

JAMES M. INHOFE, OKLAHOMA
SHELLEY MOORE CAPITO, WEST VIRGINIA
KEVIN CRAMER, NORTH DAKOTA
MIKE BRAUN, INDIANA
MIKE ROUNDS, SOUTH DAKOTA
DAN SULLIVAN, ALASKA
JOHN BOOZMAN, ARKANSAS
ROGER WICKER, MISSISSIPPI
RICHARD SHELBY, ALABAMA
JONI ERNST, IOWA

THOMAS R. CARPER, DELAWARE
BENJAMIN L. CARDIN, MARYLAND
BERNARD SANDERS, VERMONT
SHELDON WHITEHOUSE, RHODE ISLAND
JEFF MERKLEY, OREGON
KIRSTEN GILLIBRAND, NEW YORK
CORY A. BOOKER, NEW JERSEY
EDWARD J. MARKEY, MASSACHUSETTS
TAMMY DUCKWORTH, ILLINOIS
CHRIS VAN HOLLEN, MARYLAND

United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

RICHARD M. RUSSELL, MAJORITY STAFF DIRECTOR
MARY FRANCES REPKO, MINORITY STAFF DIRECTOR

July 22, 2020

The Honorable Andrew Wheeler
Administrator
U.S. Environmental Protection Agency
1301 Constitution Ave. NW
Washington, DC 20460

Dear Administrator Wheeler:

I write to urge EPA to withdraw its December 2019 proposed rule entitled, *Modernizing the Administrative Exhaustion Requirement for Permitting Decisions and Streamlining Procedures for Permit Appeals*.^[i] Far from “modernizing” EPA’s air, water, and hazardous waste permit appeals process, this rule would take us backwards -- back to a time when industries could pollute without consequence and when Americans had little say over the projects built in their own backyard. This proposed rule is yet another short-sighted attack on the ability of communities, including low-income communities and communities of color, to have a meaningful voice in projects that impact their health such as electric generation facilities, wastewater discharge facilities, and hazardous waste landfills.

Under current practice, if a regulated entity wants a permit to discharge pollutants into a river or construct and operate a fossil fuel electric plant for example, the affected local community can submit its objections in public comments on the proposed permit and fully participate in an appeal before EPA’s neutral 3-judge Environmental Appeals Board (EAB). If the EAB rules against the community, the community can then seek review in federal court.^[ii] EPA’s proposed rule unlawfully limits the scope of who can participate in environmental permit appeals, recklessly narrows what can be reviewed in such appeals, and stacks the deck with political officials who can overrule legal experts’ conclusions.

The proposed rule would eliminate the public’s absolute right to challenge air, water, and hazardous waste permits before EAB panels that EPA Administrator William Reilly created in 1992. Under the proposal, permit appeals to the EAB would be allowed only after the unanimous agreement of all parties, essentially giving the industrial permit applicant a veto over whether a challenge could occur at all and subordinating the interests of families, communities, and individuals. The proposal also eliminates the EAB’s longstanding right to consider any “important policy consideration” in permit appeals, thereby drastically scaling back the EAB’s ability to consider environmental justice (EJ) impacts. Finally, the proposal also weakens the authority of the EPA career officials who serve as EAB judges by imposing term limits on their service and allowing agency political appointees to overrule the EAB’s legal conclusions.

Many of those who would be most harmed by this proposed rule are already suffering from increased adverse health impacts and economic devastation brought on by the Trump Administration’s abysmal failure in handling the COVID-19 crisis. Centers for Disease Control data show that African Americans, Latinos, Native American and Indigenous Communities are all experiencing COVID-19-associated

^[i] 84 Fed. Reg. 66084 (Dec. 3, 2019) <https://www.govinfo.gov/content/pkg/FR-2019-12-03/pdf/2019-24940.pdf>

^[ii] “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](https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/8f612ee7fc725edd852570760071cb8e/381acd4d3ab4ca358525803c00499ab0/$FILE/The%20EAB%20at%20Twenty-Five.pdf)

hospitalization rates that are approximately four to five times higher than white Americans,^[iii] and preliminary analyses of age-adjusted COVID-related deaths released by Yale University in May 2020 showed that African Americans are three and a half times more likely to die than white Americans from COVID-19, while Latinos were nearly twice as likely to die as whites.^[iv] Moreover, the Bureau of Labor Statistics reported that in June 2020 African Americans experienced an unemployment rate of 15.4 percent and Latinos a rate of 14.5 percent compared to unemployment rate of 10.1 percent for white Americans.^[v]

Numerous studies show that communities of color are more likely to be located near pollution sources for many reasons, such as racism in housing markets, less economic and political power to oppose the siting of such facilities in their neighborhoods, and poorer job opportunities that prevent residents from relocating.^[vi] They also have less access to quality health care, have a higher prevalence of pre-existing conditions which contribute to greater COVID-related hospitalizations and fatalities, comprise a disproportionately higher share of frontline workers who are at higher risk of exposure, and face greater housing cost burdens which leave residents of these communities more vulnerable to foreclosures and evictions.^[vii]

The Trump Administration has exacerbated these longstanding and systemic disadvantages by pursuing an unrelenting pollution deregulatory agenda in the midst of a deadly respiratory pandemic. My recent “*Pandemic of Pollution*” report cites studies showing “a link between exposure to air pollution and enhanced risk of respiratory and other disease” and “an added risk of adverse outcomes from coronaviruses such as SARS that is caused by exposure to air pollution.”^[viii] It also showed that extensive evidence has emerged indicating that adverse outcomes from COVID-19 are disproportionately experienced by residents of low-income and minority communities, and it catalogues the numerous air regulation rollbacks that EPA has undertaken just since March 2020 and which are contributing to these added health risks.^[ix]

The proposed EAB rulemaking is fatally flawed and will result in increased pollution. It would silence the voices of affected communities by imposing new limits on who and what can be heard in permit appeals, in violation of both an existing Executive Order that mandates consideration of environmental justice impacts in permits and the Clean Air Act. It ignores decades of EPA administrative case rulings that have guaranteed consideration of environmental justice impacts in permit decisions, illegally imposes term limits on EPA’s career administrative judges who hear permit appeals, and gives political appointees the power to veto the legal conclusions of these judges. What follows is a more exhaustive description of my concerns.

- **The Rule Unlawfully Limits Who Can Participate in Permit Appeals.** EPA regulations provide that, “Any person who filed comments on the draft permit or participated in a public hearing on the draft permit may file a petition for review” that is then litigated before the EAB. The proposed rule, however, would only allow such parties to file a “notice of dispute” instead of a “petition for review.” The “dispute” would then begin with *mandatory* mediation, a process that until now has always been *voluntary* as required by the Alternative Dispute Resolution Act of

[iii] <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html>

[iv] <https://news.yale.edu/2020/05/19/new-analysis-quantifies-risk-covid-19-racial-ethnic-minorities>

[v] <https://www.bls.gov/news.release/empst.t02.htm>

[vi] <https://www.lung.org/clean-air/outdoors/who-is-at-risk/disparities>

[vii] https://www.jchs.harvard.edu/sites/default/files/Harvard_JCHS_State_of_the_Nations_Housing_2019.pdf

[viii] “*A Pandemic of Pollution: How EPA Air Pollution Actions Taken Since March 1, 2020 Will Harm Public Health and Potentially Add To COVID-19 Risks*”; https://www.epw.senate.gov/public/_cache/files/1/d/1d7a81eb-2042-425b-b23d-ad91ad642fce/99ED701B6DC74677CDEB56888497D96C.051820-epw-as.pdf

[ix] *Id.*

1996.^[xi] To end mandatory mediation and proceed to a formal appeal, all parties would have to consent,^[xii] thereby giving industry permit applicants such as fossil fuel power plants and waste disposal companies a veto that could be used to prevent affected communities from having their concerns heard by the EAB. This unilateral veto power is unlawful because it delegates to private or other non-federal government parties the power to effectively render a permit action final^[xiii] and violates the constitutional due process rights of permit opponents.^[xiv] The rule is also objectionable because it eliminates *amicus curiae* (friend-of-the-court) briefs^[xv] from community advocates who often raise important considerations.^[xvi]

- **The Proposed Rule Narrows the Issues That the EAB Can Review in Permit Appeals.** Under current regulations, the EAB reviews petitions for a finding of fact or conclusion of law that is “clearly erroneous.”^[xvii] But, the regulations also give the EAB discretion to review any “important policy consideration”^[xviii] or to review issues they may take note of on their own.^[xix] Although the proposed rule would retain the “clearly erroneous” standard, it eliminates the two discretionary authorities^[xx] *no matter* how defective a permit may be, how important such a defect may be to protection of human health or the environment, and regardless of whether the permitting authorities have complied with their obligations under an existing 1994 environmental justice (EJ) Executive Order (E.O. 12898).^[xxi]
- **The Proposed Rule Violates the Existing EJ Executive Order and the Clean Air Act.** The 1994 EJ Executive Order mandates that “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.”^[xxii] Yet, the rule’s dramatic scaling back of the number of appeals and elimination of the EAB’s ability to review any “important policy consideration” would completely abdicate EPA’s responsibility for considering environmental justice impacts in permit appeals in contravention of the Executive

^[xi] 5 U.S.C. § 572(c) (an agency may use dispute resolution “if the parties agree to such proceeding” and dispute resolution is to be “voluntary”), *see also* Elizabeth Melampy, Updates to the Environmental Appeals Board Procedures (Dec. 2, 2019), <https://eelp.law.harvard.edu/2019/12/updates-to-the-environmental-appeals-boardprocedures/>.

^[xii] 84 Fed. Reg. 66084, 66094 (Dec. 3, 2019) <https://www.govinfo.gov/content/pkg/FR-2019-12-03/pdf/2019-24940.pdf> (proposed section 124.19(d)(3)).

^[xiii] *See, e.g., Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (holding unconstitutional a Congressional delegation to a private entity the authority to regulate coal).

^[xiv] *See Ass’n of Am RRs. v. USDOT*, 896 F.3d 539 (D.C. Cir 2018) (violation of due process where Amtrak imposed on its competitors rules formulated with its own self-interest in mind “without the controlling intermediation of a neutral federal agency,” *id.* at 545).

^[xv] 84 Fed. Reg. 66084, 66088-89, 66095 (Dec. 3, 2019) <https://www.govinfo.gov/content/pkg/FR-2019-12-03/pdf/2019-24940.pdf> (eliminating existing section 124.19(e), which allows the filing of amicus briefs, and adding proposed section 124.20(c) allowing only the Region, State, and permittee to file permit appeal briefs).

^[xvi] *See e.g., US Gen New England* case that included many *amicus curiae* briefs from non-profit entities, neighboring states, and water utilities. https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Dockets/NPDES+03-12
^[xvii] 40 CFR 124.19(a)(4)(i)(A); <https://www.govinfo.gov/content/pkg/CFR-2013-title40-vol23/pdf/CFR-2013-title40-vol23-sec124-19.pdf>

^[xviii] *Id.*

^[xix] *Id.*, at 40 CFR 124.19(p).

^[xx] *Id.*, at 66085, 66088, 66095, and proposed section 124.20(b).

^[xxi] <https://www.govinfo.gov/content/pkg/WCPD-1994-02-14/pdf/WCPD-1994-02-14-Pg276.pdf>

^[xxii] <https://www.govinfo.gov/content/pkg/WCPD-1994-02-14/pdf/WCPD-1994-02-14-Pg276.pdf>

Order. The proposed rule also summarily states that it is “not subject to” the 1994 EJ Executive Order, and thus fails to even attempt to analyze its potential impact on the very same communities that are likely to be most impacted by it.^[xxiii] The proposed rule also ignores the legal requirement in the Clean Air Act (one of the proposed rule’s cited authorities) to hold a public hearing to solicit input on the rule prior to its finalization, which EPA has not done.^[xxiv]

- **The Proposed Rule Disregards Longstanding EAB Case Precedent.** Numerous EAB rulings expressly acknowledge and follow the directives in the 1994 EJ Executive Order. For example, the EAB ruled in the 1995 *Chemical Waste Management* hazardous waste landfill permit decision that the EAB can review the agency’s efforts to implement the EJ executive order.^[xxv] It also found that the EAB should assure early and ongoing opportunities for public involvement in the permitting process when it believes that operation of the facility may have a disproportionate impact on a minority or low-income segment of the affected community,^[xxvi] and allows EPA permit writers to use any discretionary authority provided by the relevant statute to include in permits measures to avoid adverse impacts on the health and environment of surrounding communities, including EJ communities.^[xxvii] Two recent Michigan permit decisions during the Trump Administration concur. The 2019 *Jordan Development* oil well injection permit decision affirmed the longstanding principle that the EJ Executive Order is to be applied in permitting decisions^[xxviii] and the 2019 *Muskegon* oil well injection permit decision went further by remanding the permit to the Region to explain whether and how it considered the environmental justice implications raised in a public comment.^[xxix] But EPA’s proposed rule ignores these precedents entirely.
- **The Proposed Rule’s Term Limits For EAB Judges Are Illegal.** Courts have reversed less than 1% of the final decisions that the EAB’s independent judges have issued.^[xxx] Rather than embracing the current panels’ expertise and experience, the proposed rule imposes 12-year term limits, renewable only at the whim of a politically-appointed Administrator.^[xxxi] EPA also added a prominent new threat in the proposed rule that states that “nothing in this paragraph forecloses

^[xxiii] 84 Fed. Reg. 66084, 66092 (Dec. 3, 2019) <https://www.govinfo.gov/content/pkg/FR-2019-12-03/pdf/2019-24940.pdf>

^[xxiv] Clean Air Act section 307(d), 42 U.S.C. 7607(d). <https://www.govinfo.gov/content/pkg/USCODE-2010-title42/pdf/USCODE-2010-title42-chap85-subchapIII-sec7607.pdf>

^[xxv] *In Re Chemical Waste Management of Indiana, Inc.*, 6 EAD 66, 76 (1995).

[https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Decision-Date/75A5A197B66F098685257069005F7C38/\\$File/cwmii.pdf](https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Decision-Date/75A5A197B66F098685257069005F7C38/$File/cwmii.pdf)

^[xxvi] *Id.*, at 73-74.

^[xxvii] *E.g.*, *In Re Chemical Waste Management of Indiana, Inc.*, 6 EAD 66 (1995).

[https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Decision-Date/75A5A197B66F098685257069005F7C38/\\$File/cwmii.pdf](https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Decision-Date/75A5A197B66F098685257069005F7C38/$File/cwmii.pdf)

^[xxviii] *In re Jordan Dev. Co.*, 18 E.A.D. 1, 5 (EAB 2019);

[https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Decision-Date/82F553DE454544C38525845000669FED/\\$File/Jordan%20Dev.%20Co.pdf](https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Decision-Date/82F553DE454544C38525845000669FED/$File/Jordan%20Dev.%20Co.pdf)

^[xxix] *See In Re Muskegon Development Company*, UIC Appeal No. 18-05 (April 29, 2019);

[https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/UIC-Decisions/C81C6E243B7E7583852583EB006096A2/\\$File/Vol%2017%20Order%20Remanding%20in%20Part%20and%20Denying%20Review%20in%20Part.pdf](https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/UIC-Decisions/C81C6E243B7E7583852583EB006096A2/$File/Vol%2017%20Order%20Remanding%20in%20Part%20and%20Denying%20Review%20in%20Part.pdf)

^[xxx] “*The EPA’s Environmental Appeals Board at Twenty-five: An Overview of the Board’s Procedures, Guiding Principles, and Record of Adjudicating Cases*” (2017), at 6;

[https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/8f612ee7fc725edd852570760071cb8e/381acd4d3ab4ca358525803c00499ab0/\\$FILE/The%20EAB%20at%20Twenty-Five.pdf](https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/8f612ee7fc725edd852570760071cb8e/381acd4d3ab4ca358525803c00499ab0/$FILE/The%20EAB%20at%20Twenty-Five.pdf)

^[xxxi] 84 Fed. Reg. 66084, 66092 (Dec. 3, 2019) <https://www.govinfo.gov/content/pkg/FR-2019-12-03/pdf/2019-24940.pdf> (proposed section 1.25(e)(4)).

the Administrator from reassigning a member of the Environmental Appeals Board to another position prior to the expiration of the member's renewable twelve-year term."^[xxxii] These provisions appear to be contrary to federal personnel rules because EAB judges occupy "career reserved" Senior Executive Service (SES) positions that are "necessary to ensure impartiality."^[xxxiii] As such, their positions are governed *not by EPA* but instead by the Office of Personnel Management, which has stated that such SES career appointments "are made without time limitation."^[xxxiv]

- **The Proposed Rule Erodes the Authority of the EAB's Judges.** The proposed rule allows EPA's politically-appointed General Counsel to overrule *any* legal conclusions made by the EAB's neutral career administrative appeals judges. If the EAB ruled that a permit was needed in order to release pollution into the community, EPA's General Counsel could void that decision. And although the proposed rule states that "nothing in this proposal affects the EAB's adjudication of enforcement appeals,"^[xxxv] it also states the exact opposite by proposing that the politically-appointed General Counsel "can issue a dispositive legal interpretation in any matter pending before the EAB or on any issue addressed by the EAB."^[xxxvi]
- **The Proposed Rule Will Cause More Air Pollution.** Polluting companies and their lobbyists have long sought Clean Air Act rule changes to allow them to construct their facilities before the permitting process is complete.^[xxxvii] EPA recently sought to grant such relief in March 2020 when it re-interpreted what the term "begin actual construction" within the New Source Review (NSR) regulations means^[xxxviii] in a way that would greatly increase the risk that projects will be locked into more polluting designs before the NSR permitting process was complete, which in turn could lead to substantial increases in air emissions.^[xxxix] The EAB proposed rule would have similar negative impacts because it would eliminate essential pre-construction protection for affected communities and allow facilities to begin polluting activities right away, even if the permit is deeply flawed and ends up being rejected.
- **EPA Has Failed to Comply With Repeated Document Requests About this Proposal.** As part of Questions for the Record for Deputy Administrator nominee Doug Benevento on March 13, 2020, I asked EPA to provide documents between EPA political officials and outside parties concerning the development or consideration of the proposed rule. EPA responded that, "As documents responsive to your request are identified, we will provide information as appropriate to you on a rolling basis as they become available" but, subsequently, EPA has provided no documents and has failed to state whether any exist or that EPA even conducted a search for such

^[xxxii] *Id.*

^[xxxiii] 5 U.S.C. 3132; <https://www.govinfo.gov/content/pkg/USCODE-2011-title5/pdf/USCODE-2011-title5-partIII-subpartB-chap31-subchapII-sec3132.pdf>

^[xxxiv] 5 U.S.C. 3136; <https://www.govinfo.gov/content/pkg/USCODE-2011-title5/pdf/USCODE-2011-title5-partIII-subpartB-chap31-subchapII-sec3136.pdf>; OPM's Guide to the Senior Executive Service, at 7;

^[xxxv] 84 Fed. Reg. 66084, 66085 (Dec. 3, 2019) <https://www.govinfo.gov/content/pkg/FR-2019-12-03/pdf/2019-24940.pdf>

^[xxxvi] *Id.*, at 66086, 66090, 66091, and 66092 in proposed section 1.25(e)(2)(iii).

^[xxxvii] *E.g.*, Testimony of Jeffrey R. Holmstead before the House Committee on Energy and Commerce, Subcommittee on Environment, Hearing on New Source Review Permitting Challenges for Manufacturing and Infrastructure(February 14, 2018); <https://docs.house.gov/meetings/IF/IF18/20180214/106852/HHRG-115-IF18-Wstate-HolmsteadJ-20180214.pdf>

^[xxxviii] https://www.epa.gov/sites/production/files/2020-03/documents/begin_actual_construction_032520_2.pdf

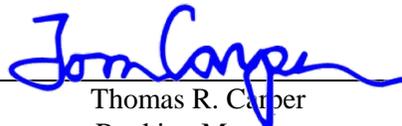
^[xxxix] *Id.*

July 22, 2020
Carper, pg. 6

documents. Following your hearing before the Environment and Public Works Committee on May 20, 2020, I asked EPA again in my Questions for the Record to provide the documents requested and, if none exist, to confirm that and describe fully the persons, offices, and locations searched and methods used to try and locate such documents. I have not received a response to this request.

In addition to urging EPA to withdraw this ill-advised rule, I am renewing my request for the above-mentioned documents, and I am once again asking EPA to brief my staff regarding the timing, legal basis, and substance of EPA's plans for this rulemaking. Please ask the appropriate member of your staff to follow up promptly with Michal Freedhoff (Michal_Freedhoff@epw.senate.gov), a senior member of the Senate Environment and Public Works Committee staff. Thank you very much for your attention to this matter. With best regards, I am,

Sincerely yours,



Thomas R. Carper
Ranking Member