

Trump Administration proposes gutting EPA's Environmental Appeals Board (84 FR 66084)

The Trump Administration has issued a proposed rule that would eviscerate the power of the Environmental Protection Agency's ("EPA's") Environmental Appeals Board ("EAB") to ensure permits issued to industry comply with public protection laws, including the Clean Water Act and the Clean Air Act, hazardous waste disposal laws, and also compliance with environmental justice considerations that have been in place for a quarter century.

The proposed rule would instead create a one-way ratchet for industry seeking to weaken permit requirements, while eliminating existing rights for the public to seek review of permits, thus shutting the public out of the agency process. **Public comments are due by January 2, 2020.**

Background: The EAB is an impartial legal body within the EPA created in 1992 under the Bush Administration, which reviews appeals of permit decisions made by EPA's regional administrators and some state permitting officials. Currently the EAB hears dozens of appeals each year from any interested party challenging the provisions of permit.

The EAB has the broad power to review matters of fact and law in permit decisions, as well as agency compliance with obligations like environmental justice assessments under E.O. 12898. (Executive Order 12898 was issued by President Clinton in 1994 to focus federal attention on environmental justice, in particular when making final agency actions, including issuing permits under major federal laws.)

When the EAB rules on a permit, its decision represents the definitive statement of the agency on the matters addressed in the review, and sets precedent for future EPA decisions. Importantly, the EAB has the power to require permit issuers to go back and redo technical analyses, properly apply law, and assess environmental justice impacts of an issued permit. Final decisions of the EAB can be appealed to federal court.

What the proposed rule would do: While the language of the proposed rule doesn't say it, the rule would take away the public's right to appeal and gives industry the exclusive power to decide whether the EAB can review a permit – in effect creating a one-way ratchet for industry to weaken environmental protections in agency permits. Lowlights of the proposed rule include:

- 1) Eliminates public's right to seek EAB review -- Impacted community groups filing an appeal on an industry-issued permit would no longer have a right to have its concerns heard by the EAB in an effort to strengthen permit provisions. Rather, they would only have a right to a one-day "alternative dispute resolution" meeting that need not produce *any* agreement or result in *any* substantive decision (merely an empty process). If industry does not voluntarily agree to further review, the EAB's power to review permits ends here, and the public has no further rights to agency review – in effect giving industry an absolute veto power over the EAB's power to substantively review permits. Thus, the only permits the EAB would review in the future would be industry-brought appeals seeking to weaken permit provisions.

- 2) Eliminate environmental justice considerations -- The EAB would no longer be able to exercise its discretion to review all aspects of a permit, and importantly would be barred from considering “important policy considerations.” Though the proposed rule doesn’t spell it out, this means the EAB could not review a permit for compliance with the E.O. on environmental justice, something it routinely does now.
- 3) Amicus Curiae participation would be eliminated -- Amicus often have provided helpful legal interpretation of an issue. Since the EAB board decisions are binding agency decisions, ensuring all relevant considerations are before the board on review makes good sense. However, these legal viewpoints will no longer be allowed under the proposed rule.
- 4) Eliminates *Sua Sponte* Review – *Sue Sponte* review by the EAB currently allows it to review all legal, policy and factual concerns it may identify in a permit, rather than just those raised by the parties. This proposal eliminates that power. And since only industry will control whether the EAB reviews a permit, it’s another one-way ratchet for industry to ensure the weakest possible permit. Even if the EAB believes the permit is fundamentally flawed in ways not raised by the parties, it would not be able to act to correct such legal deficiencies or discuss them in its opinions.
- 5) Dramatically limits the EAB’s time to issue a decision to 60 days after the case is fully briefed. Currently the EAB can take up to one year to decide an appeal, which is critically important on extremely complicated permit decisions. Limiting the EAB’s time to review and decide a case benefits industry by limiting the quality of its review.
- 6) Institutes term limits for EAB judges – limiting the time an EAB judge can serve to twelve years will weaken the pool of experienced EAB judges, again to the benefit of the regulated industry.
- 7) Allows the EPA General Counsel to intervene in an EAB review by issuing a “dispositive legal interpretation” which would then be binding on the EAB and short-circuit its review. This power will necessarily politicize a process that has existed for 25 years and facilitates consistent stability and objectivity in the permit review process.

For more information and details on the forthcoming community sign-on comments, please email Michell McIntyre (MMcIntyre@earthjustice.org).