

November 2, 2018

The Honorable Andrew Wheeler  
Acting Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

RE: Changes to EPA's Environmental Review Rating Process, Memorandum issued by  
Brittany Bolen, Associate Administrator, October 22, 2018

The Environmental Protection Network (EPN)<sup>1</sup> and Save EPA<sup>2</sup> are pleased to submit the following letter to express concerns for your consideration on the U.S. Environmental Protection Agency's (EPA) implementation of its review responsibilities under Clean Air Act Section 309 and the National Environmental Policy Act of 1969 (NEPA).

Specifically, we are addressing the changes announced in a memorandum from Associate Administrator Brittany Bolen, dated October 22, 2018, which states that EPA will no longer assign a letter and numerical rating in its comments on reviews conducted by other agencies. We strongly urge that the rating system be continued until EPA has sought public review and comment on both the existing guidance and proposed alternative language which would be used to signal EPA's concerns in its comment letters. EPA's action now leaves a gap which will create confusion and inconsistency, the very things the action sought to avoid.

EPA has played an important role in the implementation of NEPA, providing independent review of both the adequacy of the analysis of impacts and the seriousness of the environmental impacts along with the adequacy of consideration of environmental impact including both the range and substance of alternatives and mitigation.

EPA's unique independent review role is mandated in the law and carried out through the preparation of publicly available comment letters. We certainly support efforts to make the environmental review and permitting processes more efficient and effective in advancing the harmony between the human and natural environment that NEPA seeks to achieve.

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<sup>1</sup> EPN is an organization comprised of over 350 EPA alumni volunteering their time to protect the integrity of EPA, human health and the environment. EPN harnesses the expertise of former EPA career staff and confirmation-level appointees to provide an informed and rigorous defense against current efforts to undermine the protection of public health and the environment

<sup>2</sup> Save EPA is an all-volunteer organization made up of retired and former employees of the EPA.. Its members have expertise in environmental science, law, economics and policy. It is based in Colorado and has members across the country, using their collective expertise to educate and advocate for public health and environmental protection.

The Memorandum of October 22 lays out the following arguments for eliminating the longstanding use of a rating system in EPA comment letters that has been in place since 1984:

1. Federal agencies have greater sophistication now, have improved the quality of draft EISs and find the actual comments more helpful than the ratings.
2. Comment letter wording itself on a proposal that may involve unsatisfactory environmental impacts can be used in the rare instances EPA needs to signal a potential referral to CEQ as well as other terms to convey what has been conveyed in lesser ratings.
3. Elimination of the ratings will, as asserted:
  - 3.1. not lessen environmental protections
  - 3.2. help to focus attention on resolving issues
  - 3.3. address perceptions that ratings are not consistently applied across the agency, and minimize confusion on the part of federal agencies and the public.

We would be interested in seeing the administrative record that supports these assertions. Additionally, we recommend that this record be made public in concert with any proposed alternative approach to clarifying EPA's concerns in comment letters absent a rating.

4. Early engagement is more important than the ratings.

For your consideration:

- (1) **Ratings are not a substitute for comments; they are designed to complement them**  
Ratings have been an effective tool in garnering the attention of senior officials to help resolve issues quickly and thoroughly. While it is not surprising that federal agency officials found actual comments more helpful than the ratings, it is not the purpose of the ratings to substitute for comments. Rather, it is to alert officials as to the level of concern of EPA as both a warning and impetus for fixing the problems and gaps identified in the comments.
- (2) **The absence of immediate, contemporaneous guidance for specific language to be used in lieu of ratings leaves a gap that will create confusion and inconsistency**

Any EPA substitution of specific wording in its comment letter for the 1984 ratings scheme makes it imperative that EPA provide contemporaneous guidance on what that wording is and means or it risks even more of the problems of inconsistency and/or confusion that EPA is purportedly concerned about. Instead it stops use of the rating scheme and directs OFA to develop guidance and training. This will leave an important gap subject to confusion and inconsistency. We also expect that EPA will continue to express concerns about the adequacy of the assessment, as it has historically done. Without adequate information it is hard to determine what the environmental impacts will be and the adequacy of mitigation for those impacts.

**(3) Prior to elimination of the rating scheme, EPA should provide opportunity for review and comment**

Although the EPA rating system was not embodied either in statute or regulation, it was mandated by longstanding EPA guidance for over thirty years. As such, it is something that other federal agencies, levels of government, and the public have come to rely upon.

We believe that in the interest of transparency, and avoidance of inadvertent negative impact that the removal of the rating system as well as proposed alternative language for signaling EPA's overall intent and judgement in regard to a proposed action be given an opportunity for public review and comment.

It has been customary under Administrative practice that significant modifications to guidance be informed by public review and comment. Moreover, we believe that by mandating EPA comments available to the public via the Clean Air Act Section 309, Congress clearly expressed its intent to describe a public interest in the manner in which EPA characterizes its comments. Changing long standing guidance by Memorandum without public notice and comment is contrary to the principles of good government.

**(4) The interplay between review responsibilities of EPA between the Clean Air Act Section 309 and NEPA appears to be mischaracterized**

The introductory paragraphs recognize that EPA's review mandate under the Clean Air Act section 309 is broader than the review role provided to EPA under NEPA and CEQ implementing regulations.

However it seems to suggest that this role is limited to commenting on all federal EIS documents. This is not our understanding of the scope of EPA's authority and mandate, which would also include the full range of impacts and, at EPA's discretion, any proposed federal agency action that warrants review, including those that were categorized as warranting only an Environmental Assessment or categorical exclusion.<sup>3</sup>

**(5) The unique value of ratings to garner high level attention to address problems and secure consistency should not be overlooked**

Adverse ratings of a draft EIS have often been a very effective tool in getting an agency's attention to an inadequate EIS or an environmentally unacceptable project.

Adverse ratings have fostered effective agency response and improved examination of the environmental impacts of a project and in many cases resulted in additional measures being taken to mitigate those effects.

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<sup>3</sup> See [https://www.energy.gov/sites/prod/files/G-EPA-309\\_caa\\_nepa.pdf](https://www.energy.gov/sites/prod/files/G-EPA-309_caa_nepa.pdf)

Adverse ratings uniquely get the attention of upper management in agencies. It was a tool that EPA used very judiciously but in those rare instances it sent a powerful message. Furthermore, discussion within EPA between headquarters and regions over ratings helps provide national consistency in ratings and comments.

There is a suggestion that providing a rating impedes cooperation and early engagement. Our experience is the opposite. Agencies have wanted to cooperate early to address EPA's concerns and avoid bad ratings later on.

There also is a public interest in both EPA comments and ratings. Ratings provide a very useful tool for the public because a rating is a simple, short hand signal of how EPA view the project's impacts and the adequacy of the EIS.

Ultimately the goal of the process is to improve Federal Agency decision making and ensure it has the benefit of independent EPA Review and Comment. It will always be a challenge for EPA to craft a good, compelling and articulate comment letter well supported by science, within the timeframes of the public comment period.

This policy change deserves further input and consideration before changing years of practice. An emphasis on early engagement by EPA with proposed actions of other federal agencies is important but with the reduction in EPA resources for this purpose it is doubtful that it can be accomplished.

We strongly urge that the October 22 policy change: a) be put on hold until it can be thoroughly vetted through public review and comment with a full explanation of EPA's basis for the conclusions contained in the October 22 memorandum, and b) be accompanied by a discussion of any alternative means that EPA is considering for clearly conveying the intention of EPA comments on both environmental impact and adequacy of analysis when issued and open for comment.

Thank you for your consideration.

Respectfully submitted,

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