

January 2, 2020

Andrew Wheeler, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20004

Re: Comments on Modernizing the Administrative Exhaustion Requirement for Permitting Decisions and Streamlining Procedures for Permit Appeals, Docket ID No. EPA-HQ-OGC-2019-0406

Dear Administrator Wheeler:

The National Association of Clean Water Agencies (NACWA) appreciates the opportunity to file comments on the December 3, 2019, “Modernizing the Administrative Exhaustion Requirement for Permitting Decisions and Streamlining Procedures for Permit Appeals” proposal.

NACWA is a not-for-profit trade association representing the interests of publicly owned wastewater and stormwater utilities across the country that are permitted under the Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) Program. NACWA’s members include more than 320 municipal clean water agencies that own, operate, and manage publicly owned treatment works (POTWs), wastewater sewer systems, stormwater sewer systems, water reclamation districts, and all aspects of wastewater collection, treatment, and disposal. NACWA members are focused on providing services that are essential to protecting public health, the environment, and water quality.

NACWA has been a frequent participant in proceedings before the Environmental Appeals Board (EAB), including a number of NPDES permit appeals that directly impacted NACWA member utilities.

As stated in the proposal, EPA intends to create a new, time-limited alternative dispute resolution (ADR) process “resulting in a fundamental change to the Agency's long-held administrative exhaustion requirements” and make significant changes to the appeals process before the EAB.

In general, NACWA is supportive of a more efficient and effective method to resolve NPDES permit disputes and is pleased with EPA’s efforts to enhance and expedite the EAB permitting appeals process. NACWA further supports efforts to increase the use of ADR, as this can be an extremely effective method to resolve permit disputes. However, as outlined further below, NACWA also has some significant concerns with the proposal.

Under the proposal, all parties to a permit challenge would be required to convene with an EAB Judge acting as a Settlement Judge, who would assess the litigation risk. At the conclusion of the convening meeting with the Settlement Judge, or no later than 30 days after the deadline to file a response, the parties can unanimously agree to either extend the ADR process beyond the 30-day window or proceed with the appeal before the EAB. If the parties cannot agree, the permit becomes immediately subject to judicial review in federal court.

NACWA supports this proposed change. If the parties are unable reach agreement during the ADR process, NACWA believes that in most cases the losing party would be more likely to challenge an adverse EAB decision. NACWA believes that bypassing the EAB administrative appeal process and allowing parties to immediately seek judicial review will decrease the overall dispute resolution/adjudication timeframe and reduce transaction costs for all involved.

Other proposed changes included in the proposal include:

- Limit the number of requests for extensions to brief filing deadlines to just one 30-day extension per party;
- Eliminate *amicus curiae* participation;
- Grant the EPA Administrator the authority to issue binding legal interpretations for any case or issue before the appeals board at any time;
- Allow the EPA Administrator, acting through the EPA General Counsel, to determine which EAB decisions should be published and only published decisions the Administrator considers precedential; and
- Impose a 60-day deadline on the EAB to issue a final decision once an appeal has been fully briefed and argued.

NACWA is supportive of limiting the number of extension requests. The Association also supports a deadline for final decisions from the EAB as long as the time period is sufficient to build an adequate administrative record for appeal.

However, NACWA strongly opposes the prohibition on *amicus* participation in the EAB process, which will limit the EAB's ability to consider a broader array of stakeholder input. *Amicus* briefs can provide valuable assistance to the EAB in its deliberations by, for example, highlighting important technical or background information which the parties have not supplied or national policy implications which the parties do not address. This is particularly important in NPDES permit appeals, where an EAB decision can have a significant influence on how similar permits around the country are crafted in the future and directly impact regulated entities. EPA can accomplish its goal of streamlining the administrative appeal process without eliminating the important role of *amicus curiae*.

NACWA also has significant concerns with the proposal's creation of a new a process where the EPA Administrator could issue binding legal interpretations on any appeal before the EAB at any time, even after the EAB has heard arguments but before it has ruled. NACWA is also concerned with the ability of the EPA Administrator to make determinations about which EAB decisions carry precedential value.

If EPA wishes to eliminate the role of the EAB and place all administrative appeal authority within the Office of the Administrator, as was previously the case before creation of the EAB, then the Agency absolutely has the authority to make that change. However, if that is the ultimate goal, NACWA suggests the Agency simply put out a statement to that effect and be clear about its intentions to change the administrative appeals process.

Instead, the current proposal as written seems to keep the veneer of a quasi-judicial, independent administrative review process through the EAB while at the same time allowing the Agency's political leadership to intervene at any point in the process to issue its own binding legal interpretations, and also to limit the impact of any EAB decision it disagrees with. Such a new approach raises fundamental questions about what the role of the EAB really is and whether the outcome of the administrative appeals process will now simply be determined by the political priorities of EPA's leadership at any given point in time.

Again, if EPA wishes to consolidate the administrative appeals process within the Administrator's office and/or make it a more politically influenced one, it is certainly within its authority to do so. However, NACWA strongly believes the current administrative appeals process through the EAB – even with its flaws – provides an important independent buffer to the appeals process from the changing political winds and environmental policy priorities that can frequently impact the Agency. An administrative appeals process, especially for permit challenges, with outcomes that could substantially shift based on political changes in Agency leadership will create additionally regulatory uncertainty and benefits no one, the regulated community least of all.

Again, NACWA appreciates the opportunity to submit comments on the proposal and the Agency's efforts to improve its administrative appeals process. If you have any questions about these comments, please contact me at 202-833-3692 or ngardner-andrews@nacwa.org.

Sincerely,



Nathan Gardner-Andrews
Chief Advocacy Officer