

Exhaustion can be Exhausting! EPA Proposes Reforms to Permit Appeals Process

By: Brian F. Mannix | November 6, 2019

The Environmental Protection Agency (EPA) today [proposed](#) reforms affecting the agency's Environmental Appeals Board (EAB), which reviews decisions about permits issued – or denied – by EPA under multiple federal statutes. The EAB is an internal body that EPA created administratively in 1992, and it is not legally required by any of those statutes. Nonetheless, it has important legal effects. A federal judicial doctrine called [exhaustion of remedies](#) bars access to the federal courts until a petitioner has completed all available administrative appeals. Because the EAB exists, an adverse EPA decision is not final, and cannot be appealed to the courts, until the applicant has spent resources and time – sometimes years – appealing to the EAB. The proposed reforms will provide a faster path to a final EPA decision, so that applicants can either live with it or challenge it in court, but in either case they will not be stuck in administrative limbo.

The Trump Administration's substantive regulatory decisions have received lots of commentary and many legal challenges. Less noticed are the regulatory agencies' efforts to effect a variety of procedural reforms that are intended to reduce regulatory delay and uncertainty. These range from simple housekeeping, like clearing up backlogs of long-pending decisions, to broader reforms like the recent executive orders on the use of guidance documents, or the Council on Environmental Quality's [revisions](#) to regulations under the National Environmental Policy Act. The largest such reform could be to bring so-called independent agencies under more direct supervision by the president.

Many of these administrative reforms have been in development for years, and may come in response to court decisions that find fault with existing procedures, in response to [recommendations](#) from bodies like the Administrative Conference of the United States, or in response to legislation like the [FAST](#) Act (Fixing America's Surface Transportation Act of 2015). The pressures for reform are not new, but EPA and other agencies are clearly making an effort to move the ball forward.

The reforms EPA announced today will streamline the EAB, a panel of four administrative law judges who hear appeals from permitting decisions that are typically made by EPA's ten regional offices. When it was created in 1992 there were many more such decisions; today the case load is much lower because the agency has delegated most permitting decisions to the states.

In brief...

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EPA's statutes vest the authority to make final decision in the agency's Administrator, who, within limits, can delegate certain authority to subordinate officials or to states. The EAB has long had such delegated authority, subject to being overruled by the Administrator. But the Board goes to great lengths to act independently of the Administrator. (When I was at EPA, for example, the judges insisted that they each receive an identical rating in their annual performance review as EPA employees, to avoid any appearance of favoritism.) The Board sometimes intervenes, on its own initiative, in a pending agency decision even when none of the affected parties had filed an appeal.

EPA's is proposing several changes to improve the administrative appeals process. The EAB will no longer intervene on its own, nor in response to external *amici* petitions. It will only hear appeals from the parties to an EPA decision – meaning that the parties with legal standing to sue the agency are the same parties who can appeal to the EAB.

And the parties will not be obligated to appeal to the EAB. EPA's Office of General Counsel has long had an [office](#) of Alternative Dispute Resolution (ADR), and the agency will now encourage the use of ADR as the preferred method for resolving permit disputes. ADR can be completed in 30 days. If the parties instead prefer the more formal EAB process, it will remain available, but will take 60 days. The EAB's review will be limited to disputes about legal requirements; it will not be making policy decisions. And if EPA's General Counsel files a brief conveying the Administrator's views of a case, it will be dispositive.

One way or another, the revised process will provide a path to get a timely final decision from EPA – one that can be challenged in an Article III court, if one of the parties thinks the agency acted unlawfully.