

THE UNITED STATES' ENVIRONMENTAL ADJUDICATION TRIBUNAL

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The Environmental Appeals Board (Board or EAB) serves as the United States Environmental Protection Agency's (EPA) final adjudicator of administrative cases arising under the laws that EPA administers. The EAB is the only U.S. federal adjudicatory tribunal devoted exclusively to appellate review of pollution control cases, including appellate review of both administrative penalties imposed by an administrative law judge and permits issued by EPA's regional program offices. The EAB has also often been invited to share its expertise with developing nations and nations in transition seeking to strengthen environmental protection through judicial training or creation of a specialized environmental tribunal or court.

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This international assistance has grown out of the EAB's expertise in domestic environmental penalty and permitting cases, with priorities and initiatives established by other U.S. government organizations principally responsible for international relations and assistance.

Why the EAB was Created

EPA Administrator William K. Reilly created the Board in 1992 for pragmatic reasons and to give greater credence to, and inspire confidence in, the final adjudicatory decisions of the EPA.¹ Before the Board's creation, Congress amended the Clean Water Act and the Clean Air Act to expand the agency's authority to seek civil penalties in the administrative forum. In addition, the agency was receiving a greater number of challenges to permit decisions. Together, these changes presaged an expanded docket of administrative appeals, which in turn put greater burdens on the EPA administrator. At that time, Administrator Reilly was deciding to permit appeals with the aid of recommendations from the chief judicial officer. However, the expanded civil penalty authority required more resources to be devoted to penalty appeals, which were handled solely by the chief judicial officer. Creation of the Board, in part, was designed to alleviate these adjudicatory burdens.

Further, Administrator Reilly, in delegating his authority to the Board to decide appeals, also sought to strengthen EPA's administrative penalty and permitting programs. To achieve this end, the Board was formed through the appointment of three judges drawn from the highest ranks of EPA career attorneys serving in the senior executive service.

As the rulemaking establishing the Board explained, the creation of the Board as a permanent body comprised of senior career attorneys was designed to "allow for a broader range of input and perspective in administrative decisionmaking" and "lend greater authority to the agency's decisions."² To ensure neutrality, and to strengthen confidence in the independence of appellate proceedings, the administrator formally separated his enforcement authority from

1. William K. Reilly served as Administrator of the EPA from 1989 to 2003.

2. Changes to Regulations to Reflect the Role of the New Environmental Appeals Board in Agency Adjudications, 57 Fed. Reg. 5320, 5321 (February 13, 1992).

his adjudicatory authority by delegating the latter to the Board.³ The Board was, therefore, designed as a permanent, independent body exercising the full authority of the administrator in deciding administrative appeals under the environmental statutes.

EAB's Jurisdiction and Rules Governing Procedure

The Board's nationwide jurisdiction includes appeals arising under all of the major pollution control laws, such as the Clean Air Act,⁴ Clean Water Act,⁵ Safe Drinking Water Act,⁶ Solid Waste Disposal Act (also referred to as the Resource Conservation and Recovery Act or RCRA),⁷ Toxic Substances Control Act,⁸ the Federal Insecticide, Fungicide, and Rodenticide Act,⁹ and the Comprehensive Environmental Response, Compensation, and Liability Act (also referred to as Superfund).¹⁰ While the Board hears a wide array of appeals arising under these statutes, the Board's docket is principally comprised of two types of cases: 1) appeals from initial decisions¹¹ in administrative civil penalty enforcement cases; and 2) petitions to review permit decisions made by EPA program offices or by a delegated state authority setting emission limitations for industrial sources regulated by the federal environmental statutes. In addition, the Board hears petitions from private parties to recover costs they incurred in cleaning up sites under the Superfund law¹² as well as some other categories of cases.

The Board is an administrative tribunal within the executive branch of the U.S. government and, therefore, is governed by the Administrative Procedure Act (APA),¹³ and the procedural requirements specified in the specific statutes EPA administers. The APA

3. *Id.* at 5322.

4. 42 U.S.C. §§ 7401-7671q (2006).

5. 33 U.S.C. §§ 1251-1387 (2006).

6. 42 U.S.C. §§ 300f - 300j26 (2006).

7. 42 U.S.C. §§ 6901-6992k (2006).

8. 15 U.S.C. §§ 2601-2962 (2006).

9. 7 U.S.C. §§ 136-136y (2006).

10. 42 U.S.C. §§ 9601-9675 (2006).

11. An initial decision is issued by a presiding officer in an enforcement proceeding, the outcome of which determines liability and may assess an appropriate administrative civil penalty. The decision becomes final only after no appeal to the Board is filed, or after the Board has declined to review the decision on its own initiative, or *sua sponte*.

12. 42 U.S.C. § 9606(b)(2).

13. 5 U.S.C. §§ 500-596 (2006).

divides adjudication into two distinct types: formal and informal adjudication. Formal adjudication involves a trial-like hearing before a decision-maker not previously involved in the matter, with witness testimony, opportunity for cross-examination, a written record (including a transcript of the hearing), and a final written decision based only on the record established through the formal process. The APA requires federal agencies to use formal adjudication when Congress specifies in the statute (i.e., Clean Air Act or Clean Water Act) that the particular decision is to be made “on the record after an opportunity for an agency hearing.”¹⁴ The APA does not spell out specific procedural rules applicable to informal adjudication.

EPA has elaborated on the APA’s requirements by adopting two sets of procedural rules that apply to adjudications for which the EAB’s appellate review serves as the agency’s final decision. EPA has adopted formal trial-like procedures at 40 C.F.R. Part 22, which govern the assessment of administrative civil penalties for violation of environmental protection statutes.

The EPA Part 22 regulations establish consolidated rules for adjudicatory hearings in administrative enforcement actions.¹⁵ Under these administrative practice regulations, a case is commenced when EPA’s enforcement office files a complaint, which must state with specificity the factual basis of the complaint, the environmental law or regulation violated, any request for corrective action, and any proposed civil penalty.¹⁶ Any response to the complaint must be filed within thirty days, must admit or deny the allegations in the complaint, and state any defense to the action.¹⁷ The presiding officer then issues an order directing the parties to file a “pre-hearing exchange” of information. Specifically, the order directs both parties to file a statement that includes the names of any witnesses that the party intends to call, a brief narrative of their expected testimony, and any documents that the party expects to enter into evidence at the evidentiary hearing. In addition, the EPA enforcement office must file a statement explaining how any proposed penalty was calculated, and the private individual, or company, responding to the complaint has an opportunity to explain why that calculation is in error, or

14. 5 U.S.C. § 554(a).

15. 40 C.F.R. §§ 22.01-22.45 (2008).

16. *Id.* §§ 22.13-.14.

17. *Id.* § 22.15.

otherwise should be reduced or eliminated.¹⁸ In addition, persons other than the complainant and respondent may move to intervene in the proceeding. To do so, the interested party must show that a final order in the case may impair his or her interest and that this interest is not adequately represented by the existing parties to the action.¹⁹ Prior to the hearing in a case, the presiding officer may direct the parties to appear at a conference to discuss the potential for settling the case.²⁰ If the case is not settled, the case proceeds to hearing where the presiding officer hears testimony under oath, and admits relevant documents into evidence. This testimony and documentary evidence become the record of the proceeding. This record serves as the basis of the presiding officer's initial decision.²¹

Once a presiding officer has issued an initial decision under Part 22, any party may appeal that decision to the Board within thirty days following service of the decision. The appeal must describe the alleged factual and legal errors in the initial decision, and a written response to the appeal must be filed within thirty days of service of the appeal.²² Parties have a right to file a cross appeal within twenty days.²³ In the event neither party appeals, the Board may review the initial decision on its own initiative or *sua sponte*.²⁴

In reviewing a presiding officer's decision under the Part 22 rules, the Board generally analyzes the judge's factual findings, conclusions of law and any allegation of procedural error. This review is conducted *de novo*. Allegations of legal error are scrutinized to ensure that the legal conclusions are consistent with the underlying environmental statute, its implementing regulations, and applicable EPA guidance. The presiding officer's factual findings are also reviewed by the Board *de novo*; however, the Board has long held that it will give deference to the presiding officer's factual findings based on witness testimony, since that judge heard the witnesses' testimony at trial, and therefore is in the best position to make determinations of witness credibility.²⁵ In reviewing an initial decision, the Board may

18. *Id.* § 22.19.

19. *Id.* § 22.11.

20. *Id.*

21. *Id.* §§ 22.21-.26.

22. *Id.* § 22.30.

23. *Id.* § 22.30(a)(2).

24. *Id.* § 22.30(b).

25. *In re* Chippewa Hazardous Waste Remediation & Energy, Inc., 12 E.A.D. 346, 356 (EAB 2005); *In re* Friedman, 11 E.A.D. 302, 314 n.15 (EAB 2004) (quoting

adopt, modify or set aside the factual findings or legal conclusions of the presiding officer, and may assess a penalty that is higher, or lower, than that assessed in the initial decision. Further, the Board may adopt, modify, or set aside any corrective action order included in the initial decision.²⁶

EPA has adopted less formal procedures at 40 C.F.R. Part 124 that govern the agency's decisions to issue, modify, or revoke permits under the environmental protection statutes administered by the EPA. Under these rules, the Board reviews permit decisions made by the EPA²⁷ that arise under RCRA, the Underground Injection Control Program of the Safe Drinking Water Act, the Clean Air Act's Prevention of Significant Deterioration (PSD) Program (which regulates permits for emissions from new sources or significant modifications to existing sources), the Clean Air Act's outer continental shelf program (governing both major and minor sources of air pollution from certain exploratory activities located on the outer continental shelf of the United States), and the Clean Water Act's point source permitting program in states where such permitting is administered by EPA.²⁸

Cases under Part 124 requesting Board review of EPA or delegated state permit decisions may be brought within thirty days following notice of the issuance of a permit. Review may be requested by any person who filed comments on the draft permit or participated in the public hearing on the draft permit, including the regulated entity seeking the permit.²⁹ The term "person" is defined broadly and includes individuals, associations, partnerships, corporations, municipalities, and state, federal or tribal agencies.³⁰ In filing a petition to review a permit condition, the petitioning party must show that the permit condition at issue is based on a finding of fact or conclusion of law that is clearly erroneous, or that the condition is based on "an exercise of discretion or an important policy consideration" that the Board in its discretion should review.³¹

In re Ocean State Asbestos Removal, Inc., 7 E.A.D. 522, 530 (EAB 1998)).

26. Appeal from or review of initial decision, 40 C.F.R. § 22.30(f).

27. In certain instances the Board reviews permitting decisions made by states or other governmental entities that have received delegated authority to issue federal permits.

28. Purpose and Scope, 40 C.F.R. § 124.1 (2008).

29. *Id.* § 124.19.

30. *Id.* § 124.2.

31. *Id.* § 124.19(a)(1),(2).

Further, the Board may decide on its own initiative to review a permit decision.³²

EAB's Organization and Operations

The Board is currently comprised of four judges,³³ nine attorneys who serve as counsel to the Board, and three administrative professionals. Appeals received by the clerk of the Board are randomly assigned to a panel of three judges and one attorney. While case assignment is random, a judge will not be assigned to a matter in which he or she participated prior to joining the Board. Further, a judge will not be assigned to a case that involves a particular matter in which the judge (or his or her spouse) has a financial interest "if the particular matter will have a direct and predictable effect on that interest."³⁴ The procedural rules establishing the Board contain additional limitations.³⁵ In addition, other requirements also ensure the integrity and fairness of the Board's review process. By regulation, presiding officers and Board judges are prohibited from engaging in *ex parte* communication about the merits of the proceeding with any interested person outside the agency, any agency personnel serving in a prosecutorial or investigatory role, or any representative of such a person.³⁶ The applicable rule further provides that any such *ex parte* communication shall be considered argument on the merits and distributed to the parties with an opportunity for response.³⁷

Once a Board panel has been assigned, a "lead judge" is designated. At the outset of an appeal, the lead judge works with the assigned attorney to determine whether the case is properly within the scope of the Board's jurisdiction and has been timely filed, and if not, whether the case should be dismissed on jurisdictional grounds without an adjudication of the merits. For the vast majority of appeals, the case proceeds to briefing.

Following review of the petitioner's brief and the response brief, the lead judge and the attorney assigned to the case determine whether the Board's review of the case would be aided by oral

32. *Id.* § 124.19(b).

33. *See* 63 Fed. Reg. 67779 (Dec. 9, 1998).

34. 18 U.S.C. § 208(a) (2006); Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635.402.

35. Staff Offices, 40 C.F.R. § 1.25(e).

36. *Ex parte* discussion of proceeding, 40 C.F.R. § 22.8.

37. *Id.*

argument. A recommendation is then made to the panel as a whole, and if the panel determines that oral argument is appropriate, an argument is scheduled to be held in the Board's courtroom in Washington, D.C. In a typical oral argument, all three judges assigned to the panel participate. The process is structured so that each party will have thirty minutes to present their argument, starting with counsel for the petitioning party, who generally argues his or her case for twenty-five minutes; followed by thirty minutes of argument from counsel for the responding party; and a short, five-minute rebuttal by the petitioning party. The panel members ask questions of counsel throughout the argument. Counsel for the petitioning and the responding parties may refer to evidence in the record, their briefs, and applicable precedent. In the event a party does not choose to appear in person, the Board offers video conferencing technology by which counsel may argue their case from a remote location. In addition, the Board's video conferencing capability allows clients of parties to witness the oral argument from a remote location. All Board oral arguments are open to the public. Following oral argument, the panel meets to discuss how the argument affected their thinking about the direction of the case.

Regardless of whether oral argument is held, the lead judge in any case is responsible for working with the attorney assigned to the matter to produce a draft opinion that is circulated to the panel members for review and comment. The lead judge and attorney then work with the panel members to produce a final decision. The panel works collaboratively, often circulating several drafts of the opinion, in order to come to a consensus decision. That decision constitutes the final action of the EPA and serves as precedent in future EPA cases. Although consensus is the Board's objective, Board members may choose to write a concurring or dissenting opinion in lieu of joining the majority opinion.

The Board's decisions are published in bound volumes, titled the *Environmental Appeals Decisions* (E.A.D.). In addition, Board decisions are published on the Board's internet website.³⁸ Parties or interested citizens can access Board decisions, as well as briefs and pleadings that have been filed with the Board, in any pending case.³⁹ The

38. EPA.gov, EAB Decisions, http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Board+Decisions?OpenPage (last visited Nov. 6, 2010).

39. Special disclosure rules apply to documents that parties claim are

Board's website represents a model of government transparency since every document that the Board considers in making its decision on a particular case is made available for the public to view and copy via the internet. The Board also allows electronic filing of appeals and appellate briefs, which in some cases eliminates the need for mailing paper copies to the Board.

The Board's decisions are considered to be the final action of EPA. Once the Board has issued its final decision, there is no appeal to the administrator, nor is there any provision for the administrator to undertake review on his own initiative (i.e., *sua sponte*).⁴⁰ The Board may choose to refer a matter to the administrator, but the preamble to the regulations delegating the administrator's authority to the Board makes clear that this will be done "only in exceptional circumstances,"⁴¹ and the Board has not yet encountered a case where use of this authority was appropriate. As detailed more fully below, the Board's decisions may be appealed to a United States federal court, either to district court or to the appropriate court of appeals, depending on the terms of the environmental statute at issue.

Review of EAB Decisions in the Federal Courts

During its nearly twenty years of existence, the Board has developed a substantial body of environmental administrative decisional law that carries precedential weight. Under the Administrative Procedure Act, a federal court will only review the Board's decision to determine whether it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."⁴² Further, "[t]o the extent that the EAB's decision reflects a gloss on its interpretation of the governing EPA regulations, a reviewing court must also afford those policy judgments substantial deference, deferring to them unless they are arbitrary, capricious, or otherwise 'plainly'

"confidential business information." See ENVTL. APPEALS BD., ENVTL. PROT. AGENCY, PRACTICE MANUAL 31-32 (2010), available at [http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/8f612ee7fc725edd852570760071cb8e/48c5111c16c4125a852577920044ffc5/\\$FILE/PracticeManual%202010.pdf](http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/8f612ee7fc725edd852570760071cb8e/48c5111c16c4125a852577920044ffc5/$FILE/PracticeManual%202010.pdf).

40. The one limited exception is in cases involving other federal agencies where the head of such agency can request to confer with the Administrator following an EAB decision. Final Order, 40 C.F.R. § 22.31(e).

41. Changes to Regulations to Reflect the Role of the New Environmental Appeals Board in Agency Adjudications, 57 Fed. Reg. at 5321.

42. 5 U.S.C. § 706(2)(A); *Catalina Yachts, Inc. v. EPA*, 112 F. Supp. 965, 966 (C.D. Cal. 2000).

impermissible.”⁴³

The EAB’s decisions have usually been dispositive of the matters at issue. Although non-EPA litigants generally have a statutory right of appeal from the EAB’s decisions to the federal courts, they infrequently elect to appeal. Moreover, in cases where a federal court has resolved an appeal from an EAB decision, it has generally upheld the EAB. Specifically, approximately ten percent of the Board’s decisions have been appealed to a federal court, and only about two percent of the Board’s decisions have been reversed by a federal court in whole or in part. Thus, for the vast majority of cases, the Board’s decision has served as the final resolution of the case at issue.

The EAB has been adjudicating cases for almost twenty years. In that time, the Board’s track record indicates that a properly constructed administrative appeals tribunal can effectively serve as a body capable of resolving a significant number of complex environmental matters that otherwise would proceed to lengthier and far costlier litigation in federal court.

EAB’s International Assistance

The EAB’s creation in March 1992 preceded what has, in recent years, become a world-wide “amazing growth in environmental courts and tribunals.”⁴⁴ This growth has its roots in the United Nations’ Conference on Environment and Development held in June 1992, just a few months after the EAB was created.

At the United Nations’ Conference, known as the first Earth Summit, the 178 participating countries adopted the Rio Declaration on Environment and Development.⁴⁵ Ten years after the Rio

43. *Howmet Corp. v. EPA*, No. 09-5360, Slip op. (D.C. Cir. Aug. 6, 2010); *Pepperell Assoc. v. EPA*, 246 F.3d 15, 22 (1st Cir. 2001); *see also* *Howmet Corp. v. EPA*, Civ. Action No. 07-1306 (EGS) at 4 (D.D.C. Sept. 23, 2009) (Memorandum Opinion) (referring to “the EAB’s persuasive and comprehensive analysis”).

44. GEORGE PRING & CATHERINE PRING, *GREENING JUSTICE: CREATING AND IMPROVING ENVIRONMENTAL COURTS AND TRIBUNALS (THE ACCESS INITIATIVE 2009)*, available at <http://www.accessinitiative.org/resource/greening-justice> and <http://www.law.du.edu/ect-study> (available free of charge electronically at both websites).

45. Principle 10 of the Rio Declaration affirms the importance of the public’s “opportunity to participate in decision-making processes” and the need for “[e]ffective access to judicial and administrative proceedings, including redress and remedy.” Conference on Environment and Development, June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/5/Rev. 1 (June 13, 1992), (reprinted in 31 I.L.M. 874).

Declaration, at the World Summit on Sustainable Development⁴⁶ in Johannesburg, South Africa in 2002, judges from around the world presented the Johannesburg Principles on the Role of Law and Sustainable Development,⁴⁷ which had just been adopted at the Global Judges Symposium on the Role of Law and Sustainable Development. The judges symposium began by affirming the Rio Declaration and went on to “affirm that an independent judiciary and judicial process is vital for the implementation, development and enforcement of environmental law, and that members of the judiciary, as well as those contributing to the judicial process at the national, regional and global levels, are crucial partners for promoting” good governance.⁴⁸ The Global Judges Symposium and the Johannesburg Principles catalyzed the international effort to enhance judicial capacity to adjudicate environmental cases. By 2010, over 350 environmental courts or tribunals had been created in forty-one countries.⁴⁹

Because of its nearly twenty years of experience in adjudicating environmental cases, the EAB has often been viewed as a repository of knowledge and expertise on the challenges facing environmental courts and has been invited to participate in international seminars and conferences to share the Board’s insights. The EAB’s participation in these events is often paid for and supported by funds provided by the U.S. State Department and U.S. Agency for International Development (USAID).⁵⁰ The EAB’s international work supports the EPA’s international priorities, which specifically include working with other countries “to develop and support the promotion of good governance, improve judicial and legal structures and design the regulatory systems necessary for effective environmental protection around the world.”⁵¹

46. The summit was held in Johannesburg, South Africa on August 26 - September 4, 2002.

47. The Johannesburg Principles on the Role of Law and Sustainable Development adopted at the Global Judges Symposium held in Johannesburg, South Africa, on August 18-20, 2002, reprinted in *JOURNAL OF ENVIRONMENTAL LAW* 15(1) at 107-110 (2003).

48. *Id.*

49. PRING & PRING, *supra* note 44, at xiii.

50. See, e.g., STATE DEPT. & U.S. AID, FY 2007 JOINT PERFORMANCE SUMMARY at 150-51, 158 (2007) (identifying EPA as a partner in advancing its “Integrating Environmental Protection and Trade” initiative under the Economic Prosperity and Security Performance Goal).

51. Press Release, U.S. EPA, “Administrator Jackson Announces EPA’s

In the early years, the EAB largely participated in various international conferences and workshops. For example, in 2003 through 2005, the EAB participated in a number of meetings organized by the United Nations' Environment Programme specifically focused on the judicial role in environmental protection. In 2006, the EAB also partnered with the U.S. Department of Justice and the Judicial Academy of Chile to deliver a judicial workshop to judges in Chile. The EAB also participated in the first and second Asian Judges Forums in 2006 and 2007, organized by the Asian Environmental Compliance and Enforcement Network (AECEN) with funding provided by USAID and Asia Regional Development Mission.

As the number of requests kept increasing, and as the EAB observed repeated interest in particular topics, the EAB undertook to draft an off-the-shelf, exercise-based workshop for judges new to environmental litigation. The EAB completed its first draft of this project in 2008. The EAB sent its materials out for peer review by academics and judges world-wide. After completing the peer review process, the EAB has successfully used all or portions of its materials in partnerships with a number of judicial training schools. In 2008, the EAB partnered with the Philippine Judicial Academy to train approximately thirty newly-appointed environmental bench judges. In 2009, the EAB partnered with the U.S. Department of Justice (DOJ), the Central America Commission on Environment and Development (CCAD), El Salvador's Supreme Court, and El Salvador's Judicial Training Institute to train thirty-seven El Salvadoran judges. Also in 2009, the EAB worked with DOJ, CCAD, and Costa Rica's Judicial Training Institute to deliver an information exchange for thirty-eight Costa Rican judges and agency representatives. In October 2009, the EAB delivered a judicial training in partnership with the ABA Rule of Law Initiative and the Environmental and Resources Law Institute (ERLI) of Zhongnan University of Finance and Political Science in Wuhan City, China. In December 2009, the EAB partnered with Jordan's Ministry of the Environment, the Judicial Institute of Jordan, and Jordan's Ministry of the Environment to work with approximately thirty-five judges, prosecutors, and investigators. In

International Priorities/Agency to work with other countries to curb pollution at home and abroad" (Aug. 17, 2010).

2010, working with the Guatemala Judicial School, the EAB again partnered with the DOJ to deliver training to thirty-five Guatemalan judges, prosecutors, representatives of NGOs, and judicial training instructors.⁵²

The EAB course is premised on the shared characteristics of global environmental problems. These common characteristics include: 1) potential impacts on large numbers of people; 2) a potentially significant time and space separation between cause and effect; 3) small or seemingly insignificant actions having catastrophic impacts; 4) the significant cumulative impact of many smaller acts; 5) the harm to a resource that is inherently owned collectively (e.g., air, rivers, lakes); and 6) pollutants transported by multiple media (e.g., pollutants released to the air may have the greatest impact when deposited in surface water, or pollutants deposited on soil may leach into surface or groundwater, etc.). These shared environmental problems have resulted in substantive and procedural law changes in many countries.⁵³

The EAB's materials are designed to provide tools for adjudicating specific issues that commonly arise in environmental cases. The topics included common features of environmental statutes, such as permitting systems, health-based standards, product standards, ambient standards, and environmental impact assessment. The materials also cover party standing, preliminary remedies to stop the harm as soon as possible, techniques for dealing with the complexity of scientific and technical evidence, as well as case management methods for cases involving multiple parties or other complexities. In addition, the course materials address factors to

52. The EAB continues to participate in conferences, workshops and information exchanges. For example, in 2008, the EAB participated in the first meeting of the heads of judicial educational institutions in Central America and the Caribbean. The EAB also has participated in a number of round-table discussions and seminars in China organized by Vermont Law School and various Chinese institutions, including the China University of Political Science and Law in Beijing and Sun-Yat Sen Law School in Guangzhou. The EAB also led sessions and presented papers at the July 2010 Asian Judges Symposium on Environmental Decision Making, the Rule of Law, and Environmental Justice, which was organized by the Asian Development Bank, and participated in a workshop planned by the USAID-supported Asian Environmental Compliance and Enforcement Network to improve court policies and practices on the environment in Thailand in September 2010.

53. See RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* (U. Chi. Press 2004); Robert Percival, "The Globalization of Environmental Law," 26 *PACE ENVTL. L. REV.* 451 (2009).

consider in drafting remedial orders, including continuing jurisdiction to oversee cleanup orders, and orders for natural resource damage assessments. The materials also include factors a court may wish to consider in arriving at an appropriate penalty assessment, including the important need to recapture economic advantage obtained through non-compliance with environmental laws. While the course is not drafted to be specific to any particular domestic law — as the EAB and its DOJ colleagues have delivered the workshop in specific countries — local legal experts have been engaged to identify specific local laws applicable to each topic.

In preparing its materials, the EAB joined EPA's general move away from lecture-only formats to interactive exercises as a means to enliven discussion and reinforce the concepts.⁵⁴ Because adults learn best when they are able to relate new information to their already existing body of knowledge, the EAB workshop is designed to be highly interactive, allowing many opportunities for discussion and application of concepts through small group exercises. These activities, although time-consuming, are critical opportunities for the seminar participants to struggle with the ideas and clarify with each other how the ideas might apply under the local law and context and, in this way, the participants become teachers to each other as they lead each other to a shared understanding. Because environmental problems are constantly evolving as scientific, technological, and economic activities change, judges must learn to be problem-solvers in applying law in new and ever-changing contexts in order to achieve just adjudication in specific cases. The exercises are designed to encourage the participant judges to explore a problem-solving approach to their decisions. Judges do not make law, but instead must apply existing law consistently in the cases that come before the courts in a way that takes into account the facts and circumstances of the particular case. In the environmental context, the court's decision, to be fair, just, and proportionate, must take into account the

54. See, e.g., ENVTL. PROT. AGENCY, PRINCIPLES OF ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT TRAINING (2002); ENVTL PROT. AGENCY, PRINCIPLES OF EFFECTIVE ENVIRONMENTAL LAWS AND ENFORCEMENT (2006). The EAB also drew on the materials it helped create for UNEP. See UNEP.org, Judicial Training Modules on Environmental Law, http://www.unep.org/DEC/Information_Resources/globaljudgesprog.asp (last visited Nov. 6, 2010) (an excellent training course); DINAH SHELTON & ALEXANDRE KISS, UNEP, JUDICIAL HANDBOOK ON ENVIRONMENTAL LAW (2005), available at http://www.unep.org/law/PDF/JUDICIAL_HBOOK_ENV_LAW.pdf.

underlying environmental problem, and resolve the disputes between the parties in a manner that accounts for the societal goals of pollution prevention and sustainable development.

Conclusion

Since the 1970s, the United States has been a global leader in environmental protection. The EPA's creation of the EAB was yet another innovation in U.S. environmental legal protection and governance. The judicial training materials the EAB has created are now field-tested and a proven vehicle for improving environmental adjudication. In addition to providing a means for increasing judges' awareness of environmental problems and the law, workshops using these materials have served to identify both gaps in existing legal structures and opportunities for improving procedural and substantive rules. For example, after the EAB partnered with the Philippine Judicial Academy in a judicial training in 2008, the Philippine Supreme Court created a set of procedural rules specifically applicable to environmental cases. Those rules went into effect in the spring of 2010, dramatically altering the national framework for environmental adjudication. The EAB's training slides have now been translated into Spanish, Mandarin, Arabic, and Bhasa Indonesian. While the EAB's international work – in providing environmental law training of judges – supports EPA's international priorities, the EAB nevertheless remains primarily focused on its domestic work, hearing and deciding the U.S. EPA penalty, permitting, and other administrative appeals that has given the EAB the experience sought by other countries struggling with environmental problems.

