

ONE HUNDRED SIXTEENTH CONGRESS
Congress of the United States
House of Representatives

COMMITTEE ON ENERGY AND COMMERCE

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WASHINGTON, DC 20515-6115

Majority (202) 225-2927
Minority (202) 225-3641

August 20, 2019

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

Dear Administrator Wheeler:

Pursuant to Rules X and XI of the U.S. House of Representatives, the Committee is continuing to investigate efforts by the current leadership of U.S. Environmental Protection Agency (EPA) to undermine the Agency's mission to protect human health and the environment. Protecting the communities most at risk from pollution is an essential part of that mission. 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.¹ We believe the reported changes would threaten human health and the environment.

Since 1992, the EAB has provided an impartial and transparent process for challenging EPA permits. The Board hears appeals brought by individual citizens, states, cities, Native American tribes, and private businesses.² The EAB has issued over 1100 final decisions, in most instances resolving the dispute and avoiding expensive, extended litigation in federal court.³

¹ *E.P.A. Plans to Curtail the Ability of Communities to Oppose Pollution Permits*, The New York Times (July 12, 2019); see also Anna Wolgast, Kathie Stein, and Timothy Epp, *The United States' Environmental Adjudication Tribunal*, Journal of Court Innovation (Winter 2010).

² U.S. Environmental Protection Agency, *The EPA's Environmental Appeals Board at Twenty-Five: An Overview of the Board's Procedures, Guiding Principles, and Record of Adjudicating Cases* (July 1, 2017) ([www.yosemite.epa.gov/oa/EAB_Web_Docket.nsf/8f612ee7fc725edd852570760071cb8e/381acd4d3ab4ca358525803c00499ab0/\\$FILE/The%20EAB%20at%20Twenty-Five.pdf](http://www.yosemite.epa.gov/oa/EAB_Web_Docket.nsf/8f612ee7fc725edd852570760071cb8e/381acd4d3ab4ca358525803c00499ab0/$FILE/The%20EAB%20at%20Twenty-Five.pdf)).

³ *Id.*

Federal courts have been complimentary of and deferential to the Board's review, and less than one percent of EAB final decisions have been reversed.⁴

The Committee has a longstanding interest in the fair treatment of all parties affected by environmental permitting, and is troubled by EPA's reported efforts to limit the ability of communities to challenge the Agency's permitting decisions. Additionally, we are concerned that EPA is contemplating actions which could undermine the EAB's ability to effectively and independently adjudicate permits, limit the scope and nature of EAB's review, or foreclose administrative appeals altogether. Considering the EAB's impressive track record at resolving disputes, efforts to limit access to the Board or curtail its operations would appear to elevate the priorities of EPA's current political leadership over the Agency's mission to protect public health and the environment.

We therefore request that EPA provide a response to the following:

1. According to reporting, your proposal will deny affected communities' access to the EAB by allowing only permit applicants to file appeals 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?

⁴ *Id.*

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.

In addition to these questions, we request that EPA brief the Committee on the Agency's efforts to revise the role of the EAB in EPA's adjudication process. Staff will communicate with your office to arrange a mutually agreeable time.

Please provide all requested information and materials no later than September 3, 2019. If you have questions, please contact Jon Monger with the Committee staff at (202) 225-2927. Thank you for your attention to this matter.

Sincerely,



Frank Pallone, Jr.
Chairman



Paul D. Tonko
Chairman
Subcommittee on Environment
and Climate Change



Diana DeGette
Chair
Subcommittee on Oversight
and Investigations

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Attachments

cc: The Honorable Greg Walden, Ranking Member, Committee on Energy and Commerce
The Honorable John Shimkus, Ranking Member, Subcommittee on Environment and
Climate Change
The Honorable Brett Guthrie, Ranking Member, Subcommittee on Oversight and
Investigations