

Environmental Protection Agency

§ 124.19

(b) For EPA-issued permits, any documents cited in the response to comments shall be included in the administrative record for the final permit decision as defined in §124.18. If new points are raised or new material supplied during the public comment period, EPA may document its response to those matters by adding new materials to the administrative record.

(c) (*Applicable to State programs, see §§ 123.25 (NPDES), 145.11 (UIC), 233.26 (404), and 271.14 (RCRA).*) The response to comments shall be available to the public.

§ 124.18 Administrative record for final permit when EPA is the permitting authority.

(a) The Regional Administrator shall base final permit decisions under §124.15 on the administrative record defined in this section.

(b) The administrative record for any final permit shall consist of the administrative record for the draft permit and:

(1) All comments received during the public comment period provided under §124.10 (including any extension or reopening under §124.14);

(2) The tape or transcript of any hearing(s) held under §124.12;

(3) Any written materials submitted at such a hearing;

(4) The response to comments required by §124.17 and any new material placed in the record under that section;

(5) For NPDES new source permits only, final environmental impact statement and any supplement to the final EIS;

(6) Other documents contained in the supporting file for the permit; and

(7) The final permit.

(c) The additional documents required under paragraph (b) of this section should be added to the record as soon as possible after their receipt or publication by the Agency. The record shall be complete on the date the final permit is issued.

(d) This section applies to all final RCRA, UIC, PSD, and NPDES permits when the draft permit was subject to the administrative record requirements of §124.9 and to all NPDES permits when the draft permit was in-

cluded in a public notice after October 12, 1979.

(e) Material readily available at the issuing Regional Office, or published materials which are generally available and which are included in the administrative record under the standards of this section or of §124.17 ("Response to comments"), need not be physically included in the same file as the rest of the record as long as it is specifically referred to in the statement of basis or fact sheet or in the response to comments.

§ 124.19 Appeal of RCRA, UIC, NPDES and PSD Permits.

(a) *Petitioning for review of a permit decision.* (1) *Initiating an appeal.* Appeal from a RCRA, UIC, NPDES, or PSD final permit decision issued under §124.15 of this part, or a decision to deny a permit for the active life of a RCRA hazardous waste management facility or unit under §270.29 of this chapter, is commenced by filing a petition for review with the Clerk of the Environmental Appeals Board within the time prescribed in paragraph (a)(3) of this section.

(2) *Who may file?* Any person who filed comments on the draft permit or participated in a public hearing on the draft permit may file a petition for review as provided in this section. Additionally, any person who failed to file comments or failed to participate in the public hearing on the draft permit may petition for administrative review of any permit conditions set forth in the final permit decision, but only to the extent that those final permit conditions reflect changes from the proposed draft permit.

(3) *Filing deadline.* A petition for review must be filed with the Clerk of the Environmental Appeals Board within 30 days after the Regional Administrator serves notice of the issuance of a RCRA, UIC, NPDES, or PSD final permit decision under §124.15 or a decision to deny a permit for the active life of a RCRA hazardous waste management facility or unit under §270.29 of this chapter. A petition is filed when it is received by the Clerk of the Environmental Appeals Board at

the address specified for the appropriate method of delivery as provided in paragraph (i)(2) of this section.

(4) *Petition contents.* (i) In addition to meeting the requirements in paragraph (d) of this section, a petition for review must identify the contested permit condition or other specific challenge to the permit decision and clearly set forth, with legal and factual support, petitioner's contentions for why the permit decision should be reviewed. The petition must demonstrate that each challenge to the permit decision is based on:

(A) A finding of fact or conclusion of law that is clearly erroneous; or

(B) An exercise of discretion or an important policy consideration that the Environmental Appeals Board should, in its discretion, review.

(ii) Petitioners must demonstrate, by providing specific citation to the administrative record, including the document name and page number, that each issue being raised in the petition was raised during the public comment period (including any public hearing) to the extent required by §124.13. For each issue raised that was not raised previously, the petition must explain why such issues were not required to be raised during the public comment period as provided in §124.13. Additionally, if the petition raises an issue that the Regional Administrator addressed in the response to comments document issued pursuant to §124.17, then petitioner must provide a citation to the relevant comment and response and explain why the Regional Administrator's response to the comment was clearly erroneous or otherwise warrants review.

(b) *Response(s) to a petition for review.*

(1) In a PSD or other new source permit appeal, the Regional Administrator must file a response to the petition for review, a certified index of the administrative record, and the relevant portions of the administrative record within 21 days after the service of the petition. The response brief must respond to arguments raised by the appellant, together with specific citation or other appropriate reference to the record (*e.g.*, by including the document name and page number).

(2) In all other permit appeals under this section, the Regional Administrator must file a response to the petition, a certified index of the administrative record, and the relevant portions of the administrative record within 30 days after the service of a petition.

(3) A permit applicant who did not file a petition but who wishes to participate in the appeal process must file a notice of appearance and a response to the petition. Such documents must be filed by the deadlines provided in paragraph (b)(1) or (2) of this section, as appropriate.

(4) The State or Tribal authority where the permitted facility or site is or is proposed to be located (if that authority is not the permit issuer) must also file a notice of appearance and a response if it wishes to participate in the appeal. Such response must be filed by the deadlines provided in paragraph (b)(1) or (2) of this section, as appropriate.

(c) *Replies.* (1) In PSD and other new source permit appeals, the Environmental Appeals Board will apply a presumption against the filing of a reply brief. By motion, petitioner may seek leave of the Environmental Appeals Board to file a reply to the response, which the Environmental Appeals Board, in its discretion, may grant. The motion must be filed simultaneously with the proposed reply within 10 days after service of the response. In its motion, petitioner must specify those arguments in the response to which petitioner seeks to reply and the reasons petitioner believes it is necessary to file a reply to those arguments. Petitioner may not raise new issues or arguments in the motion or in the reply.

(2) In all other permit appeals under this section, petitioner may file a reply within 15 days after service of the response. Petitioner may not raise new issues or arguments in the reply.

(d) *Content and form of briefs.* (1) *Content requirements.* All briefs filed under this section must contain, under appropriate headings:

(i) A table of contents, with page references;

(ii) A table of authorities with references to the pages of the brief where they are cited;

(iii) A table of attachments, if required under paragraph (d)(2) of this section; and

(iv) A statement of compliance with the word limitation.

(2) *Attachments.* Parts of the record to which the parties wish to direct the Environmental Appeals Board's attention may be appended to the brief submitted. If the brief includes attachments, a table must be included that provides the title of each appended document and assigns a label identifying where it may be found (e.g., Excerpts from the Response to Comments Document * * * Attachment 1).

(3) *Length.* Unless otherwise ordered by the Environmental Appeals Board, petitions and response briefs may not exceed 14,000 words, and all other briefs may not exceed 7,000 words. Filers may rely on the word-processing system used to determine the word count. In lieu of a word limitation, filers may comply with a 30-page limit for petitions and response briefs, or a 15-page limit for replies. Headings, footnotes, and quotations count toward the word limitation. The table of contents, table of authorities, table of attachments (if any), statement requesting oral argument (if any), statement of compliance with the word limitation, and any attachments do not count toward the word limitation. The Environmental Appeals Board may exclude any petition, response, or other brief that does not meet word limitations. Where a party can demonstrate a compelling and documented need to exceed such limitations, such party must seek advance leave of the Environmental Appeals Board to file a longer brief. Such requests are discouraged and will be granted only in unusual circumstances.

(e) *Participation by amicus curiae.* Any interested person may file an amicus brief in any appeal pending before the Environmental Appeals Board under this section. The deadline for filing such brief is 15 days after the filing of the response brief, except that amicus briefs in PSD or other new source permit appeals must be filed within 21 days after the filing of the petition. Amicus briefs must comply with all

procedural requirements of this section.

(f) *Motions.* (1) *In general.* A request for an order or other relief must be made by written motion unless these rules prescribe another form.

(2) *Contents of a motion.* A motion must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support the motion. In advance of filing a motion, parties must attempt to ascertain whether the other party(ies) concur(s) or object(s) to the motion and must indicate in the motion the attempt made and the response obtained.

(3) *Response to motion.* Any party may file a response to a motion. Responses must state with particularity the grounds for opposition and the legal argument necessary to support the motion. The response must be filed within 15 days after service of the motion unless the Environmental Appeals Board shortens or extends the time for response.

(4) *Reply.* Any reply to a response filed under paragraph (f)(3) of this section must be filed within 10 days after service of the response. A reply must not introduce any new issues or arguments and may respond only to matters presented in the response.

(5) *Length.* Unless otherwise ordered by the Environmental Appeals Board, motions and any responses or replies may not exceed 7000 words. Filers may rely on the word-processing system used to determine the word count. In lieu of a word limitation, filers may comply with a 15-page limit. Headings, footnotes, and quotations count toward the word or page-length limitation. The Environmental Appeals Board may exclude any motion that does not meet word limitations. Where a party can demonstrate a compelling and documented need to exceed such limitations, such party must seek advance leave of the Environmental Appeals Board. Such requests are discouraged and will be granted only in unusual circumstances.

(6) *Disposition of a motion for a procedural order.* The Environmental Appeals Board may act on a motion for a procedural order at any time without awaiting a response.

(g) *Timing of motions for extension of time.* Parties must file motions for extensions of time sufficiently in advance of the due date to allow other parties to have a reasonable opportunity to respond to the request for more time and to provide the Environmental Appeals Board with a reasonable opportunity to issue an order.

(h) *Oral argument.* The Environmental Appeals Board may hold oral argument on its own initiative or at its discretion in response to a request by one or more of the parties. To request oral argument, a party must include in its substantive brief a statement explaining why oral argument should be permitted. The Environmental Appeals Board will apply a presumption against oral argument in PSD or other new source permit appeals. The Environmental Appeals Board may, by order, establish additional procedures governing any oral argument before the Environmental Appeals Board.

(i) *Filing and service requirements.* Documents filed under this section, including the petition for review, must be filed with the Clerk of the Environmental Appeals Board. A document is filed when it is received by the Clerk of the Environmental Appeals Board at the address specified for the appropriate method of delivery as provided in paragraph (i)(2) of this section. Service of a document between parties to an appeal or by the Environmental Appeals Board on a party is complete upon mailing for U.S. mail or EPA internal mail, when placed in the custody of a reliable commercial delivery service, or upon transmission for facsimile or email.

(1) *Caption and other filing requirements.* Every document filed with the Environmental Appeals Board must specifically identify in the caption the permit applicant, the permitted facility, and the permit number. All documents that are filed must be signed by the person filing the documents or the representative of the person filing the documents. Each filing must also indicate the signer's name, address, and telephone number, as well as an email address, and facsimile number, if any.

(2) *Method of filing.* Unless otherwise permitted under these rules, documents must be filed either by using the

Environmental Appeals Board's electronic filing system, by U.S. mail, or by hand delivery or courier (including delivery by U.S. Express Mail or by a commercial delivery service). In addition, a motion or a response to a motion may be submitted by facsimile if the submission contains no attachments. Upon filing a motion or response to a motion by facsimile, the sender must, within one business day, submit the original copy to the Clerk of the Environmental Appeals Board either electronically, by mail, or by hand delivery or courier. The Environmental Appeals Board may by order require filing by facsimile or the Board's electronic filing system, subject to any appropriate conditions and limitations.

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

(ii) *Filing by U.S. Mail.* Documents that are sent by U.S. Postal Service (except by U.S. Express Mail) must be sent to the official mailing address of the Clerk of the Environmental Appeals Board at: U.S. Environmental Protection Agency, Environmental Appeals Board, 1200 Pennsylvania Avenue NW., Mail Code 1103M, Washington, DC 20460-0001. The original and two copies of each document must be filed. The person filing the documents must include a cover letter to the Clerk of the Environmental Appeals Board clearly identifying the documents that are being submitted, the name of the party on whose behalf the documents are being submitted, as well as the name of the person filing the documents, his or her address, telephone number and, if available, fax number and email address.

(iii) *Filing by hand delivery or courier.* Documents delivered by hand or courier (including deliveries by U.S. Express Mail or by a commercial delivery

service) must be delivered to the Clerk of the Environmental Appeals Board at: U.S. Environmental Protection Agency, Environmental Appeals Board, WJC East Building, 1201 Constitution Avenue NW, Room 3332, Washington, DC 20004.

(3) *Service*—(i) *Service information*. The first document filed by any person shall contain the name, mailing address, telephone number, and email address of an individual authorized to receive service relating to the proceeding. Parties shall promptly file any changes in this information with the Clerk of the Environmental Appeals Board, and serve copies on all parties to the proceeding. If a party fails to furnish such information and any changes thereto, service to the party's last known address shall satisfy the requirements of paragraph (i)(3) of this section.

(ii) *Service requirements for parties*. Petitioner must serve the petition for review on the Regional Administrator and the permit applicant (if the applicant is not the petitioner). Once an appeal is docketed, every document filed with the Environmental Appeals Board must be served on all other parties. Service must be by first class U.S. mail, by any reliable commercial delivery service, or, if agreed to by the parties, by facsimile or other electronic means, including but not necessarily limited to email. A party who consents to service by facsimile or other electronic means must file an acknowledgement of its consent (identifying the type of electronic means agreed to and the electronic address to be used) with the Clerk of the Environmental Appeals Board. The Environmental Appeals Board may by order authorize or require service by facsimile, email, or other electronic means, subject to any appropriate conditions and limitations.

(iii) *Service of rulings, orders, and decisions*. The Clerk of the Environmental Appeals Board must serve copies of rulings, orders, and decisions on all parties. Service may be made by U.S. mail (including by certified mail or return receipt requested, Overnight Express and Priority Mail), EPA's internal mail, any reliable commercial delivery service, or electronic means (including

but not necessarily limited to facsimile and email).

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

(j) *Withdrawal of permit or portions of permit by Regional Administrator*. The Regional Administrator, at any time prior to 30 days after the Regional Administrator files its response to the petition for review under paragraph (b) of this section, may, upon notification to the Environmental Appeals Board and any interested parties, withdraw the permit and prepare a new draft permit under §124.6 addressing the portions so withdrawn. The new draft permit must proceed through the same process of public comment and opportunity for a public hearing as would apply to any other draft permit subject to this part. Any portions of the permit that are not withdrawn and that are not stayed under §124.16(a) continue to apply. If the Environmental Appeals Board has held oral argument, the Regional Administrator may not unilaterally withdraw the permit, but instead must request that the Environmental Appeals Board grant a voluntary remand of the permit or any portion thereof.

(k) *Petitioner request for dismissal of petition*. Petitioner, by motion, may request to have the Environmental Appeals Board dismiss its appeal. The motion must briefly state the reason for its request.

(1) *Final disposition and judicial review*. (1) A petition to the Environmental Appeals Board under paragraph (a) of this section is, under 5 U.S.C. 704, a prerequisite to seeking judicial review of the final agency action.

(2) For purposes of judicial review under the appropriate Act, final agency action on a permit occurs when agency review procedures under this section are exhausted and the Regional Administrator subsequently issues a final permit decision under this paragraph (1). A final permit decision must be issued by the Regional Administrator:

(i) When the Environmental Appeals Board issues notice to the parties that the petition for review has been denied;

(ii) When the Environmental Appeals Board issues a decision on the merits of the appeal and the decision does not include a remand of the proceedings; or

(iii) Upon the completion of remand proceedings if the proceedings are remanded, unless the Environmental Appeals Board's remand order specifically provides that appeal of the remand decision will be required to exhaust administrative remedies.

(3) The Regional Administrator must promptly publish notice of any final agency action in the FEDERAL REGISTER regarding the following permits:

(i) PSD permits;

(ii) Outer continental shelf permits issued under 40 CFR part 55;

(iii) Federal Title V operating permits issued under 40 CFR part 71;

(iv) Acid Rain permits appealed under 40 CFR part 78;

(v) Tribal Major Non-Attainment NSR permits issued under 40 CFR 49.166 through 49.173; and

(vi) Tribal Minor NSR permits issued under 40 CFR 49.151 through 49.161.

(m) *Motions for reconsideration or clarification.* Motions to reconsider or clarify any final disposition of the Environmental Appeals Board must be filed within 10 days after service of that order. Motions for reconsideration must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Motions for clarification must set forth with specificity the portion of the decision for which clarification is being sought and the reason clarification is necessary. Motions for reconsideration or clarification under this provision must be directed to, and decided by, the Environmental Appeals Board. Motions for reconsideration or clarification directed to the Administrator, rather than the Environmental Appeals Board, will not be considered, unless such motion relates to a matter that the Environmental Appeals Board has referred to the Administrator pursuant to §124.2 and for which the Administrator has issued the final order. A motion for reconsideration or clarification does not stay the effective date of the final order unless the Environmental Appeals Board specifically so orders.

(n) *Board authority.* In exercising its duties and responsibilities under this part, the Environmental Appeals Board may do all acts and take all measures necessary for the efficient, fair, and impartial adjudication of issues arising in an appeal under this part including, but not limited to, imposing procedural sanctions against a party who, without adequate justification, fails or refuses to comply with this part or an order of the Environmental Appeals Board. Such sanctions may include drawing adverse inferences against a party, striking a party's pleadings or other submissions from the record, and denying any or all relief sought by the party in the proceeding. Additionally, for good cause, the Board may relax or suspend the filing requirements prescribed by these rules or Board order.

(o) *General NPDES permits.* (1) Persons affected by an NPDES general permit may not file a petition under this section or otherwise challenge the conditions of a general permit in further Agency proceedings. Instead, they may do either of the following:

(i) Challenge the general permit by filing an action in court; or

(ii) Apply for an individual NPDES permit under §122.21 as authorized in §122.28 of this chapter and may then petition the Environmental Appeals Board to review the individual permit as provided by this section.

(2) As provided in §122.28(b)(3) of this chapter, any interested person may also petition the Director to require an individual NPDES permit for any discharger eligible for authorization to discharge under an NPDES general permit.

(p) *Authority to initiate review.* The Environmental Appeals Board also may decide on its own initiative to review any condition of any RCRA, UIC, NPDES, or PSD permit decision issued under this part for which review is available under paragraph (a) of this section. The Environmental Appeals Board must act under this paragraph (p) within 30 days of the service date of notice of the Regional Administrator's action.

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