



The Environmental Appeals Board

Practice Manual

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 “the Board”) of the U.S. Environmental Protection Agency (“EPA” or the “Agency”) is a permanent, impartial, four-member body that is independent of all Agency components outside the immediate Office of the Administrator.¹ 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.” 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). Prior to March 1992, EPA’s Chief Judicial Officer or, in some cases, a Judicial Officer, had delegated authority from the Administrator to decide civil penalty appeals. The Administrator decided permit appeals based on the recommendation of the Chief Judicial Officer or a Judicial Officer.

Practice before the EAB is governed by federal regulations. (*See* Section I.A of this Manual.) This Manual provides general descriptions of the regulatory framework and provides guidance to litigants on matters related to practice before the EAB that are not expressly covered

¹ EPA is headed by an Administrator who is appointed by the President. The EAB is a component office within the Office of the Administrator. However, 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.

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. *See 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. The EAB provides additional information about its procedures in the responses to Frequently Asked Questions (“FAQs”) on the EAB’s website at <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 (but not questions about the subject matter or status of a particular matter pending 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 these decisions are referenced in this Manual. Information on how to locate the full text of these decisions, and the text of all other decisions issued by the EAB, can be found in the Manual at Sections I.D and I.I.

A. 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”), 40 C.F.R. pt. 22. Appeals from permit decisions are governed primarily by 40 C.F.R. pt. 124. However, the following permit proceedings are governed by the CROP rather than the part 124 regulations:

(1) the 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);

(2) the 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. § 122.64(a); 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).

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

In addition to its express regulatory authority, the EAB has delegated authority from the EPA Administrator (the “Administrator”). 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, pursuant to such a delegation of authority. *See* Delegation of Authority 14-27 (“Petitions for Reimbursement”). 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).

Although the Federal Rules of Civil Procedure do not apply to EPA administrative proceedings, the EAB looks to them for guidance in interpreting the CROP. *See, e.g., In re Zaclon, Inc.*, 7 E.A.D. 482, 490 n.7 (EAB 1998) (“[T]he Federal Rules do not directly apply to EPA’s administrative proceedings”); *In re Lazarus, Inc.*, 7 E.A.D. 318, 330 n.25 (EAB 1997); *see also Puerto Rico Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 608 (1st Cir. 1994) (stating EPA’s view that federal rules “may inform administrative practice in appropriate situations”).

B. Environmental Appeals Judges and Staff

The EAB judges 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. The role of lead judge for administrative matters rotates among the judges on an annual basis. Decisions regarding case priorities are made by the EAB as a whole. The EAB typically sits on matters before it in three-member panels and decides each matter by majority vote.² 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.

² 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 is referred to the Administrator to break the tie. 40 C.F.R. § 1.25(e)(1).

C. 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. Decisions of the EAB constitute the “consummation of the agency’s decision-making process”³ and are determinative of the rights of the parties. They cannot be further appealed to the EPA Administrator.⁴ See Sections II.C (enforcement appeals) and III.C (permit appeals) of this Manual for additional information. Moreover, there is 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,⁵ that authority will only be exercised in exceptional cases.

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 also Catalina Yachts, Inc. v. EPA*, 112 F. Supp. 2d 965, 966 (C.D. Cal. 2000), affirming *In re Catalina Yachts, Inc.*, 8 E.A.D. 199 (EAB 1999); *Adams v. EPA*, 38 F.3d 43, 49 (1st Cir. 1994).

³ *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 decision-making process’” and if it determines “rights or obligations.” *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

⁴ Title 40 section 22.31(e) of the C.F.R. provides an exception for 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 EPA Administrator following the issuance of the EAB’s final order. The Administrator’s decision becomes the final order in the matter.

⁵ See 40 C.F.R. § 22.4(a) (enforcement cases); *id.* § 124.2 (permit cases).

D. Published Opinions

The formal written opinions of the EAB are published in a series of bound volumes titled Environmental Administrative Decisions (“E.A.D.”), which is the official reporter of EAB opinions. The E.A.D. may be purchased from the U.S. Superintendent of Documents by calling (202) 512-1800.⁶

The E.A.D. also contains 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. These pre-EAB opinions appear in Volumes 1, 2 and 3 of the E.A.D. in order of their date of issuance. Volumes 4 and successive volumes of the E.A.D. contain the opinions of the EAB in order of their date of issuance. Each volume of the E.A.D. contains a subject index and reference tables. Volume 8 contains a Consolidated Subject Index that covers E.A.D. volumes 4 through 8.

The complete text of an individual EAB opinion may be accessed electronically at the EAB’s website at <http://www.epa.gov/eab>.⁷ Individual copies of pre-EAB opinions and EAB formal written opinions may also be obtained from the Clerk of the Board. The full text of these opinions is also commercially available through LEXIS®, WESTLAW®, the EPA Administrative Law Reporter, the ELI Environmental Law Reporter, and EPA Shadow Law™. Pre-EAB opinions are available from some of these commercial sources.

⁶ Volumes 1-4 of the E.A.D. are sold as a set. Subsequent volumes of the E.A.D. may be purchased individually. Check the EAB website for the availability of more recent volumes of the E.A.D.

⁷ Pre-EAB opinions are not available on the EAB’s website.

1. Citations to Published EAB Opinions

The EAB has adopted an official form of citation for its opinions. A published EAB opinion, or a specific page of a published EAB opinion, should be cited by volume and page number, indicating the EAB as the decisionmaker and the year the opinion was issued. An example of a citation to an EAB opinion published in volume 6 of the E.A.D. is as follows:

In re Spang & Co., 6 E.A.D. 226 (EAB 1995)

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

In re Spang & Co., 6 E.A.D. 226, 233 (EAB 1995)

An opinion that the EAB intends to publish but that has not yet been published in the E.A.D. should be cited by reference to its EAB appeal number and the complete date of its issuance.⁸

An example of a citation to a slip opinion is as follows:

In re Three Mt. Power, LLC, PSD Appeal No. 01-05 (EAB, May 30, 2001)

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

In re Three Mt. Power, LLC, PSD Appeal No. 01-05, slip op. at 12 (EAB, May 30, 2001)

2. Citations to Published Pre-EAB Decisions

As explained in the Introduction, prior to the creation of the EAB in March 1992, the Administrator delegated authority to EPA's Chief Judicial Officer ("CJO"), or, in some cases, to a Judicial Officer ("JO"), to decide civil penalty appeals. The Administrator ("Adm'r") decided permit appeals based on the recommendations of the Chief Judicial Officer or a Judicial Officer.

⁸ When the EAB itself cites a slip opinion, the citation also indicates the volume of the E.A.D. in which the opinion will be published, as, for example, *In re Three Mt. Power, LLC*, PSD Appeal No. 01-05 (May 30, 2001), 10 E.A.D. ___. Litigants are not expected to include a reference to the anticipated volume number when citing a slip opinion.

A published pre-EAB opinion, or a specific page of a published pre-EAB opinion, should be cited by volume and page number, indicating the decisionmaker (Adm'r, CJO, or JO) and the year the opinion was issued. An example of a citation to a pre-EAB opinion published in volume 3 of the E.A.D. 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 opinion is as follows:

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

3. Subsequent Histories of EAB Decisions in Federal Court

EAB staff maintain two tables on the EAB's website that contain information relating to the subsequent history of EAB decisions that have been appealed to the federal district and circuit courts of appeal. Section I.I of this Manual contains further information about the EAB's website.

E. Unpublished Orders

The EAB issues some orders that it does not intend to publish. Unpublished EAB orders that were issued subsequent to November 1996, and that are dispositive of the outcome of the case, may be accessed at the EAB's website. EAB unpublished orders issued prior to November 1996, and pre-EAB unpublished orders, are not available electronically but may be obtained from the Clerk of the Board. An unpublished order may be cited using the slip opinion form of citation. *See supra* Section I.D.

The EAB website also contains the full text of preliminary decisions issued in matters arising under CERCLA § 106(b). As with other final EAB decisions, final decisions on CERCLA § 106(b) decisions are published in the E.A.D. *See* Section V of this Manual.

F. Oral Argument

The EAB hears oral argument in appropriate cases. The EAB will schedule oral argument at the request of a party or on its own motion where it determines that an argument would assist in decision making. Oral arguments take place in the EPA Administrative Courtroom at 1201 Constitution Avenue, N.W., Washington, D.C., and are open to the public. A schedule of oral arguments may be obtained from the Clerk of the Board. The schedule is also available on the EAB's website at <http://www.epa.gov/eab/oral.htm>. The EAB has installed audio-visual equipment in the courtroom that will permit oral arguments to take place by videoconference at the Board's discretion.

G. General Filing Requirements

1. EAB Address

a. EAB Mailing Address

All documents that are sent through the U.S. Postal Service (except by 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 that are sent to the EAB's hand-delivery address (below) through the U.S. Postal Service (except by Express Mail) will be returned to the sender and shall not be considered as filed. (Express Mail is hand-delivered by the U.S. Postal Service and must be delivered as outlined in Subsection b below).

b. Hand Delivery Address

Documents that are hand-carried in person, 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
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.

2. 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.

3. Timeliness of Submissions

The postmark date of a pleading is not determinative of timeliness either in enforcement or permit proceedings.⁹ If the pleading has been mailed by first class mail to the EAB at its mailing address (*see* Section I.G.1 of this Manual, above), it must be *received* by the EAB by the specified filing date. Likewise, if the pleading is submitted by Overnight or Priority Mail, or is hand-delivered directly to the EAB, it must be *received* at the EAB's office by 4:30 p.m. on the specified date. (Documents that are hand-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 set forth in Sections II.D and III.D of this Manual. As further discussed in those sections, deadlines for filing appeals are strictly construed.

Deadlines for petitions for reimbursement filed pursuant to CERCLA § 106(b) are set forth in the Revised Guidance on Procedures for Submitting CERCLA Section 106(b) Reimbursement Petitions and on EPA Review of Those Petitions (Oct. 9, 1996) (Appendix 1 of this Manual). See Section V.B of this Manual for information about deadlines for filing CERCLA reimbursement petitions.

4. Required Information for Filings.

The original of any filed document should be signed in blue ink by the party filing it or by the party's attorney or duly authorized representative. The first document in a proceeding

⁹ *See infra* Section V.B for discussion of requirements pertaining to CERCLA petitions.

filed with the EAB shall contain the name, address, telephone number, and fax number (if available) of an individual who is authorized to receive service relating to the proceeding. 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.

H. 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 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 for the rule on inspecting and copying documents in enforcement proceedings. An appointment with the Clerk should be made to inspect or copy documents. The cost of duplication of documents is ordinarily borne by the person seeking copies of such documents. However, duplication costs may be waived when fewer than ten pages are requested.

I. EAB Website

Information about the EAB and its procedures is available electronically at the EAB’s World Wide Web site at <http://www.epa.gov/eab>. Information at the site includes:

1. EAB Formal Opinions (complete text)
2. EAB Decisions Reviewed by the Federal Courts (Table 1)
3. EAB Decisions Pending Federal Court Review (Table 2)

4. Unpublished Final EAB Orders Issued since November 1996
5. Responses to Frequently Asked Questions (“FAQs”)
6. Upcoming Oral Arguments

II. APPEALS UNDER THE CONSOLIDATED RULES OF PRACTICE (CROP), 40 C.F.R. Part 22

A. Introduction

Section II of the Manual describes the particular rules of practice before the EAB in proceedings governed by the Consolidated Rules of Practice (“CROP”), 40 C.F.R. pt. 22, as amended July 23, 1999, eff. Aug. 23, 1999, and as further amended May 15, 2000, eff. June 14, 2000.¹⁰ The CROP generally defines the EAB role, stating that the EAB:

[R]ules on appeals from the initial decisions, rulings and orders of a Presiding Officer^[11] 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 procedural issues that are not expressly addressed in the CROP pursuant to 40 C.F.R. § 22.1(c). *See In re Zaclon, Inc.*, 7 E.A.D. 482, 490 n.7 (EAB 1998).

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:

¹⁰ The May 14, 2000 amendments solely affected sections 22.1(a), 22.3, and 22.44. *See* 65 Fed. Reg. 30,886, 30,904 (May 15, 2000).

¹¹ 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 II.B), which establishes procedures not subject to section 554 of the Administrative Procedure Act (“APA”), 5 U.S.C. § 554, the Presiding Officer is a Regional Judicial Officer. *See* 40 C.F.R. § 22.51.

- (1) The assessment of any administrative civil penalty conducted 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 CFR pt 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 Administrative Procedure Act (“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 governed by the particular environmental statute that is the subject of the litigation.¹²

Pursuant to the APA, the right to judicial review does not arise until there has been final Agency action on the matter (*see* Section I.C of this Manual). Although the EAB has the discretion to refer any case or motion to the Administrator for a final decision, *see* 40 C.F.R. § 22.4(a)(1), once the EAB rules, the EAB’s final order constitutes final agency action for purposes of judicial review. 40 C.F.R. § 22.31(a).¹³ A party dissatisfied with the EAB’s decision may file a motion for reconsideration 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 specifically ordered by the EAB. *Id.* 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 Cypress Aviation, Inc.*, 4 E.A.D. 390, 392 (EAB 1992).

¹² *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).

¹³ 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) and (d).

D. Appeals Procedure¹⁴

1. Notice of Appeal and Appeal Brief

(a) Deadline for Filing

Any party may appeal the Presiding Officer's final decision (the "Initial Decision") within 30 days from service of that decision. 40 C.F.R. § 22.30. 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 deadline for filing a Notice of Appeal strictly, and will dismiss a late appeal in most cases. The EAB may make an exception if there are extraordinary circumstances that it determines warrant relaxation of the deadline. *See In re Outboard Marine Corp.*, 6 E.A.D. 194 (EAB 1995); *In re Gary Dev. Co.*, 6 E.A.D. 526 (EAB 1996); *In re Prod. Plated Plastics, Inc.*, 5 E.A.D. 101 (EAB 1994). 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 (EAB 1992).

¹⁴ 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; or the EAB elects to review the Initial Decision on its own initiative. 40 C.F.R. § 22.27(c).

(b) Form and Content

Section 22.5(c) of the CROP contains general requirements for the form of any document that is filed with the EAB. There is no specific form for a Notice of Appeal. However, the Notice of Appeal should contain: (1) a caption that indicates the name of the case and the docket number; (2) the name, address, telephone number, and fax number (if any) of the person who is authorized to receive service relating to the proceeding; (3) a signature by the party or its representative; and (4) a Certificate of Service. 40 C.F.R. § 22.5(c). The EAB requests that the Notice of Appeal be typewritten and double-spaced on 8 ½ x 11 paper.

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

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.

40 C.F.R. § 22.30(a). Additional requirements are imposed for legal briefs and memoranda that exceed twenty pages in length. *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.*

2. Filing and Service Requirements

The CROP requires that an original and one copy of any filing be filed with the Clerk of the Board. *See* 40 C.F.R. § 22.5(a). However, the EAB requests an original and five copies of the petition and supporting documentation (and an original and three copies of exhibits that exceed 30 pages in length). A party may serve a document by first class mail (including certified mail, return receipt requested), Overnight Express and Priority Mail, or by any reliable commercial delivery service, although the Board's address for filing varies depending on the delivery system chosen. *Id.* See the General Filings Requirements in Section I.G. of this Manual. Motions that do not include substantial attachments may be filed with the Board by facsimile. However, upon filing any motion by facsimile, the sender should, within 24 hours, send the original to the EAB by mail or express delivery. The EAB may, by order, authorize facsimile filing of any other document under appropriate conditions and limitations. 40 C.F.R. § 22.5(a).

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 twenty (20) days after the date on which the first notice of appeal was served. 40 C.F.R. § 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." 40 C.F.R. § 22.30(c).

2. Standard of Review

The EAB generally reviews both the factual and legal conclusions of the Presiding Officer *de novo*.¹⁵ See 40 C.F.R. § 22.30(f) (The EAB has authority to “adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed”); *In re Billy Yee*, TSCA Appeal No. 00-2, slip op. at 13 (EAB, May 29, 2001), 10 E.A.D. ___. However, the EAB has stated that it 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.¹⁶ Moreover, the EAB has ordinarily not reversed decisions based on minor pleading deficiencies.¹⁷

The EAB applies the “preponderance of the evidence” standard established by 40 C.F.R. § 22.24(b). See *In re The Bullen Companies, Inc.*, 9 E.A.D. 620, 632 (EAB, Feb. 1, 2001).

¹⁵ See the Administrative Procedure Act, 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the power which it would have in making the initial decision except as it may limit the issues on notice or by rule.”). See also *In re H.E.L.P.E.R., Inc.*, 8 E.A.D. 437, 447 (EAB 1999) (stating that “[t]he Board reviews the Presiding Officer’s factual and legal conclusions on a *de novo* basis”).

¹⁶ “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 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. Steel Corp.*, 5 E.A.D. 355, 368 (EAB 1994), and decisions regarding discovery, *In re Billy Yee*, TSCA Appeal No. 00-2, slip op. at 13 (EAB, May 29, 2001), 10 E.A.D. ___.

¹⁷ As it stated in *In re Port of Oakland*, 4 E.A.D. 170, 205 (EAB 1992), the Board “adheres to the generally accepted legal principle that ‘administrative pleadings are liberally construed and easily amended.’” See also *In re Wego Chem. & Mineral Corp.*, 4 E.A.D. 513, 525 n.11 (EAB 1993).

Pursuant to section 22.24:

- (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.

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 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).¹⁸ 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.¹⁹ A certified interlocutory appeal will be accepted by the EAB if (1) the order or

¹⁸ The EAB may review a decision on its own initiative after the 45 day deadline for such review has expired 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.

¹⁹ If certification is denied, the party may appeal directly to the EAB within ten days of the 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 (EAB

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 proceeding, or review after the final order is issued will be inadequate or ineffective.²⁰

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 In re Rybond, Inc.*, 6 E.A.D. 614 (EAB 1996). 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 procedure as appeals from Initial Decisions. *See In re Prod. Plated Plastics, Inc.*, 5 E.A.D. 101 (EAB 1994).

1993).

²⁰ An interlocutory appeal may not be taken from the denial of a motion to disqualify a decisionmaker. *See In re CWM Chem. Serv., Inc.*, 6 E.A.D. 1 (EAB 1995) (Order on Interlocutory Appeal).

I. General Practice Matters

1. Motions

All motions shall be in writing, state the grounds therefor with particularity, set forth the relief sought, and be accompanied by any documentation relied on. 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.²¹ 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 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 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 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.

2. 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. *See* 40 C.F.R. § 22.11 (b).

3. 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). Any pleading or document that has been filed without a claim of confidentiality shall be available to

²¹ If the requestor cannot determine the position of the opposing party on the motion after making a reasonable effort to do so, the requestor may represent that fact in its pleading.

the public for inspection and copying. Filing requirements for CBI are set forth at 40 C.F.R. § 22.5(d)(2) and (3).

J. Special Rules for Appeals from RCRA Orders to Federal Facilities

The Federal Facility Compliance Act of 1992 provides that federal agencies are subject to, and required to comply with, all legal requirements (including sanctions) that may be imposed on private parties with regard to the compliance and enforcement provisions of RCRA. 42 U.S.C. § 6961(a). The statute further provides that EPA may “initiate an administrative enforcement action against [a federal agency] in the same manner and under the same circumstances as an action would be initiated against another person.” 42 U.S.C. § 6961(b). 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 a timely request is made, a decision by the Administrator becomes the final order of the Agency. *Id.*

K. EAB Approval of Certain Prehearing Settlements

The parties may discuss the possibility of settlement during the thirty-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.”²² The EAB may, on motion, extend the deadline for filing an answer to an EPA Headquarters-initiated complaint while

²² 40 C.F.R. § 22.18(b).

settlement negotiations are in progress. See Section II.1 for 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 consent order,²³ which are known collectively as a “CACO.” A consent agreement does not finally resolve the action until a consent order is signed by the Regional Administrator, or, in a proceeding initiated at Headquarters, the EAB.

²³ *See id.* § 22.18(b)(2).

III. PERMIT APPEALS UNDER TITLE 40 C.F.R. Part 124

A. Introduction

This part of the Manual pertains to the rules of practice before the EAB in proceedings governed by Title 40 C.F.R. pt. 124 (“Part 124 ”), ²⁴ which governs 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”),²⁵ the National Pollutant Discharge Elimination System (“NPDES”) program under the Clean Water Act,²⁶ the Underground Injection Control (“UIC”) program under the Safe Drinking Water Act,²⁷ and the Prevention of Significant Deterioration (“PSD”) program under

²⁴ Part 124 was revised effective June 14, 2000. *See* 65 Fed. Reg. 30,886 (May 15, 2000). The revised regulations change the procedure for appealing from NPDES permit decisions and from certain RCRA permit decisions. *See* Section III.B below for a brief description of these regulatory changes.

²⁵ 42 U.S.C. §§ 6901-6992k.

²⁶ 33 U.S.C. § 1342.

²⁷ 42 U.S.C. § 300h to 300h-7.

the Clean Air Act.²⁸ 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. (For information regarding these procedures, see 40 C.F.R. § 124.5; see also *In re Waste Technologies Indus.*, 5 E.A.D. 646, 655 & n.13 (EAB 1995).) A few categories of permit decisions issued by EPA are governed by the CROP, 40 C.F.R. pt. 22, or by statute-specific regulations, rather than by Part 124. General information about these procedures can be found in Sections II and IV of this Manual.

Section 124.19(a) creates a direct appeal to the EAB from *federally-issued* RCRA, UIC, PSD, and NPDES permit decisions. 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.²⁹ *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). An exception applies in the case of PSD permits that are issued in states administering permit programs under a *delegation* from EPA (in contrast to PSD permits issued by a state pursuant to an EPA-approved implementation plan (SIP)). The permits issued pursuant to a delegation are considered federally-issued permits for purposes of review by the EAB (see 40 C.F.R. § 124.41 (definition of “Administrator, EPA, and Regional Administrator”)). See, e.g., *Steel Dynamics, Inc.*,

²⁸ 42 U.S.C. §§ 7470-7492.

²⁹ Likewise, 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, Mass.*, 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 Comm. v. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982). 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).

9 E.A.D. 165, 168-69 (EAB 2000). However, where 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).

Former NPDES Evidentiary Hearing Procedure. Under procedures that have now been superseded, 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 appeals³⁰ has been eliminated, and replaced with a direct right of appeal of a permit decision to the EAB.³¹ For further discussion of the regulatory change and the transition to the new framework, *see* 65 Fed. Reg. 30,886 (May 15, 2000).³²

³⁰ Subpart E of the former regulations also provided for an evidentiary hearing from a permit termination that occurred in conjunction with a RCRA § 3008 enforcement order. Under the amended regulations, appeals from such permit terminations are governed by the CROP, 40 C.F.R. pt. 22.

³¹Based on decisions issued by several federal courts of appeal, EPA concluded that it has discretion to define the required hearing procedures for NPDES permit appeals, consistent with requirements of the U.S. Constitution and the hearing requirements of section 402(a) of the Clean Water Act, and that the procedures set forth in the revised regulations satisfy these requirements. *See* Amendments to Streamline the National Pollutant Discharge Elimination Program Regulations: Round Two; Final Rule, 65 Fed. Reg. 30,886, 30,886-91 (May 15, 2000).

³² For discussion of the procedures that were in effect prior to June 14, 2000, *see* the EAB’s opinions in *In re Broward County, Fla.*, 6 E.A.D. 535 (EAB 1996); *In re Mayaguez Regional Sewage Treatment Plant*, 4 E.A.D. 772 (EAB 1993), *aff’d*, *Puerto Rico Aqueduct & Sewage Auth. v. EPA*, 35 F.3d 600 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995).

C. Judicial Review: Final Agency Action

The right to judicial review of permit decisions is governed by the particular environmental statute that is the subject of the litigation and Agency regulations.³³ 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). If an appeal has been filed, final Agency action occurs when EPA issues a permit decision and “agency review procedures * * * are exhausted;” that is, (1) when the EAB has issued a final decision denying review; (2) when the EAB has issued a final decision on the merits that does not include a remand; or (3) when the EAB has issued a decision remanding the permit, and there has been a final permit decision by the Regional Administrator following the remand.³⁴ *See generally* Section III.D.1 of this Manual. In the latter case, judicial review, if it is otherwise appropriate, is only available after the Regional Administrator has resolved *all* outstanding issues. *See* 40 C.F.R. § 124.19(f)(1)(iii). When federal court review of a permit decision is available, it is based on the administrative record before the Agency.

³³ *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.

³⁴ *See* 40 C.F.R. § 124.19(f).

D. Appeals Procedure

1. Overview

The Part 124 regulations contemplate a two-stage process for the Board's consideration of permit appeals.³⁵ 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. The regulations further contemplate that, based on the EAB's review of the petition alone, the EAB will then issue a decision either granting or declining review. If the EAB declines review, the appeals process is concluded. If the EAB grants review, a second stage of the appeals process ensues. During that stage, 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 Board, in practice, endeavors to resolve as many cases as possible during the first stage of the appeals process by obtaining more information than contemplated by the regulations. The EAB's practice in this first stage can be briefly described as follows:

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* section D.5 ("Response to Petition") below. The Board will also generally allow the permit applicant to respond to a petition filed by a third party petitioner if the permit applicant has filed a request to respond. After reviewing the response, the EAB conducts a thorough analysis of the issues raised by the petition to determine whether the permit suffers any deficiencies. If the

³⁵ 40 C.F.R. § 124.19.

EAB identifies any deficiencies, it may decline review but nonetheless remand the permit to the permit issuer with instructions to correct the deficiencies. If the Board identifies no permit deficiencies, the Board denies review without qualification.

Since the EAB frequently issues a decision that is dispositive of the matter based on the petitioner's brief and the responses thereto,³⁶ petitioners are advised that a petition for review should set forth, in detail, all of the issues and all of the arguments in their favor. Further information about the contents of a petition for review is provided below in sections 2(b) - 2(e).

In the event that the Board identifies potential issues with the permit under appeal that the Board is unable to address adequately during the first stage of the process, the Board may grant formal review, giving rise to the additional procedures associated with the second stage of the process discussed in section III.D.6, below.

2. Petition for review

(a) 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 on the day after the permitting authority serves notice of its permit decision, unless a later date is specified in that notice. 40 C.F.R. § 124.19(a).³⁷ When the permitting authority serves the notice by mail, service is deemed to be completed when the

³⁶ See, for example, *In re Rohm and Haas Co.* 9 E.A.D. 499, 514 n.24 (EAB 2000), where the EAB remanded specified issues to the Region, based on the petition and the Region's response, stating that "a direct remand without additional submissions is appropriate where, as here, it does not appear as though briefs on appeal would shed light on the issues to be addressed on remand."

³⁷ See *In re Envotech, L.P.*, 6 E.A.D. 260 (EAB 1996).

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.*

Placing a petition for review into the mail does not constitute filing with the EAB for purposes of meeting regulatory filing deadlines. A document is not considered filed with the EAB until it has been *received* by the EAB. “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*, *Sur Contra La Contaminacion v. EPA*, 202 F.3d 443 (1st Cir. 2000); *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107 (EAB 1997).

(b) Form and Content – General

Although there is no required form for a petition for review of a permit, the EAB requests that these documents be typewritten and double-spaced on 8 ½ x 11 paper. In terms of content, the petition should contain: (1) the name of the case and the docket number; (2) the name, address, telephone number, and fax number (if any) of the person filing the pleading; and (3) a signature by the petitioner or its representative. Moreover, 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 briefing may occur after review has been 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). Subsections (c) through (e) below set forth important additional content requirements for petitions.

(c) Specificity of Petition

Petitions for review must meet a minimum standard of specificity. To meet this requirement, “petitioners must include specific information supporting their allegations. Petitioners for review may not simply repeat objections made during the comment period; instead they must demonstrate why the permitting authority’s response to those objections warrants review.” *In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 5 (EAB 2000).³⁸

(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). Such persons have “standing” to appeal, and may raise in the appeal any issue that is reviewable under the regulations, even if the petitioner did not previously comment on that particular issue. As the EAB explained in its opinion in *In re EcoEléctrica, L.P.*, 7 E.A.D. 56, 64 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.”³⁹ 40 C.F.R. § 124.19(a).

³⁸ See also *In re Commonwealth Chesapeake Corp.*, 6 E.A.D. 764, 772 (EAB 1997); *In re SEI Birchwood, Inc.*, 5 E.A.D. 25, 26-27 (EAB 1994). The Board has held that “mere allegations of error” are not enough to warrant review. *In re Puerto Rico Electric Power Auth.*, 6 E.A.D. 253, 255 (EAB 1995).

³⁹ A discussion of “standing” requirements also appears in *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. Serv.*, 5 E.A.D. 10, 16-17 (EAB 1994).

A petitioner with standing may only raise issues that are eligible for review under the regulations. These regulatory requirements are described in section (e), below.

(e) Requirement That Issues Have Been Raised During the Comment Period

Any issues raised in the petition must have been 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; 40 C.F.R. § 124.19.⁴⁰ The purpose of the regulation is to give the permitting authority the opportunity to hear and respond to objections to permit conditions before the permit is issued.⁴¹

3. Filing and Service Requirements

While there are no regulatory filing and service requirements regarding the number of copies to file, the EAB requests that the petitioner provide an original and five copies of the petition and supporting brief. An original and three copies may be provided in the case of

⁴⁰ 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 City of Phoenix, Ariz.*, 9 E.A.D. 515, 524-25 (EAB 2000); *In re RockGen Energy Ctr.*, 8 E.A.D. 536, 540 (EAB 1999); *In re Jett Black, Inc.*, 8 E.A.D. 353, 358 (EAB 1999); *In re Federated Oil & Gas of Traverse City, Mich.*, 6 E.A.D. 722, 726-727 (EAB 1997); *In re Broward County, Fla.*, 6 E.A.D. 535, 552 (EAB 1996); *In re Florida Pulp and Paper Ass’n*, 6 E.A.D. 49, 53 (EAB 1995).

⁴¹*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 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.”).

exhibits that exceed 30 pages. See the General Filing Requirements in Section I.G[of this Manual. Motions that do not include substantial attachments may be filed with the EAB by facsimile. However, upon filing any motion by facsimile, the sender should, within 24 hours, send the original to the EAB by mail or express delivery copy. The EAB may, on a case-by-case basis, authorize facsimile filing of any other document. Because of the typical length of briefs, the EAB will not ordinarily authorize the filing of a brief by facsimile. Consult the EAB website for current information about facsimile filing.

4. 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.⁴² See 40 C.F.R. § 124.10(a)(iv), (c)(1)(i). 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 entertain a motion by a permittee to participate in the proceeding.

5. Response to Petition by Permitting Authority

Upon receipt of a petition, the EAB routinely requests a response from the permitting authority whose permit decision has been challenged, addressing whether the petition satisfies the requirements for obtaining review under 40 C.F.R. § 124.19. See Appendix 2 ("EAB Response to Petition to Review RCRA, NPDES or UIC Permit Decision under 40 C.F.R. pt. 124

⁴² Upon granting of review, the regulations provide that the permitting authority shall give public notice, including notice to the permittee, that review has been granted. *Id.* Additionally, after review has been granted, any interested person (including the permittee) may participate in the proceeding by filing a "friend of the court" brief. In practice, the EAB will grant a timely request by a permittee for the opportunity to respond to the petition for review.

(other than New Source Permit Decisions”) and Appendix 3 (“EAB Request for Response to Petition to Review PSD Permit Decision or Other New Source Permit Decision under 40 C.F.R. pt. 124”). A copy of the request is sent to the petitioner. Except in new source cases,⁴³ the EAB’s request typically gives the permitting authority 45 days to file its response.

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. On occasion, however, petitioners who believe that the permitting authority’s response requires a reply may, upon motion explaining why a reply brief is necessary, be granted leave to file a reply brief. Since the rules do not make provision for a reply, they do not establish a deadline for such a motion. However, 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 it.

⁴³ When the appeal concerns a PSD permit or other new source permit, the EAB requests that the permittee 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 permitting authority is not seeking summary disposition, the EAB requests a response within 30 days.

6. Briefing After the EAB Has Granted Review

The EAB is required to issue an order either granting or denying review of a petition within a “reasonable time” after the petition has been filed.⁴⁴ 40 C.F.R. § 124.19(c).

If the EAB grants review of some of the issues raised in the petition, the EAB’s order granting review may request further briefing on those issues for which review was granted. The EAB may also direct the parties to prepare for oral argument on specified issues. The EAB will then issue a final decision deciding the merits of each issue for which review was granted, which may include remanding the issue for further action by the permitting authority. The EAB may grant review of an issue and remand the issue in the same order, if it concludes that further briefing will not shed light on the issue to be remanded.⁴⁵

7. Motions

a. Motions for Reconsideration or Clarification

Under 40 C.F.R. § 124.19(g), a party may seek reconsideration and a stay of the EAB’s final order.⁴⁶ 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 In re DPL Energy*, PSD Appeal No. 01-02, slip op. at 2-3 (EAB, Mar. 29, 2001) (Order Denying Reconsideration). “The reconsideration process ‘should not be regarded as an opportunity to reargue the case in a more convincing fashion. It

⁴⁴ On March 16, 1994, the Administrator issued an order directing the EAB to expedite review of appeals of RCRA permit denials filed by Interim Status Waste Combustion Facilities (Appendix 4 *infra*). Under the directive, absent extraordinary circumstances, the EAB shall act on such a petition no later than 90 days following its receipt (Appendix 4).

⁴⁵ *See supra* n.36.

⁴⁶ A motion to reconsider must be filed within 10 days of service of the final order. 40 C.F.R. § 124.19(g).

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, slip op. at 2 (EAB, Apr. 9, 2001) (Order Denying Motion for Reconsideration), quoting from *In re Southern Timber Prods., Inc.*, 3 E.A.D. 880, 889 (JO 1992).

The rules do not expressly provide for motions for clarification. However, the EAB may entertain a motion for clarification of an order where the moving party believes that an aspect of the EAB’s decision is ambiguous.⁴⁷

b. Other Motions

There are no regulatory requirements for motions filed in permit proceedings under part 124 (except for the requirements in section 124.19(g) governing motions for reconsideration). As a matter of practice, however, the EAB expects all motions to be in writing, state the grounds therefor with particularity, state the relief sought, and be accompanied by any documentation on which the motion relies. The EAB further expects routine procedural motions, such as motions for extensions of time, to state whether the opposing party concurs or objects to granting the request set forth in the motion. To be considered, motions for extensions of time must ordinarily 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 issue an order. Unless circumstances suggest the need for an earlier response, any response to a motion should be filed within 15 days

⁴⁷ 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 d/b/a Adcom Wire Company*, RCRA Appeal No. 92-2 (EAB, July 25, 1994) (Order on Adcom’s Motion for Clarification) (unpublished order). (See Section I.E of this Manual for information about obtaining a copy of an unpublished order issued by the EAB.)

after service of the motion to assure consideration. Any motion faxed to the EAB should, within 24 hours, be followed by a mail or express delivery copy so that receipt is assured.

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 (EAB 1997). *See, e.g., In re Tondur Energy Co.*, 9 E.A.D. 710, 716 n. 10 (EAB 2001) (the appeals process is not generally available to challenge Agency regulations).

2. Standard of Review

There is no appeal as of right from the Regional Administrator's permit decision.⁴⁸ Rather, under the rules governing permit appeals, the petitioner has the burden of demonstrating that review should be granted. In particular, the petition must show that the 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."⁴⁹ 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

⁴⁸ *In re Miners Advocacy Council*, 4 E.A.D. 40, 42 (EAB, May 29, 1992).

⁴⁹ *See, e.g., In re City of Jacksonville, District II Wastewater Treatment Plant*, 4 E.A.D. 150, 152 (EAB 1992).

(May 19, 1980). *See In re Jett Black, Inc.*, 8 E.A.D. 353, 358 (EAB 1999); *see also In re Maui Elec. 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 permitting authority's issuance of the permit. 40 C.F.R. § 124.19(b).

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

1. RCRA, UIC and NPDES Permits

The effect of an administrative appeal on the conditions of a RCRA, UIC, or NPDES permit will depend on whether the permit applicant is applying for its first permit or is seeking renewal or modification of an existing permit. If the appeal involves a first permit (including a new injection well, new source, or any other new discharger or recommencing discharger), the permit applicant will not have an effective permit pending final agency action on the appeal, and therefore the permit applicant may not operate the facility in the manner contemplated by the permit during the pendency of the appeal. 40 C.F.R. § 124.16(a)(1).⁵⁰ If the appeal involves a renewal or modification of an existing permit, EPA regulations generally allow the permit applicant to continue to operate under its existing permit during the pendency of the appeal of the new permit. *See, e.g.*, 40 C.F.R. §§ 122.6, 124.5(c)(2). Pursuant to 40 C.F.R. § 124.16, any *contested* conditions of the modified or renewed permit are stayed pending final agency action on the appeal. 40 C.F.R. § 124.16(a)(1). Uncontested conditions that are not

⁵⁰ *See In re Wastewater Treatment Facility of Union Township, Mich.*, NPDES Appeal No. 00-27, slip op. at 2 (EAB, Oct. 19, 2000) (Order Denying Request Not to Stay Permit) (“There is no statutory or regulatory authority allowing a new discharger to commence discharging while its NPDES permit is on appeal * * *”).

severable from the contested conditions are stayed together with the contested conditions. However, the discharger must begin complying with any *uncontested* conditions of the new permit that the Regional Administrator has identified as severable from the contested conditions,⁵¹ along with the non-superseded conditions of its existing permit. If the EAB then denies review of the permit, the contested and non-severable uncontested conditions will become effective as provided in 40 C.F.R. § 124.19(f)(1). If the EAB grants review, the contested conditions and non-severable uncontested conditions will be stayed pending resolution of the appeal and final agency action. 40 C.F.R. § 124.16(a)(l).

2. PSD Permits

Construction of either a new or significantly modified facility that requires a PSD permit may not begin until a final permit has been issued by the Regional Administrator (or delegated state agency) following EAB review. Since “a PSD permit is a pre-construction permit * * * [issued to] a new facility” (*In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 110 n.5 (EAB 1997), regulatory provisions that apply to permit appeals filed by dischargers that are already operating under a permit (*see* G.1 above) do not apply to PSD permit appeals.

H. Stays of Permit Appeals Pending Settlement Negotiations

Review of a permit by the Board is not automatically stayed during settlement negotiations among the parties to the appeal. However, the EAB may, upon request of the parties or on its own initiative, stay further briefing during settlement negotiations. If protracted

⁵¹ Upon receipt of notification from the EAB that a RCRA, UIC, or NPDES permit decision has been appealed, the Regional Administrator is required to notify the EAB, the applicant, and all other interested persons which permit conditions are uncontested and severable from any contested provisions. 40 C.F.R. § 124.16(a)(2)(ii). These conditions shall become “fully effective and enforceable 30 days from the date” of the Regional Administrator’s notice. 40 C.F.R. § 124.16(a)(2)(i),(ii).

settlement negotiations are contemplated, the EAB may remand the permit to the permitting authority for the purpose of pursuing a settlement outside the appeals process, without prejudice to a party's right to request reinstatement of the appeal if that should prove necessary.

IV. OTHER EAB APPEALS PROCEDURES

A. Introduction

Although most enforcement appeals to the EAB are governed by the CROP (*see supra* Section II) and most permit appeals to the EAB are governed by 40 C.F.R. pt. 124 (*see supra* Section III), some administrative appeals are governed 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. pt. 66.

2. CAA § 207(c)

A decision of the Presiding Officer under 40 C.F.R. pt. 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. pt. 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. pt. 71.

Section 71.11(l) provides a right of appeal to the EAB from a federal Title V operating permit decision. Section 71.10(i) provides a right of 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. However, there is no right of appeal to the EAB from a permit issued by a state with an EPA-authorized state program.

An informal right of appeal to the EAB is available pursuant to 40 C.F.R. § 71.27(a)(2) from the Administrator's denial of a request that a permit be revised, revoked and reissued, or terminated.

2. Acid Rain Program

Title 40 C.F.R. pt. 72 establishes permit requirements under EPA's Acid Rain Program pursuant to Title IV of the CAA. Section 78.3(b)(1) provides a right of appeal to the EAB from certain acid rain permit decisions listed at 40 C.F.R. § 78.1(a). *See also* 40 C.F.R. § 78.1(c).

Title 40 section 78.20 sets forth the appeals procedure under part 78.

D. Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") Non-enforcement Proceedings

EPA regulations at 40 C.F.R. pt. 164 govern hearings in FIFRA proceedings arising from (1) refusals 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 generally* 40 C.F.R. pt. 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* 40 C.F.R. § 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.

V. 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.⁵² 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.⁵³

There are no federal regulations governing CERCLA reimbursement proceedings. EAB has issued a detailed guidance document, “Guidance on Procedures for Submission and Review of CERCLA Section 106(b) Petitions” (November 10, 2004) (“CERCLA Guidance”)⁵⁴

⁵² If the petitioner has not complied with the terms of the order, the petition will be denied. *See Employers Ins. of Wausau v. Clinton*, 848 F. Supp. 1359 (N.D. Ill. 1994).

⁵³ The constitutionality of the reimbursement procedure established in section 106(b)(2) was upheld in *Employers Ins. of Wausau v. Browner*, 848 F. Supp. 1359 (N.D. Ill. 1994), *aff’d*, 52 F.3d 656 (7th Cir. 1995), *cert. denied*, 516 U.S. 1042 (1996).

⁵⁴ The EAB mailing address and hand delivery address for documents filed with the EAB and the hours of the Clerk of the Board that are set forth in Section II of the CERCLA Guidance have been changed. See Section I.G of this Manual (General Filing Requirements) for the current mailing address and hand delivery address for filing documents with the EAB and for current filing procedures and requirements.

(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.⁵⁵

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

B. Procedure for Submitting CERCLA Reimbursement Petitions

By statute, a claimant must file a petition for reimbursement “within 60 days after completion of the required action.”⁵⁶ See CERCLA § 106(b)(2)(A), 42 U.S.C. § 9606(b)(2)(A). 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)⁵⁷ 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 pleading raising any such contentions within 30 days after the date of the EAB’s letter soliciting a response to the petition. These threshold eligibility requirements relate to whether the administrative order in question is subject to section 106(b)(2), whether the order

⁵⁵ 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 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 (EAB 1999).

⁵⁶ For the purpose of determining a petitioner’s compliance with the statutory 60-day deadline, the EAB will look at the postmark date if the petition was sent to the Board by certified mail, and to the date of receipt by the EAB if the petition was transmitted by any other means. See CERCLA Guidance at 2.

⁵⁷ See *supra* n.55

has been complied with, whether the required action has been completed, and whether the petition is timely. 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 does not contend that any of the threshold eligibility requirements have not been met, 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 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. 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.*, CERCLA § 106(b) Petition No. 00-1 (Nov. 6, 2001), 10 E.A.D. ____; *In re The Port Authority of New York*, CERCLA § 106(b) Petition No. 96-5 (EAB, May 30, 2001), 10 E.A.D. _____. 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).

The postmark date of a pleading (other than the petition itself)⁵⁸ is not determinative of the time a pleading was filed. If the pleading has been mailed by first class mail to the EAB, it must be received in the central EPA mail room by the specified filing date. The pleading is then date-stamped upon receipt by the mail room and forwarded to the EAB. If the pleading is submitted by Overnight or Priority Mail, or is hand-delivered directly to the EAB, it must be received at the Board's offices by the specified date. If the Board establishes a briefing schedule by order, any date the Board specifies for filing a pleading means the date by which it must be received, unless otherwise specified in the order.

⁵⁸ *See supra* n.56.

APPENDICES

1. Guidance on Procedures for Submission and Review of CERCLA Section 106(b) Reimbursement Petitions (November 10, 2004)
2. EAB Request for Regional Response to Petition to Review RCRA, NPDES, or UIC Permit Decision under 40 C.F.R. pt. 124 (Other than New Source Permit Decisions)
3. EAB Request for Regional Response to Petition to Review PSD Permit Decision or Other New Source Permit Decision under 40 C.F.R. pt. 124
4. EAB Consent Order Review 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" (March 16, 1994)
6. Pleading Templates