

An Introduction to the U.S. EPA's Environmental Appeals Board

Judge Mary Kay Lynch

U.S. EPA Environmental Appeals Board

Phnom Penh, Cambodia, August 21-22, 2017

Siem Reap, Cambodia, August 24-25, 2017



SUMMARY OF PRESENTATION

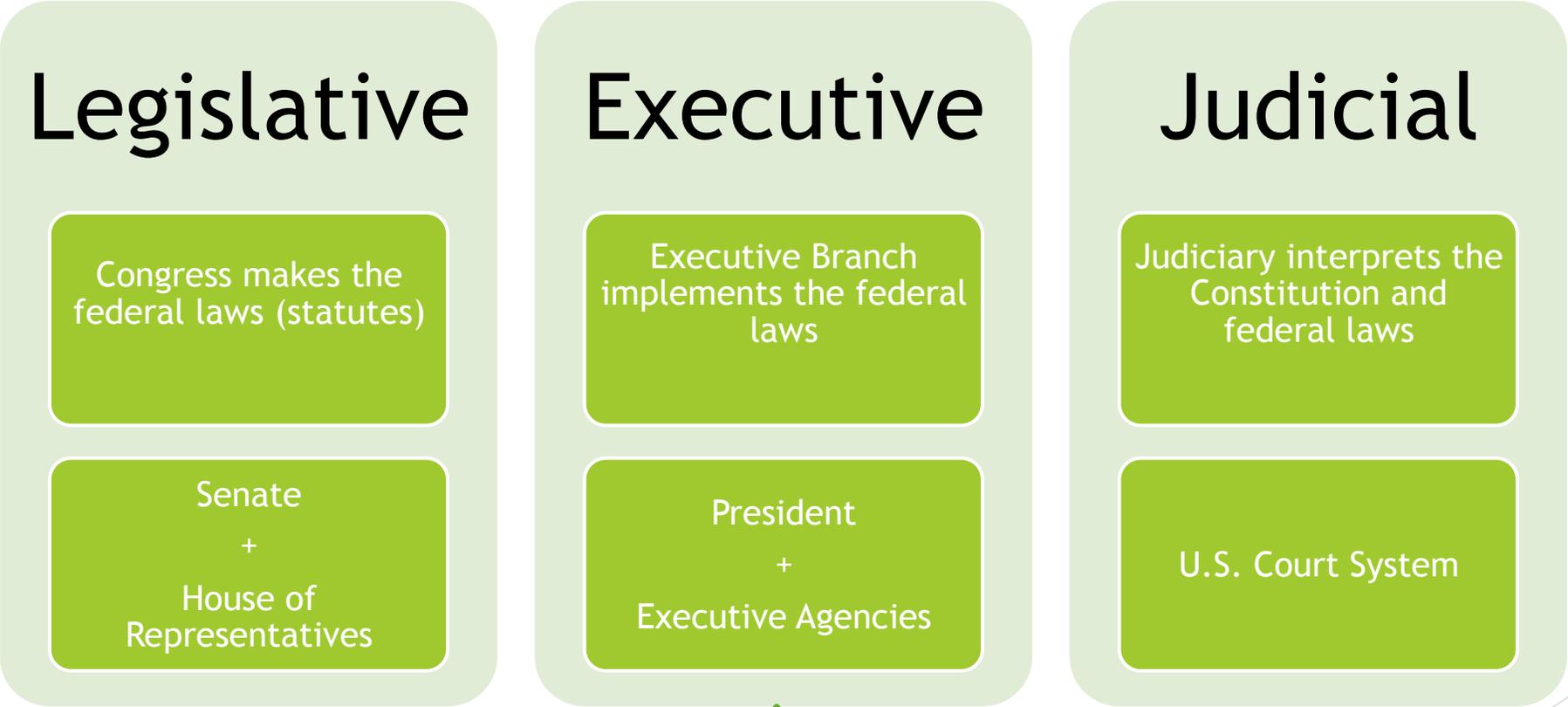
- ▶ Introduction to the Environmental Appeals Board (EAB)
- ▶ Where does the EAB fit into the broader structure of environmental adjudication in the United States?
- ▶ How Does the EAB Operate?
- ▶ Alternative Dispute Resolution



INTRODUCTION TO THE EAB

- ▶ The Environmental Appeals Board (EAB or Board) is an administrative appellate tribunal within the EPA and the **Executive Branch**, established 25 years ago
- ▶ The Board has 4 Environmental Appeals Judges that are career senior executives within the EPA
- ▶ The Board hears appeals in administrative enforcement cases and permitting cases, under all of EPA's major environmental statutes. These include air pollution, water pollution, toxics and chemicals, pesticides, and waste disposal laws.

WHERE DOES THE EAB FIT INTO THE BROADER STRUCTURE OF the U.S. GOVERNMENT and ENVIRONMENTAL ADJUDICATION IN THE US?



ADMINISTRATIVE ADJUDICATION

ENFORCMENT APPEALS

- ❖ Many U.S. environmental enforcement cases are brought administratively
- ❖ An administrative law judge hears evidence, serves as factfinder, and issues an initial decision on the matter
- ❖ Either the Agency or the respondent (violator) can appeal the administrative law judge's initial decision to the EAB

PERMIT APPEALS

- ❖ Cases are brought by private companies, towns and cities, neighboring states, citizens groups, or tribes objecting to permit decisions
- ❖ Any interested party can appeal from an agency permit decision, so long as they have participated in public comment process
- ❖ Substantial deference is given to the permit issuer on technical questions so long as their rationale is clear in the record

Difference Between Administrative and Judicial Enforcement

Administrative Cases typically involve:

- ▶ Smaller Penalties
- ▶ Less Serious Violations
- ▶ Less Significant Harm
- ▶ Simple Relief
- ▶ Specialty Tribunals
- ▶ Lower Costs
- ▶ Faster resolution

Judicial Cases typically involve:

- ▶ Larger Penalties
- ▶ More Serious Violations (including criminal)
- ▶ More Significant Harm
- ▶ More Complex Relief (Injunctive Relief)
- ▶ Courts of General Jurisdiction
- ▶ Higher Costs / Attorneys Fees / longer time frame



Administrative Cases
(Administrative Tribunal -EAB)

Civil Judicial Cases
(Federal Court)

Criminal
Judicial Cases
(Federal Court)

EAB Adjudication Process

In both permit and enforcement appeals:

- ▶ Cases are decided in panels of three
- ▶ The panel is assigned on a neutral basis
- ▶ EAB regulations require written response (legal brief) from the Agency, and any other opposing party
- ▶ Agency files administrative record of decision
 - Trial record in appeals from enforcement cases heard by an ALJ
 - Permit record in challenges to a permit decision
- ▶ Board may hold oral argument, and may order or allow additional briefing to address specific issues
- ▶ In accordance with applicable law, the Board does not engage in *ex parte* (off-the-record) communications between the Board and parties to an appeal
- ▶ The Board makes the final decision for EPA and issues a written decision

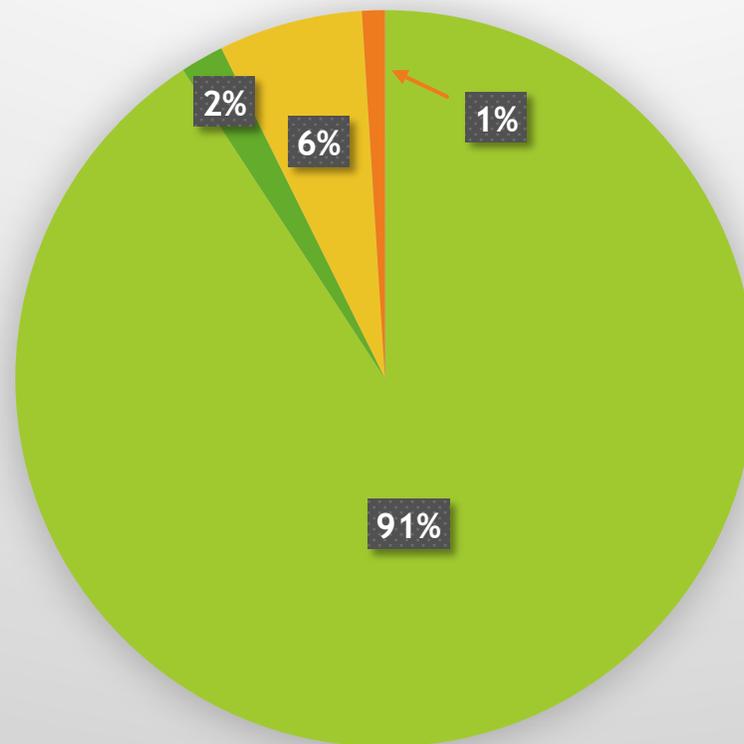
EAB Objectives

- ▶ Ensure consistency in the Agency's application of legal requirements across the country and across programs
- ▶ Where the Agency errs, provide clear direction on remand for the case appealed, as well as for future permitting and enforcement actions
- ▶ In most cases, resolve the dispute and conclude litigation, avoiding protracted federal court review, and expediting environmental permitting or compliance

Appeals From EAB Decisions

- ▶ An appeal to the EAB is a prerequisite for judicial (court) review
- ▶ Non-Agency parties dissatisfied with EAB decision may appeal to federal courts (judicial review)
- ▶ Agency cannot appeal adverse EAB decision
 - EAB is the final agency decision-maker
 - Exception: head of another agency can request conference with EPA Administrator following EAB decision
- ▶ Of the over 1,000 EAB final decisions issued, only a small percentage have been appealed to federal court. Only 1% of all EAB decisions have been reversed

EAB Outcomes



- No Further Appeal
- Settled
- Won on Appeal
- Reversed

ALTERNATIVE DISPUTE RESOLUTION

What is it? and who uses it?

- ▶ Alternative Dispute Resolution (ADR) is a process for the amicable resolution of disputes.
- ▶ Every U.S. government agency utilizes ADR.
- ▶ EPA supports the use of ADR to resolve disputes.
- ▶ Legislation requires federal agencies and courts to adopt policies encouraging the use of ADR.
 - ▶ Administrative Dispute Resolution Act of 1990, 1996.
 - ▶ Alternative Dispute Resolution Act of 1998.

In general, how does ADR work?

- ▶ Informed neutral engages with parties
- ▶ Focuses parties on issues to be resolved
- ▶ Encourages information exchange.
- ▶ Provides assistance to the parties in attempting to reach a mutually agreeable resolution

What Kind of Expertise Does the EAB provide?

- ▶ Board uses its expertise in adjudicating other cases to evaluate the case.
- ▶ Provides parties with confidential assessment of strengths and weaknesses of arguments.
- ▶ Provides assistance in reaching mutually acceptable resolution.

What are the Key Benefits of ADR at the EAB?

- ▶ The ADR Program has helped parties achieve
 - A Fast resolution of issues
 - Creative, satisfying and enduring solutions
 - Broader support for outcomes
 - 90% of mediated cases settled in whole or in part

QUESTIONS?

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