not raise any issues during the petition review process that were not identified in the petition, and may not submit any evidence or information during the petition review process that was not identified in the petition, unless the petitioner demonstrates in a motion to the EAB that: (1) for new issues, such issues were not reasonably ascertainable as of the date

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<sup>68</sup> A petition must be promptly amended as appropriate to correct or clarify any statements therein that are no longer true or that are determined not to have been true when made.

the petition was filed; or (2) for new evidence or information, the petitioner could not reasonably have known of its existence, or could not reasonably have anticipated its relevance or materiality, as of the date the petition was filed.

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

D. Required Attachments

A copy of the Section 106(a) administrative order on which the petitioner's claim is based must accompany the petition as an attachment. In addition, all other documents on which the petitioner relies in support of its claim must also be submitted as attachments to the petition, except for documents to be relied on solely as evidence of the costs incurred or as evidence of their reasonableness.<sup>69</sup> Each of the attachments must be separately identified, and the relevance of each attachment to the petitioner's claim briefly explained, in the body of the petition.

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

A. Response to the Petition

Upon receiving a petition for reimbursement, the EAB will send a letter to the appropriate EPA Regional office<sup>70</sup> that issued the Section 106 order (with a copy to the petitioner) soliciting a response ("Response") to the petition. The Region shall file either a limited response under Section IV.A.1, asserting that petitioner has not met one or more prerequisites for obtaining review or a response on the merits in accordance with Section IV.A.2.

- (1) Limited response addressing prerequisites for obtaining review

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<sup>69</sup> Copies of such cost-related documents need only be submitted after the Board issues a Final Decision and Order Granting Reimbursement. See Section IV.F, infra.

<sup>70</sup> All references to the Region or regional office in Section IV of this Guidance also apply to the federal agency that issued the order in those cases where the order was not issued by EPA.

If the Region contends that one or more of the four statutory prerequisites for obtaining review have not been met, the Region shall raise those contentions by submitting a motion to dismiss the petition without reaching the merits of petitioner's claim. The motion should address only the petitioner's alleged failure to meet one or more of the prerequisites for obtaining review. The Region shall file its pleading within thirty days after the date of the EAB's letter soliciting a response to the petition.<sup>71</sup> The petitioner will then have twenty days from the date the Region's motion is filed to file a reply to the motion.

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

## 2. Response on the merits

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

## 3. Certified index and copies of documents

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

## B. Additional Briefing

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

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<sup>71</sup> The Region may request a limited extension of time if necessary to verify whether a petitioner has completed the response action. The Region is encouraged to make any such request as far in advance of the filing deadline as possible.

C. Evidentiary Hearing

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

D. Oral Argument

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

E. Stays and Withdrawals

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

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

F. EAB Decision

The EAB will issue either a Final Decision and Order Granting Reimbursement or a Final Order Denying Reimbursement. It will issue a Final Decision and Order Granting Reimbursement if it determines that a petitioner is entitled to reimbursement of all or any portion of the costs claimed in the petition. It will issue a Final Decision and Order Denying Reimbursement only if it determines that no portion of the costs claimed by the petitioner should be reimbursed.

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

Final Decision and Order Granting Reimbursement: A Final Decision and Order Granting Reimbursement does not constitute the Agency's final action on the petition because the EAB must still determine the amount of reimbursement to be awarded. When issuing a Final Decision and Order Granting Reimbursement, therefore, the EAB will also direct the petitioner to file a brief with supporting documentation of all reasonable costs that it incurred in implementing the order.<sup>72</sup> The Region will then be afforded an opportunity to respond and challenge particular cost items (as unreasonable or otherwise not recoverable), and the petitioner will be permitted to reply to those challenges, in accordance with a briefing schedule established by the EAB.<sup>73</sup>

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

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

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

## V. FURTHER INFORMATION

For further information concerning the matters addressed in this guidance, contact the Clerk of the Board, Environmental Appeals Board (Mail Code 1103B). U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue,

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<sup>72</sup> Petitioner may reference documents in the record.

<sup>73</sup> Section 106(b)(2)(A) of the statute expressly limits reimbursement from the Fund to "reasonable" costs (plus interest). The petitioner shall submit evidence of the costs actually incurred, which evidence shall include, at a minimum, itemized invoices and proof of their payment in full. The EAB may also require a demonstration that those costs are reasonable, particularly in cases where the Region argues that specific cost items are not reasonable. While not all factors bearing on the reasonableness of a petitioner's costs can be articulated in this guidance, they would typically include: bidding procedures used for a particular project and the number of bids received; reasons for selecting a contractor other than the lowest bidder; cost estimates provided by prospective contractors and the circumstances surrounding any later deviations from those estimates; and the reasons for any unforeseen expansion of a particular project or unforeseen delay in its completion, to the extent that such expansion or delay resulted in additional costs. Petitioners should retain documents and other evidence bearing on such matters, and should be prepared to submit such evidence to the EAB upon request.

N.W., Washington, DC 20460, (202) 233-0110. The office hours of the Clerk of the Board are 8:30 a.m. to 12:00 p.m. and 1:00 p.m. to 4:30 p.m., Monday through Friday (excluding federal holidays).

APPENDIX

CERCLA Section 106(a) provides:

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

CERCLA Section 106(b)(2) provides:

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

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

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

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

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

**Appendix 2: EAB Request for Response to Petition for Review of RCRA, NPDES, or UIC Permit Decision under 40 C.F.R. part 124 (Other than Clean Air Act New Source Review Permit Decisions)**

[Region Counsel and/or Director]  
[Region or Name of the State Office]  
[Address]

Re: Case Name  
Permit Number:  
Appeal Number(s):

Dear [Name]:

This is to advise you that the Environmental Appeals Board received on \_\_\_\_\_ [Date] \_\_\_\_\_, a petition filed by \_\_\_\_\_ [Name] \_\_\_\_\_, on behalf \_\_\_\_\_ [Name of Petitioner(s)] \_\_\_\_\_, asking the Board to review a [statute] permit determination by \_\_\_\_\_ [Permit issuer/State and or Region] \_\_\_\_\_.

A copy of the petition and exhibits (**IF ANY**) can be found on the Board's website at [www.epa.gov/eab](http://www.epa.gov/eab). Click on "EAB Dockets" in the left-hand menu, and click on the "Active Dockets" link, and then click on the appropriate case name. If you have any difficulty accessing this document, please let me know.

To assist the Environmental Appeals Board in deciding whether the matters raised by petitioner should be reviewed, please have your staff prepare a response that addresses the petitioner's contentions and whether petitioner has satisfied the requirements for obtaining review under 40 C.F.R. § 124.19(a) and file such response no later than [45 days of the date of this letter]. Include relevant portions of the administrative record with the response, together with a certified index of the entire administrative record. Filing may be accomplished electronically pursuant to the Board's Order of January 28, 2010.<sup>74</sup> Alternatively, filing may be accomplished by filing a

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<sup>74</sup> The Board has issued an Order authorizing the electronic filing of documents in cases involving permit appeals. *See* Order Authorizing Electronic Filing in Proceedings Before the Environmental Appeals Board Not Governed by 40 C.F.R. Part 22 (Jan. 28, 2010), *available at* <http://www.epa.gov/eab> (click "Standing Orders" on sidebar). Instructions on registration and document filing are available by using the "Electronic Filing" link on the Board's website. Documents containing  
(continued...)

paper original (signed in blue ink) and two copies of these materials with the Board (at the address shown below) by the date specified above. A copy must be sent to Petitioner, and a certificate of service showing the date and method of service should be included with the filing.

All documents, including the materials due [45 days of the date of this letter], must reference the appeal number. **IMPORTANT:** In addition, any envelope or other packaging containing documents sent to the Environmental Appeals Board's mailing address or hand-delivery address, as prescribed below, must bear a complete and accurate return address in the upper left hand corner. The envelope or packaging must also clearly state the case name and appeal number in the lower left hand corner.

**All documents that are sent through the U.S. Postal Service, Express Mail, hand-delivered, via courier must include the name of the organization, address, facsimile number, telephone number, and an email address, if available<sup>75</sup>.**

Documents that are sent through the U.S. Postal Service (except by Express Mail) MUST be addressed to the Environmental Appeals Board's mailing address which is:

U.S. Environmental Protection Agency  
Clerk of the Board  
Environmental Appeals Board 1103B  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460-0001

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<sup>74</sup>(...continued)

confidential business information should not be filed electronically as the Board considers business confidentiality claims waived when a document is electronically filed. *Id.* at 5-6. Please note that if a party, or its attorney or other representative, electronically files any document, such as a notice of appeal, brief, or motion, that exceeds fifty (50) pages in length, inclusive of the certificate of service, table of contents, and table of authorities, but exclusive of exhibits or attachments, it must also send one paper copy of that document to the Board by U.S. Mail, hand, courier, or commercial delivery service within one business day of the date of the electronic filing. *See id.* at 4-5. Such paper copy must be accompanied by a signed certification stating that it is identical to the electronically filed document. *Id.* at 5. If the combined page length of all of the exhibits or attachments submitted in support of a brief or motion exceeds fifty (50) pages, the requirement to submit a paper copy, and its timing, applies to the entire set of exhibits or attachments. *Id.* Anyone electronically filing exhibits or attachments in support of a brief, motion, or other document should submit them separately from the associated brief or motion. *Id.* at 3.

<sup>75</sup> All mail sent to the Environmental Protection Agency may be delayed by a random sterilization procedure. Parties are encouraged to utilize the Board's e-filing system or hand or courier delivery when filing pleadings with the Board. Additional information regarding mail delivery to the Board is available on the Environmental Appeals Board website ([www.epa.gov/eab](http://www.epa.gov/eab)) at the Clerk of the Board or Frequently Asked Questions links.

Documents that are sent to the Environmental Appeals Board's hand-delivery address through the U.S. Postal Service (except by Express Mail) will be returned to the sender and shall not be considered as filed.

Documents that are hand-carried in person, delivered via Courier or mailed by Express Mail or delivered by a non-U.S. Postal Service carrier (e.g., Federal Express or UPS) MUST be delivered to:

U.S. Environmental Protection Agency  
Clerk of the Board  
Environmental Appeals Board  
Ronald Reagan Building, EPA Mail Room  
1300 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004

Documents that are hand-carried may be delivered to the Ronald Reagan Building, EPA Mail Room from 8:30 a.m. to 4:00 p.m., Monday through Friday (excluding federal holidays). Documents filed electronically may be filed at any time up to 11:59 p.m. Eastern Time on the day the document is required to be filed with the Board.

A copy of this letter is being sent to the petitioner as notification of these filing requirements.

Thank you for your attention to these matters.

Sincerely,

Eurika Durr  
Clerk of the Board

cc: [Name and Address of Petitioner(s)]

[Name and Address of Regional Counsel]

[Name and Address of Permittee]

**Appendix 3: EAB Request for Response to Petition for Review of  
PSD Permit Decision or Other New Source Permit Decision  
under 40 C.F.R. part 124**

[Director or Regional Counsel]  
[Region or Name of the State Office]  
[Address]

Re: Case Name  
Permit Number:  
Appeal Number: PSD

Dear [Name]:

This is to advise you that, the Environmental Appeals Board (the “Board” or “EAB”) received a petition on **[date]**, filed by       **[Name]**      , on behalf       **[Name(s) of Petitioner]**      , asking the Board to review a **[PSD/OCS]** permit decision issued by       **[Permit issuer: U.S. EPA, Region or State, Issuer]**      .

A copy of the petition and exhibits **(IF ANY)** can be found on the Board’s website at [www.epa.gov/eab](http://www.epa.gov/eab). Click on “EAB Dockets” in the left-hand menu, then click on the “Active Dockets” link, and then click on the appropriate case name. If you have any difficulty accessing this document, please let me know.

To assist the Board in deciding whether the matters raised by Petitioner should be reviewed, please have your staff prepare a response that addresses Petitioner’s contentions and whether Petitioner has satisfied the requirements for obtaining review under 40 C.F.R. section 124.19. Your response to the petition must be received no later than **[21 days from the date of this letter]**.

**[IF PETITIONER IS NOT THE PERMITTEE, ADD THE FOLLOWING:** A copy of this letter is being sent to the permittee, **[NAME]**, as notification of this petition and these filing requirements. If the permittee chooses to file a response, it must be received by **[21 DAYS FROM**

**THE DATE OF THIS LETTER**], and comply with the filing instructions provided below.] A copy of this letter is **[also]** being sent to the petitioner as notification of these filing requirements.

**Any response brief filed may not exceed 14,000 words.**<sup>76</sup> Include with your response relevant portions of the administrative record, together with a certified index of the entire administrative record. The permit issuer is encouraged to file the index to the record, preferably electronically, as soon as possible after receiving notification of this appeal. Early filing of the certified index enables the Board to begin prompt review of the record even before all of the briefs are filed.

Due to the time-sensitive nature of **[PSD / OCS]** permit appeals, the Board will apply a presumption against the filing of reply briefs and sur-replies. Oral argument in **[PSD/OCS]** appeals is also disfavored. The Board may use scheduling and status conferences to narrow the issues on appeal or otherwise facilitate the expeditious resolution of this case. For additional information relevant to **[PSD or OCS]** permit appeals, please refer to the Board's April 19, 2011 Order Governing Petitions for Review of Clean Air Act New Source Review Permits (attached), also available at <http://www.epa.gov/eab> (Click "Standing Orders" on sidebar).

### **Filing Requirements**

Filing may be accomplished electronically pursuant to the Board's Order of January 28, 2010.<sup>77</sup> Alternatively, filing may be accomplished by filing a paper original (signed in blue ink) and two copies of these materials with the Board (at the address shown below) by the date specified above. A copy must be sent to Petitioner, and a certificate of service showing the date and method of service should be included with the filing.

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**IMPORTANT:** All documents filed must reference the appeal number and the name, address, and telephone number of the filer. If available, the filer should also provide a fax number

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<sup>76</sup> Filers may rely on the word-processing system used to determine the word count. In lieu of a word limitation, parties may comply with a 30-page limit. Headings, footnotes, and quotations count toward the word limitation. A table of contents, table of authorities, statement requesting oral argument, statement of compliance with the word limitation, exhibits, or any addendum does not count toward the word limitation.

<sup>77</sup> The Board has issued an Order authorizing the electronic filing of documents in cases involving permit appeals. See Order Authorizing Electronic Filing in Proceedings Before the Environmental Appeals Board Not Governed by 40 C.F.R. Part 22 (Jan. 28, 2010), available at <http://www.epa.gov/eab> (click "Standing Orders" on sidebar). Instructions on registration and document filing are available by using the "Electronic Filing" link on the Board's website. Documents containing confidential business information should not be filed electronically as the Board considers business confidentiality claims waived when a document is electronically filed. *Id.* at 5-6. Anyone electronically filing exhibits or attachments in support of a brief, motion, or other document should submit them separately from the associated brief or motion. *Id.* at 3.

and an email address. **In addition, any envelope or other packaging containing documents sent through the U.S. Postal Service, Express Mail, hand-delivered or via Courier must bear a complete and accurate return address in the upper left hand corner. The envelope or packaging must also clearly state the case name and case identifier in the lower left hand corner.**<sup>78</sup>

\_\_\_\_\_ Documents that are sent through the U.S. Postal Service (except by Express Mail) **MUST** be addressed to the Environmental Appeals Board's mailing address which is:

U.S. Environmental Protection Agency  
Clerk of the Board  
Environmental Appeals Board 1103B  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460-0001

Documents that are sent to the Environmental Appeals Board's hand-delivery address through the U.S. Postal Service (except by Express Mail) will be returned to the sender and shall not be considered as filed.

#### **Hand Delivery Address**

\_\_\_\_\_ Documents that are **hand-carried**, delivered via Courier, mailed by Express Mail or delivered by a non-U.S. Postal Service carrier (e.g., Federal Express or UPS) **MUST** be delivered to:

U.S. Environmental Protection Agency  
Clerk of the Board  
Environmental Appeals Board  
Ronald Reagan Building, EPA Mail Room  
1300 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004

Such documents may be delivered to the Ronald Reagan Building, EPA Mail Room, from 8:30 a.m. to 4:00 p.m., Monday through Friday (excluding federal holidays). Documents filed electronically may be filed at any time up to 11:59 p.m. Eastern Time on the day the document is required to be filed with the Board.

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<sup>78</sup> All mail sent to the Environmental Protection Agency may be delayed by a random sterilization procedure. Parties are encouraged to utilize the Board's e-filing system or hand or courier delivery when filing pleadings with the Board. Additional information regarding mail delivery to the Board is available on the Environmental Appeals Board website ([www.epa.gov/eab](http://www.epa.gov/eab)) at the Clerk of the Board or Frequently Asked Questions links.

Thank you for your attention to this matter.

Sincerely,

Eurika Durr  
Clerk of the Board

cc: [Name and Address of Petitioner(s)]

[Name and Address of Regional Counsel]

[Name and Address of Permittee, *if Petitioner is not the Permittee*]

## **Appendix 4: EAB Consent Agreement and Final Order Procedures**

### **ENVIRONMENTAL APPEALS BOARD CONSENT AGREEMENT AND FINAL ORDER PROCEDURES**

Part 22 delegates to the Environmental Appeals Board the authority to ratify, on behalf of the Administrator, consent agreements and final orders (“CAFOs”) memorializing settlements between the Agency and respondents resulting from certain administrative enforcement actions. *See* 40 C.F.R. § 22.18(b). The Board’s authority to ratify settlements initially derived from delegations from the Administrator to the Board delegating the authority to issue consent orders and final orders under specific environmental statutes. *See, e.g.*, Marine Protection, Research and Sanctuary Act (EPA Delegation 3-1-C); Federal Insecticide, Fungicide and Rodenticide Act (EPA Delegation 5-15-B); Clean Air Act (EPA Delegation 7-41-C); Solid Waste Disposal Act (EPA Delegations 8-9-C, 8-27, 8-44); and Toxic Substances Control Act (EPA Delegation 12-2-C). Under the terms of these delegations, the final orders may assess penalties and, in some circumstances, require compliance. These delegations were reflected in the revisions to part 22 when the Board was created.

To assist the Board in performing its ratification authority, starting April 8, 2011, any proposed order that the Director of the Office of Civil Enforcement (OCE) or Acting Director of OCE is authorized to sign, which does not require concurrence by the Assistant Administrator for the Office of Enforcement and Compliance Assurance (OECA), shall be transmitted to the Board by an action memorandum signed by the Director of OCE or Acting Director of OCE. Any proposed order that the OECA Assistant Administrator or a representative of an OECA office other than OCE has signed, or proposed orders for which concurrence by the OECA Assistant Administrator is required, shall be transmitted to the Board by an action memorandum signed by either the OECA Assistant Administrator or the Deputy Assistant Administrator for OECA. The action memorandum shall include:

1. A non-CBI copy of the complaint;
2. A detailed explanation of how the proposed agreement is consistent with the applicable penalty guidelines or, if not, why not; with a brief statement of the facts describing both the allegations of the complaint and how the settlement addresses each of the violations identified;
3. A summary of any human health or environmental concerns presented by the respondent’s actions or why there are no concerns;
4. An explanation of how the order addresses the disposition of any substances or wastes identified in the complaint, including any additional steps, if required, to address any past exposure to the environment;
5. A brief explanation of any past or pending actions involving this same respondent arising out of the same facts;

6. A statement of how the public interest is served by the agreement;
7. Copies of all policy documents relied upon in the assessment of a penalty, or, in the alternative, an identification of where such documents are publicly available; and
8. A proposed order with certificate of service (similar to Board's Template).

**Appendix 5: Memorandum from Administrator to Environmental Appeals Board  
titled "Expedited Administrative Review of Appeals of RCRA  
Permit Denials Filed by Interim Status Hazardous Waste  
Combustion Facilities" (March 16, 1994)**

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

March 16, 1994

THE ADMINISTRATOR

MEMORANDUM

SUBJECT: Expedited Administrative Review of Appeals of RCRA  
Permit Denials Filed by Interim Status Hazardous  
Waste Combustion Facilities

TO: Environmental Appeals Board

On May 18, 1993, I announced EPA's Draft Hazardous Waste Minimization and Combustion Strategy. The draft strategy sets as top priorities the reduction of hazardous waste at the source and the implementation of fully protective controls at hazardous waste combustion facilities.

As part of the draft strategy, I directed the Regions to give priority to permit decisions for existing hazardous waste combustion facilities operating under interim status requirements while awaiting final action on their RCRA permit applications. This priority is important because interim status requirements are generally less stringent than permit requirements. In addition, the draft strategy calls for improved permitting processes and public involvement. One area targeted for improvement was the process governing the denial of final permits because of a facility's inability to demonstrate compliance with the permit requirements of RCRA.

Under the regulations governing appeals of RCRA permit decisions, a facility can petition the Environmental Appeals Board to review the Region's decision within thirty days of that decision. The filing of a petition for review with the Board automatically stays the effective date of the Region's decision denying a final permit until the Board takes final action on the petition and the Region issues a final permit decision based on the Board's disposition. Thus, where a facility appeals a decision denying its permit application or challenges permit conditions that are more stringent than the applicable interim standards, the facility can continue to operate under the interim status standards during the pendency of the appeal. There is presently no fixed timeframe within which the Board must act upon petitions for review of RCRA permit denials.

In order to ensure the prompt cessation of hazardous waste combustion at facilities that have been denied a final permit by the Region, while still preserving the important role of administrative review, I am today directing the Board to give its highest priority to appeals of Regional RCRA permit denial decisions for interim status combustion facilities. Absent truly extraordinary circumstances, I am directing the Board to take final action on any such appeal no later than 90 days following the Board's receipt of the petition for review. This directive shall take effect immediately. In addition, in cases where a permit establishing more stringent permit conditions is granted but appealed, if the facility's continued operation during the appeal subject to the less restrictive interim status standards has particularly serious environmental consequences, the Regions will be asked to so notify the Board and I expect the Board to adjust its priorities accordingly.

I believe that this approach, which has been endorsed by the Assistant Administrator for Solid Waste and Emergency Response and EPA's Waste Minimization and Combustion Strategy Steering Committee, will help us achieve the goal of aggressively controlling hazardous waste combustion facilities. Furthermore, this approach addresses in direct fashion one of the important parts of our May 18 draft strategy -- enhancing the permitting process such that timely decisions are made in a manner consistent with strong protection of human health and the environment.

Carol M. Browner

## **Appendix 6: Pleading Templates**

The Environmental Appeals Board has developed templates for filings in EAB proceedings. These templates are solely for the guidance of participants in these proceedings. The EAB will accept documents that do not conform to these templates, provided that all applicable regulatory requirements are satisfied.

The templates, which are set forth below, are as follows:

1. Notice of Appeal under 40 C.F.R. part 22
2. Appeal Brief under 40 C.F.R. part 22
3. Petition for Review of Permit Decision under 40 C.F.R. part 124
4. Motion for Leave to File Reply Brief under 40 C.F.R. parts 22 or 124
5. Motion for Extension of Time under 40 C.F.R. parts 22 or 124
6. Request for Oral Argument
7. CERCLA Section 106(b) Reimbursement Petition
8. Certificate of Service

1. Notice of Appeal under 40 C.F.R. part 22

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

\_\_\_\_\_  
\_\_\_\_\_) )  
In re: \_\_\_\_\_ ) )  
\_\_\_\_\_ ) )  
[named Respondent below] \_\_\_\_\_ ) )  
Dkt. No. [docket number below] \_\_\_\_\_ ) )  
\_\_\_\_\_ ) )

**NOTICE OF APPEAL**

\_\_\_\_\_ [name of appellant] (“Appellant”) seeks review of a decision of Administrative Law Judge [or other Presiding Officer]<sup>79</sup> \_\_\_\_\_ [name], issued \_\_\_\_\_ [date], assessing a civil penalty of \$ \_\_\_\_\_, for violations of section[s] \_\_\_\_\_ of \_\_\_\_\_ [name of statute], \_\_\_ U.S.C. \_\_\_\_\_. An appeal brief is attached.

[name]  
[address]  
[telephone number]  
[fax number, if any]

Date: \_\_\_\_\_

Attorney for Appellant

---

<sup>79</sup>The Presiding Officer is an Administrative Law Judge except where the regulations allow a Regional Judicial Officer to serve as the Presiding Officer. 40 C.F.R. § 22.3.

2. Appeal Brief under 40 C.F.R. part 22

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

\_\_\_\_\_  
\_\_\_\_\_)  
In re: )  
 )  
[named Respondent below] )  
Dkt. No. [docket number below] )  
\_\_\_\_\_)

**APPEAL BRIEF**

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Alternative Findings of Fact .....

Alternative Conclusions of Law .....

\* \* \*

TABLE OF AUTHORITIES

Cases

[case name and citation] .....

Statutes

[title and section of statute] .....

Regulations

[title and section of regulation] .....

\* \* \*

## INTRODUCTION

\_\_\_\_\_ appeals from an Initial Decision of \_\_\_\_\_ [the Administrative Law Judge or other Presiding Officer] assessing a civil penalty of \$\_\_\_\_\_ for violations of [title and section of statute]. Judge \_\_\_\_\_ [or “The Presiding Officer”] found that \_\_\_\_\_ had violated section[s] \_\_\_\_ [and \_\_\_\_\_ ] on \_\_\_\_\_ occasions, by \_\_\_\_\_ . For the reasons stated below, the Administrative Law Judge [or “the Presiding Officer”] erred in his [her] conclusion that [indicate nature of alleged error(s), i.e., erroneous liability determination, erroneous penalty assessment, or both].

\* \* \*

## ISSUES PRESENTED FOR REVIEW

\_\_\_\_\_ [Succinctly state each issue with respect to which Appellant alleges error.]

A. \_\_\_\_\_

B. \_\_\_\_\_

\* \* \*

## FACTUAL AND PROCEDURAL BACKGROUND

[Describe relevant facts, citing to the record before the Administrative Law Judge (or other Presiding Officer) as appropriate, and reference relevant procedural history.]

ARGUMENT

[Set forth with particularity each argument that the Administrative Law Judge  
(or other Presiding Officer) erred in his/her Initial Decision]

A. \_\_\_\_\_

\_\_\_\_\_ B. \_\_\_\_\_

ALTERNATIVE FINDINGS OF FACT

[To the extent that Appellant is arguing that the Administrative Law Judge (or  
other Presiding Officer) erred in one or more findings of fact, appellant should set forth with  
particularity its proposed alternative findings.]

\* \* \*

ALTERNATIVE CONCLUSIONS OF LAW

[To the extent that appellant is arguing that the Administrative Law Judge (or  
other Presiding Officer) erred in one or more conclusions of law, appellant should set forth  
with particularity its proposed alternative findings.]

\* \* \*

CONCLUSION

[State the relief sought through the appeal.]

Respectfully submitted

---

[name]

[address]

[telephone number]

[fax number, if any]

Attorney for Appellant

Date: \_\_\_\_\_

3. Petition for Review of Permit Decision under 40 C.F.R. part 124

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

\_\_\_\_\_)  
\_\_\_\_\_)  
In re: \_\_\_\_\_)  
\_\_\_\_\_)  
[name of permittee] \_\_\_\_\_)  
Permit No. \_\_\_\_\_)  
\_\_\_\_\_)

PETITION FOR REVIEW

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INTRODUCTION

Pursuant to 40 C.F.R. § 124.19(a), \_\_\_\_\_ [name of petitioner] (“Petitioner” or “\_\_\_”) petitions for review of the conditions of \_\_\_\_\_ [type of permit] Permit No. 00-0000 (“the Permit”), which was issued to \_\_\_\_\_ (“Permittee” or “\_\_\_”) on \_\_\_\_\_, by \_\_\_\_\_. [If the permit was a Clean Air Act Prevention of Significant Deterioration permit issued pursuant to an EPA delegation, include the following: The State of \_\_\_\_\_ is authorized to administer the Prevention of Significant Deterioration permit program pursuant to a delegation of authority by the United States Environmental Protection Agency.] The permit at issue in this proceeding authorizes \_\_\_\_\_ to \_\_\_\_\_. Petitioner contends that certain conditions are based on clearly erroneous findings of fact and conclusions of law. Specifically, petitioner challenges the following permit conditions:

(1) \_\_\_\_\_

\_\_\_\_\_(2) \_\_\_\_\_

\_\_\_\_\_

### FACTUAL AND STATUTORY BACKGROUND

[Describe nature of activity being permitted and circumstances leading to issuance of permit.]

\* \* \*

### THRESHOLD PROCEDURAL REQUIREMENTS

Petitioner satisfies the threshold requirements for filing a petition for review under 40 C.F.R. part 124, to wit:

1. Petitioner has standing to petition for review of the permit decision because it participated in the public comment period on the permit. *See* 40 C.F.R. § 124.19(a). [If petitioner commented in writing, attach a copy of the comments or cite the administrative record. If petitioner commented at a public hearing, reference the date, time, and place of the hearing.]

2. The issues raised by Petitioner in its petition were raised during the public comment period and therefore were preserved for review. [Cite administrative record or other evidence.]

\* \* \*

## ARGUMENT

[Petitioner should set forth with particularity its arguments pertaining to each permit condition with respect to which petitioner seeks review, citing relevant case law in support of any legal arguments. The argument(s) must also explain why the permitting authority's treatment of the issues in its Response to Comments document issued after the public comment period was deficient or erroneous.

\* \* \*

## CONCLUSION

[Summarize the relief sought]

---

[name]  
[address]  
[telephone number]  
[fax number, if any]

Attorney for Appellant

Date: \_\_\_\_\_

4. Motion for Leave to File Reply Brief under 40 C.F.R. parts 22 or 124

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

\_\_\_\_\_  
\_\_\_\_\_) )  
In re: \_\_\_\_\_ ) )  
\_\_\_\_\_ ) )  
[name of Appellant (part 22) or ) \_\_\_\_\_ Appeal No. \_\_\_\_\_  
Permittee (part 124)] ) [Appeal number assigned by EAB Clerk]  
\_\_\_\_\_ ) )

MOTION FOR LEAVE TO FILE REPLY BRIEF

\_\_\_\_\_ (“Appellant” or “Petitioner” ) moves for leave to file a reply to the  
briefs submitted in the above-captioned matter. Petitioner filed its Notice of Appeal  
[Petition for Review] on \_\_\_\_\_. \_\_\_\_\_ filed its response on \_\_\_\_\_.

In support of its motion, Petitioner states that the response brief raises new issues  
that Petitioner did not previously have the opportunity to address. Specifically, [state  
nature of new issues and/or any other justification for leave to file a reply brief].

Date: \_\_\_\_\_

\_\_\_\_\_  
[name]  
[address]  
[telephone number]  
[fax number, if any]  
Attorney for Appellant [Petitioner]

5. Motion for Extension of Time under 40 C.F.R. parts 22 or 124

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

\_\_\_\_\_  
\_\_\_\_\_) )  
In re: \_\_\_\_\_ ) )  
\_\_\_\_\_ ) )  
[name of Appellant (Part 22) or \_\_\_\_\_ Appeal No. \_\_\_\_\_ [EAB Appeal Number]  
Permittee (Part 124)] \_\_\_\_\_ ) )  
\_\_\_\_\_ ) )  
\_\_\_\_\_ ) )

MOTION FOR EXTENSION OF TIME

\_\_\_\_\_ requests that the Environmental Appeals Board (“EAB”) grant a \_\_\_\_\_ day extension of time to file its response to the Notice of Appeal [or Petition for Review] filed on behalf of \_\_\_\_\_ in the above-captioned matter. \_\_\_\_\_ seeks this additional time because [provide justification (e.g., scheduling conflict for movant’s counsel, need to coordinate with other governmental entities, etc.)].

Movant’s counsel believes that a \_\_\_\_\_ day extension will allow Movant to provide an adequate response to \_\_\_\_\_ and will not prejudice the Appellant [or Petitioner]. Movant represents that Opposing Counsel does not oppose the motion. [See Letter from \_\_\_\_\_ to \_\_\_\_\_, [date], attached hereto.]

For the reasons set forth above, \_\_\_\_\_ respectively requests that its Motion for Extension of Time to respond to the \_\_\_\_\_ be granted and that the EAB extend the deadline for \_\_\_\_\_'s response to \_\_\_\_\_.

Respectively submitted,

_____	_____
_____	[name]_____
_____	[address]
_____	[telephone number]
	[fax number, if any]

Date: \_\_\_\_\_ Attorney for Appellant [Petitioner]

6. Request for Oral Argument under 40 C.F.R. Parts 22 or 124

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

\_\_\_\_\_  
\_\_\_\_\_) )  
In re: \_\_\_\_\_ ) )  
\_\_\_\_\_ ) )  
[name of Appellant (Part 22) \_\_\_\_\_ Appeal No. \_\_\_\_\_ [EAB Appeal No.]  
or Permittee (Part 124)] \_\_\_\_\_ ) )  
\_\_\_\_\_) )  
\_\_\_\_\_ ) )

**REQUEST FOR ORAL ARGUMENT**

\_\_\_\_\_ hereby requests that the EAB order oral argument in the above-captioned matter.

Oral argument would assist the Board in its deliberations on the issues presented by the case for the following reasons: [provide justification for oral argument (e.g., the issues presented are of first impression for the Board or of a nature or complexity such that oral argument would materially assist in their resolution.)]

\_\_\_\_\_  
\_\_\_\_\_) )  
\_\_\_\_\_) )  
[name]  
[address]  
[telephone number]  
[fax number, if any]

Date: \_\_\_\_\_

Attorney for Appellant [Petitioner]

7. CERCLA Section 106(b) Petition for Reimbursement

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

\_\_\_\_\_  
\_\_\_\_\_) )  
In re: \_\_\_\_\_) )  
\_\_\_\_\_, \_\_\_\_\_) )  
Petitioner \_\_\_\_\_) )  
\_\_\_\_\_) )  
\_\_\_\_\_) )  
\_\_\_\_\_)

PETITION FOR REIMBURSEMENT OF COSTS

## INTRODUCTION

\_\_\_\_\_ (“Petitioner”) submits this petition for reimbursement pursuant to section 106(b) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (“CERCLA”), 42 U.S.C. § 9606(b)(2). Petitioner requests reimbursement of \$\_\_\_\_\_ in costs incurred in complying with an Administrative Order (“AO”) issued by \_\_\_\_\_ pursuant to section 106(b) of CERCLA, 42 U.S.C. § 9606(b), on \_\_\_\_\_ [date], requiring Petitioner [and others] to perform a response action at the \_\_\_\_\_ site in \_\_\_\_\_ (AO attached as Exhibit \_\_\_).<sup>80</sup> \_\_\_\_\_ issued a notice of completion of the response action on \_\_\_\_\_. As explained below, Petitioner is entitled to reimbursement under CERCLA § 106(b) because [explain basis for reimbursement (i.e., petitioner is not a liable party under CERCLA § 107(b), the response action directed by the AO was arbitrary and capricious, or both)].

Petitioner meets the statutory and regulatory threshold requirements for reimbursement:

1. Petitioner complied fully with the terms of the AO.
2. This petition is being filed within 60 days after completion of the response action, as required by CERCLA § 106(b)(2)(a).
3. Petitioner incurred response costs in complying with the AO.

\* \* \*

---

<sup>80</sup>A copy of the AO must be attached to the petition.

## FACTUAL AND PROCEDURAL BACKGROUND

[Describe, *inter alia*, the site of the response action, Petitioner's relationship to the site, the circumstances surrounding issuance of the AO to Petitioner, the nature of the response action undertaken.]

\* \* \*

## SUMMARY OF ARGUMENT

[State in summary form the grounds for reimbursement.]

\* \* \*

## ARGUMENT

[State in detail the grounds for reimbursement, citing legal and factual support as appropriate.]

\* \* \*

## CONCLUSION

For the foregoing reasons, Petitioner requests reimbursement of approximately \$\_\_\_\_\_, the precise amount of which will be documented for the Board following the determination of Petitioner's entitlement to reimbursement.

[name]  
[address]  
[telephone number]  
[fax number, if any]

Attorney for Petitioner

[name of facility]  
[address of facility]

Date: \_\_\_\_\_

## APPENDIX

[Petitioner should include as attachments the AO, evidence of satisfaction of the AO, and all affidavits and other appropriate evidence needed to support factual assertions in the petition.]

8. Certificate of Service

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing \_\_\_\_\_ in the matter of \_\_\_\_\_, \_\_\_\_ Appeal No. \_\_\_\_\_, were served by United States First Class Mail on the following persons, this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_:

[name]  
[address]

[name]  
[address]

\_\_\_\_\_  
[name]  
[address]  
[telephone number]  
[fax number, if any]

Attorney for Appellant

Date: \_\_\_\_\_