

January 2, 2020

Via Regulations.Gov

Mark C. Talty
Office of General Counsel
Cross-Cutting Issues Law Office
Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Re: EPA–HQ–OGC–2019–0406; FRL–10002–10–OGC, EPA’s Proposal to Gut the Environmental Appeals Board (84 FR 66,084, Dec. 3, 2019)

Dear Mr. Talty:

Thank you for the opportunity for the undersigned organizations to submit these comments on the proposed rule entitled, “Modernizing the Administrative Exhaustion Requirement for Permitting Decisions and Streamlining Procedures for Permit Appeals” (“Proposed Rule”), that was issued by the Environmental Protection Agency (“EPA” or “Agency”).¹

The Proposed Rule, published in the Federal Register on December 3, 2019, purports to be a “procedural rule intended to streamline and modernize” EPA’s permitting process. Rather, as laid out in more detail later in this comment letter, this Proposed Rule contains significant substantive changes that would eviscerate the power of the Environmental Protection Agency’s Environmental Appeals Board (“EAB” or “Board”) to ensure permits issued to polluting industry comply with public protection laws, including the Clean Water Act the Clean Air Act, and hazardous waste disposal laws.

As such, we hereby request public hearings on this rule as is our right under the Clean Air Act, and believe that EPA must conduct such hearings in each Region that currently issues permits that are appealable to the EAB under any relevant statute. Finally, we note that the announced comment period is impermissibly short (under the CAA and other statutes), and we request an extension of the comment period for an additional period of at least 90 days.

¹ 84 Fed. Reg. 66084 (Dec. 3, 2019). Available at: <https://www.federalregister.gov/documents/2019/12/03/2019-24940/modernizing-the-administrative-exhaustion-requirement-for-permitting-decisions-and-streamlining>

This proposal also seems designed to strip the EAB of the power to ensure compliance with environmental justice obligations put in place over 25 year ago by Executive Order 12898.

What this Proposed Rule *will* do is create a one-way ratchet that will allow industry permit-applicants to seek weaker permit requirements from the EAB. At the same time, this rule would eliminate existing rights that the public enjoys to seek review of permits before the EAB, effectively making any such review available only at the will of the permit applicant. The result will be to give industry the power to effectively shut the public out of the administrative appeals process.

Real justice in our democracy requires that all interested parties have a meaningful right to be heard under the law – a right that is not subordinate to the desires of wealthier or more politically powerful interests. However, this proposal all but extinguishes the rights of communities most affected by EPA’s environmental permits, eliminating their ability to meaningfully participate in the process of administrative review. Significantly, the rule has the opposite impact for industry permit applicants, giving them even greater rights, and more power to seek even weaker permit conditions. We urge the Agency to withdraw this Proposed Rule in its entirety.

Many of the individuals and groups signing these comments have experienced the harms associated with pollution in our communities and have fought to ensure equal access to justice under the law.

This Proposed Rule, if finalized as written, would likely mean that these communities and families would no longer have the right to appeal a pollution permit to the EAB that might affect their health and wellbeing. Individuals and advocates will lose an historically important and effective avenue to seek relief and help, and the Agency will lose the opportunity to correct serious errors in the environmental permits issued by EPA regional offices and delegated states before those permits become final.

History of the EAB and its power to provide justice to the public

As EPA’s own report on the EAB states, “its primary role is to provide a fair appeals process for resolving environmental permitting and enforcement disputes between EPA and non-EPA stakeholders.”² It achieves this function by ensuring that EPA applies legal requirements consistently while considering appeals from *all* interested parties to

² “The EPA’s Environmental Appeals Board at Twenty-five: An Overview of the Board’s Procedures, Guiding Principles, and Record of Adjudicating Cases” (2017), available at: [https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/8f612ee7fc725edd852570760071cb8e/381acd4d3ab4ca358525803c00499ab0/\\$FILE/The%20EAB%20at%20Twenty-Five.pdf](https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/8f612ee7fc725edd852570760071cb8e/381acd4d3ab4ca358525803c00499ab0/$FILE/The%20EAB%20at%20Twenty-Five.pdf) @ pg. 1.

EPA's permitting process – from impacted individuals, local community groups, and nonprofit organizations, as well as from private, regulated industries. Full stakeholder involvement “allow[s] for a broader range of input and perspective in administrative decision making.”³ By the EPA's own admission, providing this fair forum equally to *all* interested parties serves to resolve “appeals efficiently in order to expedite environmental compliance and permitting and avoid protracted review in federal court.”⁴ All of the EAB's decisions can be found on the EPA's website.⁵

This impartial legal body within the EPA was created in 1992 under the Administration of President George H. W. Bush, and has jurisdiction to review appeals of permit decisions made by EPA's regional administrators and some state and tribal permitting officials when they act under delegated federal authority.⁶ It also holds jurisdiction over all permits issued within the U.S. outer continental shelf, which encompasses 3.4 million square nautical miles of ocean sea bed (an area larger than the combined land mass of all fifty states).^{7 8}

The EAB has the broad power to review matters of fact and law in permit decisions, and to address important policy considerations such as the agency's compliance with environmental justice obligations under Presidential Executive Order 12898. (E.O. 12898 was issued by President Clinton in 1994 to focus federal attention on environmental justice, including when making final agency decisions such as issuing permits under major environmental statutes.)⁹

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 related to a permit decision. Final decisions of the EAB can be appealed to federal court.

Case Example of the Importance of the EAB to Access to Justice

The 2010 case before the EAB involving permits issued under the Clean Air Act to Shell Oil for drilling operations in Alaska serves as an instructive example of how the EAB

³ 57 Fed. Reg. 5220, 5321-22 (Feb. 13, 1992).

⁴ Supra note 2, at pg. 1. (“Since its creation, the (EAB) has issued over eleven hundred final decisions”)

⁵ EAB docket, available at https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/EAB+Dockets?OpenPage

⁶ Id.

⁷ Id.; 40 C.F.R. § 124.19.

⁸ https://www.gc.noaa.gov/documents/2011/012711_gcil_maritime_eez_map.pdf

⁹ See 59 Fed Reg 7629 (Feb. 16, 1994) summary available at <https://www.epa.gov/laws-regulations/summary-executive-order-12898-federal-actions-address-environmental-justice> (“federal actions to address environmental justice in minority populations and low-income populations”)

works to ensure a “fair appeals process for resolving environmental permitting and enforcement disputes.”¹⁰

In that 2010 case, several Native American tribes including the Inupiat Community of the Arctic Slope appealed several EPA-issued permits to the EAB. The tribes argued that the permits issued by EPA Region 10 to Shell Oil had “failed to address the local community’s environmental justice concerns and the potential health impacts of emissions” of nitrous oxides, particulate matter, and other pollutants.¹¹ The EAB agreed with the tribes and noted that the native communities “already suffer from high rates of respiratory diseases like asthma.”¹² Both permits were sent back to the EPA to rewrite them taking these health impacts into account.

Under the current Proposed Rule, these Alaskan tribes would not only potentially lose their right to have the EAB hear their concerns (assuming Shell would have blocked EAB review), but the EAB itself would no longer have the power to address environmental justice considerations at all, even when it did conduct a full review of permit decisions.

As with the Shell case, industrial facilities are all too often located in already overburdened, resource-strapped, or low-income communities. Such communities need the ability to appeal permitting decisions that would result in dangerous pollution being released into their air and water – and the EAB process is often one of the only realistic options they have for meaningful review.

EPA’s attempt to silence community voices by giving permit applicants an absolute veto over any EAB review is shameful and unlawful. This Proposed Rule serves one purpose and one purpose only, to further empower industrial polluters at the expense of impacted children, families, workers and communities.

Specific comments on the Proposed Rule:

¹⁰ Suzanne Savell, “Appeals Board Rejects Air Permits for Offshore Drilling in the Arctic” Environmental Justice News (Jan. 4, 2011), available at <https://crag.org/appeals-board-rejects-air-permits-for-offshore-drilling-in-the-arctic/>

¹¹ Id.; decision available at -

[https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Filings%20By%20Appeal%20Number/41B37138DABA5A54852578090072B80A/\\$File/Shell%20Gulf%20of%20Mexico.pdf](https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Filings%20By%20Appeal%20Number/41B37138DABA5A54852578090072B80A/$File/Shell%20Gulf%20of%20Mexico.pdf) at 149 (“In the present case, AEWC and the Region agree that the North Slope communities potentially impacted by Shell’s proposed operations include a “significantly high percentage of Alaskan Natives, who are considered a minority under [Executive Order] 12898.”); at 109 (“The Region also clearly erred in the limited scope of its analysis of the impact of NO₂ emissions on Alaska Native “environmental justice” communities located in the affected area).

¹² Id.

Section III.A.1¹³ -- “New Time-Limited ADR Process” – Although EPA does not come out and say so in the Proposal, the “New Time-Limited ADR Process” appears designed to eliminate the public’s right to EAB administrative appeal, and to create an absolute veto power on the part of permit applicants to foreclose any EAB appeal. There are two common postures for permit appeals before the board:

(1) appeals brought by individuals, communities, or non-governmental organizations (“NGO’s”) to challenge the adequacy of a permit that EPA (or a delegated permitting authority) issues to an industrial or municipal polluter (e.g. as being procedurally inadequate and/or insufficiently protective of public health or welfare); and

(2) appeals brought by permit applicants against the EPA (or delegated permitting authority), usually seeking to make a permit less stringent and less protective of health and the environment.

In the first kind of appeal, the parties involved necessarily include EPA (or the delegated permit issuer), the individual, community or NGO, and the permit applicant. In the second kind of appeal, the parties involved necessarily include EPA (or the delegated permit issuer) and the permit applicant. These comments are primarily concerned with the rights of parties that appeal an EPA-issued permit under the first kind of appeal.

Under current rules, a voluntary “alternative dispute resolution” (ADR) process can occur (if all parties agree) before proceeding to the EAB to review. Under EPA’s new proposal, ADR would no longer be voluntary, but required. After the perfunctory ADR process occurs, however, the proposal requires “unanimous consent” of all the parties for the proceeding to advance to “an appeal before the EAB.”¹⁴ Therefore, in the first kind of review described above, if the industry permit applicant does not agree to further review (which it almost certainly would not if the petitioner were seeking more stringent permit conditions) the EAB’s power to review permits ends there, and the public has no further rights to administrative review.

Thus, under the Proposed Rule, EPA seeks impermissibly to delegate to permit applicants the power to veto permit appeals over the objection of individuals, communities, or organizations who petition for review of a permit, even in the face of obvious permit defects. Moreover, permit applicants could veto Board review even where a petitioner raises issues that the Board *itself* believes to be worthy of review. This, in effect, subordinates both the legitimate interest of petitioners and the Board’s

¹³ 84 Federal Register @ 66088.

¹⁴ *Id.*

own discretion to proceed with a permit review to the desires of the permit applicant. The result is a one-way ratchet for industry to weaken environmental protections in agency-issued permits.¹⁵

Rather than a right to substantive administrative review, the only right truly left in the EAB appeal process would be to a perfunctory “alternative dispute resolution” meeting. Such ADR meetings need not produce *any* agreement or result in *any* substantive decision, nor do they even involve any meaningful scrutiny of permits by the Board itself. Thus for communities, in the end, the Proposed Rule replaces substantive and meaningful administrative review with an ADR session that involves little more than an empty exercise in a situation where one of the parties (the permit-holder) has no incentive to negotiate since it can block the EAB from review.

Indeed, the only permits likely to receive full EAB review in the future would be industry-brought appeals seeking to weaken permit provisions (proceedings that often would not involve any other parties). Among other things, this would violate one the EAB’s core principles, that “ensure the Board’s impartiality and provide for the fair treatment of all interested persons.”¹⁶

*Section III.A.2*¹⁷ – “Clarifying the EAB’s Scope and Standard of Review in Permit Appeals” – This provision purports to limit the EAB’s jurisdiction to resolving issues of fact and law, and eliminating the Boards discretion to address “important policy considerations.”¹⁸ Though the proposed rule doesn’t bother to explain what is encompassed when it carves out “important policy considerations” from the EAB’s scope of review, one likely practical effect of this change is to eliminate the Board’s ability to address whether permitting authorities have complied with their obligations under Executive Orders. The most significant result would be to eliminate one of the very few mechanisms for accountability within EPA for environmental justice review under E.O. 12898.

The 1994 Executive Order on Environmental Justice “directs federal agencies to identify and address the disproportionately high and adverse human health or environmental effects of their actions on minority and low-income populations, to the greatest extent practicable and permitted by law.”¹⁹ This Proposed Rule is directly at odd with the

¹⁵ It is worth noting here that in the second kind of permit appeal (where an applicant itself challenges a permit decision in hopes of making the permit weaker), and where there is no other party, the permit applicant is the sole decider of whether the permit review proceeds. This is because under the Proposed Rule the EPA regional office (or other permitting authority) is not among the parties that get a vote regarding whether the appeal proceeds to review.

¹⁶ Supra note 2 at 1 (emphasis added).

¹⁷ 84 Federal Register @ 66088.

¹⁸ Id.

¹⁹ Supra note 9..

fundamental purpose of the 1994 E.O. because it specifically eliminates the Agency's ability to allow communities to meaningfully participate (giving industry a veto right over administrative review), and it likely strips the EAB of its power to even consider whether environmental justice impacts have been appropriately addressed in the permitting process.

Moreover, these parties are often those least able to afford the cost of litigating their rights in federal court, so the EAB is often their best or only opportunity to have their grievances heard and to hold permitting authorities accountable to the law. For example, this provision of the Proposed Rule (were it effective at the time) might have specifically prevented the native Alaskan tribes discussed above from seeking to compel EPA to live up to its environmental justice obligations in connection with its approval of arctic drilling permits.

Section III.A.3²⁰ -- "Eliminate Amicus Curiae Participation" -- Amicus, or "friend of the court" filings often provide helpful guidance for appellate decision-makers. Since many EAB decisions create binding agency precedent, 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.

The Proposed Rule fails to meaningfully address or explain why such a change is warranted, simply stating that, "allowing for additional input in a permit appeal... is unnecessary..." while stating that eliminating this important voice in the process would "hasten the resolution of permit appeals by 15 days."²¹ This view is antithetical to the founding principles of the EAB, to sound administrative decision-making, and to the concept of equal access to justice for all. EPA explains neither why 15 days is worth foregoing the opportunity to fully understand the broader implications of an administrative appeal, nor whether that time might be saved in some way that does not significantly compromise the quality of the Board's review.

Section III.A.4²² -- "Eliminating *Sua Sponte* Review" -- EPA's regulations currently allow the EAB to review any permit decision, and any and all legal or factual issues, or important policy considerations it may identify in a permit, whether or not a permit (or specific issue) has been challenged by an outside party. EPA's Proposed Rule eliminates the Board's authority to review permits *sua sponte*, allowing for review only when an outside party challenges some aspect of a permit, and only if the permit applicant consents to review (i.e., acquiescing as part of unanimous consent for Board review to proceed). Thus, no matter how blatant or how important a permit defect may be, the Board is powerless to elect, on its own, to review any permit. Moreover, since

²⁰ 84 Federal Register @ 66088.

²¹ *Id.*

²² 84 Federal Register @ 66088.

the only cases likely to receive substantive EAB review under this Proposal are industry challenges seeking to make permits more lenient, this limitation on EAB discretion further tips the scales against protection of public health, and puts children, families and communities in greater jeopardy.

Section III.A.5²³ -- “Expediting the Appeals Process” – This section of the Proposed Rule dramatically limits the EAB’s time to issue a decision to 60 days after the case is fully briefed. A 60 day limit is entirely arbitrary, will necessarily limit the quality and thoroughness of EAB review, and fails entirely to account for differences in the complexity of cases before the Board. In practice, depending on the quality of the permitting process below, an appeal may come to the Board with a single substantive issue, or with a dozen. Forcing the EAB to resolve every case in 60 days necessarily diminishes that Board’s ability to fully and fairly consider the issues before it.

This section of the Proposed Rule also pressures the EAB to issue shorter opinions and limits requests from parties for extensions of time to properly brief issues. Again, these measures will tend to disproportionately disadvantage community participation which often involve parties with fewer legal resources at their disposal than industry permit applicants. These measures also limit the EAB’s discretion to manage its proceeding so as to ensure that public protections laws are being appropriately complied with and enforced.

Section III.A.6²⁴ -- “12 year Terms for EAB Judges” – In this section of the Proposed Rule, the EPA proposes limiting terms an EAB judge can serve to twelve years. While the Proposed Rule notes that these EAB judges are “career employees of the EPA and members of the Senior Executive Service” it identifies no rationale for seeking to remove judges from the EAB.

We are concerned that this proposal will unnecessarily politicize an apolitical adjudicatory process by inserting a specific opportunity for the politically appointed Administrator to “at the end of that twelve-year period...reassign the Judge to another position within EPA.”²⁵ Moreover, it will drain the EAB of important experience and institutional knowledge that is critical to this kind of decision making (something that is implicitly recognized in the context of federal judicial appointments).

We note again the goals of the EAB as set out by EPA itself:

“The Board operates independently from the rest of the Agency in order to keep the Agency’s adjudicative process separate from its permitting

²³ 84 Federal Register @ 66088.

²⁴ 84 Fed. Reg. @ 66089.

²⁵ Id.

and enforcement authorities. The four Environmental Appeals Judges are not political appointees: they are career federal employees who are chosen to serve on the Board through a competitive process, and their tenure is not term-limited. By maintaining its independence from the rest of the Agency and remaining free from outside influences, the Board ensures that its decision making is fair and in accordance with the law.”²⁶

This Proposed Rule will necessarily politicize the EAB, weaken the pool of experienced EAB judges, and harm the administration of justice to all who may seek review by the EAB. Barring a compelling rationale to make the proposed changes to the EAB’s makeup, we urge the EPA to reject this proposal.

*Section III.A.7*²⁷ --“Identifying Precedential EAB Decisions” – This section of the Proposed Rule seeks to create a new process which will identify a subset of EAB’s decisions as “precedential” decisions, and further states that a decision can only be considered as “precedential” if it is a published opinion. The proposal then states that “the determination of which decisions should be published would be determined by the Administrator.”²⁸

It appears that the ultimate goal of this three-step machination is to again inject political considerations into what is now an apolitical quasi-adjudicatory process by allowing a political appointee (the Administrator) to put a thumb on the scales of justice by giving more legal weight to certain decisions of the EAB that the Administrator favors and less weight to politically disfavored decisions.

The Proposed Rule attempt to justify this provision by noting that, “identifying certain decisions as precedential is important because federal courts give greater deference to such decision.”²⁹ However, all the decisions of the EAB are already binding on the EPA, and therefore should be given proper weight by federal courts already. This proposed change is not only unnecessary, but serves to further weaken the power of the EAB to administer justice fairly, and in accordance with the law.³⁰

Finally, whether or not EAB decisions are published, all its decisions are currently in writing and all its decisions are posted “online where the public can access them.”³¹ Again citing EPA’s own words, “The Board serves as a valuable repository of knowledge and experience about environmental adjudication at the administrative

²⁶ Supra Note 2 at pg. 6.

²⁷ 84 Federal Register @ 66090.

²⁸ Id.

²⁹ Id.

³⁰ Supra note 2 at pg 6.

³¹ Supra note 2 at pg. 16.

level, and it shares its expertise with legal practitioners, decision makers and other tribunals both domestically and internationally.”³²

Section III.A.8³³ -- “Administrator’s Legal Interpretations” – This provision of the Proposed Rule 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 would short-circuit the EAB’s independent review. This power will again necessarily politicize a process that has been apolitical and has existed for over 25 years to facilitate consistent stability and objectivity in the permit review process, and to “provide for the fair treatment of all interested persons.”³⁴

This change would erode the separation between the EAB and the agency’s permitting and enforcement functions, compromising the Board’s objectivity, and undermining stability, predictability, and consistency of agency decisions. In addition, the board already regularly invites the participation of the Office of General Counsel (“OGC”) when important legal issues arise, and gives significant weight to OGC’s views. However, the Board exercises delegated power from the Administrator, so it is no more appropriate for the Board to subordinate its decision making authority to that of OGC than it would be for the Administrator to do so. In the end, this provision does little more than dilute the authority of the Board, and introduce greater uncertainty in EAB appeals.

Procedural Flaws – Finally, EPA is wrong that this Proposed Rule is merely a “procedural rule.” In fact, this rule directly affects the substantive rights of members of the public in a profound way. If the rule were finalized, the public would no longer have the ability to seek review before the Board without the consent of permit applicants. Nor would they have the ability to submit amicus briefs in cases before the Board that address issues with broad and important public implications. The public also would no longer have a right to extensions of time in EAB appeals. And it would no longer enjoy the protection that the EAB’s *sua sponte* review authority provides when it identifies illegal permits or impermissible permit conditions. Finally, the public could no longer turn to the Board to hold the EPA accountable to its obligations under the Environmental Justice Executive Order and certain other agency legal obligations.

As noted in our introduction, this Proposed Rule, far from merely directing internal policies and procedures, goes directly to the heart of the public’s right pursue administrative review. Accordingly, this action must be considered a substantive rulemaking for each of the statutes under which permit review are now available, and

³² Id.

³³ 84 Federal Register @ 66088.

³⁴ Supra note 2 @ 16.

must be subject to the rulemaking requirements of each of those statutes (including Clean Air Act (“CAA”) section 307(d)).

Among the rights that the public enjoys under the CAA is the right to a public hearing. We hereby request public hearings on this rule, and believe that EPA must conduct such hearings in each Region that currently issues permits that are appealable to the EAB under any relevant statute. Finally, we note that the announced comment period is impermissibly short (under the CAA and other statutes), and we request an extension of the comment period for an additional period of at least 90 days.

Conclusion

As EPA’s own report states, “by operating independently, impartially and transparently, the Board promotes consistency with legal requirements, assures non-Agency stakeholders that they will be treated fairly, and provides a cost-effective process for resolving disputes.”³⁵

For the EAB to continue to play, “a vital role in furthering the Agency’s mission to promote and protect a strong and healthy environment,”³⁶ we urge the EPA to withdraw this Proposed Rule in its entirety and allow the EAB to pursue its mission to provide an open and fair administrative appeals process that is available to all.

Sincerely,

Earthjustice

List all signatories...

³⁵ EAB report @ pg. 16.

³⁶ *Id.*