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U.S. EPA Environmental Appeals Board: August 20th U.S. House of Representatives Committee on Energy and Commerce Letter Questioning Potential Changes

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The United States House of Representatives Committee on Energy and Commerce (“Committee”) sent an August 20th letter to the United States Environmental Protection Agency (“EPA”) Administrator requesting information regarding potential changes to the EPA Environmental Appeals Board (“EAB”).

The letter originated from:

- Frank Pallone, Jr., Chairman, Committee on Energy and Commerce
- Diana DeGette, Chair, Subcommittee on Oversight and Investigations
- Paul D. Tonko, Chairman, Subcommittee on Environment and Climate Change

The EAB is the final decision maker on administrative appeals on various environmental statutes that EPA administers. It is a tribunal independent outside the immediate Office of the Administrator.

EAB describes its caseload as consisting primarily of appeals from permit decisions and administrative civil penalty rulings. It also addresses petitions for reimbursement of costs incurred in complying with cleanup orders issued under the Comprehensive Environmental Response, Compensation, and Liability Act.

EAB is made up of four judges who sit in panels of three.

The August 20th letter states by way of introduction:

According to a recent New York Times report, EPA is considering changes to the procedures for resolving challenges to EPA permits through the EPA Environmental Appeals Board (EAB) - changes which could disproportionately harm poor and minority communities. We believe the reported changes would threaten human health and the environment.

The Committee references the EAB review process and the fact it has issued over 1,100 final decisions in lieu of federal court litigation. Concern is expressed about actions that would undermine EAB’s independence and limit its scope of review. The following questions are posed:

1. According to reporting, your proposal will deny affected communities’ access to the EAB by allowing only permit applicants to file appeal with the EAB. Is this accurate, and if so, what justification can you provide for this change?

2. How will the changes being considered by the Agency to the EAB appeals process impact low-wealth and minority communities? Please provide all Agency materials which analyze the anticipated impact these changes will have on low-wealth and minority communities.
3. We understand that EPA's proposal is likely to revoke the delegation of authority to the EAB to elect to review exercises of discretion or important policy considerations. How often and in what situations has that authority been used? What analysis has been done of the deterrent effect of that delegation of authority?
4. We understand that EPA may propose to mandate that the EAB issue a final decision within 60 days of briefing and argument. Is that correct? If, on average, the EAB issues decisions five and a half months after a permit appeal is filed, how long after the completion of briefing and argument is the EAB issuing decisions? What consideration has EPA given to the fact that the EAB conducts thorough examinations of the administrative record underpinning Agency decisions in the context of this seemingly arbitrary 60-day deadline?
5. In what percentage of EAB appeals were briefing extensions requested? What is the average and outer bounds of the length of time requested? What are the existing requirements to obtain an extension? What percentage of extension requests are granted, and has EPA analyzed whether those extensions affect the time to resolution of a case in the context of EAB 's full docket?
6. It has been suggested that the current practice of the Agency is that conclusions of law made by the General Counsel are dispositive in administrative appeals. Please explain, in detail, how that current practice is implemented. For example, please provide examples in which EAB decisions treat opinions by the General Counsel regarding conclusions of law as dispositive.
7. What steps is EPA taking to ensure its regional offices make high quality and appropriately justified permitting decisions?
8. The rigorous reviews conducted by the EAB undoubtedly have a positive effect on the quality of permitting decisions. What analysis has been performed of the possible impact changes to the EAB review process, including shortening the review period, might have on the quality of permitting decisions?
9. We understand that the forthcoming proposal is likely to exclude enforcement appeals from the EAB changes. Is that accurate? If so, please explain why EPA would exclude enforcement appeals from the proposed rule.

A copy of the letter can be downloaded [here](#).