

A CITIZENS' GUIDE
TO
EPA'S ENVIRONMENTAL APPEALS BOARD



November 2006

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Introduction

This Guide provides a brief description of how our environmental laws protect you and your community and an overview of the role of the U.S. Environmental Protection Agency's (EPA) Environmental Appeals Board (EAB) in assuring that these laws are administered properly and fairly. It also provides general information about the procedures the EAB follows in making decisions. It is intended principally for citizens without formal legal training who are involved in matters pending before the EAB. If you find yourself involved in a legal matter before the EAB, or would like to participate in a legal matter pending before the EAB, this booklet can answer some of your questions about the EAB and direct you to sources of more detailed information.

This Guide only provides general guidance about the EAB and its procedures. For you to be able to participate effectively in an EAB legal proceeding, reading the specific statutes and regulations that apply to your case is a must, as is consulting the EAB's Practice Manual (June 2004), which contains additional information about EAB procedures and model forms for appeal documents.

The EAB's website at www.epa.gov/eab contains the text of the EAB's opinions and additional information about the EAB, including answers to Frequently Asked Questions about EAB procedures. The EAB website

also contains a new link to EAB Dockets, which provides electronic access to the text of most documents filed in cases currently pending before the EAB and EAB cases closed after January 1, 2006. EAB Dockets also contains a list of EAB cases closed before January 1, 2006. You can get more information about the EAB dockets at EAB Dockets on page 17 of this Guide.

The EAB recently launched a new system that allows parties in cases that are pending before the EAB or in new matters to submit an electronic copy of any document that is being filed in those cases, instead of filing multiple paper copies. (Submission of a single signed paper copy is still required to constitute “filing.”) You can find information about the EAB’s electronic filing system at “How and where should I file documents with the EAB” on page 20 of this Guide, or on the EAB website under “Electronic Filing.”

EPA’s website at www.epa.gov contains a wealth of information about EPA, including “plain English” guides to the laws that EPA administers and a description of the activities of each of EPA’s program offices.

How do the environmental laws protect me and my community?



The federal environmental laws protect you and your community by identifying and addressing risks to our health and our natural environment – the air, water, and land.

EPA is responsible for leading the effort to implement most of these laws. EPA:

- conducts research to identify environmental risks and ways to minimize or avoid these risks;
- imposes limitations on the release of certain pollutants into the environment;
- regulates certain activities that may pose a risk to our health or the environment, or both; and
- takes enforcement actions against violators of environmental laws, including actions to impose financial penalties on violators

.What are the major environmental laws that EPA administers?

Overview

The environmental laws that EPA carries out address a wide range of actual and potential threats to the environment. These laws set forth Congress' goals for safeguarding our air, land, and water, and establish a legal framework for achieving these goals. They give EPA the authority, and in many cases, impose a duty on EPA, to develop and issue regulations that implement the laws' requirements. EPA's regulations spell out the activities that the Agency oversees and rules of conduct for persons who are involved in those activities. The laws are published in the United States Code. EPA's environmental regulations are published in Title 40 of the Code of Federal Regulations (CFR). You can find the U.S. Code and the CFR at most law libraries.

Congress intends that the states play a significant role in carrying out the federal environmental laws, and has authorized the states, with EPA approval, to implement many specific environmental programs. The EAB only hears cases that concern federal laws and programs and not those arising from approved state and independent programs.

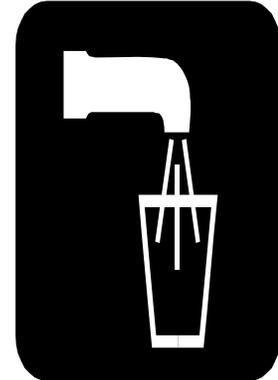
Clean Air Act

The purpose of the Clean Air Act (CAA) is to protect and improve the quality of our air by limiting emissions of air pollutants. The Act directs EPA to identify air pollutants, to study the causes of air pollution, to evaluate the impact of air pollutants on our health, and to adopt national air quality standards for air pollutants that may endanger public health or welfare. The Act also includes certain licensing or permitting requirements, including, for example, the requirement that major sources of air pollution (such as factories and power plants) obtain preconstruction permits that set limits on the amount of each regulated pollutant the facility may emit.

The states play a leading role in regulating air pollution. Under the Clean Air Act, EPA, or a state program approved by EPA, has the authority to issue preconstruction permits under the federal Prevention of Significant Deterioration (PSD) program. The PSD program is designed to protect the quality of the air in those areas of the United States where the air quality already meets or exceeds national standards (attainment areas). The EAB's authorities include the authority to review challenges to federal PSD permits issued by either EPA or a state to which EPA has delegated its permitting authority. The EAB's authority under the CAA also includes reviewing Agency decisions issued under the "acid rain" regulations. The EAB also reviews appeals from EPA-initiated administrative penalty cases brought against persons whom EPA believes have violated the Clean Air Act or regulations issued under the Clean Air Act.

Clean Water Act

The purpose of the Federal Water Pollution Control Act, commonly known as the Clean Water Act (CWA), is to protect United States waters from pollutants. The states have the primary responsibility for protecting U.S. waters. However, EPA (or a state approved for this purpose) has the responsibility to administer the CWA's National Pollution Discharge Elimination System (NPDES) permit program, which regulates discharges of pollutants into regulated waters. The EAB has the authority to review challenges to NPDES permits issued by EPA. The EAB also reviews appeals from administrative penalty cases brought by EPA against persons whom EPA believes have violated the Clean Water Act in some way.



Comprehensive Environmental Response, Compensation, and Liability Act

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (also called Superfund) has two major purposes: first, to assure that releases of hazardous substances are cleaned up promptly; and second, to require those people or companies who generated, transported, and disposed of the hazardous substances to pay for the cleanup. Among other things, the Act authorizes EPA (and certain other federal agencies) to issue orders requiring a person or group of people to undertake specific actions to prevent or minimize a threat from the release of a hazardous substance or to clean up hazardous substances that have already been released.

Anyone who receives a cleanup order and who thinks that he or she should not be held responsible for cleanup costs may petition the EAB to recover its cleanup costs. However, a person who challenges a cleanup order must comply promptly and fully with the cleanup order first, and may not petition for reimbursement until the cleanup has been completed. The EAB also reviews appeals from administrative penalty cases brought by EPA against persons who have violated a CERCLA cleanup order.

Emergency Planning and Community Right to Know Act

The purpose of the Emergency Planning and Community Right to Know Act (EPCRA), is to minimize the impact of chemical releases that pose threats to public health and the environment, and to provide information to the public about hazardous chemicals in their communities. EPCRA includes a requirement that certain facilities that manufacture, use, or store toxic chemicals file reports on their releases of toxic chemicals into the environment. The EAB reviews appeals from administrative penalty cases brought by EPA against persons whom EPA believes have violated CWA in some way.



Federal Insecticide, Fungicide, and Rodenticide Act

The purpose of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) is to prevent pesticides from causing unreasonable harm to our health or the environment. Every pesticide that is sold or distributed in the U.S. must be registered with EPA. The pesticide registrant must provide information to EPA that supports its claim that the chemicals used in the pesticide will not pose an unreasonable risk to people or the environment. Pesticides must have labels that explain how to use them and that contain warnings about the risks they pose. Certain particularly dangerous pesticides may only be applied by a government-certified applicator. The certification requirement is intended to assure that the applicator will use the pesticide in a way that minimizes any risk to our health and the environment.



EPA enforces the requirements of FIFRA by assessing civil penalties against individuals, companies, or organizations who violate its requirements. The EAB reviews appeals from administrative penalty cases brought by EPA against persons who EPA believes have violated FIFRA in some way.

Resource Conservation and Recovery Act



The Resource Conservation and Recovery Act (RCRA) protects our land as a valuable natural resource by reducing land disposal of hazardous wastes and by minimizing the risks posed by hazardous waste disposal. RCRA authorizes EPA to regulate hazardous wastes from “cradle to grave” (that is, from the point of generation to the point of disposal). Most notably, RCRA authorizes EPA to impose stringent requirements on facilities that treat, store, or dispose of hazardous waste by means of a permit program. The EAB has the authority to review challenges to the terms of EPA-issued permits. The EAB also reviews appeals from administrative penalty cases brought by EPA against persons whom EPA believes have violated RCRA in some way.

Safe Drinking Water Act

The purpose of the Safe Drinking Water Act (SDWA) is to safeguard the nation's drinking water supply. The underground injection control (UIC) program under the SDWA protects actual and potential sources of drinking water from hazardous substances by requiring that any injection of pollutants that may impact a drinking water source comply with the terms of a federal permit. The EAB has the authority to review challenges to the terms of UIC permits. The EAB also reviews appeals from administrative penalty cases brought by EPA against persons who EPA believes have violated the SDWA in some way.

Toxic Substances Control Act (TSCA)

The purpose of the Toxic Substances Control Act (TSCA) is to safeguard against unreasonable risks of harm to our health or the environment from toxic chemicals. TSCA does this by regulating the use, storage, and disposal of toxic chemicals. It authorizes EPA to require the testing of certain chemical substances and to require manufacturers and processors of those chemical substances to maintain records and submit reports to EPA. EPA enforces the requirements of TSCA by imposing civil penalties on individuals, companies, or organizations who violate its requirements. The EAB reviews appeals from administrative penalty cases brought by EPA against persons whom EPA believes have violated TSCA in some way.



What is the role of the Environmental Appeals Board?



The Environmental Appeals Board (EAB), which was created in 1992, functions as an administrative appeals court within EPA. It consists of four Environmental Appeals Judges and a staff of lawyers and administrative support personnel who assist them.

The EAB's primary role is to resolve certain types of controversies between members of the public, or private or governmental entities, and EPA (or state) offices arising from the application of federal environmental laws. Both the environmental laws and EPA's regulations specify who may raise an issue to the EAB and what types of issues may be raised. The EAB mostly decides cases about the terms of federal environmental permits and about the amount of financial penalties that EPA has assessed for violations of the environmental laws. A case will not ordinarily reach the EAB until an EPA Administrative Law Judge or senior EPA official (or, in

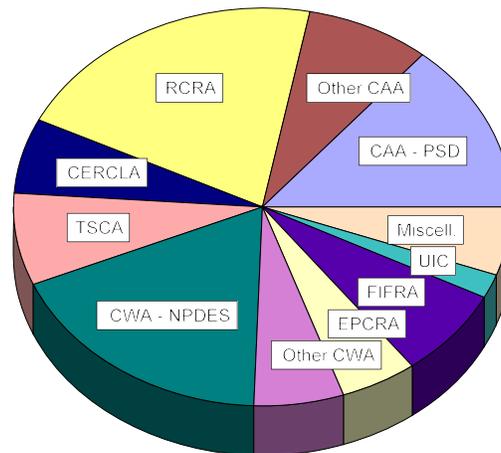
some permit cases, a state agency official with delegated authority to issue federal environmental permits) has issued a decision on the matter and someone who is adversely affected by that decision appeals the decision to the EAB.

The EAB also rules on petitions that members of the public (typically private or government entities) submit to the EAB seeking reimbursement of costs they incurred in complying with a cleanup order that EPA had previously issued under CERCLA. The EAB has developed guidelines for these cases and explains them in a guidance document the EAB issued in June 2004. You can read the guidance document on the EAB's website.

The pie chart for the EAB's published decisions below gives an indication of the types of cases, by statute, that have been appealed to the EAB.

EAB FORMAL OPINIONS

March 1992 to October 2006



The EAB's Decisionmaking Process

The process by which the EAB decides a case is a formal process that is largely governed by EPA regulations. Although the EAB is part of EPA, it is independent of the EPA offices who are parties to the cases it decides. This independence allows the EAB to make fair decisions. The EAB gives equal consideration to the legal arguments made by members of the public and their counsel and the legal arguments made by Agency lawyers. The EAB will not communicate with one party to a case that is pending before the EAB without the other party being present. This is to assure the EAB's impartiality in its cases. EAB staff attorneys are available, however, to answer questions about EAB procedures that are not answered in this Guide or on the EAB website.

A panel of three Environmental Appeals Judges considers and decides each case filed with the EAB. The EAB makes each decision by majority vote. The EAB issues a decision in each case it decides, in which it explains the reasoning behind its decision. The decision typically contains a discussion of the factual background of the case, the applicable law, the issues raised by the case, and the EAB's rulings on all issues raised by the parties. The EAB publishes the most significant of its opinions in bound volumes entitled "Environmental Administrative Decisions" (E.A.D.). The EAB also issues unpublished final decisions in some cases. Both the published and unpublished decisions of the EAB can be read on the EAB's website.

The judges on the panel try to reach a decision that reflects the views and reasoning of all three judges. However, a judge may write a concurring opinion (a separate opinion written by a judge who agrees with the conclusion reached by the majority but who wishes to state different reasons for reaching that conclusion) or a dissenting opinion (a separate opinion written by a judge who disagrees with the conclusion reached by the majority).

The EAB's decision is EPA's final decision on the dispute and is binding on the parties to the dispute, unless the decision is reversed by a federal court. Except for cases involving penalty assessments against other federal agencies, EAB decisions cannot be appealed to the EPA Administrator. A party (other than EPA) who is dissatisfied with the EAB's decision may appeal that decision to a federal court. The EAB's website lists all federal court decisions that have been issued following an appeal from an EAB decision and all pending appeals from EAB decisions to a federal court.

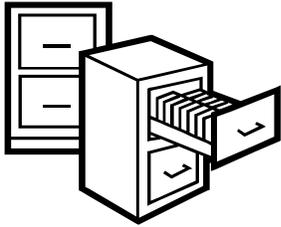
EAB Dockets

The EAB's Active Dockets and Closed Dockets are now accessible electronically on the EAB's website. Active Dockets contains an index of all filings in cases that are pending before the EAB and allows you to read and print most of the documents that have been filed in these cases. Closed Dockets (since January 1, 2006) lists all cases closed during that period and allows you to read and print most of the documents that have been filed in those cases. Closed Dockets contains a list of all cases that were closed between March 1992, when the EAB was created, and January 1, 2006. It does not contain an index of filed documents.

EAB Decisions Must Be Followed in Later Cases

When the EAB issues a decision, it follows the decisions that it previously issued in cases that have similar factual circumstances and raise similar legal issues. The EAB's earlier decisions serve as "precedents" for the pending case. This means that the EAB will decide the pending case in the same way that it decided the earlier cases, if the factual circumstances and legal issues are substantially similar. If there are significant differences that require the EAB to reach a different result, it will explain those differences in its opinion. Lawyers refer to this principle of decisionmaking by a Latin phrase, "stare decisis," which means "to stand by things decided." When a decisionmaking body like the EAB gives its prior decisions precedential value, members of the regulated communities can rely on these decisions to guide their conduct. Moreover, they can be assured of a fair decisionmaking process in which people who conduct themselves in the same way under similar circumstances will be treated the same way by the legal system. If you are participating in an EAB case, or are trying to decide whether to file a case before the EAB, you should read carefully the decisions that the EAB has issued in which it ruled on issues that may apply to your case.

Clerk of the Board



The Clerk of the Environmental Appeals Board maintains the EAB's "docket," the administrative system for tracking matters that are pending before the EAB. The Clerk also maintains records of closed cases (Closed Dockets). For information about these dockets, see EAB Dockets on page 17 of this Guide.

The office of the Clerk of the Board is located in the Colorado Building, 1341 G Street, N.W., Suite 600, Washington, D.C., 20005. The Clerk will be glad to answer your questions about procedures for filing documents with the EAB. The office is open from 8:30 a.m. to 12 p.m. and from 1 p.m. to 4:30 p.m. Monday through Friday. The Clerk can be reached by telephone at (202) 233-0122 during office hours.

You may read any document that was filed in an EAB proceeding at the Clerk's office (or on the EAB's website), provided that the document does not contain confidential business information. You may not make copies of documents but you may ask the Clerk to make copies for you.

Please call the Clerk to make an appointment if you would like to read or obtain copies of any documents. There will be a charge of 15 cents per page for copies of documents. You may also read most documents that have been filed in pending cases, and cases that were closed after January 1, 2006, by accessing the EAB's "electronic reading room," using a link to EAB Dockets on the EAB website.

How and where should I file documents with the EAB?

You may file documents with the EAB in person or by mail. All documents that you send 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

All documents that you hand-carry in person or that you arrange to have delivered by courier, Express Mail, or a non-U.S. Postal Service carrier (such as Federal Express) 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

Every envelope or package, whether mailed or hand-delivered, should bear a complete and accurate return address in the upper left hand corner, and should clearly state the case name and any case number (if the Clerk of the Board has assigned one) in the lower left hand corner.

The EAB requests five copies of most filings (three copies of exhibits longer than 30 pages). It recently launched an innovative system that allows you to submit an electronic copy (in PDF format) of any original paper filing (including exhibits) in any pending case or new matter, in lieu of submitting multiple paper copies of a “filed” document, though a single signed copy is still required to constitute filing. To access the system, or to obtain more information about it, use the “Electronic Submission” link on the EAB website.

Enforcement appeals and permit appeals: an overview

The two most common types of cases appealed to the EAB, and the two types of cases in which members of the public are most likely to be involved, are administrative enforcement appeals and permit appeals. Because they occur most frequently, this Guide provides an overview and discussion of each.

Appeals from administrative enforcement decisions

An EAB enforcement appeal is a formal challenge to a final decision that an EPA Administrative Law Judge (“ALJ”) or other presiding officer issued in an administrative enforcement proceeding. Typically, an EPA Regional Office (or, occasionally an EPA headquarters office) begins an enforcement proceeding by filing a complaint charging that a person (which can include a corporation or government entity) violated an environmental law or regulation. The complaint proposes the amount of the financial penalty that EPA should assess for the violation and, where necessary, what actions EPA believes the person should take to remedy the violation. The EPA office that filed the complaint is called “the Complainant.” The person who is charged with the violation is called the “Respondent”. A complaint may charge, for example, that the Respondent violated FIFRA by selling pesticides that were not labeled with adequate instructions for use. As another example, a complaint may charge that the Respondent violated RCRA by improperly disposing of hazardous waste. The Respondent may dispute the charges in the Complaint, or the amount of the proposed financial penalty, by filing an Answer.

After the Answer has been filed, the case is assigned to an ALJ, who reviews the written legal arguments (called “briefs”) that both parties submit. If the ALJ thinks that the case presents

genuine factual issues that are material to a decision in the case, he or she will schedule a hearing, during which each side may present witnesses and introduce documentary evidence. The ALJ then issues a decision that resolves the issues in the case, based on the parties' briefs and the evidence introduced at the hearing. The ALJ's decision is called an "Initial Decision."

Within the timeframe specified in the regulations (see page 26 of this Guide), both the Complainant and the Respondent have the right to file an appeal with the EAB from the Initial Decision, challenging the ALJ's conclusions regarding liability for the violations or the amount of the penalty, or both. The Respondent may argue that he or she did not violate the law or that the ALJ assessed too high a financial penalty for the violation. The Regional office that filed the original complaint against the Respondent may argue that the ALJ acted in error when he or she concluded that the Respondent did not violate the law, or may argue that the ALJ should have assessed a higher penalty. The steps in the enforcement appeals process are described beginning on page 26 of this Guide. If no one files an appeal, the Initial Decision becomes a final EPA decision, unless the EAB decides on its own initiative to review the decision.

Appeals from permit decisions

A permit appeal is a challenge to a decision issuing or modifying an environmental permit or denying a permit application. The permittee (permit holder) or permit applicant, or any other interested person who objects to some aspect of the permit decision, may file a petition asking the EAB to review a permit decision. The permit applicant or permittee typically argues that particular permit provisions – discharge limitations or monitoring requirements, for example – are too restrictive. A private citizen (or a group of citizens) other than the permittee who files an appeal typically argues that the terms of the permit are too lenient to provide adequate protection for the environment or that the permit should not be issued at all.

A petition to review a permit decision must be filed before the deadline established by the regulations. This means that the EAB must receive the petition on time. It is not enough merely for the petition to have been mailed by the deadline. The petitioner must also satisfy several other prerequisites before the EAB will consider the issues the petition raises. First, the petitioner must have participated in the process during which the permit issuer reviewed the permit application and issued a draft permit for public comments, either by speaking at a public hearing or by submitting written comments on the draft permit. This regulatory requirement is intended to assure that the petitioner has a sufficient interest in the permit to be allowed to file an appeal. Second, with some limited exceptions (that is, where there has been a significant change between the draft and final permit, with respect to which there was no opportunity to comment), the petitioner may only raise the specific issues that were raised during the Region's permit review process. This regulatory requirement is intended to assure that the permit issuer had an

opportunity to consider the petitioner's arguments and to respond to them during the comment period on the draft permit.

It is important that permit processes be predictable and come to conclusion in a reasonable time. Allowing issues to be raised for the first time on appeal would not contribute to these objectives. Therefore, if you have concerns about a pending permit, you should participate in the public comment period on the draft permit. The comment period provides an important opportunity for you to raise objections to the draft permit and to provide the permit issuer with any pertinent information that supports those objections. Your participation during the comment period preserves your opportunity to file an appeal if you are dissatisfied with the permit decision. Your objections should be as specific as possible because you typically may only raise on appeal an objection that you or another commenter specifically raised during the public comment period.

Even if you have met all of the prerequisites for filing a petition, the EAB has the discretion not to decide your petition. The regulations provide that petition may only be considered if you demonstrate that the permit issuer made a "clearly erroneous" finding of fact or legal conclusion, or that your issue raises an important policy question.

The regulations provide for a two-stage appeals process. During the first stage, the regulations contemplate that the EAB will make a decision either granting or denying review of the petition. If the EAB grants review, the EAB will proceed to the second stage of the appeals process, during which the parties and the Region each submit additional written arguments for further review by the EAB.

The EAB's practice, however, is to try to resolve as many appeals as possible during the first stage of the appeals process. Therefore, the EAB frequently makes a final decision on the issues, based on the petition and the permit issuer's response, without scheduling a further

exchange of written briefs. (If the permit applicant did not file the petition, the EAB will generally also consider a response from the permit applicant, if requested). In some cases, the EAB has denied review of the petition, while in other cases, the EAB has ruled in the petitioner's favor and overturned the permit or returned the permit to the permit issuer for further work. Since the EAB typically makes a final decision on the merits of an appeal based on the petition and the Region's response, the EAB encourages participants to provide all necessary support for all of their arguments at the time the petition for review is submitted.

What are the steps in an enforcement appeal?

Step 1. Appellant Files a Notice of Appeal with the EAB



A person who is dissatisfied with the ALJ's Initial Decision files a Notice of Appeal with the Clerk of the EAB. The Clerk logs in the appeal and assigns it an appeal number. The "appellant" (party filing the appeal) may be the person against whom the proceeding was brought (the Respondent) or may be the EPA office that filed a complaint against the Respondent. In some cases, both parties may file appeals. The Notice of Appeal must comply with federal regulations that govern enforcement appeals, known as the CROP (which is an acronym for Consolidated Rules of Practice). The CROP is published in Title 40 Part 22 of the Code of Federal Regulations. Some of the CROP's requirements related to notices of appeal are summarized below.

The EAB must receive a Notice of Appeal within 30 days from the date the Initial Decision was served. The EAB enforces this deadline strictly. Under EPA's regulations, the Initial Decision may be served personally, by mail, or by a commercial delivery service. The regulations contain specific rules for how to calculate the 30-day period of time in which to file your appeal, depending on how the Initial Decision was served. In addition to reading the regulations, follow the instructions in the section of this booklet titled "How and where should I file documents with the EAB." If you mail a Notice of Appeal to the EPA Headquarters address, you must allow sufficient time for the EPA mailroom to forward it to the Clerk of the Board before the 30-day deadline. If you hand-deliver the Notice, you must deliver it to the Clerk of the Board between 9 and 12 noon or between 1 and 4:30 p.m. Monday through Friday.

The CROP does not prescribe a specific form for a Notice of Appeal. However, the regulations do specify the information the Notice must include and the types of issues it may raise. The CROP also contains instructions for the form and content of the appellate brief, the document that contains the factual and legal arguments which support the Notice of Appeal. The EAB's Practice Manual contains forms for a Notice of Appeal and appellate brief that you can use as models in drafting your own Notice of Appeal and appellate brief.

Step 2: **Other Participants File Briefs Responding to the Notice of Appeal**

Once a party files an appeal, any other participant in the case may file a response to the appellate brief. The response brief must be limited to the arguments that were raised in the appellate brief and must be filed within the time period allowed by the regulations. If either side wishes to file additional briefs, it must request permission from the EAB. A party who is not the Appellant may also file an additional notice of appeal (called a cross-appeal) on any issue in the case, within 20 days after the first notice of appeal was served.

Step 3. **Oral Argument**

You may request oral argument in your appeal or your response to an appeal, and the EAB may grant your request or may schedule an oral argument on its own initiative. See page 35 of this Guide for more information about oral arguments before the EAB.

Step 4. **The EAB Deliberates About the Issues**

The Clerk of the Board assigns the case to a three-judge panel, one of whom serves as lead judge and prepares the EAB's written decision in the case. The EAB considers briefs that were submitted by the participants and also reviews relevant portions of the Administrative Record. (The Administrative Record consists of the transcript of any hearing held by the ALJ and any documents submitted to the ALJ.)

The CROP provides that the Complainant has “the burdens of presentation and persuasion,” both as to liability and as to the appropriateness of the penalty. In general terms, the Complainant’s “burden of presentation” means that it is the Complainant’s obligation in the first instance to present factual evidence that a violation occurred and to demonstrate why the recommended penalty amount is appropriate. The Complainant’s “burden of persuasion” means that it is the Complainant’s obligation to present evidence and arguments that are more persuasive than those of the Respondent in order for the EAB to decide in the Complainant’s favor.

Step 5. **Complainant and Respondent May Discuss Settlement**

You may continue to discuss settlement of your case after an appeal has been filed. EPA encourages settlements, and the EAB will ordinarily grant a request to stay (postpone) the proceeding if settlement discussions are taking place. Such requests are granted upon a written motion to the Board setting forth the reasons for the request.

Step 6: **The EAB Issues a Decision**

The EAB issues a decision on the issues raised by the appeal. The EAB has the authority to set aside the ALJ's factual findings and legal conclusions and to reach its own determination as to whether the Respondent is liable for the violations charged in the complaint. In practice, the EAB will ordinarily defer to the ALJ's factual findings, especially if the factual issues involve the testimony of witnesses, since the ALJ will have had an opportunity to observe them and evaluate their credibility.

The CROP gives the EAB authority to set aside the ALJ's recommended penalty amount and to make its own determination of an appropriate civil penalty. However, the EAB has stated that it will not ordinarily substitute its judgment as to an appropriate penalty amount for the judgment of the ALJ unless the ALJ has made a clear error in applying any applicable penalty guidelines, has not given convincing reasons for deviating from them, or for explaining the penalty assessed.

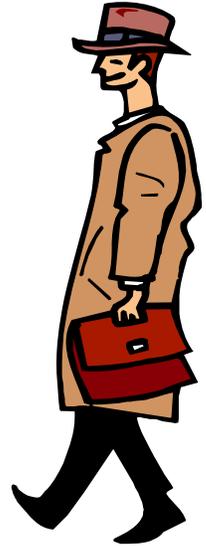
The EAB mails its decision to the parties to the case and makes the full text of the opinion available on its website at www.epa.gov/eab. Individual copies of EAB opinions may be obtained from the Clerk of the Board. EAB opinions are also commercially available through LEXIS[®], WESTLAW[®], the EPA Administrative Law Reporter, the ELI Environmental Law Reporter, and EPA Shadow Law[™].

The EAB's decision is final and may not be appealed to the EPA Administrator (except in limited cases involving another federal agency.) However, any party other than EPA has a right to appeal the EAB's decision to a federal court. The particular court to which the appeal must be addressed, and the standard of review that the court must apply, is determined by the particular environmental statute at issue.

What are the steps in a permit appeal?

Step 1. A Member of the Public Files a Petition for Review

A member of the public or an organization that objects to a permit decision (referred to as “the Petitioner”) files a petition with the Clerk of the Board asking the EAB to review the permit decision. The petition must comply with the requirements in the regulations that govern permit appeals. Most permit appeals are governed by regulations that are published in Title 40 part 124 of the Code of Federal Regulations. These regulations provide that a petition must be filed with the EAB within 30 days after a final permit decision was issued. The petitioner must also satisfy certain regulatory prerequisites in order for the petition to be considered. Some of these requirements are summarized on pages 23 to 25 of this Guide in the section titled “Appeals from Permit Decisions.”



Step 2. **Permit Issuer Files a Response Brief**

The Clerk of the Board logs in the appeal and assigns it an appeal number. The Clerk sends a letter to the permit issuer (an EPA Regional office or a state office for a state-issued permit), notifying the permit issuer that an appeal has been filed, and requesting a response to the arguments in the petition. The EAB's Practice Manual contains a sample of the letter that the Clerk sends to the permit issuer.

If the petition was filed by someone other than the permit applicant (for example, by an interested member of the community or a community organization), the Clerk will notify the permit applicant that a petition has been filed. The EAB will ordinarily grant a motion by the permittee to file a response brief if the permittee makes such a request.

Step 3. **Oral Argument**

The EAB may grant a motion for an oral argument or may schedule an oral argument on its own initiative. See page 36 of this guide for more information about oral arguments before the EAB.

Step 4. **The EAB Deliberates About the Issues**

The Clerk of the Board assigns the case to panel of three judges, one of whom serves as lead judge for purposes of preparing the written opinion the EAB will issue after it decides the issues in the case. The EAB reviews the briefs submitted by the parties and the documents in the record. Where there has been an oral argument, the EAB takes into account the points made during the argument.

Step 5. **EAB Grants or Denies Review of the Petition**

After reviewing all the relevant materials, the EAB issues an order either granting or denying review of the petition. If the EAB grants review of the petition, it will typically ask the parties to submit further briefs and will establish a schedule for the briefs. In some cases, the EAB issues an order remanding (sending back) a particular issue to require the permit issuer to adjust permit terms or provide a better explanation for a permit condition that has been challenged.

The EAB mails its decision on the parties to the case and makes the full text of its opinion available on the EAB website at www.epa.gov/eab. Individual copies of the opinion may be obtained from the Clerk of the Board and, in the case of published opinions, are also commercially available through LEXIS®, WESTLAW®, the EPA Administrative Law Reporter, the ELI Environmental Law Reporter, and EPA Shadow Law™. The EAB occasionally issues final unpublished decisions, which are available on its website. The EAB's decision is final and may not be appealed to the EPA Administrator (except for cases involving penalty assessments against other federal agencies). However, any party other than EPA has a right to appeal the

EAB's decision to a federal court. The particular court to which the appeal must be addressed, and the standard of review that the court must apply, is determined by the particular environmental statute upon which the case is based.

Can I represent myself or do I need to hire a lawyer?

You may represent yourself in a proceeding before the EAB. The regulations do not require that you be represented by a lawyer. If you decide to represent yourself, the EAB judges will make every effort to give full weight to your arguments, even if you do not express them using legal terminology. However, you will be required to comply with statutory and regulatory deadlines and other legal requirements that apply to your case. The Clerk of the Board and the staff attorneys to the EAB will be glad to answer any questions you have about EAB procedures. Of course, they cannot discuss the merits of your particular case with you or give you guidance on how to argue your case.

It may, however, be in your interest to have a lawyer represent you, particularly if your case involves complex legal issues. Your lawyer may be better able to understand the specialized language used in legal arguments and will be familiar with the legal research tools that help find relevant EAB and court opinions issued in other cases. Your lawyer may also be able to give you advice as to which of your arguments are likely to be persuasive.

Before you decide whether or not to hire a lawyer, you may want to read some of the EAB's opinions in cases that are similar to your own, and to decide whether you will be comfortable and effective as a "pro se litigant" (a participant who represents himself).

Should I ask for an oral argument or should I rely solely on my written brief?

An oral argument is a hearing conducted by the EAB at which each party is given the opportunity to further explain its positions. Importantly, an appellate hearing of this kind is not an opportunity to present additional evidence or witness testimony in your case. Generally, on appeal, the evidence considered is limited to the evidence that informed the decision being appealed. An appellate oral argument is rather an opportunity for you or your advocate to explain why the legal position you have taken in your briefs is the correct one.

If you think that an oral argument will benefit your case, you should request one as part of your appeal or file a motion requesting that the EAB schedule one. However, the decision whether or not to hold an argument is within the EAB's discretion. Your motion will be more effective if you explain which issues you would like to discuss at an argument and why you think that an oral presentation would be helpful to the EAB in resolving them. The EAB will generally hold an argument where it is persuaded that an oral presentation will help it to understand better the issues raised in the briefs, and contribute to an improved decisionmaking process.

The EAB may schedule an oral argument on its own initiative. If so, the order scheduling oral argument will usually specify the particular issues on which the EAB would like to hear argument.

The EAB holds oral arguments in the EPA Administrative Courtroom at the EPA East Building, 1201 Constitution Avenue, N.W., Washington, D.C. The courtroom is equipped with an Integrated Evidence Presentation System that makes it possible to participate in an oral argument by videoconferencing without traveling to Washington. The Clerk of the Board can provide additional information about videoconferencing. (See page 19). See also Courtroom Technology on the EAB website.



Where can I find out more about the EAB?

EAB ON THE WEB

The EAB website, www.epa.gov/eab, is the best source of information about the EAB's procedures and about recent EAB decisions. The website contains:

- ***EAB Dockets.*** EAB Dockets, a new link on the EAB website, consists of Active Dockets, consisting of an index to documents filed in cases pending before the EAB, and the complete text of most documents; Closed Dockets (since January 1, 2006), consisting of an index to documents filed in cases closed after January 1, 2006, and the complete text of most documents; and Closed Dockets, consisting of a list of cases that were closed before January 1, 2006.
- ***Electronic Submissions.*** Electronic Submissions, a new link on the EAB's website, allows participants in new or pending cases before the EAB to submit copies of filed documents electronically.
- ***EAB Practice Manual (June 2004).*** The EAB Practice Manual contains information about the statutes and regulations that govern practice before the EAB, and the procedures followed by the EAB in resolving disputes. An Appendix to the Manual contains sample documents that you can use as guidance in

preparing the documents you submit to the EAB.

- ***EAB Formal Opinions.*** The website contains the complete text of all of the formal opinions the EAB has issued. If you know the name of the opinion you are looking for, you can find it in the alphabetical index. If not, the website contains lists of EAB opinions that are arranged both chronologically and by statute. You can also use the “search” dialog box to search for a particular topic the EAB has addressed in an opinion.
- ***EAB Unpublished Opinions.*** The website contains the text of unpublished final decisions the EAB has issued since November 1996.
- ***Frequently Asked Questions.*** The website contains answers to frequently asked questions about EAB procedures.
- ***Tables of Subsequent History of EAB Opinions.*** The website contains a table of EAB Opinions Reviewed by the Federal Courts that contains information about EAB decisions that have been affirmed or reversed by a federal district court or federal circuit court of appeals. The companion table lists appeals from EAB decisions that are pending in federal court.

EAB BROCHURE

The EAB publishes an annual brochure each spring that contains general information about the EAB and an overview of the formal opinions issued by the EAB during the preceding year. The brochure can be obtained from the Clerk of the Board (see page 19 of this Guide for the telephone number and mailing address of the Clerk.)

Where can I read the decisions the EAB has issued?

The EAB publishes its formal opinions in a series of bound volumes titled Environmental Administrative Decisions (E.A.D.). Copies of the E.A.D. are available at approximately 700 of the “federal depository libraries.” Federal depository libraries are libraries that are located throughout the United States that provide access to a large number of federal publications. Trained librarians are available at these libraries to help members of the public find and use documents. You can find a list of the federal depository libraries on the web at: gpoaccess.gov/libraries.html.



The E.A.D. contains several tables and a subject index that are not available on the website and that are valuable research tools. The tables enable you to find EAB opinions and federal court opinions that address a particular topic. All EAB opinions, including EAB opinions that were issued after the publication deadline for the most recent volume of the E.A.D., can be read on the EAB website. Unpublished decisions of the EAB are also available on the website.

The EAB has adopted an official form of citation for its opinions. A form of citation is a standardized way to reference a legal opinion. A published decision of the EAB should be cited by reference to the E.A.D. volume and page where it appears, and the year the decision was issued. As an example, *In re Solutia, Inc.*, 10 E.A.D. 193 (EAB 2001), refers to an opinion the EAB issued in 2001 that can be found in volume 10 of the E.A.D., beginning on page 193. An unpublished opinion should be cited by reference to the appeal number assigned to the case by the Clerk of the Board, and the complete date of the opinion. An example of a citation to an

order the EAB does not intend for publication is *In re Sumas Energy 2 Generation Facility (Order Denying Review)*, PSD Appeal No. 05-03 (May 26, 2005). Additional information about citing EAB opinions can be found in the EAB Practice Manual.

How can I be an effective participant in an EAB proceeding?

- ✓ Comply strictly with all EAB deadlines for submitting documents.

- ✓ Read all relevant EAB opinions. The EAB's formal and unpublished decisions serve as "precedents" for future EAB decisions. If you will be participating in a case pending before the EAB, or are trying to decide whether to appeal to the EAB, reading these opinions will help you evaluate the persuasiveness of your arguments. If you find opinions that support your case, you should reference them in your brief and explain why the EAB's reasoning in the opinion also applies to your case.

- ✓ Make sure your legal brief addresses the key arguments the other party raises.

- ✓ Consult the pleading templates in the appendix to the EAB Practice Manual for forms that you can use as a model in drafting documents you file with the EAB. The templates include, for example, a form for a Notice of Appeal and a form for a Petition for Review of Permit Decision.

- ✓ In an enforcement case:
 - ➡ Read the regulations at 40 CFR pt. 22, which govern enforcement proceedings before the EAB. Don't rely solely on EPA guidance documents, since they do not have the force of law.

- ➡ State the relief you want. Your arguments will be more effective if you clearly state what you want the EAB to do. Let the Board know whether you want the EAB to reverse a finding of liability as to all the charges in the complaint or only as to some of the charges. If you want the EAB to reduce the penalty you were assessed, state what you would consider an appropriate penalty and why.
- ➡ Direct the EAB to the factual evidence in the record (documents or testimony by witnesses) that supports your argument.
- ➡ Explain why the decision you are appealing is based on a legal error.
Does the decision conflict with previously-issued decisions of the EAB?
Does the decision conflict with a statute or regulations?



In a permit case:

- ➡ Read the regulations at 40 C.F.R., which govern permit proceedings before the EAB. Don't rely solely on EPA guidance documents, which don't have the force of law.
- ➡ Participate actively in the permit proceeding before the permit has been issued. Raise all of your concerns about a permit during the public comment period on the draft permit so that the permit issuer has an opportunity to address them. Issues that can be raised during the public comment period and are not raised are waived and cannot be appealed later. Be specific in your comments or concerns.
- ➡ Identify the specific permit conditions that you are challenging and

the specific comment or comments on the draft permit that you or some other commenter submitted that addressed the issue you are now raising on appeal.

- Explain clearly why the Region's permit decision is based on a clear factual or legal error.
- Explain why the Region's response to public comments did not provide an adequate answer to the concerns raised by the public comments.
- As appropriate, propose alternative permit conditions to the conditions that you oppose.



COMMON PITFALLS TO AVOID

- ⊗ **Missing the filing deadline for your notice of appeal or petition to review a permit decision**
- ⊗ **Not pointing out relevant EAB decisions that support your position**
- ⊗ **Trying to avoid reference to relevant EAB decisions that don't support your position**
- ⊗ **In a permit proceeding**
 - ☛ **not participating actively in the comment period on the draft permit**
 - ☛ **not explaining why the Region's response to comments did not adequately address your concerns**

Conclusion

The EAB hopes that you have found this Guide to be a useful introduction to the administrative appeals process of the U.S. Environmental Protection Agency. If there are additional topics that you believe should be addressed in a Guide of this kind, please direct your ideas to the Clerk of the Board, using the contact information on page 19. Your suggestions are welcomed.