

# AMENDMENTS TO PROCEDURAL REGULATIONS IN PARTS 22 AND 124 AFFECTING APPEALS TO THE ENVIRONMENTAL APPEALS BOARD

## I. What Action Has EPA Taken?

EPA promulgated a final rule making minor amendments to its administrative hearing and permit appeals regulations in parts 22 and 124 of title 40 of the Code of Federal Regulations on January 9, 2017. *These changes became effective on May 22, 2017, and are applicable to all new filings after that date.*

With respect to the amendments to parts 22 and 124 that are relevant to appeals to the Environmental Appeals Board, they simplify the administrative processing of cases by expanding the availability of electronic filing and service procedures, removing inconsistencies in parts 22 and 124, and streamlining the procedures in cases initiated at EPA Headquarters. The original effective date of the amendments was extended until May 22, 2017.

## II. Background

Part 22 contains procedures governing administrative adjudicatory proceedings under EPA-administered statutes to assess administrative civil penalties, to issue various compliance orders, and to terminate or suspend certain permits. 40 CFR 22.1. Included in part 22 are procedures for appeals from decisions of the Administrative Law Judges and Regional Judicial Officers to the Environmental Appeals Board. *See id.* part 22, subpart F.

Part 124 governs the EPA's issuance, modification, and revocation of permits under the Resource Conservation and Recovery Act, the Underground Injection Control program of the Safe Drinking Water Act, the Prevention of Significant Deterioration program of the Clean Air Act, and the National Pollutant Discharge Elimination System program of the Clean Water Act. These permit rules include procedures for appealing permit decisions by the EPA's regional offices to the Environmental Appeals Board. *See id.* § 124.19.

EPA routinely updates these rules to keep them current and make them more efficient. Part 124 was last updated on January 25, 2013, 78 Fed. Reg. 5285, and part 22 on October 25, 2016, 81 Fed. Reg. 73478, and on November 6, 2014, 79 Fed. Reg. 65897.

## III. What Changes Do the Amendments Make?

The amendments contain three general types of changes to parts 22 and 124: (1) modifications to existing requirements; (2) clarifications to the current language of the regulations; and (3) changes to make parts 22 and 124 more consistent.

### A. Modifications

Parts 22 and/or 124 are modified to:

- Allow parties to agree to serve each other by electronic means, including email. An agreement on electronic service must be in writing. *Id.* § 22.5(b)(2), §124.19(i)(3)(ii).
- Authorize the Board to serve parties by electronic means, including email. *Id.* § 22.6; § 124.19(i)(3)(iii).
- Authorize the Board to require that parties file documents through its electronic filing system. *Id.* § 22.5(a), § 124.19(i)(2). Parts 22 and 124 currently allow parties to file documents with the Board through the Board’s electronic filing system, and that is not being changed.
- Amend the deadline for filing a response to a petition under part 124 for review of a permit so that the deadline runs from the date of **service** of the petition, not the date of the **filing** of the petition. *Id.* 124.19(b)(1).
- Specify that the Presiding Officer in an enforcement proceeding initiated at Headquarters shall be an Administrative Law Judge rather than splitting that role between the Board and an Administrative Law Judge. *Id.* §22.4(a)(1).
- Relieve parties from the requirement to **serve** documents on the Board if those documents are **filed** with the Board. *Id.* § 22.5(b).

## B. Clarifications

Parts 22 and 124 are amended to make clear:

- That service of documents is considered “complete” upon mailing for U.S. mail and EPA internal mail, when placed in the custody of a reliable commercial delivery service, and upon transmission for facsimile or email. *Id.* § 22.7(c), § 124.19(i).
- That an additional period of three days is added to the response time to documents served by U.S. mail, EPA internal mail (including both Headquarters and Pouch mail), or commercial delivery service but not to documents served by electronic means such as email. This change brings parts 22 and 124 into conformity with the Federal Rules of Civil Procedure, as amended, and makes the time period in each part consistent with the other. *Id.* § 22.7(c), § 124.20(d).
- That the filing of a motion to reopen a hearing or set aside a default judgment tolls not only the time by when an initial decision becomes final but also the time by which the Board must decide whether it will review a decision on its own initiative. *Id.* § 22.28.
- The manner in which attachments to a filing with the Board should be identified. *Id.* § 22.30(a)(iii), § 124.19(a)(4)(ii).

### **C. Making Parts 22 and 124 Consistent**

To make parts 22 and 124 more consistent, the amendments changed the language in those parts so that:

- Parts 22 and 124 contain the same word/page limitations on briefs and motions. *Id.* § 22.30(a)(3), §124.19(f)(5).
- Parts 22 and 124 contain similar language concerning the specificity and appropriateness of citations of authority, oral arguments, requests for extensions of time, and the requirement to identify an email address in a party's first filing. *Id.* 22.30(a)(1)(iii), § 124.19(a)(4)(ii).

A copy of the revised rules can be found at: 82 Fed. Reg. 2230 (January 9, 2017).