Environmental Protection Network

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December 20, 2019

Andrew Wheeler, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20004

Re: "Modernizing the Administrative Exhaustion Requirement for Permitting Decisions and Streamlining Procedures for Permit Appeals"

Dear Administrator Andrew Wheeler:

The Environmental Protection Network (EPN) is an organization comprised of over 450 U.S. Environmental Protection Agency (EPA) alumni volunteering their time to protect the integrity of the EPA, human health and the environment. We harness the expertise of former EPA career staff and confirmation-level appointees to provide an informed and rigorous defense against current Administration efforts to undermine public health and environmental protections.

We are writing to you with comments regarding the December 3, 2019, "Modernizing the Administrative Exhaustion Requirement for Permitting Decisions and Streamlining Procedures for Permit Appeals" proposal. This proposed rule largely impacts the functionality of the Environmental Appeals Board (EAB), the final decision maker on administrative appeals under all major environmental statutes that EPA administers. There may be ways to improve the efficiency of the EAB, but it should not be done at the expense of the public's ability to meaningfully raise issues of concern about permits that allow emissions of pollutants in American communities. What we find most concerning about this proposal are the numerous elements that would privilege speed of resolution for the permit holder at the expense of the public's opportunity to raise issues and would allow political leadership to interfere with what has traditionally been an impartial and reliable bread-and-butter activity of the agency. Indeed, virtually every aspect of the proposal would narrow, shorten, or curtail the public's ability to raise issues before the EAB or limit authorities the EAB has reasonably exercised for decades.

The proposal would strike a particularly serious blow to environmental justice. It provides that the EAB cannot resolve a dispute unless both parties agree. That means that a permit applicant can prevent an EAB hearing and force residents of overburdened communities who wish to challenge a permit to bear the expense and burden of filing an action in federal court. It would also prevent the EAB from reviewing permitting actions to ensure that they comply with agency policy, including the requirement to conduct an environmental justice analysis of a proposed permitting decision.

The proposal does not put forward a compelling need for these changes. In fact, it provides no argument or evidence that the current EAB process is causing unreasonable delay in the permit review process. Rather, it notes that the number of permits reviewed by the EAB has decreased over time, and the voluntary

alternative dispute resolution (ADR) process has helped achieve faster resolution and broader support of outcomes. This is a process that is not broken and does not need fixing.

We appreciate the opportunity to comment and the agency's consideration of our points. EPN urges that EPA not move forward with this proposal. Attachment 1, "Updates to the Environmental Appeals Board Procedures," describes in more specific detail our key concerns with the proposal, and we incorporate them in this letter for the agency's consideration and response.

Respectfully submitted,

Michelle Roos
Executive Director
Environmental Protection Network

Updates to the Environmental Appeals Board Procedures
by Elizabeth Melampy, JD 2021

EPA recently proposed updates to the procedures for the Environmental Appeals Board (EAB)'s review of agency-granted permits. While the proposed rule intends to "streamline and modernize" the permit review process, it could harm the overall effectiveness, independence, efficiency, and transparency of the permit review process. Many of the proposed changes would disadvantage people and communities whose air or water is impacted by permitting decisions but who lack the resources to engage in the entire appeals process or seek relief in federal court.

The EAB reviews EPA's permitting decisions under a variety of environmental laws, including the Clean Water Act, the Clean Air Act, and the Resources Conservation and Recovery Act. The release of air and water pollution governed by an EPA-issued permit under these statutes can affect the health and surrounding environment of a broad range of stakeholders, such as local communities, neighboring states, and Tribes. Accordingly, the permit applicant or any interested person can appeal the issuance, terms, or denial of a permit to the EAB. For example, a company may seek a permit under the Clean Water Act to discharge pollutants into a nearby waterway. If EPA grants the permit, the company may appeal its terms, seeking a less stringent pollution threshold, or the town or an environmental group may appeal its terms (seeking a more stringent pollution limit) or the issuance of the permit altogether.

On December 3, 2019, EPA published a proposed rule amending the procedures for the EAB appeals process. The proposed rule: (1) creates a mandatory time-limited alternative dispute resolution (ADR) process; (2) limits the EAB's scope and standard of review; (3) eliminates *amicus curiae* participation; (4) eliminates the EAB's power to review permits on its own initiative; (5) shortens the time frame for the appeal process; (6) limits EAB judge terms to twelve years; (7) creates procedures for identifying which EAB decisions will be precedential; (8) gives priority to the Administrator's legal interpretations; and (9) changes regulations to implement these new policies.

These changes could result in a number of specific adverse effects. For example, under the proposal the EAB might no longer function as a neutral body within the agency where all parties affected by a permit decision can seek prompt review. Instead, the proposed process could be more expensive, less predictable for companies seeking permits, and inaccessible to some communities affected by the pollution governed by permits. The review process may also become more susceptible to the political pressures that EPA political leadership often faces.

EAB Background

EPA first established the EAB in 1992, in part to ensure that permit reviews "allow for a broader range of input and perspective in administrative decisionmaking" while "inspiring confidence in the fairness of Agency adjudications." In founding the EAB, EPA recognized the importance in separating key functions (permitting/enforcement versus adjudication) to promote confidence in the agency's operations. On its 25th anniversary, the EAB confirmed and reiterated its founding values of independence, impartiality, and transparency. The EAB permit appeals process keeps EPA accountable to its own regulations and statutes by providing an extra level of impartial review. As part of the review, for example, the EAB often decides whether EPA provided sufficient information and opportunity for meaningful public involvement in the initial decision-making process. Vetting those issues reduces parties' perceived need to challenge permits in federal court and strengthens EPA's position defending permits when they are challenged.

The EAB reviews appeals to a permit brought by any interested person. Historically, the EAB has been able to receive and consider briefs from *amici curiae* ("friends of the court") from non-appealing stakeholders. By allowing any party to participate as "amicus," the EAB's current rules ensure that all stakeholders – from individuals and communities to businesses and Tribes – can seek EAB review in a way that puts a manageable demand on groups whose resources are often scarce. Parties also have had the option of using a voluntary ADR process prior to, or in lieu of, going before the EAB. ADR often results in faster resolution and more flexible and creative outcomes for the parties than a traditional appeal before the EAB panel.

In these ways, the EAB appeal process provides a check on EPA actions, independently ensuring that EPA decisions further its mission to protect the environment and public health for all stakeholders, regardless of their economic status.

Proposed Changes

Requiring ADR

The proposed rule will convert the now-voluntary ADR opportunity into a mandatory prerequisite for parties before they can argue before the EAB. This requirement has the potential, in at least some cases, to *lengthen*, rather than streamline, the process for permit review, since even parties who do not want to submit their controversy to ADR now have to go through the process before any other potential review can be granted. By making ADR a required step before filing an appeal with the EAB, the proposal reduces the information available to the EAB judge facilitating the mediation and could squander the success of the EAB's current voluntary alternative dispute resolution program. Moreover, the Alternative Dispute Resolution Act of 1996 § 572(c) requires that ADR be voluntary. The proposal's prescriptive requirement ignores that law and creates formalistic barriers to permit review.

Under the proposed rule, parties must agree by unanimous consent to either continue the ADR process or have a hearing in front of the EAB. If parties do not reach an agreement on how to proceed, the case will go to federal court. This change effectively removes control from the EAB and hands it to parties, many of whom could try to game the system depending on which avenue they think will be most favorable for them. It could mean that many cases go to Federal court without the EAB's thorough review of the documentary record, which consists of lengthy technical documents and comments by stakeholders that inform the permitting decision. Without the quality control that the EAB provides under the current rules, this change could lead to Federal courts sending more decisions back to the agency to review, resulting in a longer process for parties, increased uncertainty regarding the outcome, and additional work for EPA.

The value to the overall permitting process of getting parties to federal court sooner may be overstated, since only 1% of the EAB's decisions are overturned in federal court. For regulated sources, whose priority is to move forward with implementing projects, the EAB's decisions are valuable because they can be relied

on as effectively final, which reflects the EAB's goal of inspiring confidence in the permitting process. Making the EAB a mere set of hoops to jump through on the way to federal court was not contemplated when the EAB was founded. Moreover, resolving a dispute in federal court takes significantly more time and money, resources which some individuals and groups directly affected by air or water pollution discharges don't have.

Limiting EAB's Scope of Review

The proposed rule significantly limits the EAB's scope of review when reviewing a permit, resulting in less certainty in the process for parties.

The proposal removes the EAB's review of agency acts of discretion. Historically, the EAB has been able to review agency acts of discretion and policy determinations that went into the initial permit decision. One example of this is the agency's consideration of a permit's impact on environmental justice communities. The EAB's review of agency discretion – those acts not strictly required by law – occurs in addition to the factual and legal determinations (e.g., whether EPA offered sufficient notice and opportunity for public participation). This proposed change will prevent the EAB from considering important aspects of a permitting decision and will force parties to bring those issues to Federal court for review.

This change will also significantly alter how the EAB can interact with the factual record before it. The proposal allows parties to choose which contested issues they want the EAB to hear. Under the proposal, even if the EAB decides certain aspects of the case, parties could bring other

issues to Federal court for review. This has the potential to increase the time and resources necessary to resolve a dispute, while also allowing parties to strategize about which claims should be heard where, circumventing the purpose of efficient, independent, and transparent review. The proposed rule also eliminates the EAB's power to review a permit on its own initiative (*sua sponte* review), meaning the EAB will now only review permits if they are appealed. These changes limit the EAB's review function and power, contravening its founding purpose.

Diminishing EAB's Independence

Aspects of the proposed rules also diminish the independence of the EAB and politicize the appeals process by giving more power to the EPA Administrator.

Under the proposed rule, the Administrator (through the agency's General Counsel) will be able to determine which EAB decisions are precedential (i.e., whether it will have any bearing on subsequent decisions by EPA and the EAB), giving a political appointee effective control over the jurisprudence of the independent board. Additionally, the proposed rule would allow the Administrator and General Counsel to issue a binding legal interpretation in any matter before the EAB, effectively overriding the very function of the EAB. Lastly, the proposed rule would limit EAB judges' terms to twelve years. Historically there has been no term limit, meaning that judges operate across administrations, assuring their independence and expertise. Adding a term limit would provide increased opportunities for EPA administrators to appoint judges with a more partisan purpose.

Each of these changes creates opportunity for political influence in what is supposed to be an independent review process.

Making it More Difficult for Stakeholders to Participate

The proposed rule removes the opportunity for interested third-parties to participate in a permit review as *amici*. By eliminating the stakeholders' amicus option, the proposal curtails citizen, corporate, and sovereign stakeholders' opportunity to seek review before the board by making the opportunity dependent on the exercise of rights by other parties with widely divergent interests.

In many cases before the EAB, a variety of amici submit briefs with important considerations and arguments that flesh out the full scope of the issues underlying the permit. Generally, the parties that come to the EAB as amici are downstream states, tribes, or trade associations/citizens groups who are affected by the permit issuance or terms. For example, the Dominion Energy case challenging emissions into the Narraganset Bay in Rhode Island included many amicus briefs from non-profits, neighboring states, and water utilities, all of which added important considerations into the review process.

As of now, there is a low barrier-to-entry (both in terms of procedural requirements and in terms of cost and resources) for participation in an EAB appeal process. Eliminating amicus participation will limit the EAB appeal process to only the challenger and the agency, preventing interested persons from being able to participate and advocate for their communities. Limiting amicus participation in this way directly contravenes the EAB's founding goal of promoting a diverse "range of input and perspective."

Conclusions

This proposed rule will have a practical effect of preventing permit review for interested and affected people, potentially lengthening and complicating the review process, and limiting the functional operations of the EAB in ways that directly conflict with its founding mission.

Permits allowing pollutant discharges ultimately affect communities, not all of which are directly involved in the permitting decision, such as communities downwind or downstream of a facility that releases harmful emissions into the air or water. EPA has an obligation to minimize, and to the extent possible, avoid, harm to these communities. One aspect of this responsibility is creating a process for permit review that strives to create a more level and just playing field between polluters and those affected. EAB's current review process reflects these values through its emphasis on an independent board, empowerment of parties through the ADR process, and accessibility to interested members of the public. This proposal, however, would weaken important safeguards for affected communities while, in some cases, granting more power to polluters and political appointees within the agency.