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Proposed Action Memo: EPA Rollbacks to Environmental Appeals Board

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I. Summary

On August 21, 2020, the Environmental Protection Agency (EPA) promulgated a rule undercutting the ability of the Environmental Appeals Board (EAB) to hear appeals of permit decisions and undermining the EAB's independence from the rest of the EPA.

Rollback

- Streamlining Procedures for Permit Appeals, 85 Fed. Reg. 51650 (Final Rule)

Agency

- Environmental Protection Agency

Impact

- Allows the EPA Administrator, by and through the General Counsel, to give dispositive legal interpretations on any matter before EAB, destroying EAB independence.
- Eliminates EAB's authority to conduct *sua sponte* review of permits.
- Sets 12-year term limits for EAB judges.
- Excessively restricts amicus curiae participation by interested parties.
- Reduces scope of EAB's review authority by removing prior provision that allowed EAB to review exercises of discretion and important policy considerations—likely ending EAB's consideration of permit compliance with the 1994 Executive Order on Environmental Justice.

Proposed Actions

- Issue interpretive guidance qualifying EPA Administrator's authority, by and through the General Counsel, to intervene in cases before the EAB.
- Initiate rulemaking process to safeguard the constitutionality of the EAB, granting the EPA Administrator authority to issue dispositive legal interpretations before and after appeals, but not while an appeal is on the active docket.
- Initiate rulemaking process to:
    - Remove 12-year term limit for EAB judges, reinstating career appointments
    - Restore amicus curiae participation by interested parties.
    - Restore scope of EAB's review to include exercises of discretion and important policy considerations.
    - Require consideration of environmental justice factors throughout EAB appeals process.

II. Justification

For nearly 30 years, the Environmental Appeals Board has been the principal forum in which to appeal pollution permits granted or denied by the EPA. Though established within the EPA, the EAB has long been insulated from the rest of the Agency, allowing it to operate as an independent and impartial decisionmaker.[1] The EAB's thorough adjudicatory process and reputation for objectivity have created a reliable system through which corporations, state and local governments, regional EPA offices, and impacted communities all plead their cases.

EAB has also served as a critical forum for tribal and minority communities, as more than half of all Americans who live within two miles of a facility that generates and handles hazardous waste are people of color.[2] This is, in part, because minority communities are less likely to have the resources to challenge pollution permits throughout the permitting process and in federal court. "[Many] low-income, minority, tribal, and indigenous communities continue to live in the shadows of the worst pollution and face some of the harshest impacts," as a result.[3] Until recently, however, the EAB was more accessible than the federal court system in the fight for environmental justice.[4]

In 1992, EPA established the EAB to hear appeals of pollution permit decisions that had previously been within the sole purview of the Administrator. In addition to creating a more practical and efficient appeals process, EPA sought to "allow for a broader range of input and perspective in administrative decisionmaking," thereby "lending greater authority to the Agency's decisions," and "inspiring confidence in the fairness of Agency adjudications."[5] The EAB is authorized to hear appeals of permits issued by or on behalf of EPA, including those issued under the Clean Air Act,

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1 U.S. ENVTL. PROTECTION AGENCY, A CITIZENS GUIDE TO EPA'S ENVIRONMENTAL APPEALS BOARD at 10 (2018) [hereinafter A Citizen's Guide].

2 Robert D. Bullard et al., *Toxic Wastes and Race at Twenty: Why Race Still Matters After All of These Years*, 38 ENVTL. L. 371, 396 (2008). *See also* Paul Mohai and Robin Saha, *Which came first, people or pollution? Assessing the disparate siting and post-siting demographic change hypotheses of environmental justice*, 10 ENVTL. RES. LETTERS 1, 16, 72 (2017) (finding that racial composition of a community is a consistently strong predictor of which areas are destined to receive facilities that generate and handle hazardous waste, while property values were a strong predictor from 1981-1995).

3 U.S. ENVTL. PROTECTION AGENCY, PLAN EJ 2014 at 14 (2011). *See also* Lesley Fleischman & Marcus Franklin, *Fumes Across the Fence Line: The Health Impacts of Air Pollution from Oil & Gas Facilities on African American Communities* at 6 (Nov. 2017), http://www.catf.us/wp-content/uploads/2017/11/CATF_Pub_FumesAcrossTheFenceLine.pdf (finding that African Americans are exposed to 38% more polluted air than Caucasian Americans).

4 *Id. See also* Lesley Fleischman & Marcus Franklin, *Fumes Across the Fence Line: The Health Impacts of Air Pollution from Oil & Gas Facilities on African American Communities* at 6 (Nov. 2017), http://www.catf.us/wp-content/uploads/2017/11/CATF_Pub_FumesAcrossTheFenceLine.pdf (finding that African Americans are exposed to 38% more polluted air than Caucasian Americans). *See also* American Lung Association, Comment Letter on Proposed Rule to Modernize the Administrative Exhaustion Requirement for Permitting Decisions and Streamlining Procedures for Permit Appeals at 2 (Dec. 3, 2019) (explaining that polluting facilities in the United States are disproportionately located in low-income or minority communities) https://beta.regulations.gov/comment/EPA-HQ-OGC-2019-0406-0011.

5 Changes to Regulations to Reflect the Role of the New Environmental Appeals Board in Agency Adjudications, 57 Fed. Reg. 5320, 5320–22 (Feb. 13, 1992).

the Clean Water Act, the Safe Drinking Water Act, and the Resource Conservation and Recovery Act.[6]

Fair and fully considered EAB decisions require explicit attention to environmental justice concerns. In conjunction with President Clinton's Executive Order 12898 mandating that each federal agency incorporate environmental justice into its mission,[7] "decades of EPA administrative case rulings [] have guaranteed consideration of environmental justice impacts in permit decisions."[8] EPA's 2014 Environmental Justice Plan built upon these efforts, setting a goal to "enable overburdened communities to have full and meaningful access to the permitting process and to develop permits that address environmental justice issues to the greatest extent practicable under existing environmental laws."[9]

EAB judges sought to carry out this mission, in part, through a robust permit appeals process, which included EAB authority to review permit decisions for exercises of discretion and important policy considerations, the authority to conduct *sua sponte* review of permit decisions, and amicus curiae participation by interested parties throughout the permit appeals process.

All of these crucial mechanisms were either eliminated or effectively gutted in the EPA's August 21, 2020 procedural rule titled, "Streamlining Procedures for Permit Appeals."[10] The current rule expedites the pollution permitting process for applicants, ostensibly making the EAB a more attractive option for parties to resolve permit disputes and creating positive externalities, such as reduced construction delays.[11] While this may be true, the rule's greater impact is to extinguish EAB's independence from the rest of the EPA and deprive minority and low-income communities of access to the EAB. This impact creates harmful secondary effects as well, severely undermining the legitimacy of the appeals process itself and restricting the EAB's ability to consider environmental justice impacts.[12]

III. Current State

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6 *Id.* at 5320–5321.

7 Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7,629 (Feb. 16, 1994).

8 Press Release, U.S. Senator for Delaware Tom Carper, EPA's Legally Flawed Environmental Permitting Rule Would Silence the American People and Have Devastating Consequences for Environmental Justice Communities (Jul. 22, 2020) https://www.carper.senate.gov/public/index.cfm/2020/7/carper-epa-s-legally-flawed-environmental-permitting-rule-would-silence-the-american-people-and-have-devastating-consequences-for-environmental-justice-communities.

9 U.S. ENVTL. PROTECTION AGENCY, PLAN EJ 2014 at 11 (2011).

10 Streamlining Procedures for Permit Appeals, 85 Fed. Reg. 51,650 (August 21, 2020) (to be codified at 40 C.F.R. pt. 124).

11 Modernizing the Administrative Exhaustion Requirement for Permitting Decisions and Streamlining Procedures for Permit Appeals, 84 Fed. Reg. 66,084 (proposed Dec. 3, 2019) (to be codified at 40 C.F.R. pt. 124).

12 Press Release, U.S. Senator for Delaware Tom Carper, *supra* note 9.

Though billed as a procedural rule, "Streamlining Procedures for Permit Appeals" affects serious substantive change in the scope of EAB's authority and its ability to hear appeals. The current version of the rule seems aimed at achieving three main goals: 1) drastically reducing EAB's independence and authority to adjudicate permit appeals, 2) restructuring the role of EAB judges to avoid litigation under the Appointments Clause, and 3) curtailing EAB access for impacted communities and non-governmental organizations (NGOs), thereby hamstringing environmental justice efforts. The following subsections detail each substantive change made in the final rule and the implications of each change.

EPA Administrator May Issue Dispositive Legal Interpretations

In the most serious blow to the EAB's independence, the current rule provides that "…the Administrator, by and through the General Counsel, can issue a dispositive legal interpretation in any matter before the EAB or on any issue addressed by the EAB."[13] This appears to give "the Administrator not just a 'thumb on the scales' but complete control over the EAB's decision."[14] The prior EAB process enabled parties to litigate appeals before a neutral, final decision maker not previously involved in the particular decision at issue. That guarantee of impartiality no longer exists.

This aspect of the rule is vague, with almost no elaboration by EPA. It is not clear at what stages the Administrator could intervene in EAB proceedings to pronounce an interpretation, or what role the Administrator's dispositive interpretation would have on the rest of the appeals process.[15] Without further clarification, it is entirely possible that the EPA Administrator could intervene at any stage in the appeals process to issue a dispositive legal interpretation, effectively short-circuiting the EAB process at will. If so, the "dispositive interpretation" clause removes any guarantee of EAB independence within the EPA.

It seems likely that EPA crafted this subsection of the current rule as part of a larger effort to avoid litigation stemming from the 2018 Supreme Court decision in *Lucia v. SEC*.[16] In *Lucia*, the Supreme Court held that Administrative Law Judges (ALJs) in the Securities and Exchange Commission (SEC) are "Officers of the United States," rather than employees, requiring that they be appointed by the President with the advice and consent of the Senate.[17] This ruling posed an immediate problem for the EAB, as the role of an EAB judge under the previous version of 40 CFR §124.19 had critical similarities to the role of an SEC ALJ, and EAB judges were not confirmed by the

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13 85 Fed. Reg. 51,650 at 51653.

14 South Coast Air Quality Management District, Comment Letter on Proposed Rule to Modernize the Administrative Exhaustion Requirement for Permitting Decisions and Streamlining Procedures for Permit Appeals at 2 (Dec. 3, 2019), https://beta.regulations.gov/comment/EPA-HQ-OGC-2019-0406-0007.

15 *See* Environmental Integrity Project, Comment Letter on Proposed Rule to Modernize the Administrative Exhaustion Requirement for Permitting Decisions and Streamlining Procedures for Permit Appeals at 2–3 (Dec. 3, 2019), https://beta.regulations.gov/comment/EPA-HQ-OGC-2019-0406-0021.

16 Lucia v. SEC, 138 S. Ct. 2044 (2018). *See also* 85 Fed. Reg. 51650, 51654.

17 *Id.* at 2047.

Senate. Thus, after *Lucia*, a court could have found that EAB judges were serving in violation of the Appointments Clause.[18]

In promulgating the current rule, EPA correctly identified the threat of litigation under the Appointments Clause as a grave problem. The constitutionality of the entire EAB could be in jeopardy without some restructuring of the role of EAB judges. However, the solutions set forth in the current rule are misguided—gutting EAB independence and authority rather than increasing EAB's accountability to the Administrator. As this is likely the most serious issue resulting from the current rule, Section V of this memorandum provides a more in-depth discussion of *Lucia's* impact on the constitutionality of the EAB judge positions.

Eliminated *Sua Sponte* Review

In seemingly another attempt to prevent litigation arising from *Lucia*, the current rule has eliminated EAB's authority to conduct *sua sponte* review of permits. *"Sua Sponte* review… ensures that *all* permits comply with federal law and EPA guidelines even if the public – whether by lack of awareness, lack of resources, or both – does not bring a petition for appeal."[19] In promulgating the rule, the EPA argued that the EAB rarely exercised its *sua sponte* review authority.[20] But the EAB's mere ability to use that authority may have had a salutary effect on the permitting process. Removing *sua sponte* review weakens EAB's capacity for oversight. For example, if EAB identifies an issue that others have not brought forward, EAB would be unable to address the issue and protect the public.

Set 12-Year Term Limit for EAB Judges

Additionally, the current rule limits EAB Judges to serving 12-year terms, renewable at the EPA Administrator's discretion.[21] In keeping with the two aforementioned changes, EPA's justification for creating term limits also seems almost entirely directed at the *Lucia* issue. The term limits ostensibly assist in pigeon-holing EAB Judges into the status of an employee, rather than as principal "Officers of the United States." However, for reasons elaborated in Section V of this memorandum, the 12-year term limit is an unnecessary mechanism for heading off litigation under the Appointments Clause.

Eliminated Review of Discretionary Acts and Important Policy Considerations

With the current rule, EPA also eliminated EAB's discretionary review and EAB's power to review the Agency's compliance with discretionary policies. This change appears most harmful to environmental justice efforts. The Agency justified reducing the scope of EAB's authority in order to make "EAB's review more akin to that of federal courts."[22] However, this action notably limits EAB's ability to review EPA's compliance with Executive Orders, including EO 12898.

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18 U.S. CONST. art. 2, §2, cl. 2.

19 American Lung Association, Comment *supra* note 1, at 3.

20 85 Fed. Reg. 51,650 at 51652.

21 *Id.* at 51,652–53.

22 *Id.* at 51652.

Under Executive Order 12898, "each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."[23] However, since the Office of Environmental Justice within EPA has no authority to enforce its guidance on implementing EO 12898, enforcement falls on other administrative bodies, such as EAB.[24]

The EAB, as an independent and impartial body, has on multiple occasions remanded permits issued by EPA Regional Offices due to inadequate consideration of environmental justice impacts.[25] Of course, permit applicants have also won appeals where the EAB has explicitly weighed environmental justice concerns and ruled for permit applicant sometimes relying on agency procedural delays and "grandfathering" recent polluting facilities into older, less stringent air quality standards.[26]

That is to say, the EAB's power to review permits for environmental justice concerns is not a guarantee of protection for minority and low-income communities. But the current rule guarantees that environmental justice will be considered less frequently in permit appeals. At present, EAB is only able to consider environmental justice when required by a statute relevant to the appeal.[27] By gutting the vital EAB function of discretionary and important policy consideration review, EAB cannot continue to specifically evaluate environmental justice issues in assessing permits that disproportionately impact the communities most at risk of pollution-related harms.

Amicus Curiae Participation

Finally, the current rule eviscerates 40 CFR 124.19(e), which allows for amicus curiae participation by interested parties in the permit appeal process.[28] Previously, in most appeals, the deadline to file amicus briefs was 15 days after the filing of the response brief. Now, all amicus briefs must be filed 21 days after the petition for review is filed. Further, amicus briefs may not exceed 15 pages.[29] EPA's only justification for implementing these changes is that this helps achieve "the goal of streamlining the overall appeals process" without entirely eliminating amicus participation. In reality, these cuts are so deep that they will make meaningful amicus participation prohibitively difficult. Thus, while pollution permit seekers retain the full time and page allotments from the previous version of the

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23 59 Fed. Reg. 7629, 7629 (Feb. 11, 1994).

24 *See* Hannah Perls, EPA Undermines its Own Environmental Justice Programs (November 12, 2020), https://eelp.law.harvard.edu/2020/11/epa-undermines-its-own-environmental-justice-programs/.

25 *See e.g.,* In Re Muskegon Development Company, 2019 WL 1987188 (EAB 2019); In Re Shell Gulf of Mexico, Inc. (frontier discovery drilling unit), 15 E.A.D. 103 (EAB 2010).

26 Eileen Gauna, *Federal Environmental Justice Policy in Permitting*, in FAILED PROMISES: EVALUATING THE FEDERAL GOVERNMENT'S RESPONSE TO ENVIRONMENTAL JUSTICE 57, 65–66 (David M. Konisky ed., 2015). *See also* In re Avenal Power Center LLC, 15 E.A.D. 384, 391 (EAB 2011).

27 *See e.g.* 32 CFR §651.17 ("…requires the proponent to determine whether the proposed action will have a disproportionate impact on minority or low-income communities, both off-post and on-post.")

28 85 Fed. Reg. 51,650 at 51652.

29 *Id.*

rule, the current version of §124.19(e) all but mutes NGO and community advocacy voices in the appeals process.

This change not only tilts the appeals process towards permit seekers but encroaches on the integrity of the process itself. EAB cases regularly require Judges to make industry-specific assessments and analyze complex permit conditions.[30] Amicus briefs provide insightful technical and background information that parties may not have supplied in their arguments.[31]

Moreover, narrowing EAB's breadth of input when evaluating permitting decisions harms under-resourced groups, which may not have the capacity to appeal on their own but would join ongoing appeals.[32] Drastically shortening both the window in which to file and the maximum length of an amicus brief removes valuable input from the appeals process, while only making the overall appeals process marginally shorter.

IV. Proposed Action

To restore EAB independence and revitalize the Board's authority to review permits for compliance with important policies, such as environmental justice, the Agency should immediately promulgate a guidance document announcing a new interpretation of one provision in the current rule. The guidance document should qualify the EPA Administrator's authority, by and through the General Counsel, to intervene in cases before the EAB.

The Agency should then initiate a rulemaking to revert to the 2019 version of 40 C.F.R. §124.19 with some updates. This would 1) restore the scope of EAB's review to include *sua sponte* review of permit decisions, 2) reestablish EAB's authority to review exercises of discretion and important policy considerations, and 3) require consideration of environmental justice factors throughout the EAB appeals process.

Unfortunately, interim measures to stay the current rule are implausible. The current rule became effective September 21, 2020. No action outside the halls of EPA was necessary to begin complying with the current rule, so there was no delay between the rule's effective date and the compliance date. This prevents the incoming administration from "delaying," "suspending," or "staying" the rule on the premise that it was promulgated too close to the inauguration of incoming administration.[33] There is no ongoing litigation against the rule either; therefore, seeking abeyance of the rule is not a viable option.

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30 Earthjustice, *supra* note 4, at 11.

31 The National Association of Clean Water Agencies, Comment Letter on Proposed Rule to Modernize the Administrative Exhaustion Requirement for Permitting Decisions and Streamlining Procedures for Permit Appeals at 2 (Dec. 3, 2019), https://beta.regulations.gov/comment/EPA-HQ-OGC-2019-0406-0017.

32 The Fond du Lac Band of Lake Superior Chippewa, Comment Letter on Proposed Rule to Modernize the Administrative Exhaustion Requirement for Permitting Decisions and Streamlining Procedures for Permit Appeals at 2 (Dec. 3, 2019), https://beta.regulations.gov/comment/EPA-HQ-OGC-2019-0406-0028.

33 Bethany Davis Noll & Natalie Jacewicz, *A Roadmap to Regulatory Strategy in an Era of Hyper-Partisanship* at 13 (2020), https://policyintegrity.org/files/publications/A_Roadmap_to_Regulatory_Strategy_in_an_Era_of_Hyper-Partisanship.pdf.

Guidance Document

In the 1992 rule creating the EAB, the EPA Administrator delegated the authority to hear pollution permit appeals to the EAB.[34] Interventions by the Administrator in EAB cases would infringe on the integrity of the EAB process, but this does not technically alter the scope of EAB's authority to hear and adjudicate appeals. As stated in the final rule, the intent of the rule is "to allow the Administrator, in specific cases, to retain authority as it pertains to legal interpretations in administrative appeals."[35] But of course, because the Administrator has retained this authority throughout the life of the EAB, this section of the current rule amounts to nothing more than the previous administration's interpretation of the EPA Administrator's unbroken authority to hear appeals.

The language of the final rule supports this view, acknowledging that "EPA agrees with the comment that the Administrator does not need this mechanism to achieve the goals of this provision."[36] Because this mechanism affects no change in the EPA Administrator's or the EAB's scope of authority to hear appeals, the incoming administration could issue a guidance simply clarifying the extent of the Administrator's authority to issue dispositive legal interpretations in the appeals process.

The guidance document could first commit to upholding the original goals of the EAB, namely burnishing the authority of Agency decisions and inspiring fairness in the appeals process. The EPA should then interpret the Administrator's authority to intervene in matters before the EAB to be limited to appeals not on the active docket. Effectively, this would mean that the Administrator may issue a dispositive legal interpretation before the appeal has formally commenced, or after the EAB has issued its final ruling, but will not intervene while an appeal is active. This interpretation does not fully restore the prior independence of the EAB, as the Administrator still has final authority if the Administrator chooses to intervene. However, this guidance clarifies when the Administrator can intervene and therefore solidifies how the appeals process will be organized, reinjecting the process with stability and reliability.[37]

Furthermore, the current rule is harmfully overbroad, conflating EAB judges' accountability to the Administrator with a lack of independence from the Administrator. The guidance document can correct this. One possible solution to restore EAB independence within the EPA is to assert that once the appeals process begins before the Board, the EPA Administrator will not intervene. By qualifying the Administrator's right to issue dispositive legal interpretations either before or after an appeal, the integrity of the EAB appeals process itself remains intact. Even so, EAB judges would be generally accountable to the Administrator, as any final decision could be reviewed by the

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34 57 Fed. Reg. 5320, 5320.

35 85 Fed. Reg. 51650, 51653.

36 *Id.*

37 This measure is likely necessary to restore EAB independence while simultaneously avoiding litigation arising from *Lucia*. Issuing guidance declining to exercise the Administrator's ability to intervene and issue dispositive legal interpretations would functionally restore final authority to EAB judges, which would weigh against a court finding EAB judges to be employees rather than "Officers of the United States."

Administrator. Moreover, EAB judges would be required to tailor their jurisprudence in future cases to accommodate the Administrator's dispositive interpretations.

By making this concession on EAB's independence, the Agency will mitigate the risk of litigation that might otherwise unravel EAB as an adjudicatory body.

Rulemaking Process

EPA should then initiate a rulemaking process to repeal the current rule and promulgate a new rule. This new rule would largely return to the language of the rule as it stood prior to the August 21, 2020 change.[38] This includes restoring 40 CFR 124.19(e) to its prior language which will rejuvenate the amicus participation process. However, the Notice of Proposed Rulemaking (NPRM) should make clear that the Agency intends to 1) clarify the role of EAB judges such that they will retain employee status, and 2) make certain environmental justice updates, requesting input on how to most effectively formalize considerations of environmental justice in the EAB appeals process.

To clarify the role of EAB judges in a way that protects against Appointments Clause litigation, the new rule should be cautious when reinstating EAB's power to act at its own discretion. Specifically, the new rule should not restore the EAB's power of *sua sponte* review. While *sua sponte* review may have once been a useful tool for the EAB, in post-*Lucia* analyses of Appointments Clause violations it will be a strike against the EAB.[39] However, the NPRM should explore restoring the EAB's power to review important policy considerations and discretionary acts. Because this power is not triggered at EAB's discretion but at the request of a party to the appeal, it is less likely to create an Appointments Clause issue. Finally, the NPRM should propose to eliminate the 12-year term limits for EAB judges. As term limits do not appear to be a factor in a court's "Officer" v. employee analysis, a new rule could restore EAB judges' career appointments. These proposed changes clearly do not succeed in completely restoring EAB's independence and scope of authority as it stood in 2019. Unfortunately, it appears impossible to do so without inviting litigation that could threaten the constitutionality of the EAB.

A notice-and-comment rulemaking process is likely necessary to do away with the most troublesome aspects of the current rule. Despite the Trump administration's claims that the changes made in the August 21, 2020 final rule are just procedural, limiting the scope of review of EAB judges, creating the 12-year term for EAB judges, and eliminating amicus curiae participation in permit appeals obviously has substantive effects.[40] Additionally, since the August 21, 2020 rule was promulgated through notice and comment, "Streamlining Procedures for Permit Appeals" was likely a "substantive" rule binding the agency. Because of this, a guidance document will not suffice to effectively repeal the August 21, 2020 rule.

A rulemaking process will be required even though the current rule simply omits the previous references to EAB's scope of authority instead of disclaiming that authority. 40 C.F.R. §1.25(b)

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38 40 C.F.R. §124.19 (2019).

39 *See* Section V, 9–10.

40 Earthjustice, *supra* note 4, at 6–7.

provides only that EAB "shall exercise any authority expressly delegated to it in this title."[41] Thus, because the current rule does not explicitly authorize review for exercises of discretion and important policy considerations, the Agency cannot realistically interpret the current rule to include such powers. Abiding by the same principle, EAB judges no longer have explicit authority to serve beyond the 12-year terms. Repealing the current rule and reinstating the 2019 language of these subsections is therefore the only plausible way to restore critical EAB functions in compliance with §1.25(b).

When weighing possible environmental justice reforms for EAB, the Agency should look for ways to increase EAB's authority to monitor and enforce Executive Order 12898. As much of the new rule will necessarily be focused on restoring previous EAB authority, enhancing EAB's capacity to consider environmental justice is one of the few ways the incoming administration can go beyond restoration and improve the EAB. It might be possible to amend §124.19(b)(1-2) to require the Regional Administrator to include an environmental justice analysis in his/her response to the petitioner, thereby ensuring that environmental justice arguments are entered into the appeals record. Alternatively, or in addition to the above option, EPA could insert a clause into §124.9(b), requiring that an environmental justice analysis be part of the administrative record for draft permits when the EPA is the permitting authority.

Notice-and-comment rulemaking that will undo the harms of "Streamlining Procedures for Permit Appeals" can unfold in two ways. First, EPA could first do a notice-and-comment rulemaking solely to repeal the current rule, restoring §124.19 to its pre-2020 language. Because EPA would not be proposing any new policies, this step could be relatively brief (a 30-day period for notice and comment would suffice). EPA could then do a second, separate notice-and-comment rulemaking to upgrade the EAB's environmental justice capacity.

Alternatively, EPA could repeal the current rule and propose a new rule in one fell swoop, thereby restoring EAB's independence, clarifying its scope of authority, and strengthening its ability to address environmental justice concerns through one regulatory action.

On balance, we recommend the latter strategy. In a two-step process, if the current rule is repealed and the EAB takes any action before the new rule is promulgated, there is serious risk of litigation arising from Lucia. A one-step process in which EPA codifies EAB judges' status as employees pursuant to the aforementioned guidance document will directly address any potential Appointments Clause issues. Until a new rule is passed, the guidance document should begin the process of restoring faith in EAB independence. Additionally, any efforts at addressing EAB independence and Appointments Clause issues through notice and comment rulemaking face the same risks as the same efforts made in a guidance document.

Following either strategy, a new rule likely would not require an exhaustive cost-benefit analysis to insulate it from challenges that it is arbitrary and capricious. The Trump administration asserted that the current rule would decrease delays in permitting and construction, lower regulatory costs, and

[41] 40 C.F.R. §1.25(b) (2019).

increase jobs at polluting sites. To counter this, the incoming administration could emphasize the increased healthcare and pollution clean-up costs under the current rule, and projected property value declines related to increased pollution. The incoming administration could also re-assert the obvious benefits associated with the previous version of the rule or an updated rule, such as the lower costs and greater accessibility associated with appealing to EAB rather than federal courts.

Finally, the Biden administration should expect environmental and community advocacy groups to continue pushing for a greater focus on environmental justice at the EAB. This will likely take the form of increased appeals to the EAB for more stringent pollution permits and lobbying to formalize environmental justice considerations in the EAB appeals process.

The New Rule Should Avoid Changes to the ADR System

As of 2017, the ADR "program [had] been highly successful, and, to date, over 90% of the cases that have gone through the program have been resolved without litigation."[42] Though many commenters expressed strong opposition, the previous administration initially sought to expand upon the program's effectiveness by making it mandatory. However, the success rate of self-selected arbitrations in a voluntary scheme fails to account for the cases in which parties chose not to arbitrate. Moreover, that statistic cannot be extrapolated into a mandatory ADR scheme where the balance of power in the pre-appeals process would greatly favor the parties seeking pollution permits. ADR should remain entirely voluntary and should not serve as a substitute for the EAB appeals process.

[42] U.S. ENVTL. 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, 5 (2020).