

Congress of the United States

House of Representatives

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY

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February 11, 2020

The Honorable Andrew Wheeler
Administrator
Environmental Protection Agency
Office of the Administrator 1101A
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Administrator Wheeler:

I write regarding your draft memorandum titled “Science Advisory Board Engagement Process,” which lays out new guidance for engaging with the Science Advisory Board (SAB) on any proposed criteria document, standard, limitation, or regulation. This document was published in the media on December 10, 2019¹ and is attached.

The draft memorandum calls for monthly non-public meetings between the SAB Staff Office and the Chair of the SAB regarding certain proposed rules. The Chair, in consultation with EPA, would then determine whether there are scientific aspects of a proposed rule that may merit SAB review. The draft memorandum asserts that “no further action will be taken on those actions that the Chair determines do not merit SAB review.” It proposes that SAB members would be welcome to review and submit individual public comments for those actions that the Chair determines would not benefit from full SAB scientific review.

I am particularly troubled by the timing of this draft memorandum as it appears to be a retaliatory reaction to recent draft SAB reports that are critical of several proposed rulemakings being promulgated by the Agency.²

The proposed guidance seemingly runs counter to the provision in the Environmental Research, Development, and Demonstration Authorization Act of 1978 (ERDDAA), which established the SAB,³ and the Federal Advisory Committee Act (FACA), which broadly requires balance, independence, and transparency among federal advisory committees such as the SAB.⁴ Our concerns relating to ERDDAA are as follows:

¹ <https://www.eenews.net/greenwire/2019/12/10/stories/1061775673>

² <https://yosemite.epa.gov/sab/sabproduct.nsf/WebBOARD/recentadditions?OpenDocument>

³ 42 U.S.C. § 4365.

⁴ 5 U.S.C. app. 2.

Discretionary Requests versus Independently Authorized Reviews.

Your draft memorandum notes that ERDDAA states that the SAB “shall provide such scientific advice as may be requested by the Administrator.”⁵ It fails to mention, however, that ERDDAA also requires you to provide the SAB with all proposed criteria documents, standards, limitations, and regulations at the time they are provided to another Federal agency for formal review and comment and authorizes the SAB to review those submissions - with or without your request.⁶ Indeed, the SAB’s charter states that it is not just the right, but the singular duty of the SAB to provide the Administrator with advice and recommendations on the adequacy and scientific basis of any such submissions.⁷ In addition, the SAB is free and independent to initiate any reviews it sees appropriate and necessary according to its own preferred timeline and scope.

The role of the SAB chair in relation to the full SAB.

To the extent of my knowledge, no provision in the SAB’s authorizing statutes permit the EPA to submit proposed criteria documents, standards, limitations, and regulations to the SAB Chair alone. Furthermore, no any provision or any reasonable interpretation thereof, delegates the authority of the full SAB to review these items to its Chair.⁸ Indeed, ERDDAA requires you to submit the documents listed above to “the Board” rather than an individual designated by EPA, and authorizes “the Board” rather than any single member to review them.⁹ Beyond these questions about statutory authority, I note that it is difficult to see how this process could possibly enhance transparency in the SAB review process, which you assert is one of the purposes of the draft memorandum. ERDDAA specifies that the Board shall make “every effort” to maximize transparency.¹⁰ I also note that appointing the SAB Chair as the sole decisionmaker on what EPA documents warrant scientific review would eliminate participation of independent science organizations, individual scientists and other outside stakeholders in the SAB prioritization process.

Undermining the ability of SAB to offer timely advice.

Under existing SAB procedures, the Board reviews the bi-annual Unified Agenda for upcoming regulatory actions in order to identify those proposals that might require independent scientific advice. This process allows SAB to anticipate actions before they are taken, request relevant documentation from the Agency, and provide advice before decisions are made. Your draft memorandum instead proposes that SAB participation begin only *after* a Tier 1 or Tier 2 proposed rule has been signed or published in the *Federal Register* for public comment. This process change would delay SAB’s engagement on any given rule by months or even years and virtually assure that formal SAB advice arrive very late in the final rule stage, or even after rules are finalized and cannot be changed.

⁵ 42 U.S.C. § 4365(a).

⁶ 42 U.S.C. § 4365(c).

⁷ Charter available at <https://yosemite.epa.gov/sab/sabproduct.nsf/WebBOARD/BasicInformation?OpenDocument>

⁸ The Chair’s responsibilities are limited to designating, in consultation with the EPA Administrator, the time and place of SAB meetings. 42 U.S.C. § 4365(b).

⁹ 42 U.S.C. § 4365(c).

¹⁰ 42 U.S.C. § 4365(h)

The draft memorandum notes that “the EPA Administrator is responsible for establishing the scope of and timing for [Administrator-requested] scientific advice from the SAB on regulatory actions.”¹¹ But implicit in this prerogative is that the Administrator makes requests in a manner such that the SAB’s advice can actually be used to inform Agency decision-making. The Administrator must not establish overly narrow scopes for SAB reviews or delay their progress in a fashion that threatens their timeliness or integrity.

Limiting the resources due to the full SAB.

ERDDAA directs the SAB to “avail itself of the technical and scientific capabilities” of federal agencies, including the EPA, in preparing its advice and comments.¹² The SAB Charter emphasizes that EPA will be responsible for financial and administrative support of the SAB.¹³ Your draft memorandum notes that “SAB members are welcome to review and submit individual public comments for those actions that the Chair determines would not benefit from a full scientific review.” But such individual commenters would apparently be deprived of the information and staff resources that they need to make insightful recommendations about an action – resources not necessarily provided to the general public. The concession that SAB Members may submit individual comments on actions not selected for formal review by the SAB Chair is thus no different from requests for comment from the general public provided in the *Federal Register* upon publication of a proposed rule.

For these reasons, I have serious questions not just about what practical effects the draft memorandum would have on the SAB’s utility to EPA and the general public, but also about its legality.

Please address the following questions:

1. What is EPA's authority for refusing to provide the proposed criteria documents, standards, limitations, and regulations that are the subject of the draft memorandum to each member of the SAB in their capacity as SAB members?
2. What is the legal basis for EPA's assertion that the SAB Chair may make decisions for the full SAB?
3. Is EPA authorized to designate any other individual member of the SAB to speak for the entire Board? If so, what is the authority for making such a designation?
4. What is EPA's authority to prohibit the full SAB from reviewing any proposed criteria document, standard, limitation, or regulation? Is EPA authorized to allow some SAB members but not others to review these documents? If so, what is EPA's authority for making these determinations?
5. If the draft memorandum were finalized and should SAB members then choose to submit individual public comments for an action that the Chair has determined would not benefit from full SAB scientific review, what support and resources would EPA provide to those SAB members?
6. How do the procedures outlined in the draft memorandum protect against inappropriate influence by EPA and ensure that the SAB’s advice or recommendations will be the result of its independent judgment?

¹¹ Andrew R. Wheeler, Administrator. Draft Memorandum on Science Advisory Board Engagement Process. December, 2019. Page 2, footnote 4.

¹² 42 U.S.C. § 4365(d)

¹³ Charter available at <https://yosemite.epa.gov/sab/sabproduct.nsf/WebBOARD/BasicInformation?OpenDocument>

7. How does the draft memorandum balance EPA's responsibilities to both set the SAB's agenda and ensure its independence?
8. What is your explanation for the timing and effect of this memorandum in the context of the recent SAB draft reports that critique several EPA proposed rulemakings?¹⁴

Please provide answers to these questions no later than close of business on March 3, 2020. If you have any questions, please contact Janie Thompson at 202-225-6375.

Sincerely,



EDDIE BERNICE JOHNSON

Chairwoman

Committee on Science, Space and Technology

CC:

FRANK LUCAS

Ranking Member

Committee on Science, Space and Technology

¹⁴ <https://yosemite.epa.gov/sab/sabproduct.nsf/WebBOARD/recentadditions?OpenDocument>