

RULES OF COURT FOR ENVIRONMENTAL ADJUDICATION



Environmental Appeals Board
U.S. Environmental Protection Agency
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Outline of Rules of Court Presentation

Part I.

Role of Environmental Courts & Principles that Guide Environmental Adjudication in the U.S.

Part II.

Court Rules

Part III.

Interactive Group Activity

The Role of Environmental Courts in the U.S.

- ▶ Courts bring accountability and certainty to the system
- ▶ Courts help promote the rule of law.
- ▶ Courts help ensure that rules and regulations are enforced
- ▶ Specialized judges provide expertise in complex technical fields
- ▶ Specialized administrative courts can be faster and less expensive than federal courts of general jurisdiction



Four Principles that Guide Adjudication in the U.S.

1. Independence
2. Transparency
3. Full and Fair Hearings
4. Adjudicative Consistency

1. Independence

❖ Judicial independence means freedom from outside influences:

- Freedom from political influences
- Freedom from monetary influences
- Freedom from personal influences



Independence

(Continued...)

❖ Judges must be unbiased and impartial decisionmakers

- The judicial oath of office – 28 U.S.C. § 453
- No prior involvement in case investigation or prosecution
- Can be disqualified based on financial stake in the outcome



2. Transparency

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❖ Transparent decision making

- Clear rules, procedures, obligations, and standards
- Requirement for a written record available to the public
- All hearings are open to the public
- No-one-sided (*ex parte*) communication with the parties, including any EPA employee, on the merits of the case
- Decisions, orders and briefs publically available online (www.epa.gov/eab)

3. Full and Fair Hearings

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- ❖ **Right to be heard:** Parties have the right to present their best case to the decision maker.
- ❖ **At trial:** Parties can present witnesses and documentary evidence and respond to evidence presented by the other side.
 - ❖ Body of evidence forms the basis of the judge's decision.
 - ❖ Must be “reliable, probative and substantial evidence.” (Administrative Procedure Act (APA §556d))
- ❖ **On appeal:** Decisions are based on the administrative record of the appealed decision . Parties have a full opportunity to advocate their position by filing briefs, presenting oral argument if the tribunal determines it would be beneficial, and moving for reconsideration of a final decision

4. Adjudicative Consistency

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- ▶ Appellate decisions constitute final Agency action on a particular matter and serve as precedent for future cases
- ▶ Publication of appellate decisions via the web and published volumes provides access to the appellate decisions on any given topic and promotes predictability on the part of regulated industry and interested citizens
- ▶ Rules of Court to make principles effective

Court Rules

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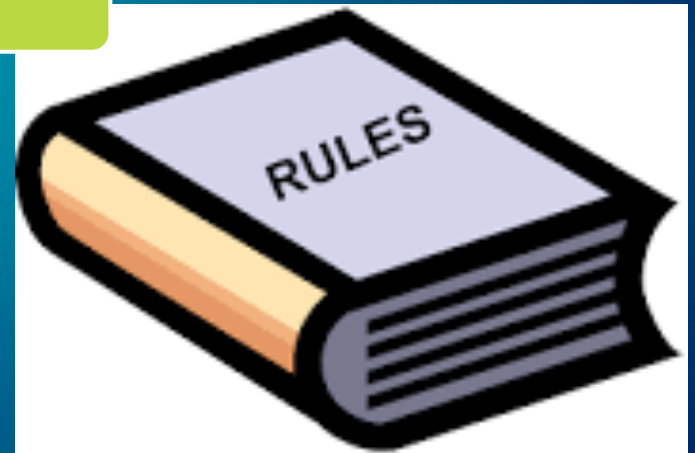
Purpose of Court Rules

Mechanisms for Imposing Court Rules

- By Court Rule
- By Regulation
- By Standing Order
- Guidance

Potential Content for Court Rules

- Powers of the Court
- Integrity of Process
- Standing
- Burdens & Presumptions
- Procedural Rules
- Remedies



Purpose of Court Rules

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Example from the Philippines

- Philippine Rules of Court Section 3. Objectives:
 - To protect and advance the constitutional right of the people to a balanced and healthful ecology;
 - To provide a simplified, speedy, and inexpensive procedure for the enforcement of environmental rights and duties recognized under the Constitution, existing laws, rules and regulations, and international agreements;
 - To introduce and adopt innovations and best practices ensuring the effective enforcement of remedies and redress for violation of environmental laws; and
 - To enable the courts to monitor and exact compliance with orders and judgements in environmental cases.

Methods for Imposing Court Rules

By Court Rule

By Regulation

By Standing Order

Guidance

By Regulation

- ❖ In the U.S., the Code of Federal Regulations (C.F.R.) outlines rules that apply to the EAB:
 - ▶ 40 CFR Part 22: governs procedures for the trial and appeal of an administrative environmental enforcement case.
 - ▶ 40 C.F.R. Part 124: governs procedures that apply to permit decisions, and appeals from permit decisions.
 - ▶ Both set of regulations can be found on the EAB's website at www.epa.gov/eab/regulations_governing_appeals
- ❖ U.S. Courts promulgate their own procedural rules
 - ▶ Federal Rules of Civil Procedure
 - ▶ Federal Rules of Appellate Procedure
 - ▶ Federal Rules of Evidence

By Standing Order

- U.S. tribunals can issue standing orders governing their own procedures that apply to all those who come before them.
- For example, the EAB has issued several standing orders available online to guide practitioners, including:
 - Orders on electronic filing
 - Procedures specific for certain types of air permit cases

(www.epa.gov/eab/standing_orders)

Standing Orders (Continued)

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Some sample Language:

(from EAB Standing Order Governing Petitions for Review of Clean Air Act New Source Review Permits, March 27, 2013)

- “In order to facilitate expeditious resolution of [Clean Air Act New Source Review appeals], while simultaneously giving fair consideration to the issues raised in any given matter, the Board adopts the following procedures:” Revised Order.
- “The Board will use scheduling and status conferences to expedite the filing of briefs, the narrowing of issues on appeal, and the resolution of cases. Parties may request the Board to schedule such a conference to expedite case resolution.”
- “Where the parties believe that Alternative Dispute Resolution (ADR) would be of assistance in resolving disputed issues, by joint motion, they may request to participate in the Board’s ADR program.”

- ❖ The EAB has issued several documents online to provide guidance to practitioners and the public.
 - Practice Manual
 - Citizens Guide
 - www.epa.gov/eab/guidance_documents

Potential Content for Court Rules

Powers of the Court

Integrity of Process

Standing

Burdens & Presumptions

Procedural Rules

Remedies

Rules Relating to the Powers of the Court

Examples from EPA Regulations:

Some powers of Presiding Officer listed in 40 C.F.R. section 22.4:

1. Conduct administrative hearing;
2. Rule upon motions, and issue orders
3. Administer oaths and take affidavits;
4. Examine witnesses and receive documentary or other evidence;
5. Order a party to produce testimony, documents, or other evidence;
6. admit evidence;
7. Hear and decide questions of facts, law, or discretion;
8. Require parties to attend conferences for the settlement or simplification of the issues, or the expedition of the proceedings;
9. Issue subpoenas.

Rules Relating to the Powers of the Court (continued...)

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EAB Powers Defined by Regulation (40 CFR 22.4):

- Environmental Appeals Board – rules on appeals of decisions issued by Presiding Officer
- In exercising its duties and responsibilities, the Environmental Appeals Board may do all acts and take all measures as are necessary for the efficient, fair and impartial adjudication of issues arising in a proceeding.

Rules Relating to the Integrity of the Process

Examples of Ex Parte Rules –

U.S. Law (Administrative Procedure Act):

- ▶ No one outside the agency may communicate with anyone inside the agency (including a judge) who is expected to be involved in the decision-making process
- ▶ If anyone inside the agency receives communication in violation of the ex parte rule, the agency (including a judge) may, in the interest of justice, dismiss, deny or disregard the interest or claim to address such violation

EPA Regulations:

- ▶ There can be no *ex parte* communications about a case between the Decision-maker (or any person likely to advise the decision-maker) any interested person outside the Agency, or with any Agency staff member who performs a prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person

Standing

Example from Thailand:

Recommendation of the President of the Supreme Court:

The right of standing in an environmental suit shall be determined with consideration of the right of a person to benefit from the natural resources and biodiversity as well as the right to live a normal life in a sustainable manner in an environment free of any harm to health, wellbeing, or quality of life as prescribed for in the constitution of the Kingdom of Thailand.

Rules Relating to Burdens of Proof

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- EPA regulations place the burdens of presentation and persuasion on the Agency
- The Agency must demonstrate that the violation occurred as alleged and that the relief sought is appropriate
- The alleged violator has the burdens of presentation and persuasion for any defenses.
- The Presiding Officer shall decide each matter in controversy by a preponderance of the evidence.

Rules Relating to Presumptions

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Example from New York:

N.Y. Environmental Conservation Law 71-2719

- Possession of fifteen hundred gallons or fifteen thousand pounds, whichever is less, of an aggregate weight or volume of hazardous wastes or substances hazardous to public health, safety or the environment, **shall be presumptive evidence of knowledge** on the part of the person in possession that the material is a hazardous waste or a substance hazardous to public health, safety or the environment.

- ▶ Filing Deadlines
- ▶ Procedures for Filing (where & how)
- ▶ Who may file?
- ▶ Content Requirements
- ▶ Page Limits
- ▶ Requests for Oral Argument
- ▶ Motions Practice
- ▶ Rules Relating to Evidence...
- ▶ Rules Relating to Decisions...

Rules Relating to Evidence

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▶ Admissibility

- ▶ In the U.S. evidence is admissible when it is relevant, reliable, probative and material.

- ▶ E.g. EPA regulations on evidence provide:

The Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value.

▶ Witnesses

- ▶ Witnesses shall be examined orally, under oath, or by the Presiding Officer.
- ▶ Parties have the right to cross-examine a witness.
- ▶ The Presiding Officer may admit affidavits of witnesses who are unavailable.
- ▶ Expert Witnesses
- ▶ Witnesses qualified by knowledge, skill, experience, or education may testify in the form of an opinion

Rules Relating to Evidence

(Continued...)

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Example from the Philippine Supreme Court

Documentary Evidence – Rule 21

- ▶ Photographs, videos, and similar evidence of events, acts, transactions of wildlife, wildlife by-products, or derivatives, forest products or mineral resources subject of a case shall be admissible when authenticated by the person who took the same, by some other person present when said evidence was taken, or by any other person competent to testify to the accuracy thereof.
- ▶ Entries in official records made in the performance of his duty by a public officer of the Philippines, or by a person in performance of a duty specially enjoined by law, are *prima facie* evidence of the facts stated therein.

Rules Relating to Evidence (Continued...)

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Example from the Supreme People's Court, China

Regarding Expert Opinions and the Application of Law in Environmental Civil Public Interest Litigation (2015)

- ▶ Where parties apply to have an expert with special knowledge to testify in trial to comment on the appraisal opinions or give opinions to special issues such as causation, methods to restore ecological environment, ecological restoration costs and damages of interim losses of ecological functions between actual ecological damage and restoration; the people's court should approve.
- ▶ Expert opinions provided in the previous provision that have been cross examined can be admitted as evidence.

Rules Relating to Decisions

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► Agency Trial Level

The initial decision shall contain findings of fact, conclusions regarding all material issues of law or discretion, as well as reasons therefor, and, if appropriate, a recommended civil penalty assessment, compliance order, corrective action order, or Permit Action.

► Agency Appellate Level

The Environmental Appeals Board shall adopt, modify, or set aside the findings of facts and conclusions of law or discretion contained in the decision or order being reviewed, and shall set forth in the final order the reasons for its actions. The Environmental Appeals Board may assess a penalty that is higher or lower than the amount recommended ***. The Environmental Appeals Board may adopt, modify or set aside any recommended compliance or corrective order or Permit Action. The Environmental Appeals Board may remand the case to the Presiding Officer for further action.

Rules Relating to Decisions (Continued...)

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► Federal Court Rules

- When a case is tried on the facts without a jury, the court must make findings of fact and state its conclusions of law separately.
- Every order granting an injunction and every restraining order must state specifically states the reasons why it is issued; and describe in reasonable detail the act or acts restrained or required.

Rules Relating to Appeals

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► Agency Rules

- Within 30 days after the initial decision is served, any party may file an appeal
- The parties' rights on appeal shall be limited to those issues raised in the course of the proceeding and by the initial decision, and to issues concerning subject matter jurisdiction.

Example from the Supreme People's Court of China

Regarding Remedies and the Application of Law in Environmental Civil Public Interest Litigation (2015)

- ▶ People's courts may require the polluters to restore the environment to the condition and function before the harm happened. In case that complete restoration is not feasible, the people's courts may allow substitutive ways of restoration.
- ▶ People's courts that order defendant to restore environment may determine the cost of restoration when the defendant fails to implement its restoration obligations at the same time, or directly issue judgment on the ecological environmental restoration costs that the defendant should bear.
- ▶ Ecological environmental restoration costs include the cost of designing and implementing restoration projects and the cost of monitoring supervision.

Rules of Court

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The level of our success is limited only by our imagination...
-- Aesop

Interactive Group Activity

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Working in small groups, please discuss some ideas you have about environmental procedural rules that that would be helpful to incorporate into Cambodian Courts.

We will then ask each group to report out on the main ideas they have discussed.