

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

**ORDER ON PROCEDURES FOR
PETITIONS FOR REIMBURSEMENT SUBMITTED UNDER SECTION 106(b)(2)(A)
OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION,
AND LIABILITY ACT OF 1980, 42 U.S.C. § 9606(b)(2)(A)**

Before Environmental Appeals Judges Aaron P. Avila, Mary Kay Lynch, and Kathie A. Stein.

Per Curiam:

CERCLA section 106(b)(2)(A) provides that “[a]ny 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 * * * for the reasonable costs of such action, plus interest.” 42 U.S.C. § 9606(b)(2)(A). The President delegated his authority to decide claims for reimbursement under section 106(b) to the EPA Administrator, Exec. Order No. 12,580, 52 Fed. Reg. 2923 (Jan. 29, 1987), and the Administrator has re-delegated the authority to receive, evaluate, and make determinations regarding petitions for reimbursement submitted pursuant to section 106(b) to the Environmental Appeals Board (“Board”). U.S. EPA Delegation of Authority 14-27, Petitions for Reimbursement §§ 1.a, 2.a (rev. Jan. 18, 2017). The Board is also authorized, as appropriate, to authorize payments of such claims. *Id.*¹

The Board has developed procedures governing submission and review of petitions for reimbursement. These procedures are detailed below in Appendix A and will be applied to all

¹ Certain federal agencies other than EPA, including the U.S. Coast Guard, also have the authority to issue CERCLA section 106(a) orders. *See* Exec. Order No. 12580, 52 Fed. Reg. 2923 (Jan. 29, 1987), as amended by Exec. Order No. 13,016, 61 Fed. Reg. 45,871-72 (Aug. 28, 1996). Reimbursement claims based on orders issued by these agencies must also be filed with the Board. *See* U.S. EPA Delegation of Authority 14-27, Petitions for Reimbursement §§ 1.a, 2.a (rev. Jan. 18, 2017). The procedures set forth in this Standing Order apply to those claims as well.

CERCLA section 106(b)(2)(A) petitions. The Board hereby authorizes parties in all currently pending and newly filed petitions for reimbursement to utilize email to fulfill their service obligations under the attached procedures. *See* Appendix A, I.B. The applicable CERCLA provisions are included in Appendix B below.

The Board in its discretion may issue an order modifying these procedures as appropriate on a case-by-case basis and the Board may revoke or amend this order at any time. This order creates no vested rights in any party.

So ordered.

Dated: July 7, 2020

APPENDIX A

PROCEDURES FOR CERCLA SECTION 106(b)(2)(A) REIMBURSEMENT PETITIONS

I. *FILING PROCEDURES, SERVICE PROCEDURES, AND DEADLINES*

Section 106(b)(2)(A) of CERCLA provides that a person seeking reimbursement must “petition * * * for reimbursement” within 60 days after completion of the required action. 42 U.S.C. § 9606(b)(2)(A). A petitioner must submit its petition and supporting documents to the Environmental Appeals Board (“Board”) by filing these document(s) either electronically, by mail, or by hand delivery as described below. For additional information, see the Environmental Appeals Board Practice Manual (Aug. 2013) as well as the Board’s August 12, 2013 Revised Order Authorizing Electronic Filing in Proceedings Before the Environmental Appeals Board Not Governed by 40 C.F.R. Part 22. Both of these documents can be found on the Board’s website at www.epa.gov/eab.

A. Filing Methods

1. Electronic Filing. Documents that are filed electronically need to be submitted using the Board’s electronic filing system, subject to any appropriate conditions and limitations imposed by order of the Board. All documents filed electronically must include the full name of the person filing below the signature line. Compliance with the Board’s 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, a petition filed electronically needs to be received by the Board no 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: U.S. Environmental Protection Agency, Environmental Appeals Board, 1200 Pennsylvania Avenue, N.W., Mail Code 1103M, Washington, DC 20460-0001. 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 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, a petition sent by mail needs to be postmarked no 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 or by a commercial delivery service) must be delivered to the Clerk of the Environmental Appeals Board at: U.S. Environmental Protection Agency, Environmental Appeals Board, 1201 Constitution Avenue, N.W., U.S. EPA East Building Room

3332, 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 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 also needs to 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 a party files with the Board must be served on all other parties. Parties are responsible for serving each other. Service must be by first class mail, or by any reliable commercial delivery service, or, if agreed to by the parties, by facsimile or other electronic means, including but not necessarily limited to email. The Board may by order authorize or require service by facsimile, email, or other electronic means, subject to any appropriate conditions or limitations. By order, the Board has authorized parties in all currently pending and newly filed petitions for reimbursement to utilize email to fulfill their service obligations. When a party must act within a specific time period after being served and service is made by U.S. mail, EPA's internal mail, or reliable commercial delivery service, 3 days shall be added to the prescribed time. The prescribed period for acting after being served is not expanded by 3 days when service is made by personal delivery, facsimile, or email.

The Clerk of the Board will serve copies of rulings, orders, and decisions on all parties by U.S. mail (including by certified mail or return receipt requested, overnight express and priority mail), EPA's internal mail, any reliable commercial delivery service, or electronic means (including but not necessarily limited to facsimile and email).

C. Proof of Service

A certificate of service needs to 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.

II. CONTENTS OF THE PETITION FOR REIMBURSEMENT

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 CERCLA section 106(a) administrative order, if issued by EPA.

A complete copy of the section 106(a) administrative 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 Board 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 section 106(b), 42 U.S.C. § 9606(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 Board 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) Administrative Order. The petition must state that the petitioner has complied with the underlying section 106(a) administrative order and the petition must be accompanied by evidence supporting that statement;
2. Completion of the Required Action. The petition must state that the required action has been completed and the petition 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) administrative order was completed, so that the Board can determine whether the petition is timely; and
4. Incurrence of Costs. A reimbursement petition must contain a demonstration that the petitioner incurred costs in connection with the section 106(a) administrative 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 Board 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 Board 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.² Except as may be permitted by the Board for good cause shown, and except as specifically provided in sections II.B.4 and III.F of these procedures (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 Board that: (1) for new issues, such issues were not reasonably ascertainable as of the date the petition was filed; or (2) for new evidence or information, the petitioner could not reasonably have known of its existence, or could not reasonably have anticipated its relevance or materiality, as of the date the petition was filed.

The petition must explicitly state, as to each claim set forth therein, whether the claim arises under CERCLA § 106(b)(2)(C) or under CERCLA § 106(b)(2)(D), or both. Both subparagraphs (b)(2)(C) and (b)(2)(D) expressly place the burden of proof on the petitioner. 42 U.S.C. §§ 9606(b)(2)(C)-(D). Section 106(b)(2)(D) provides for the reimbursement of "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." *Id.* § 9606(b)(2)(D) (emphasis added). Therefore, when making a claim under section 106(b)(2)(D), the petitioner must be specific in identifying the portion of the 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.³ 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.

² 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.

³ Copies of such cost-related documents need only be submitted after the Board issues a Final Decision and Order Granting Reimbursement. *See* Section III.F, *infra*.

III. *EAB PROCEDURES FOR PROCESSING SECTION 106(b)(2)(A) PETITIONS*

A. Response to Petitions

Upon receiving a petition for reimbursement, the Board will send a letter to the appropriate EPA Regional office⁴ that issued the section 106 administrative order (with a copy to the petitioner) soliciting a response (“Response”) to the petition. The Region will file either a limited response under section III.A.1 below, asserting that petitioner has not met one or more prerequisites for obtaining review, or a response on the merits in accordance with section III.A.2 also below.

1. Limited Response Addressing Prerequisites for Obtaining Review

If the Region contends that one or more of the four statutory prerequisites for obtaining review have not been met, the Region will 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. Unless otherwise ordered by the Board, the Region’s pleading is due within 30 days after the date of the Board’s letter soliciting a response to the petition.⁵ The petitioner will then have twenty days, from the date the Region files its motion, 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 Board 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 Region’s arguments with respect to the merits of the petitioner’s claims. The Board’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 refile a petition for reimbursement at a subsequent time.

2. Response on the Merits

If the Region does not contend or file a motion to dismiss the petition on the ground 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 60 days after the date of the Board’s letter soliciting a response to the petition (unless a later date is specified by the Board). The Region’s submission of a response addressing the merits of the petitioner’s claims in no way limits the Board’s authority to reject the petition for failure to satisfy one or more of the statutory prerequisites described in section III.B of these procedures.

⁴ All references to the Region or regional office in section III of these procedures also apply to the federal agency that issued the order in those cases where the order was not issued by EPA.

⁵ 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.

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 section 106(a) administrative 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. Board Authority and Additional Briefing

In exercising its responsibilities, the Board will take all measures necessary for the efficient, fair, and impartial adjudication of issues arising in section 106(b) Petitions. This may include but is not limited to the Board requiring, at any time, the petitioner and/or the Region to provide such supplemental briefing as the Board may deem necessary for an informed resolution of any of the issues presented. Briefs other than those expressly required by the Board may be submitted only with leave of the Board. Additionally, for good cause, the Board may relax or suspend the filing requirements prescribed by this order.

C. Evidentiary Hearing

CERCLA section 106(b), 42 U.S.C. § 9606(b), does not require that the agency issuing the order provide an evidentiary hearing on a reimbursement petition. However, the Board 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 Board 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 Board 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 Board may, in its discretion, schedule oral argument with respect to one or more specified issues, or the case as a whole, 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, U.S. Environmental Protection Agency, EPA East Building, Room 1152, 1201 Constitution Avenue, N.W., Washington, D.C. Parties may participate using EPA's videoconferencing system. The Environmental Appeals Board Practice Manual and the Board's website site at www.epa.gov/eab provide further information on oral arguments.

E. Stays and Withdrawals

The Board 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. Board Decision

The Board 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 section 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 30 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 Board must still determine the amount of reimbursement to be awarded. When issuing a Final Decision and Order Granting Reimbursement, therefore, the Board will also direct the petitioner to file a brief with supporting documentation of all reasonable costs that it incurred in implementing the order.⁶ 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 Board.⁷

⁶ Petitioner may reference documents in the record.

⁷ CERCLA section 106(b)(2)(A) expressly limits reimbursement from the Fund to "reasonable" costs (plus interest). 42 U.S.C § 9606(b)(2)(A). 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 Board 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 these procedures, 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 Board upon request.

Upon granting a petition for reimbursement, the Board will notify the assistant administrator for the Office of Land and Emergency Management. U.S. EPA Delegation of Authority 14-27, Petitions for Reimbursement § 3.a (rev. Jan. 18, 2017).

Final Decision Determining Reimbursable Costs and Authorizing Payment. After the cost issues have been briefed, the Board 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 section 106(b)(2)(B), 42 U.S.C § 9606(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 30 days of receipt of the Board's decision.

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

The Board encourages litigants to use the official form of citation for Board opinions, as set forth in the Environmental Appeals Board Practice Manual.

IV. *FURTHER INFORMATION*

For further information concerning the matters addressed in these procedures, contact the Clerk of the Board at: Environmental Appeals Board, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, N.W., Mail Code 1103M, Washington, DC 20460-0001, (202) 233-0110; or Clerk_EAB@epa.gov. 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).

Parties are encouraged to seek a negotiated resolution to these issues or to participate in the Board's Alternative Dispute Resolution ("ADR") Program. Information on the Board's ADR Program is available on the Board's website at www.epa.gov/eab.

APPENDIX B

CERCLA Section 106(a), 42 U.S.C. § 9606(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), 42 U.S.C. § 9606(a), 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.