List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS.

■ 1. The authority citation for Part 165 continues to read as follows:

Authority: 46 U.S.C. 70034, 70051; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T08–0415 to read as follows:

§ 165.T08–0415 Emergency Safety Zone; Lower Mississippi River, Rosedale, MS.

(a) *Location.* The following area is a safety zone: All waters of the Mississippi River from MM 592.0 to MM 595.0.

(b) *Regulations.* (1) Under the general safety zone regulations in subpart C of this part, you may not enter the safety zone described in paragraph (a) of this section unless authorized by the COTP or the COTP's designated representative.

(2) To seek permission to enter, contact the COTP or the COTP's representative by telephone or email. Those in the safety zone must comply with all lawful orders or directions given to them by the COTP or the COTP's designated representative.

(c) *Enforcement period.* This section will be enforced as needed during daylight hours from August 3, 2020 through August 31, 2020, or until all salvage and diving work is complete, whichever occurs earlier. Periods of activation will be promulgated by Broadcast Notice to Mariners.

Dated: July 30, 2020.

R.S. Rhodes,

Captain, U.S. Coast Guard, Captain of the Port Lower Mississippi River.

[FR Doc. 2020–17482 Filed 8–20–20; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 1, 49, 71, and 124

[EPA–HQ–OGC–2019–0406; FRL 10012–97–OGC]

Streamlining Procedures for Permit Appeals

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The action finalizes a procedural rule to streamline and modernize the Environmental Protection Agency's (EPA) permit appeal process and ensure that appeals are decided consistent with the authority delegated from the Administrator by modifying existing procedural requirements and realigning prior delegations. This final procedural rule applies to permits issued by or on behalf of EPA under the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, and the Resources Conservation and Recovery Act.

DATES: This final rule is effective on September 21, 2020.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–HQ–OGC–2019–0406. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Mark Talty, Office of General Counsel, Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; (202) 564–2751; email address: *staff_ogc@epa.gov.*

SUPPLEMENTARY INFORMATION:

Organization of This Document. The following outline is provided to aid in locating information in this preamble.

I. General Information
- A. Does this action apply to me?
- B. What is the Agency's authority for taking this action?

II. Background
- A. What changes did the Agency propose in its December 3, 2019 proposal?
- B. What action is the Agency taking today?

III. Summary of the Final Rule
- A. What are the key elements of this final rule?
  - 1. Clarifying the EAB's Scope of Review in Permit Appeals
  - 2. Reforming *Amicus Curiae* Participation
  - 3. Eliminating *Sua Sponte* Review
  - 4. Expediting the Appeal Process
  - 5. 12-Year Terms for EAB Judges
  - 6. Designating EAB Decisions for Publication
  - 7. Administrator's Legal Interpretations
- B. How does this final rule affect pending appeals?
- C. Why is EPA finalizing these reforms?

IV. Statutory and Executive Orders

I. General Information

A. Does this action apply to me?

This rule modifies the rules of practice governing certain administrative appeals handled by the Environmental Appeals Board (EAB) under 40 CFR 124.19 and other regulations listed below. It applies to persons and entities that seek to challenge EPA permitting decisions under the National Pollutant Discharge Elimination System (NPDES) program of the Clean Water Act, the Safe Drinking Water Act's Underground Injection Control (UIC) program, and the Resources Conservation and Recovery Act (RCRA), including Remedial Action Plans, 40 CFR 270.42(f) and 270.155. It also applies to persons or entities that seek to challenge the following EPA permitting decisions under the Clean Air Act: Prevention of Significant Deterioration permits, 40 CFR 52.21(q), Outer Continental Shelf permits, 40 CFR 55.6(a)(3); Title V permits, 40 CFR 71.11(*l*); Tribal Major Non-Attainment NSR permits, 40 CFR 49.172(d)(5); and Tribal Minor NSR permits, 40 CFR 49.159(d).

With exception of section III.A.7 (Administrator's Legal Interpretations) of this preamble, nothing in this proposal affects the EAB's adjudication of enforcement appeals.

B. What is the Agency's authority for taking this action?

EPA's authority to issue this procedural rule is contained in Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.;* Safe Drinking Water Act, 42 U.S.C. 300(f) *et seq.;* Clean Water Act, 33 U.S.C. 1251 *et seq.;* and Clean Air Act, 42 U.S.C. 1857 *et seq.* EPA is also issuing this rule under its general housekeeping authority. The Federal Housekeeping Statute provides that "[t]he head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property." EPA is not one of the 15 "Executive Departments" listed at 5 U.S.C. 301. However, EPA gained housekeeping authority through the Reorganization Plan No. 3 of 1970, 84 Stat. 2086 (July 9, 1970). The Office of Legal Counsel has opined that the Reorganization Plan "convey[s] to the [EPA] Administrator all of the housekeeping authority available to other department heads under section 301" and demonstrates that "Congress has vested the Administrator with the authority to run

EPA, to exercise its functions, and to issue regulations incidental to the performance of those functions." [1]

II. Background

A. What changes did the Agency propose in its December 3, 2019 proposal?

EPA proposed a rule of agency organization, procedure or practice that sought to change the administrative exhaustion requirements for permit appeals, revise existing appeal procedures and provide greater accountability for those exercising delegated authority over administrative appeals more generally. Although not subject to the notice and comment requirements of the Administrative Procedure Act, the Agency nonetheless voluntarily sought comment because it believes that the information and opinions supplied by the public would help inform the Agency's views.

On December 3, 2019, EPA proposed the creation of a new, time-limited alternative dispute resolution process (ADR process) as a precondition to judicial review. Under the proposal, the parties in the ADR process could have agreed by unanimous consent to either extend the ADR process or proceed with an appeal before the Environmental Appeals Board (EAB). If the parties did not agree to proceed with either the ADR process or an EAB appeal, the permit would have become final and could be challenged in federal court. EPA also proposed to amend the appeal process to clarify the scope and standard of EAB review, remove a provision authorizing participation in appeals by amicus curiae, and eliminate the EAB's authority to review Regional permit decisions on its own initiative, even absent an appeal. To promote internal efficiencies, EPA also proposed to establish a 60-day deadline for the EAB to issue a final decision once an appeal had been fully briefed and argued and to limit the length of EAB opinions to only as long as necessary to address the issues raised in an appeal; EPA also proposed to limit the availability of extensions to file briefs. The proposed rule would have applied to permits issued by or on behalf of EPA under the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, and the Resources Conservation and Recovery Act.

In addition to these permit appeal reforms, EPA proposed several additional reforms designed to provide tools to better allow the Administrator to exercise his or her statutory authority together with appropriate checks and balances on how the Board exercises its delegated authority. In that vein, EPA proposed to set twelve-year terms for EAB Judges, which the Administrator could renew at the end of that twelve-year period or reassign the Judge to another position within EPA. EPA also proposed a new process to identify which EAB opinions would be considered precedential. Finally, EPA proposed a new mechanism by which the Administrator, by and through the General Counsel, could issue a dispositive legal interpretation in any matter pending before the EAB.

B. What action is the Agency taking today?

EPA is not finalizing the new, time-limited ADR process from the December 3rd proposal, which would have served as a precondition to judicial review. EPA received several comments expressing the view that the proposed process violated the Alternative Dispute Resolution Act by mandating the use of ADR to resolve permit disputes and that the proposed process could, in some instances, lengthen the appeal process. While the comments are not dispositive of the issue, EPA is not finalizing that aspect of the proposal as a matter of its discretion in maintaining a familiar process with accelerated timelines. As a result, nothing in this action changes the current administrative exhaustion requirements, which require permittees and interested parties to file an appeal with the EAB before challenging a permitting decision in federal court. Moreover, nothing in this action changes the EAB's existing ADR program, which will remain available to interested parties. EPA is also not finalizing changes to the appeal process for ocean dumping permit decisions made by Regional Administrators under the Marine Protection, Research, and Sanctuaries Act in 40 CFR 222.12, which already contains expedited appeal procedures. Furthermore, EPA is not finalizing changes to the appeal process for acid rain permits under 40 CFR 78.3(b), which includes the opportunity for evidentiary hearings.

EPA is finalizing each of the changes identified immediately below and described in Section III of this preamble. In addition to describing each of the changes in more detail, the Agency summarizes some of the more significant comments that it received on the proposal and EPA's responses in Section III of this preamble.

First, EPA is clarifying the scope of the EAB's review authority by eliminating a prior provision that allowed the Board to review an exercise of discretion "or an important policy consideration." Under this final rule, the EAB's scope is more aligned with that of federal courts and limited to findings of fact and conclusions of law that are clearly erroneous.

Second, EPA is modifying the process for submission of *amicus curiae* briefs as part of the overall goal of streamlining the appeal process. Under this rule, parties will have 21 days from the filing of a notice of appeal to file *amicus* briefs and the length of such briefs is limited to no more than 15 pages.

Third, EPA is eliminating the EAB's authority to review Regional permit decisions on its own initiative (*sua sponte*), even absent a private party appeal, which has rarely been invoked.

Fourth, EPA is establishing a 60-day deadline for the EAB to issue a final decision once an appeal has been fully briefed and argued. The EAB may grant itself a one-time 60-day extension if it determines that the nature and complexity of the case requires additional time. EPA is also limiting the availability of filing extensions to one request per party, with a maximum extension of 30 days. While nothing in the final rule modifies the EAB's existing discretion to relax or suspend filing requirements for good cause, in keeping with the intent of the revisions, such discretion should be exercised in limited circumstances and based on an adequate finding of good cause.

Fifth, EPA is setting twelve-year terms for EAB Judges, which the Administrator may renew at the end of that twelve-year period or reassign the Judge to another position within EPA consistent with the provisions in 5 CFR 317.901.

Sixth, EPA is establishing a process for designating certain EAB decisions for publication.

EPA is revising the EAB's existing delegation of authority by establishing a mechanism by which the Administrator, by and through the General Counsel, can issue a dispositive legal interpretation in any matter pending before the EAB or on any issue addressed by the EAB.

The revised permit appeal procedures apply only to permitting decisions under:

- The National Pollutant Discharge Elimination System (NPDES) program of the Clean Water Act;
- The Safe Drinking Water Act's Underground Injection Control (UIC) program;
- The Resources Conservation and Recovery Act (RCRA), including

[1] Authority of EPA to Hold Employees Liable for Negligent Loss, Damage, or Destruction of Government Personal Property, 32 O.L.C. 79, 2008 WL 4422366 at *4 (May 28, 2008) ("OLC Opinion").

Remedial Action Plans, 40 CFR 270.42(f) and 270.155; and

- The Clean Air Act, including Prevention of Significant Deterioration (PSD) permits, 40 CFR 52.21(q); Outer Continental Shelf permits, 40 CFR 55.6(a)(3); Title V permits, 40 CFR 71.11(*l*); Tribal Major Non-Attainment NSR permits, 40 CFR 49.172(d)(5); and Tribal Minor NSR permits, 40 CFR 49.159(d).

The procedural changes in this rule do not apply to other types of appeals not listed above. In addition, with the exception of the proposed revisions above, nothing in this rule alters the mechanics of permit appeals or the process by which parties interact with the EAB, *e.g.*, service requirements.

III. Summary of the Final Rule

A. What are the key elements of this final rule?

1. Clarifying the EAB's Scope of Review in Permit Appeals

EPA proposed to clarify the EAB's *scope* of review while leaving the *standard* of review applied by the EAB untouched. More specifically, EPA proposed to eliminate 40 CFR 124.19(a)(4)(i)(B), which had been viewed as establishing authority for the EAB to review the Agency's compliance with discretionary policies—issues that a federal court generally could not review. EPA is finalizing its proposal to clarify the EAB's scope of review. This final rule makes clear that the EAB's scope of review does not extend to the Agency's compliance with internal discretionary policies or Executive Orders.

Several commenters stated that the proposal arbitrarily limits the EAB's scope of review and ignores the fact that federal courts regularly review exercises of agency discretion to ensure that agencies make such decisions in a rational way based on adequate consideration of all relevant factors. While the Agency agrees with the commenters that federal courts review discretionary policy decisions under an arbitrary and capricious *standard* of review, the Agency's strict compliance with Executive Orders or internal agency policy is generally outside the *scope* of review in federal courts. *See Defs. of Wildlife* v. *Jackson,* 791 F. Supp. 2d 96, 121 (D.D.C. 2011) ("Plaintiffs cannot use the review provisions of the APA to enforce an Executive Order that is not subject to judicial review."). By eliminating 40 CFR 124.19(a)(4)(i)(B), the Agency is making the scope of EAB's review more akin to that of federal courts.

2. Reforming Amicus Curiae Participation

EPA proposed to eliminate the provision at 40 CFR 124.19(e) that authorizes interested persons to participate in a permit appeal as *amicus curiae* as a means of streamlining the appeal process. Many commenters opposed this proposal by explaining the various benefits that *amicus* participation provides to the appeal process, which include additional viewpoints on particularly complex matters and an avenue for boarder participation among groups with limited resources. In light of the benefits highlighted by the commenters, EPA is retaining the ability for *amicus* participation, but with certain limitations. All *amicus* briefs must be filed within 21 days after the filing of the petition for review and are limited to no more than 15 pages. The 21-day window had previously been imposed on *amicus* participants in PSD and other New Source Review permit appeals under the Clean Air Act but will now apply in all permit appeals under other statutes. This approach preserves the benefits of *amicus* participation while also achieving the goal of streamlining the overall appeal process.

3. Eliminating Sua Sponte Review

EPA is finalizing its proposal to eliminate the EAB's *sua sponte* review authority for permit decisions. As several commenters noted, the EAB has rarely exercised its *sua sponte* authority to review permits. Some commenters asked that EPA clarify that the Board retains its *sua sponte* authority over enforcement decisions. At least one commenter expressed concern that the EAB would no longer be able to review a permit no matter how blatant or how important a permit defect may be.

First and foremost, it is the responsibility of the permit writers to draft permits that achieve the intended results and comply with all legal requirements. Over the course of the last fifty years of writing permits, the Agency has become much better at doing just that. Second, as the commenters suggested, the EAB has rarely used its *sua sponte* authority to review permit appeals, and this rule does not remove the EAB's authority in enforcement cases where it has traditionally exercised such authority.

4. Expediting the Appeal Process

EPA proposed several measures to expedite the appeal process, including limiting filing extensions to one request per party, with a maximum extension of 30 days, establishing a 60-day deadline for the EAB to issue its decision (measured from the date of oral argument or the filing of the last brief, whichever is later) and limiting the length of EAB opinions to only as long as needed to address the specific issues raised in the appeal. EPA solicited comment on whether to set a numerical limit, either in words or pages, on EAB opinions.

EPA received several comments opposed to these expediting reforms, most of which criticized the 60-day deadline for issuing decisions. Generally, the commenters felt the 60-day deadline is arbitrary and lacked justification. One commenter stated that the Agency failed to explain why the Board maintains its ability to adjust filing requirements for good cause but is inflexibly required to issue opinions within 60 days.

EPA is finalizing the 60-day deadline for the EAB to issue a decision, with the deadline measured from the date of oral argument or the filing of the last brief, whichever is later. However, in light of the comments it received, the EAB may grant itself a one-time 60-day extension if the Board determines that the nature and complexity of the case requires additional time. While EPA concedes that any deadline assumes some amount of arbitrariness, such deadlines are routinely created in statutes and regulations based on policy choices that favor timely decision-making and resolution of issues in lieu of open-ended processes. EPA believes that a 60-day deadline, with the availability of an additional 60-day extension, is reasonable in light of the additional reforms contained in this rule.

EPA is also finalizing the two additional expediting measures as proposed. The EAB is required to make its opinions only as long as needed to address the specific issues raised in the appeal. This reform is consistent with the deadline imposed on the Board for issuing decisions and should assist the EAB in achieving those deadlines. Additionally, this final rule limits filing extensions to one request per party, with a maximum extension of 30 days that the EAB, in the exercise of its discretion, may choose to grant. Nothing in this final rule eliminates the EAB's discretion to relax or suspend filing requirements for good cause.

5. 12-Year Terms for EAB Judges

EPA proposed setting 12-year renewable terms for EAB judges. EPA sought comments on this proposed term limit and whether 8 years or another time period was more appropriate. At least one commenter supported the creation of renewable terms but thought

shorter terms were more appropriate. The Agency also received comments opposed to any term for EAB judges. These commenters asserted there is no rationale for why EAB judges should be treated any differently from other career Senior Executive Service (SES) positions and that the proposal unnecessarily politicizes the EAB. One commenter argued that the proposal was illegal because SES positions are governed by a specific statute implemented by the Office of Personnel Management (OPM) and that OPM has the sole authority to determine conditions of service for SES employees.

EPA disagrees with those commenters that opposed the proposed term limit. The EAB, and its individual judges, exercise authority expressly delegated to it from the Administrator by Title 40 of the Code of Federal Regulations. 40 CFR 1.25(e)(2). An EAB judge plays an important role in shaping the decisions of the Agency, and while that role has traditionally been viewed with a certain amount of independence, each judge is acting on the express delegation of the Administrator's authority. It is entirely consistent with that delegation that the Administrator have some express mechanism of accountability over those exercising such authority. The 12-year renewable terms routinize the review of the Board's composition. By setting the terms at 12 years and staggering their implementation in 3-year increments, any one Administrator is limited in the number appointments he or she could make (barring a vacancy due to resignation), provided the Administrator elected not to renew a given term.

EPA also disagrees that the term limits are illegal. As members of the SES, an EAB judge is subject to reassignment to any other SES position in the Agency for which he or she qualifies. *See* 5 U.S.C. 3395 ("Reassignment and transfer within the Senior Executive Service"); 5 CFR 317.901 ("Reassignments"); *see also Guide to the Senior Executive Service* (March 2017), page 10.[2] The 12-year term is not a separate condition applied to SES employees. It is simply a mechanism by which the Administrator can exercise his or her authority consistent with the applicable SES procedures. If the Administrator chooses not to renew an appointment, the Administrator can assign that judge to another SES position within EPA for which he or she qualifies, provided the Administrator reassigns the judge in compliance with all applicable SES procedures. *See* 5 CFR 317.901.

For these reasons, EPA is setting fixed twelve-year terms for EAB Judges, which the Administrator may renew at the end of that twelve-year period or reassign the Judge to another SES position within EPA. For purposes of clarity, the final rule includes additional regulatory text that explicitly requires the Administrator to follow the proper SES requirements when reassigning an EAB judge. To implement the 12-year terms and ensure that they are on a staggered schedule, the Administrator will apply the twelve-year terms to the current EAB judges on a rolling basis over the next twelve years. Each seat on the EAB is designated a number based on the seniority of the Board's current members. The seat of the longest serving judge is designated as seat one, the second longest serving judge as seat two, the third longest serving judge as seat three, and the most recent judge as seat four. If any of the four seats are vacant as of the effective date of the final rule, any such seat will be designated a number based on the date on which it became vacant, after seats have been designated for current judges. The term for the newly designated seat one ends three years after the effective date of the final rule. The process then continues at three-year intervals, with seat two ending six years after the effective date, seat three ending nine years after the effective date, and seat four ending twelve years after the effective date. Thereafter, all terms will last for twelve years. If a judge vacates his or her position before the end of the judge's term, the Administrator will appoint a new judge to serve for the remainder of the vacated term. That new member could then be renewed at the end of the vacated term.

6. Designating EAB Decisions for Publication

EPA sought comment on whether it should create a process to explicitly identify certain decisions of the EAB as precedential. The proposal noted that under such a process, only published decisions could be considered precedential and the determination of which decisions should be published would made by the Administrator.

EPA is finalizing a process that maintains the EAB's existing practice of distinguishing between published decisions and unpublished final orders with one important change: The publication of any decision designated for publication by the EAB is delayed for 15 days. During this period, the Administrator may review the decision and change the designation to an unpublished final order. Moving forward, it is the express policy of the Agency that only published decisions of the EAB represent EPA's official, authoritative position with regard to the issues addressed in such decisions. This change is intended to indicate to reviewing courts that only published EAB decisions may warrant deference under *Kisor* v. *Wilkie,* 139 S. Ct. 2400 (2019) and *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). This new process will therefore provide the Administrator, as the original source of authority for implementing and interpreting EPA's statutes and regulations, the ability to ensure EAB opinions reflect the Agency's official position concerning major policy or procedural issues, or other issues of exceptional importance in the situations where it is appropriate to create such positions through adjudication before the Board.

7. Administrator's Legal Interpretations

EPA is finalizing the proposed mechanism by which 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. The Administrator may direct the General Counsel to file written notice to the EAB providing the Administrator's legal interpretation of an applicable Agency regulation or governing statute in any matter before the EAB. This Administrator's use of this mechanism applies to all actions before EAB—both permit and enforcement cases. This mechanism is distinguished from briefs filed by an EPA Region setting forth its position as the permit issuer. The intent of this proposal is to allow the Administrator, in specific cases, to retain authority as it pertains to legal interpretations in administrative appeals. Nothing in this rule limits the Administrator's existing authority (derived from his or her statutory authority to issue the permits in the first instance) to review or change any EAB decision.

EPA received several comments opposing this new mechanism. Some commenters asserted that the Agency failed to provide any details on how the process would work and when it could be invoked. At least one commenter noted that existing processes should be enough to address any of the issues this mechanism sought to address. Other commenters asserted that its application to enforcement cases presented due process concerns related to *ex parte* communications and unfair notice.

[2] This document is published by the Office of Personnel Management at *https://www.opm.gov/policy-data-oversight/senior-executive-service/reference-materials/guidesesservices.pdf.*

EPA believes it has sufficiently explained how the mechanism works and when it can be invoked. The Administrator will direct the General Counsel to file a written notice with the EAB that provides the Administrator's legal interpretation of the relevant statute or regulation. As explained in the proposal and reiterated in this final rule, the Administrator may utilize the mechanism in any matter before the EAB or on any issue addressed by the EAB, meaning it has no temporal limitation. EPA agrees with the comment that the Administrator does not need this mechanism to achieve the goals of this provision. However, the Agency believes that codifying this mechanism more directly and transparently reflects the Administrator's authority, and, as discussed in Section III.C below, mitigates any concerns over EAB judges acting as inferior officers. Lastly, EPA does not believe that this mechanism raises due process concerns. Any use of this mechanism will necessarily conform with EPA's *ex parte* rules in 40 CFR 22.8. In order to ensure such conformance, the General Counsel will issue a memorandum detailing specific measures that will be taken to create any necessary firewalls between attorneys litigating matters before the Board and those that may work on the Administrator's legal interpretation in a given case. With regard to unfair notice, the relevant inquiry is whether the regulated party had adequate notice of the relevant legal requirement at the time the alleged violation occurred. A binding legal interpretation issued by the Administrator during the enforcement appeal process does nothing to change whether there was adequate notice prior to bringing the enforcement action.

B. How does this final rule affect pending appeals?

The provisions included in this final rule apply to any appeal filed with the EAB after the effective date of this final rule, including for permit decisions that were finalized before the effective date but for which the period for filing a petition for review has not expired. The final rule does not apply to any appeal that was filed before the effective date of this rule.

C. Why is EPA finalizing these reforms?

Each statue implemented by EPA that requires the issuance of permits authorizes the Administrator to issue such permits. The Administrator retains discretion as to the procedural process of issuing such permits and may delegate his or her authority as he or she deems necessary to implement the statutory objectives. *See Avenal Power Center, LLC* v. *EPA,* 787 F. Supp. 2d 1, 3 (D.D.C. 2011). The EAB was created in 1992 by a delegation of the Administrator's authority over appellate proceedings, including, among other things, appeals from permit decisions made by Regional Administrators. That delegation of authority, along with the Board's rules of procedure and scope of responsibilities, was codified via a procedural rule. *See* 57 FR 5320 (February 13, 1992). Having created the EAB through delegation, the Administrator may now alter the Board's role in the permitting process, particularly if he or she believes a different approach would better serve the purposes of the statutes he or she implements. This action does just that by modifying the prior rules of procedure and realigning the prior delegations in manner that ensures a proper level of accountability and consistency in decision-making, streamlines the permitting process, and ultimately results in better and more efficient outcomes.

EPA received several comments asserting that its proposal did not constitute a procedural rule. Many of the same commenters asserted that, because the proposal sought to revise the process for appealing PSD and Acid Rain permits under the CAA, the Agency is required to follow that statute's rulemaking requirements in section 307(d), which include, among other things, a public hearing. EPA disagrees with both comments. This action is a rule of agency procedure and practice under the Administrative Procedure Act (APA). 5 U.S.C. 553(b)(A). This final rule simply amends certain aspects of the original procedural rule that established the EAB in 1992. Moreover, because it is a procedural rule under the APA, the final rule is exempt from section 307(d) of the CAA: "This subsection shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of title 5." 42 U.S.C. 7607(d)(1). Courts have affirmed that the CAA adopts the APA's notice and comment exceptions in 5 U.S.C. 553(b). *See EME Homer City Generation, L.P.* v. *EPA,* 795 F.3d 118, 134 (D.C. Cir. 2015) ("[T]he Clean Air Act permits EPA to conduct rulemaking without notice and comment when doing so would be appropriate under Subsection 553(b) of the Administrative Procedure Act. . . ."); *see also Sierra Club* v. *Jackson,* 833 F.Supp.2d 11 (D.C. Circuit 2012); *Small Refiner Lead Phase-Down Task Force* v. *EPA,* 705 F.2d 506 (D.C. Cir. 1983).

EPA also received one comment asserting that, in light of the Supreme Court's decision in *Lucia* v. *SEC,* 138 S. Ct. 2044 (2018), and the functions performed by the EAB, the appointment of EAB judges is unconstitutional. In *Lucia,* the Supreme Court held that SEC administrative law judges are constitutional officers of the United States and must be appointed in accordance with the Appointments Clause of the Constitution. The commenter suggests that EAB judges are constitutional officers that have not been appointed consistent with the Appointments Clause, which requires such officers be appointed by the President with the advice and consent of the Senate, unless "Congress . . . by law vest[s] the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. CONST. art. II, § 2, cl. 2.

EPA disagrees that EAB service as the Board is currently comprised violates the Constitution. The Administrator derives his or her appointment authority from Reorganization Plan No. 3 of 1970, 84 Stat. 2086 (July 9, 1970), which also "convey[ed] to the [EPA] Administrator all of the housekeeping authority available to other department heads under [5 U.S.C. 301]" and demonstrates that "Congress has vested the Administrator with the authority to run EPA, to exercise its functions, and to issue regulations incidental to the performance of those functions." [3] Courts have previously held that "offices" under the Appointments Clause can be created by Executive Branch officials invoking their general housekeeping and delegation authorities. *See Willy* v. *Administrative Review Bd.,* 423 F.3d 483, 491 (5th Cir. 2005) (citing Reorg. Plan No. 6 of 1950, § 2, 15 FR 3174 (1950), 64 Stat. 1263, and 5 U.S.C. 301); *see also Varnadore* v. *Secretary of Labor,* 141 F.3d 625, 631 (6th Cir. 1998); *Com. of Pa., Dep't of Pub. Welfare* v. *U.S. Dep't of Health & Human Servs.,* 80 F.3d 796, 804–05 (3d Cir. 1996). The Administrator is authorized to create the Board and appoint EAB judges. While EPA does not contest the commenter's characterization of EAB judges as inferior officers, the Agency disagrees with any suggestion that EAB decisions may only be made by principal officers. The EAB's authority is delegated from the Administrator, who adopts the procedural rules, such as this action, that govern the EAB, and the judges are

[3] *See supra* n.1.

subject to removal or reassignment by the Administrator as explained in Section III.A.6. Moreover, having created the EAB via regulation, the Administrator is also free to abolish the EAB. *See In re Grand Jury Investigation,* 916 F.3d 1047, 1052 (D.C. Cir. 2019) (explaining that a principal officer's ability to completely abolish an office can render that officer inferior) (citing *In re Sealed Case,* 829 F.2d 50, 56 (D.C. Cir. 1987); *Morrison* v. *Olson,* 487 U.S. 654, 721 (1988) (Scalia, J., dissenting) (noting that an officer is inferior and subject to control "if by no other means than" the principal's ability to "amend[ ] or revok[e] the regulation defining his authority")). While the creation of the EAB and the appointment of its judges meet constitutional requirements, *Lucia* does highlight the requirement that inferior officers are accountable to a principal officer. And that, while the EAB has been viewed with a measure of independence, it is ultimately accountable to the Administrator and the authority he or she has delegated to it. This action only strengthens the EAB's accountability to the Administrator by, among other things, confirming the Administrator's ability to provide legal interpretations on matters before the EAB.

IV. Statutory and Executive Order Reviews

A. Executive Orders 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is exempt from review by the Office of Management and Budget (OMB) because it is limited to agency organization, management or personnel matters.

B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This action is not an Executive Order 13771 regulatory action because it relates to agency organization, management or personnel.

C. Paperwork Reduction Act (PRA)

This action does not contain any information collection activities and therefore does not impose an information collection burden under the PRA.

D. Regulatory Flexibility Act (RFA)

This action is not subject to the RFA. The RFA applies only to rules subject to notice and comment rulemaking requirements under the Administrative Procedure Act (APA), 5 U.S.C. 553, or any other statute. This rule pertains to agency management or personnel, which the EPA expressly exempts from notice and comment rulemaking requirements under 5 U.S.C. 553(a)(2).

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1536, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector.

F. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175.

H. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that EPA has reason to believe may disproportionately affect children, per the definition of "covered regulatory action" in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use

This action is not a "significant energy action" because it is not likely to have a significant adverse effect on the supply, distribution or use of energy.

J. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

This action is not subject to Executive Order 12898 (59 FR 7629, Feb. 16, 1994) because it does not establish an environmental health or safety standard.

L. Congressional Review Act (CRA)

This final rule is exempt because it is a rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.

List of Subjects

40 CFR Part 1

Environmental protection, Organization and functions (Government agencies).

40 CFR Part 49

Environmental protection, Administrative practice and procedure, Air pollution control, Indians, Intergovernmental relations, Reporting and Recordkeeping requirements.

40 CFR Part 71

Environmental protection, Administrative practice and procedure, Air pollution control, Reporting and recordkeeping requirements.

40 CFR Part 124

Environmental protection, Administrative practice and procedures, Air pollution control, Hazardous waste, Indians-lands, Reporting and recordkeeping requirements, Water pollution control, Water supply.

Andrew Wheeler,

Administrator.

For the reasons set forth in the preamble, EPA amends 40 CFR parts 1, 49, 71, and 124 as follows:

PART 1—STATEMENT OF ORGANIZATION AND GENERAL INFORMATION

■ 1. The authority citation for part 1 is revised to read as follows:

Authority: 5 U.S.C. 552; Reorganization Plan No. 3 of 1970, 84 Stat. 2086 (July 9, 1970).

■ 2. Amend § 1.25 by revising paragraphs (e)(2) and (3) and adding paragraphs (e)(4) and (5) to read as follows:

§ 1.25 Staff offices.

* * * * *

(e) * * *

(2) *Functions.* (i) The Environmental Appeals Board shall exercise only that authority expressly delegated to it in this title. The Environmental Appeals Board, may also, at the Administrator's express request, provide advice and consultation, make findings of fact and conclusions of law, prepare a recommended decision, or serve as the final decisionmaker, as the Administrator deems appropriate.

(ii) In performing its functions, the Environmental Appeals Board may consult with any EPA employee concerning any matter governed by the rules set forth in this title, provided such consultation does not violate applicable *ex parte* rules in this title.

(iii) The Administrator may limit the Environmental Appeals Board's authority to interpret statutes and regulations otherwise delegated to it in this title by issuing, through the General Counsel, a binding legal interpretation of any applicable statute or regulation. Nothing in this section limits the Administrator's authority to review or change any EAB decision.

(3) *Final Decisions and Orders.* (i) *Designation.* The Environmental Appeals Board shall designate each final decision as either a published decision or an unpublished final order at the time such decision is issued.

(ii) *Published decisions.* (A) Except as provided in paragraph (e)(3)(ii)(B) of this section, the Environmental Appeals Board may not publish a decision in the Environmental Appeals Decisions (E.A.D.) or on the Board's website under the heading "Published Decisions" until 15 days after the date on which the decision is issued.

(B) The Administrator may, within 15 days of the Environmental Appeals Board issuing a decision designated for publication, re-designate the decision as an unpublished final order. Once re-designated, the Environmental Appeals Board may not publish such decision in the Environmental Appeals Decisions (E.A.D.) or on the Board's website under the heading "Published Decisions".

(4) *Qualifications.* Each member of the Environmental Appeals Board shall be a graduate of an accredited law school and a member in good standing of a recognized bar association of any State or the District of Columbia. Board Members shall not be employed by the Office of Enforcement, the Office of the General Counsel, a Regional Office, or any other office directly associated with matters that could come before the Environmental Appeals Board. A Board Member shall recuse himself or herself from deciding a particular case if that Board Member in previous employment performed prosecutorial or investigative functions with respect to the case, participated in the preparation or presentation of evidence in the case, or was otherwise personally involved in the case.

(5) *Term.* (i) *Initial terms.* (A) The seat of the longest serving member is designated as seat one, the second longest serving member as seat two, the third longest serving member as seat three, and the most recent member as seat four. If any of the four seats are vacant as of September 21, 2020, any such seat is designated a number based on the date on which it became vacant, after seats have been designated for current members.

(B) The initial term for seat one ends three years from September 21, 2020. The initial term for seat two ends six years from September 21, 2020. The initial term for seat three ends nine years from September 21, 2020. The initial term for seat four ends twelve years after September 21, 2020. The Administrator has the option of renewing these initial terms under paragraph (e)(5)(ii) of this section.

(C) Nothing in this section prevents a member of the Environmental Appeals Board from resigning, retiring, or transferring before the expiration of the member's initial term. Similarly, nothing in this paragraph forecloses the Administrator from reassigning a member of the Environmental Appeals Board to another position, consistent with applicable requirements, prior to the expiration of the member's initial term. The Administrator shall follow the provisions in 5 CFR 317.901 in making any reassignment under this section.

(D) If a member of the Environmental Appeals Board resigns, retires, or transfers before the expiration of the member's initial term, the replacement member will serve for the remaining portion of the initial term, with an option for renewal at the end of the term. If the term of the replacement member is not renewed, the Administrator shall reassign the replacement member to another position, consistent with the provisions of 5 CFR 317.901.

(ii) *12-year terms.* (A) After the initial terms in paragraph (e)(5)(i) of this section, each member of the Environmental Appeals Board is appointed to a twelve-year term, with an option for renewal at the end of that twelve-year period. Nothing in this paragraph prevents a member of the Environmental Appeals Board from resigning, retiring, or transferring before the expiration of the member's twelve-year term. Similarly, nothing in this paragraph forecloses the Administrator from reassigning a member of the Environmental Appeals Board to another position, consistent with applicable requirements, prior to the expiration of the member's renewable twelve-year term. The Administrator shall follow the provisions in 5 CFR 317.901 in making any reassignment under this section.

(B) If a member of the Environmental Appeals Board resigns, retires, or transfers before the expiration of the member's term, the replacement member will serve for the remaining portion of the term, with an option for renewal at the end of the term. If the term of the replacement member is not renewed, the Administrator shall reassign the replacement member to another position, consistent with the provisions of 5 CFR 317.901.

PART 49—INDIAN COUNTRY: AIR QUALITY PLANNING AND MANAGEMENT

■ 3. The authority citation for part 49 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

Subpart C—General Federal Implementation Plan Provisions

■ 4. Amend § 49.159 by revising paragraph (d) to read as follows:

§ 49.159 Final permit issuance and administrative and judicial review.

* * * * *

(d) *Can permit decisions be appealed?* (1) Permit decisions may be appealed under the permit appeal procedures of 40 CFR 124.19.

(2) An appeal under paragraph (d)(1) of this section is, under section 307(b) of the Act, a prerequisite to seeking judicial review of the final agency action.

* * * * *

■ 5. Amend § 49.172 by revising paragraph (d) to read as follows:

§ 49.172 Final permit issuance and administrative and judicial review.

* * * * *

(d) *Can permit decisions be appealed?* (1) Permit decisions may be appealed under the permit appeal procedures of 40 CFR 124.19.

(2) An appeal under paragraph (d)(1) of this section is, under section 307(b) of the Act, a prerequisite to seeking judicial review of the final agency action.

* * * * *

PART 71—FEDERAL OPERATING PERMIT PROGRAMS

■ 6. The authority citation for part 71 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

Subpart A—Operating Permits

■ 7. Amend § 71.11 by revising paragraph (l) to read as follows:

§ 71.11 Administrative record, public participation, and administrative review.

* * * * *

(l) *Appeal of permits.* (1) Permit decisions may be appealed under the permit appeal procedures of 40 CFR 124.19.

(2) An appeal under paragraph (l)(1) of this section is, under section 307(b) of the Act, a prerequisite to seeking judicial review of the final agency action.

* * * * *

Subpart B—Permits for Early Reductions Sources

■ 8. Amend § 71.27 by revising paragraph (l) to read as follows:

§ 71.27 Public participation and appeal.

* * * * *

(l) *Appeal of permits.* (1) Permit decisions may be appealed under the permit appeal procedures of 40 CFR 124.19.

(2) An appeal under paragraph (l)(1) of this section is, under section 307(b) of the Act, a prerequisite to seeking judicial review of the final agency action.

(3) The filing of a petition for review of any condition of the permit or permit decision shall not stay the effect of any contested permit or permit condition.

* * * * *

PART 124—PROCEDURES FOR DECISIONMAKING

■ 9. The authority citation for part 124 continues to read as follows:

Authority: Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.;* Safe Drinking Water Act, 42 U.S.C. 300f *et seq.;* Clean Water Act, 33 U.S.C. 1251 *et seq.;* Clean Air Act, 42 U.S.C. 7401 *et seq.*

Subpart A—General Program Requirements

■ 10. Amend § 124.19 by:

■ a. Revising paragraphs (a)(4)(i), (e), (g) and (l);

■ b. Removing paragraph (p); and

■ c. Redesignating paragraphs (m) through (o) as paragraphs (n) through (p) and adding a new paragraph (m).

The revisions and additions read as follows:

§ 124.19 Appeal of RCRA, UIC, NPDES and PSD Permits.

(a) * * *

(4) * * * (i) In addition to meeting the requirements in paragraph (d) of this section, a petition for review must identify the contested permit condition or other specific challenge to the permit decision and clearly set forth, with legal and factual support, petitioner's contentions for why the permit decision should be reviewed. The petition must demonstrate that each challenge to the permit decision is based on a finding of fact or conclusion of law that is clearly erroneous.

* * * * *

(e) *Participation by amicus curiae.* Any interested person may file an amicus brief in any appeal pending before the Environmental Appeals Board under this section. The deadline for filing such brief 21 days after the filing of the petition. Amicus briefs may not exceed 15 pages.

* * * * *

(g) *Motions for extension of time.* (1) Parties must file motions for extensions of time sufficiently in advance of the due date to allow other parties to have a reasonable opportunity to respond to the request for more time and to provide the Environmental Appeals Board with a reasonable opportunity to issue an order.

(2) Each party may only file one motion for extension and the requested extension may not exceed 30 days.

* * * * *

(l) *Final disposition.* (1) Except as provided in paragraph (l)(2), the Environmental Appeals Board shall issue its decision on a permit appeal by the later date occurring 60 days after the date on which:

(i) The final brief has been submitted; or

(ii) Oral argument is concluded.

(2) The Environmental Appeals Board may, upon determining that the nature and complexity of the case requires additional time, grant itself an additional 60 days to issue its decision.

(3) Any written opinion issued by the Environmental Appeals Board should only be as long as necessary to address the specific issues presented to the Board in the appeal.

(m) *Judicial review.* (1) A petition to the Environmental Appeals Board under paragraph (a) of this section is, under 5 U.S.C. 704, a prerequisite to seeking judicial review of the final agency action.

(2) For purposes of judicial review under the appropriate Act, final agency action on a permit occurs when agency review procedures under this section are exhausted and the Regional Administrator subsequently issues a final permit decision under this paragraph. A final permit decision must be issued by the Regional Administrator:

(i) When the Environmental Appeals Board issues notice to the parties that the petition for review has been denied;

(ii) When the Environmental Appeals Board issues a decision on the merits of the appeal and the decision does not include a remand of the proceedings; or

(iii) Upon the completion of remand proceedings if the proceedings are remanded, unless the Environmental Appeals Board's remand order specifically provides that appeal of the remand decision will be required to exhaust administrative remedies.

(3) The Regional Administrator must promptly publish notice of any final agency action in the **Federal Register** regarding the following permits:

(i) PSD permits;

(ii) Outer continental shelf permits issued under 40 CFR part 55;

(iii) Federal Title V operating permits issued under 40 CFR part 71;

(iv) Acid Rain permits appealed under 40 CFR part 78;

(v) Tribal Major Non-Attainment NSR permits issued under 40 CFR 49.166 through 49.173; and

(vi) Tribal Minor NSR permits issued under 40 CFR 49.151 through 49.161.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 9 and 721

[EPA–HQ–OPPT–2019–0595; FRL–10010–61]

RIN 2070–AB27

Significant New Use Rules on Certain Chemical Substances (20–1.B)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is issuing significant new use rules (SNURs) under the Toxic Substances Control Act (TSCA) for chemical substances which are the subject of premanufacture notices (PMNs). This action requires persons to notify EPA least 90 days before commencing manufacture (defined by statute to include import) or processing of any of these chemical substances for an activity that is designated as a significant new use by this rule. The required notification initiates EPA's evaluation of the chemical under the conditions of use within the applicable review period. Persons may not commence manufacture or processing for the significant new use until EPA has conducted a review of the notice, made an appropriate determination on the notice, and has taken such actions as are required as a result of that determination.

DATES: This rule is effective on October 20, 2020. For purposes of judicial review, this rule shall be promulgated at 1 p.m. (e.s.t.) on September 4, 2020.