January 2, 2020

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

Sent via Regulations.gov

RE: Comments on Docket ID No. EPA-HQ-OGC-2019-0406

Dear Administrator Wheeler:

The American Lung Association opposes the U.S. Environmental Protection Agency's (EPA's) proposed procedural rule altering the Environmental Appeals Board (EAB) process, titled "Modernizing the Administrative Exhaustion Requirement for Permitting Decisions and Streamlining Procedures for Permit Appeals" ("Proposed Rule").

The Proposed Rule, according to EPA, is designed to be a procedural change with the purpose of streamlining EPA's permitting process. However, the language is far more concerning than this description implies, meriting greater opportunity for public comment. The Proposed Rule contradicts the long-established functions of the EAB and could ultimately harm public health.

EPA should provide more time for comments and a public hearing

Under the Clean Air Act, the public has a right to public hearings on proposed rules and an adequate comment period. However, the comment period for this Proposed Rule is a brief 30 days, a minimal time in ordinary periods, but egregiously short during this time of year. These 30 days fall during the time when offices are closed, and many people are traveling to be with friends and family for the holidays. This timing inhibits organizations' abilities to analyze and

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offer detailed comments on the proposal – particularly nonprofit organizations. The timing appears designed to primarily minimize public input. We request that EPA extend the comment period to at least 90 days and to hold a public hearing.

Undermining the purpose of the EAB

The EAB was created in 1992 and has the responsibility of reviewing permits issued by the EPA Regional Administrators and some state and tribal permitting officers. An interested party ("the public") may file an appeal to an EPA permit over concerns that the permit does not do enough to protect the health of the environment and the people surrounding the utility at hand ("permit applicant"). As we unfortunately know all too well, communities where polluting facilities are built are disproportionately likely to be low-income or minority areas, and the public too often lacks the wealth and power to litigate their rights in federal court. This means that for the very communities for which air pollution permits are most critical, the EAB may be one of the only resources they have to ensure that these permits protect public health.

By the methods outlined below, this Proposed Rule would effectively strip the public of their right to fair and impartial administrative review. Instead of the current process, which in EPA's own words is designed "to provide a fair appeals process for resolving environmental permitting and enforcement disputes between EPA and non-EPA stakeholders," the Proposed Rule would result in a board fundamentally biased against those seeking to challenge a pollution permit as too weak.[1]

Favoring industry over health

Under the current process, interested parties have the ability to first attempt an "alternative dispute resolution" (ADR) before bringing an issue to the EAB. Under the Proposed Rule, ADR would be a requirement rather than a voluntary course of action - and the *only* way an appeal could make it from the ADR to the full EAB is if there was unanimous consent to do so from all the parties involved. If one party disagreed with the appeal, the process would end there, and the permit would be allowed to stand as-is.

The result would be that in cases where an outside group or individual challenged a pollution permit, the polluting source could essentially veto any appeal to the EAB.

Without outrightly saying it, EPA is seeking to tilt the favor towards the permit applicant – particularly if the complaint from the public would result in stronger permit provisions.

This could have direct implications for the health of the communities surrounding the location of a permit applicant. Under the Clean Air Act, a permit from EPA is required for any new source of emission or any modifications made to a source of emission. That permit outlines the steps and technology that the source is legally bound to put in place to lower emissions. Currently, if an emitting source receives a permit with weak language, the public has the right to fair and impartial administrative review, which can result in stronger measures required to protect their health. Under the Proposed Rule, the revised procedures would effectively deny the public their voice in this challenge. Absent such review, the emissions permitted from that plant could damage the health of the community surrounding the plant at a greater level than if the current EAB process was in place.

Further weakening the review process

Under current EAB practice, the Board is able to review permits and related legal, factual and policy considerations at its own discretion, referred to as *Sua Sponte* review. This practice 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.

In the Proposed Rule, EPA says that the EAB "rarely invokes this authority." This is a wholly inadequate justification for eliminating *Sua Sponte* entirely. Regardless of how often the EAB takes advantage of it, having the ability to review a permit for any reason – particularly one that contains provisions that do not adequately protect the public from harmful emissions – is an important responsibility the EAB needs to continue to have. If EPA shuts the public out of the review process using the earlier sections of the Proposed Rule, knocking down this additional wall of protection against improper permits is especially egregious.

Further, the Proposed Rule includes other changes to limit the EAB's decision-making process. The Proposed Rule eliminates amicus curiae participation in appeals, eliminating viewpoints from the case that can offer additional, relevant and constructive information to the EAB in what are often complex, technical cases. The Proposed Rule also severely

limits the Board's time to issue decisions, further undermining their ability to fully consider each case.

Further adding reason for concern, when the EAB issues a ruling on a permit, that ruling becomes a binding agency decision, capable of setting precedent for future decisions. By severely limiting the public's ability to raise concerns over a particular permit, the EPA is not only ignoring key pieces of information in the case, they are effectively enshrining that decision for years to come.

Conclusion

The Proposed Rule is yet another example of EPA attempting to undercut processes that have been in place and worked for years in favor of a system that will defer to powerful industry, a trend we have seen too often in this Administration. We at the American Lung Association will continue to protect the communities affected by air pollution due to local emission sources. We urge the Administrator to abandon this Proposed Rule and any attempts to erode systems designed to protect the public health. We call on the Administrator to, at the very least, extend the comment period and hold a public hearing on this proposal.

Sincerely,

Deborah Brown
Chief Mission Officer
American Lung Association

1. The EPA's Environmental Appeals Board at Twenty-five: An Overview of the Board's Procedures, Guiding Principles, and Record of Adjudicating Cases, https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/8f612ee7fc725edd852570760071cb8e/381acd4d3ab4ca358525803c00499ab0/$FILE/The%20EAB%20at%20Twenty-Five.pdf