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ENVIRONMENTAL DECISION-MAKING THROUGH ADJUDICATORY APPEALS IN THE UNITED STATES

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Abstract

This research examines the appeals process of decisions made by the United States Environmental Protection Agency (EPA). As part of an adjudicatory appeals process, the Environmental Appeals Board (EAB) was established in 1992 internal to the EPA to review the decisions of the agency in specific areas. The purpose of the EAB was to serve as a neutral arbitrator that assists in the expeditious corrections of error which includes providing for consistency of policymaking and alleviation of cases proceeding to the federal court system. This research explores if the EAB has lived up to its charter. Research questions include what are the outcomes of these EAB adjudicatory appeal hearings? Are some environmental laws challenged more than others? More importantly, what is the impact of the federal courts on this EAB adjudicatory appeal process? For instance, are the courts in disagreement or generally affirm EAB decisions? And, overall, how long does this process take for a petitioner who files an EAB appeal and then moves the case into the federal courts for a remedy? Using publicly available data, decisions are analyzed from 1992-2018 (n=1014) by the EAB in regard to the type of appeal, the environmental legislation and programs involved as well as

the duration of time for EAB decision-making over time. In addition, the outcome of the appeals to the federal courts (n=83) during this same time period are investigated to determine the efficaciousness of this process for an appellant. Results show that permits are 1.5 times more likely to be appealed versus other actions like penalties or consent orders before the EAB. Water issues (30.5%) are more likely to be appealed to the EAB than air (24.9%) or other cases. Based on data from January 2006 to January 2019 (n=552), the EAB has improved its processing time to provide decisions from approximately 7 months to 3 months. Only 8% of the EAB cases advance to the federal court system. However, the results indicate that appellants are not likely to have their case reversed by the federal court system. Only 13% of the EAB cases at the federal courts are reversed, and 9.6% are remanded back to the EAB, and 20.5% are affirmed. The majority of cases are either dismissed or denied (56.6%). This means that the original decision of the EAB remains intact for 77% of the cases heard at the federal courts. These results suggest some guidance to polluters early in the permitting process, particularly in water and air, could improve EPA decision-making preventing the need for cases coming before the EAB. The results indicate more guidance or clearer standards for implementation of permits is required by the EPA to polluters. In addition, the EAB appears to not be a major adjudicatory appeals venue for appellants, although the federal courts appear to be even less so which could mean the role of neutral arbitrator has not been achieved.

Keywords

Environmental Appeals Board, Environmental Adjudication, U.S. Environmental Protection Agency

1. Introduction

In the United States, the Environmental Protection Agency (EPA) is one of the main enforcement agencies of environmental regulations and requirements in the executive branch of the federal government. Created in 1970 by President Nixon, EPA as a federal agency is considered a quasi-independent regulatory body. This means it has significant influence with some autonomy on environmental public policymaking, particularly in regard to regulating industry and the private sector as well as state/local governments, and under certain instances, other federal agencies. The EPA Administrator is appointed by the President and approved by the United States Senate. Other executive branch departments and agencies plus the state and local governments play an important role in enforcing environmental regulations. However, it is the EPA that plays a key national role in this area. As part of its duties, the EPA is required to set national environmental regulatory standards

referred to as rulemakings, and enforce compliance in the areas of air, water, remediation, and hazardous and toxic chemicals, to name just a few. In the process, the EPA has established some internal systems for self-oversight of its decisions. Research has also found that the adjudication in international topics like climate change or marine policy is critical when evaluating public policy and the role of the courts (Hodas, 2018; Tan, 2018).

Representative democracy is a critical element in public policy and law-making, to which the agency adjudication process can pose a dilemma because the members are not elected or held accountable to an elected official (Trijono, 2018). An adjudicatory function of federal agencies under the Administrative Procedures Act of 1946 which governs this policymaking aspect of EPA has come into question over the years (Funk, 2017). Review of evidence in agency decision making plays a vital role in a variety of policy areas (Lazo, 2019).

One major reviewer of EPA policy decisions is the Environmental Appeals Board (EAB). The focus of this research is on the decisions of the EAB and challenges to its decisions in the federal courts. The EAB is an adjudicatory appeals board comprised of three environmental lawyers that work for the EPA to review the agency's decisions on enforcement and permits, as well as other areas which are all filed as appeals to the original EPA decision. The EAB was created to serve as an impartial administrative appeals tribunal. Research has also found that the adjudication in international topics like climate change or marine policy is critical when evaluating public policy and the role of the courts (Hodas, 2018; Tan, 2018).

1.1 Specific Role of the EAB in Environmental Decisions at the EPA

The EAB plays a significant role as an appeals adjudicator for EPA decisions. Most of its appeals focus on two areas of decision-making: 1) the objection to a financial penalty as part of an enforcement action, and 2) the appeal of an issued permit to pollute. When the EPA enforces a financial penalty, it is reviewed by an EPA administrative law judge (ALJ), who is hired by the federal government and works specifically on the review of EPA enforcement decisions. ALJ's are not unique to the EPA; in fact, the federal government in the United States employs approximately 1,800 judges of this type located in 24 different agencies with the majority being located in the Social Security Administration (Taratoot, 2014, pg. 117). However, the ALJ's at the EPA have a variety of duties. They can administer oaths, issue subpoenas, serve as a neutral decision-maker in adjudication cases, determine admissibility of evidence, make findings of fact, and issue the initial decision in a case that is brought before them (U.S. Environmental Protection Agency, 2017; Taratoot, 2014, pg. 118). When EPA issues a financial penalty against a violator, it is reviewed by the

ALJ who issues the initial agency decision. This only happens with these types of EPA decisions not others that can be appealed directly to the EAB. This ALJ decision then can be appealed to the EAB. The second part of the work of the EAB's decisions come from appeals to permits. These decisions are not reviewed by an ALJ but go directly to EAB as the primary appeals process. These appeals can come from both the permit applicant and other stakeholders involved in the permit process.

Decisions made by the EAB are in accordance with applicable environmental legislation and regulations as well as EAB precedents (U.S. Environmental Protection Agency, 2018). Its decisions are considered the final judgement by the EPA. Cases are heard in Washington, DC in a formal hearing and decided by majority vote of the three-person EAB panel. Written opinions and decisions become part of the EAB docket and are available to the public. After the EAB issues its decision, the only remedy left to a petitioner is to appeal through the federal district courts.

1.2 Research Questions

This research examines the operation of the EAB which functions as an adjudicatory body in environmental policymaking after the EPA has made its decision. This is an important function of public policymaking in a democracy where unelected regulatory agencies make critical enforcement decisions. While there is a rich body of research focused on judicial decision-making, the appellate decisions of a body like EAB has not been closely evaluated.

Several questions explored in this research are important in regard to EAB decision-making. Specifically, what are the outcomes of these EAB adjudicatory appeal hearings? Are some environmental laws challenged more than others? The results might indicate more guidance or clearer standards for implementation may be required by the EPA to polluters. More importantly, what is the impact of the federal courts on this EAB adjudicatory appeal process? For instance, are the courts in disagreement or generally affirm EAB decisions? Does the EAB truly function as the neutral arbitrator of the EPA's actions as it was intended to? And, overall, how long does this process take for a petitioner who files an EAB decision in the federal courts for a remedy? The outcomes to these questions can lead to operational improvements for the functioning of the EAB. To investigate these questions, this research uses data made available by EPA on their EAB decisions, which is publicly available online (U.S. Environmental Protection Agency, 2019). Overall, the findings of this research show that the EAB process has focused on specific environmental laws more than others. Also, the research findings show that the EAB has taken significant time for review in some cases, but has improved its efficiency in review cases more recently. Regarding the content of the cases, this research also finds that while cases have been reversed by the federal district courts, it is more likely

that the EAB decisions are affirmed. The findings question whether the EAB functions as a neutral arbitrator that is willing to reverse the decisions of the EPA that it reviews.

2. Literature Review

When the EAB was established on March 1, 1992 by EPA Administrator William Reilly, it was to serve as an appeals route for EPA decisions in permits and enforcement actions (Reich, 1994). According to the regulation establishing the EAB, it was created to allow for a broader range of input and perspective in administrative decision-making, to provide for greater authority to the EPA's decisions, and to inspire confidence in the fairness of EPA's adjudications (U.S. Environmental Protection Agency, 2013; U.S. Environmental Protection Agency, 2017).

EPA clearly outlines the mission of the EAB. It states that the EAB mission is three-fold: to apply legal requirements consistently across the agency; to provide cost-effective opportunities for review of its actions; and to resolve appeals from petitioners efficiently in order to expedite environmental compliance and permitting, thereby potentially avoiding protracted litigation in federal court (U.S. Environmental Protection Agency, 2017). A major goal in creating the EAB was to minimize or avoid the expense and time usually associated with a federal court case. Ultimately, the desired outcome was to reduce the number of court challenges to EPA's decisions.

A need for an internal agency appeals panel became apparent with new authorities that were given to EPA under the air and water legislation (which required an appeals process). In addition, there were a number of appeals being handled by the EPA Administrator prior to the EAB that concentrated on permit decisions (Wolgast, Stein & Epp, 2010). Before the creation of the EAB, appeals were made by the EPA Administrator's Office which often included the lead judicial officer inside the agency. Today, the judges are appointed by the EPA Administrator to form a pool of four judges available to be selected to sit on the three-judge EAB panel. Eight attorneys support the EAB by reviewing the administrative record, analyzing applicable law and EPA policy, and preparing formal written opinions (U.S. Environmental Protection Agency, 2019). These attorneys are not assigned to support the individual judges on the panel, although they provide specific policy research and support at the request of the EAB member. They are available to answer questions from litigants, and the general public about the appeals process. There is also an EAB Clerk and administrative specialist to manage the EAB's docket records. While there is no chief justice, all judges on the panel are senior career-level EPA employees with equal authority over cases (Reich, 1994; U.S. Environmental Protection Agency 2013).

In addition to appeals to permits and penalties, the EAB also has the jurisdiction over EPA consent agreements and consent orders, plus administrative orders relating to federal facilities, and administrative enforcement actions. Historically, the EAB's docket consists primarily of appeals from penalties and challenges to permit decisions. The EAB also has jurisdiction to hear other types of appeals and, on occasion, resolves disputes under special delegation by the EPA Administrator (U.S. Environmental Protection Agency, 2017). Figure 1 shows the flow of the decision process at EPA that includes the types of appeals as well as the insertion of the ALJ into the financial penalties area. Note that the federal courts can be used in all these decisions for appealing the decisions of the EAB.

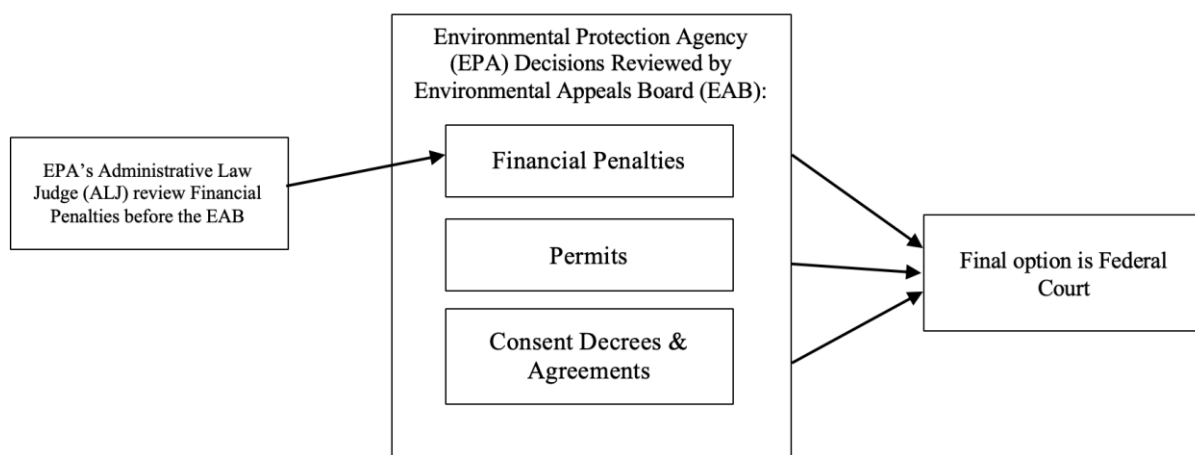


Figure 1: Flow of Appeals Process

2.1 The Role of Adjudicatory Processes in Public Policymaking

In general, an adjudicatory appeals process poses a dilemma for a democracy. Government agencies make regulations and issue permits granting the right to pollute based on rulemakings and public comment, and also enforce compliance actions. This occurs at the national and state/local levels in the United States. Usually permits and rulemakings governing these permits are reviewed in a public comment process which allows participation by a variety of affected interests. However, when an appeal is made for a permit or penalty decision to the EAB, the decision process becomes more distant from the democratic policymaking process (Barnett, 2016). The EAB panel of judges are selected by the EPA Administrator, not an elected official, nor confirmed by an elected representative body. However, some legal scholars argue that an appeals process, as part of adjudication, is important for a democracy. For instance, Shavell (1995, 2018) claims that adjudication allows for corrections of error made in agency decision-making. The point here is that it is easier to fix the

errors made at this stage than enhancing the quality of the trial process (Shavell, 1995, pg. 379; Shavell, 2018). It also has benefit as being part of a multistage adjudicatory process on EPA decisions (Kaplow, 2017).

When filing appeals to the EAB, petitioners have 30 days from when EPA's initial decision for both the penalty or the permit action was made. This should provide for an expeditious filing on behalf of the petitioner. The EAB analyzes the factual findings of the agency's actions in conjunction with the environmental law, and any allegation of procedural error. Allegations of error are scrutinized to ensure that the legal conclusions are consistent with the underlying environmental statute, its implementing regulations, and applicable EPA guidance (U.S. Environmental Protection Agency, 2018).

Most EAB cases do not get taken into the federal courts. However, when the case progresses to a federal court, the outcomes can vary. For instance, the federal court can decide to affirm the decisions of the EAB, dismiss the case for a variety of reasons, remand the case back to the EPA for further review, or reverse the decision. Both affirming and dismissal of an EAB case allows the decision made by the EAB to stand as the policy outcome. In the event a case is remanded or reversed, the federal court is sending a clear signal that the decision needs to either be reviewed by EPA or completely reversed. This research examines the decisions by the federal courts on EAB decisions.

2.2 Federal Court Oversight on the EAB Decisions

The EAB behaves more like a judiciary body than an EPA bureaucratic employee in the executive branch charged with appellate decision making. As a result, EAB members are expected behave similarly to other types of federal judges rather than an EPA employee. Therefore, using research on behavior of federal district judges, results show that in environmental cases from 1974 - 1991, penalties were issued by judges that were explained by several factors not associated with the magnitude of the environmental violation. For instance, Ringquist & Emmert (1999) found that variables such as the facts of the case and defendant characteristics, the federal institutional actors, and the surrounding political context were important factors in penalty outcomes. Political considerations were especially influential in these case decisions. Penalty severity was also affected by judicial policy preferences and local political forces. Ringquist & Emmert (1999) found that it is commonly thought that EPA prefers to provide a more amicable way to resolve enforcement actions than to use political and financial capital in protracted litigation in the courts. The authors cite that in the past, roughly 90% of all civil penalty cases are settled through consent decrees between EPA and

the violator (Ringquist & Emmert, 1999, pg. 12). Moreover, research shows that decisions by federal judges were much more likely to support the policy and legal positions of the president who appointed them (Ringquist & Emmert, 1999, pg. 15).

Some research has shown that the federal government, as well as state and local governments, have a significant advantage in winning cases over litigants in the federal courts, making the EAB a more important venue for an appeal than the courts. In fact, Songer and Sheehan (1992, pg. 241) found that in their 1986 sample of United States Court of Appeals of over 4,000 cases, that “the federal government won 58.2% of the time. This meant the federal government was 4.66 times more likely than others to prevail when involved with a case. The same impact held, but to a lesser extent for state and local governments which won cases 29.9% of the time.”

These skewed outcomes in the higher-level federal courts make the EAB decisions extremely important for a litigant since the federal courts are likely to be impacted by forces not involved with the merits of the appeal. Further research on who wins in the Court of Appeals from 1925 - 1988, confirmed this trend of government litigant’s success is partially explained from the repetitive experience and substantial organizational strength that the federal, state, and local governments have in court (Songer, Sheehan, & Haire, 1999).

Cases involving the U.S. Supreme Court show similar trends as the other federal courts. EPA cases reaching the U.S. Supreme Court often support the executive agencies like EPA. From a study of cases in 1969 - 1988, judges at both Courts of Appeals and the U.S. Supreme Court, are much more likely to uphold the exercise of discretion by the agency when the policy implications of that exercise are consistent with the policy preferences of the judges (Humphries & Songer, 1999, pg. 217). Again, for a litigant in the appeals process, the EAB may be the most likely place for being able to overturn an EPA decision or correct a legal error.

2.3 Influences on EPA Adjudicatory Decisions

Like the influences on federal court decisions, there is research that also has shown similar influences on ALJ decisions. For instance, in recent research on environmental adjudicatory decisions, Taratoot (2014) finds that the size of the penalties issued by EPA can be influenced by personal policy preferences, political constraints from Congress, and litigant characteristics. Before a case gets to the EAB, the internal EPA ALJ issues a penalty against the violator. Taratoot (2014) statistically found that the partisan affiliation of each of the members of the EAB impacted decisions by the EPA ALJ prior to the appeal. Surprisingly, the EPA’s ALJs decisions were found to be responsive to the policy preferences of the EAB. In fact, research shows that for every additional

EAB member considered as having policies similar to the partisan affiliation with the Democratic Party, the size of the civil penalty increased by \$22,436 by the ALJ (Taratoot, 2014, pg. 130). This level of responsiveness contradicts the foundation of the EAB as being a neutral, trial-like appeal for those charged with a penalty. Because of these influences, Rachlinski (2005, pg. 550-551) makes the case for the EPA avoiding adjudicatory-like decision processes. He also argues that from the perspective of the EPA, using adjudicatory processes are not cost effective for agency policymaking because they focus on a single case rather than working on standards that can be followed in rulemakings.

Overall, the literature points out some of the benefits and dilemmas of having an EAB. It can provide an appeal process to the adjudicatory decisions of the ALJ. However, it is also possible that the counter argument holds validity which has been found in the research literature. There can be additional biases on EAB decisions from sources outside the merit of the case. This research examines the data from the EAB cases as well as the amount of time it takes to decide a case. It tests if environmental laws are equally likely to be appealed. Also, the data is tested to determine if there is a relationship between the types of appeals and the environmental legislation involved. The study also tests if the duration of the EAB decision is as expeditious as intended, and how frequently the EAB decisions are reversed or affirmed by the federal court.

3. Research Design and Methods

Data was gathered from the EPA regarding both EAB decisions and federal court review of those decisions. This information is a matter of public record. These decisions are printed in bound volumes under Environmental Appeals Decisions (E.A.D.) and are available on the EAB website from EPA (U.S. Environmental Protection Agency, 2019).

The cases that are made available on the EAB website begins with the start of the EAB in 1992. The EAB data (n=1014) used in this research comprises both published and unpublished cases from 1992 to November 2018. The importance of using both published and unpublished cases has been demonstrated by authors particularly in regard to environmental cases (Ringquist & Emmert, 1999). Few EAB cases proceed into the federal courts. However, those cases are also posted for public access on the EPA website for EAB data. The EAB cases that proceed into the federal courts from that same time period (n=83) were included in the analysis as a means to evaluate which cases are most likely to go into the federal courts. Finally, for the calculations of duration for decisions of the EAB cases and federal court cases from January 2006 to January 2019 (n=552).

Environmental legislation and associated programs heard before the EAB were coded from these data sets. This includes the following statutes and associated programs:

- Clean Air Act (CAA) including Prevention of Significant Deterioration Program (PSD), New Source Review (NSR), Title V operating permits, Title IV Acid Rain permits, Outer Continental Shelf Program (OCS), Wood Heater Certification.
- Clean Water Act (CWA), which includes the National Pollution Discharge Elimination System (NPES).
- Safe Drinking Water Act (SDWA) and the associated Underground Injection Control Program (UIC).
- Resource Conservation and Recovery Act permit appeals (RCRA) including penalties for Corrective Actions (sec. 3008) and Underground Storage Tanks (sec. 9006).
- Toxic Substances Control Act (TSCA).
- Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA or commonly known as pesticides).
- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, also referred to as Superfund).
- Emergency Planning and Community Right to Know Act (EPC).
- Equal Access to Justice (EA).
- Marine Protection, Research and Sanctuary Act (MP).
- Act to Prevent Pollution from Ships (AP).
- Multimedia cases (MM).

To evaluate if there were pieces of environmental legislation more likely to be heard by the EAB, appeal cases were coded for the major environmental legislation involved as well as its associated programs. Types of cases were coded in terms of permits, penalties, and other actions heard by the EAB. For cases from 2006 to 2018, the date of filing both EAB cases and federal court cases was evaluated to test the timeliness of decisions, which was a foundational mission of the EAB. Combined, these trends should begin to evaluate the performance of the EAB as a neutral and efficient arbitrator of EPA's decisions.

4. Results and Findings

The results show that appeal cases heard by the EAB have changed over the years. According to Reich (1994), the first year of the EAB, cases were divided equally between enforcement and permit actions. During this same period, the EAB took action on a variety of cases related to TSCA (18 cases), FIFRA (14 cases), RCRA (11 cases), CWA (6 cases), EPC (3 cases), SDWA (2 cases), and the CAA (1 case) (Reich, 1994, pg.65).

The results from this research show significant changes to both the types of cases heard, the actions taken by the EAB, and the distribution of cases by legislation. An evaluation of the cases advancing into the federal court system and the duration of review by the EAB, as well as time to complete decision by the federal courts, are included in the analysis.

4.1 Types of Cases heard before the EAB

When examining the type of appeal made to the EAB by legislation, it appears that there are some important trends. There is a significant relationship between the environmental legislation and type of EAB appeals (Table 1). The majority of the EAB cases are under the CWA (30.5%), then the CAA (24.9%). When the type of decision is coded into all the appeal cases heard by the EAB, such as permits and penalty actions, consent orders, CERCLA reimbursements, and certification appeals, there appears to be a statistical and moderate relationship between the type of decision by EAB and the environmental legislation (Chi-Square=1384.6, sig=.000; Cramer's V=.584, sig=.000). While part of this outcome was predictable, such as CERCLA reimbursement actions being covered under the CERLA legislation, what is surprising is the comparison of penalties and permits. EAB actions are 1.5 times more likely to come from permit appeals than penalty appeals. Permit and penalty appeals are more likely to occur in CWA and CAA than in the other environmental laws. Unlike in Reich's (1994) report where the first year of the EAB focused on TSCA, FIFRA, and RCRA, the clear shift has been to CWA and CAA over time. When the analysis is limited to only penalty and permit appeals with environmental legislation that has at least 10 cases, the statistical relationship increases between type of decision made by the EAB and the environmental legislation (Chi-Square=508.6, sig.000; Cramer's V=.724, sig.000). When the data is further disaggregated to look at the type of action within the legislation, the NPDES permits under the CWA and the Underground Storage Tanks Program under RCRA (sec. 9006) are the majority of the cases filed. This means most cases being considered for appeal are not associated with penalties or other appeal types.

Table 1: Type of EAB Cases by Legislation from 1992-2018 (n=1014) (U.S. Environmental Protection Agency, 2019)

Type of Decision by EAB	Environmental Legislation												
	CAA	CWA	CERCLA	EPC	EA	FIFRA	MP	RCRA	TSCA	SDWA	APPS	MM	TOTALS
Penalty Appeals	83	56	3	26	6	57	1	45	93	2	5	12	389
Compliance Order	1	0	0	0	0	0	0	0	0	0	0	0	1
Permit Appeals	167	253	0	0	0	0	0	85	0	73	0	0	578
Certification Appeals	1	0	0	0	0	0	0	0	0	0	0	0	1
CERCLA Reimbursement	0	0	45	0	0	0	0	0	0	0	0	0	45
Totals	252	309	48	26	6	57	1	130	93	75	5	12	1014

Chi-Square=1284.6, sig=.000; Cramer's V=.584, sig=.000

Over time CWA and CAA, the two major pieces of legislation appealed to the EAB, show a profile that has some differences (Figure 2). For CWA, which is the majority of the appeals, there are years of increased numbers of cases brought such as in 2001 - 2002, 2004, 2006 - 2010, and again in 2016. There are increased frequencies of cases filed for CAA over CWA in 1999 and 2014. This profile reflects the activities of petitioners being most impacted by EPA decisions involving air and water over time, with water dominating the adjudicatory appeal process.

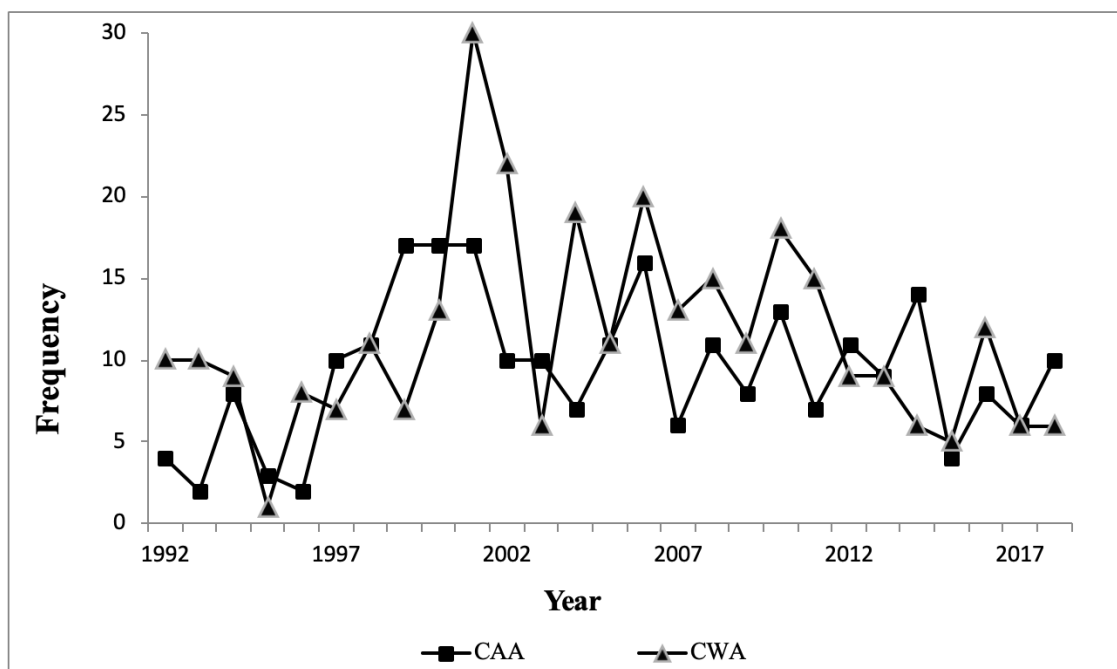


Figure 2: CWA and CAA Cases Decided by the EAB from 1992-2018 (n=1014) (U.S. Environmental Protection Agency, 2019)

From these results, it is clear that environmental legislation is not equally appealed by petitioners, and that the CWA and CAA play important and dominating roles in representation before the EAB consistently over time.

4.2 Federal Court Actions on EAB Decisions

Federal courts in the United States generally will only review EAB decisions to determine if the decisions were not in accordance with the law or considered an abuse of power, being arbitrary and capricious. Court's defer to the regulatory agencies that have more expertise in the environmental policy area, and have spent significantly more time on the case before it enters the federal court system. According to the EAB research by Wolgast, Stein & Epp (2010, pg. 194), only 10% of the EAB decisions have been appealed to a federal court, with only 2% leading to a reversal outcome. This differs somewhat from the data posted on the EAB site used in this research.

Using the EAB data, 83 decisions out of a total of 1014 cases has been filed in the federal courts which is approximately 8%. This indicates that the EAB is effective in its mission to alleviate cases filed in the federal court system, with less than 10% actually progressing to the federal court system. However, the results in Table 2 show that the federal court cases were only reversed approximately 13.3% of the time by the federal courts. Also important is the number of remanded cases that require EPA to review the case again, which was represented at 9.6%. Together these cases represent a change to the original EAB decision, at least in part, by the federal courts approximately 23% of the time. The federal courts do affirm EAB cases 20.5% of the time, with 56.6% of the cases being dismissed or denied. It is important to consider dismissed, denied and affirmed decisions together when looking at the policy outcome because they are similar results for the appellant. The policy result is the same, meaning the original EAB decision remains or stands whole without revisions. When these decisions are combined, this shows that the EAB decisions remain the policy by the federal courts approximately 77% of the time. This would indicate to litigants interested in filing in the federal courts that it is unlikely that their case would be reversed, remanded or even heard by the federal court system.

Table 2: Federal Court Decisions on EAB Cases to 2018 (U.S. Environmental Protection Agency, 2019)

Decision by Federal Court	EAB Cases in Federal Court	
	Frequency	Percent
Affirmed	17	20.5%
Dismissed or Denied	47	56.6%
Remanded	8	9.6%
Reversed	11	13.3%
Totals	83	100%

When the federal court data is disaggregated by environmental legislation (Table 3), results show that not all environmental legislation has the same likelihood of entering into the federal courts. The data show that the CWA (28.9%) has the most EAB cases advancing to the courts, followed by the CAA and RCRA both at 20.4%. EAB cases involved TSCA (18.0%) and SDWA (12.0%) are less likely to advance into the federal court system. Perhaps with the majority of cases being decided by the EAB being water and air issues, what is surprising with this result is that RCRA is equal to the CAA for cases appearing in the federal courts.

Table 3 shows that when the federal court decisions are compared by statute that CWA (28.9%), CAA (20.4%), and RCRA (20.4%) are areas that the EAB have been challenged in the federal courts. Of all the reversed cases, it is the CWA (6%) that is more likely to be reversed. Also, CAA (15.7%) and CWA (16.9%) cases are most likely to be dismissed or denied a hearing by the courts.

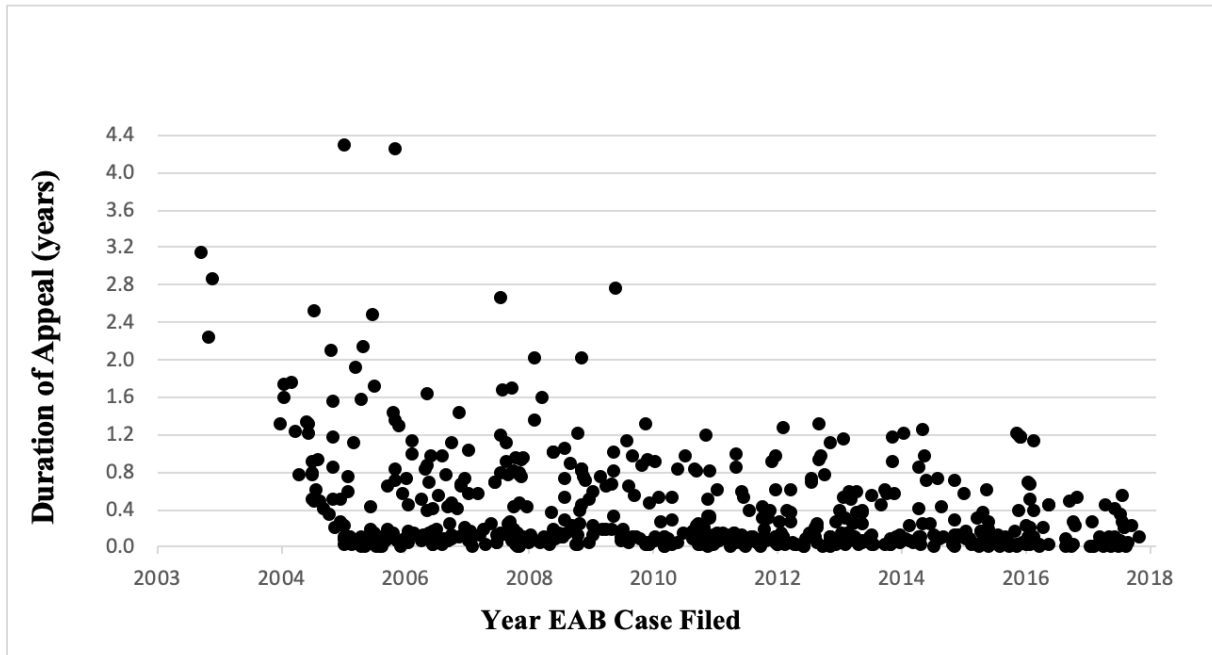
Table 3: Federal Court Decisions on EAB Cases to 2018 (n=83) (U.S. Environmental Protection Agency, 2019)

Decision by Federal Court	Environmental Legislation					
	CAA	CWA	RCRA	TSCA	SDWA	Totals
Affirmed	1.2% (1)	2.4% (2)	7.2% (6)	4.8% (4)	4.8% (4)	20.4% (17)
Dismissed or Denied	15.7% (13)	16.9% (14)	8.4% (7)	8.4% (7)	7.2% (6)	56.6% (47)
Remanded	1.2% (1)	3.6% (3)	2.4% (2)	2.4% (2)	0	9.6% (8)
Reversed	2.4% (2)	6.0% (5)	2.4% (2)	2.4% (2)	0	13.3%

Decision by Federal Court	Environmental Legislation					
	CAA	CWA	RCRA	TSCA	SDWA	Totals
						(11)
Totals	20.4% (17)	28.9% (24)	20.4% (17)	18.0% (15)	12.0% (10)	83 100%

4.3 Duration of EAB Reviews

A foundational premise of using the EAB was to make appeals to EPA decisions more expeditious and less costly than using the federal courts system. Using the EAB data set (U.S. Environmental Protection Agency, 2019), the duration of EAB closed in 2006 to January 2019 (n=552) was evaluated. Figure 3 examines the amount a time it took the EAB to close a case since 2006. Cases closed in 2006, could have a filing start date years before. It is clear from Figure 3 that the EAB has become more efficient over time in processing cases. Cases starting in 2009 begin to range from less than one year to 1.5 years to complete once filed with the EAB with an average of 3.6 months (.30 years). Prior to that time, the data show a larger range of cases in terms of duration of completion with an average of 7.2 months (.60 years). The total mean duration time is 5.5 months (.46 years) for the entire period from January 2006 to January 2019. There are two cases eliminated as outliers that were eight years or older for review duration and three cases found that were empty typographical entries by the EPA in this data set.



***There are two cases eliminated as outliers that were eight years or older for review duration and three cases found that were empty typographical entries by the EPA.*

Figure 3: *Duration of Time for EAB Case Decision Closed in 2006 to January 2019 (n=552) (U.S. Environmental Protection Agency, 2019)*

4.4 Duration of Time from EAB Decision to Federal Court Case Decision

The other important analysis in regard to time is the duration for a final decision for the appellant. One founding purpose of creating the EAB was to resolve cases for the EPA without incurring the extra time of a federal court case hearing. Therefore, the duration of time from when an EAB decision is completed to the completion of that same case in the federal courts can indicate the benefit of the EAB for the appellant. This duration can be inferred as the time it takes for a case to work its way through the federal court system. Figure 4 shows that the amount of time from when the EAB decision is made to the completion of a federal court case has generally been around a mean of 1.4 years without the outlier cases taking more than 5 years. The duration takes approximately 3 years at the highest (without the unique cases which can be considered outliers). This time is considerably more than the amount of time taken by a solely EAB process, which in Figure 3 results for a petitioner of approximately 3-4 months. One risk for the appellant that moves the EAB decided case into the federal courts is that significant duration is added to the time a case has already taken in the EAB process. It indicates that the EAB process is a faster route for a decision than the federal courts, however, it also means this time is additive to the time to get a decision for the petitioner.

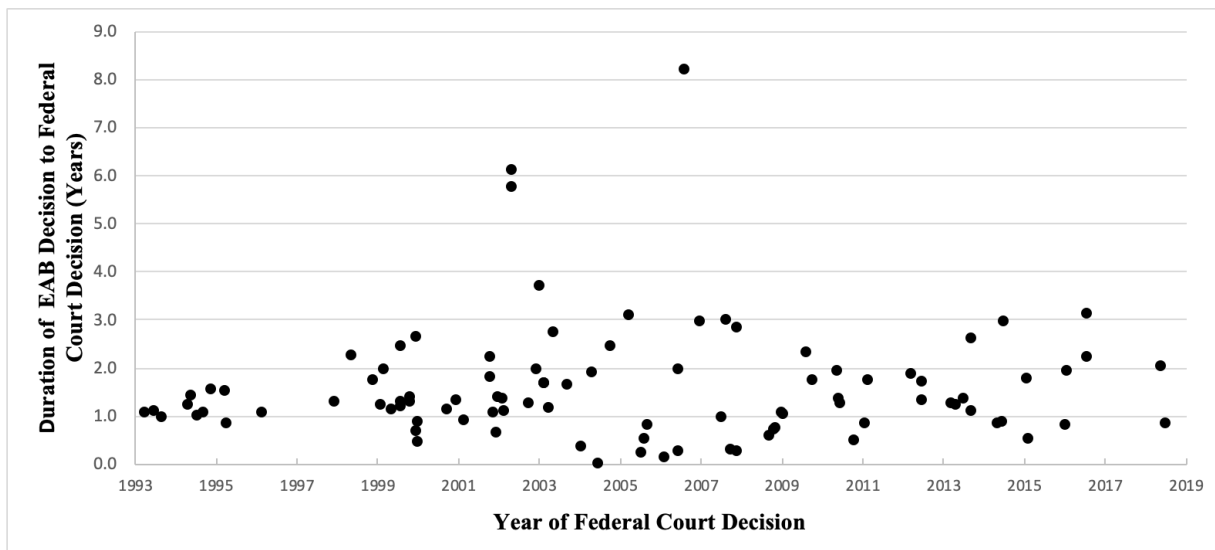


Figure 4: Duration of Time from EAB Decision to Federal Court Decision from 1992 to January 2019 (n=83) (U.S. Environmental Protection Agency, 2019)

5. Conclusions

There are several important conclusions from the results of this research. Addressing the research questions, all environmental legislation is not equally challenged in appeals from EPA decisions. Water cases dominate the cases appealed to the EAB over all other policies. The majority of EAB cases are related to permits, not penalties or other types of actions the EAB has authority over. One conclusion for the EPA might be that the permitting process should be evaluated in terms of internal EPA decision-making. Permits generally include a public comment period and can be appealed by members of the public, therefore, it is concerning that a process that involves a stakeholder comment process yields more cases before the EAB than penalties.

The second set of conclusions derived from this research shows that the mission of the EAB has been partially achieved. Clearly, the amount of time to decide an EAB case is much more expeditious than using the federal courts system. However, less than 10% of the EAB cases are advanced to the federal courts, meaning the EAB plays a deciding policy role on EPA decisions. The other dynamic is that most of the cases have outcomes that do not support the appellant when EAB decisions are affirmed, dismissed, or denied a hearing by the federal court. Only 13% of the EAB cases heard by the federal courts are reversed and only 9.6% remanded back for reconsideration. The problem for the appellant is an EAB decision is most likely to not be changed in their favor by the federal courts. In fact, the decision is most likely to be dismissed or denied, and even more likely to

not be reversed. This is not an equal playing field for the appellant. There is significant time required to take an EAB decision to a federal court, leaving a difficult decision for the appellant to use the federal courts as an oversight on the EAB. Taken together with the previous research on external impacts to these decision-makers, the appellants are best to work through the process with the EAB, even with the likelihood of the EAB supporting the EPA decisions, and thereby avoid the federal court system which is costly and time consuming.

Finally, these results should signal to EPA some performance improvements in its permitting processes. Because there is a dominance of cases from water and air cases, it appears improvements could be made internally to reduce the number of permit cases coming before the EAB. Representative democracy is a critical element in public policy and law-making, wherein the agency adjudication process can pose a dilemma (Trijono, 2018).

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