

EPA Faces Suit Over Denial Of Petition To End Alabama's CWA Permitting

May 10, 2017

Environmentalists are suing EPA over its denial of several petitions asking the agency to withdraw Alabama's delegated Clean Water Act (CWA) permitting authority, after the agency found earlier this year that deficiencies in the states penalty assessment process and budget levels were not enough to revoke the permitting authority.

A coalition of seven environmental groups asked the U.S. Court of Appeals for the 11th Circuit^[1] May 5 to review EPA's Jan. 11 response^[2] to the groups, which include Cahaba Riverkeeper, Chotawhatchee Riverkeeper, Friends of Hurricane Creek, Black Warrior Riverkeeper, Sierra Club Alabama Chapter, Friends of the Locust Fork River and Alabama Rivers Alliance.

The groups filed a series of petitions with EPA Region 4 between 2010 and 2012, raising concerns that Alabama's National Pollutant Discharge Elimination System (NPDES) program was violating the CWA and had "neglected responsibilities," in part due to a series of budget cuts.

The groups asked that EPA take immediate action to remove the Alabama Department of Environmental Management's (ADEM) NPDES authority, a step EPA has never taken although such de-delegation petitions have increased EPA oversight of NPDES programs in several states, including Kentucky, Iowa and Minnesota.

"Alabama's water pollution program is fundamentally broken and does not meet minimum federal standards," the groups wrote in their 2010 petition to strip the state of its delegated authority. "Most concerning is the state's refusal to commit the funds and resources necessary to carry out even the most basic requirements of a NPDES program."

The groups also reiterated these concerns in a 2012 supplement, saying the state "has systematically eviscerated the program by levying budget cuts on top of budget cuts" and "putting our very health and well being at risk."

Region 4 in an April 2014 "interim response^[3]" to the petition concluded that some of allegations in the petitions did not warrant initiation of program withdrawal proceedings. For other allegations, EPA agreed the groups raised valid concerns but said the agency was "deferring a decision on the

petitions with respect to these issues, and will work with ADEM and give ADEM an opportunity to address EPA's concerns before EPA determines whether it is necessary to order the commencement of proceedings for program withdrawal."

Under the CWA, states may apply for and receive EPA authorization to administer the NPDES program -- something ADEM received in 1979. But EPA can withdraw NPDES program approval where a state program no longer complies with the CWA and its implementing regulations, and where the state fails to take corrective action.

EPA's Response

EPA in its final response to the environmentalists' petitions addresses both the issues on which it deferred decisions in its interim response and issues raised in a 2015 supplemental filing by the Alabama Rivers Alliance.

The supplemental filing claimed ADEM fails to provide required public notice of outfall locations when issuing public notice of draft permit decisions and that members of ADEM's Environmental Management Commission are in non-compliance with CWA regulations that make any person who receives a significant portion of his income from permit holders ineligible to serve on a body that approves permit applications.

EPA in the final response defends ADEM's decision to post outfall locations online, saying that even though not all citizens have ready access to the internet, the same can be said of newspapers, which the petitioners say would be a compliant method of providing notice. And even "if this were determined to fall short of the regulatory requirement, it would not rise to a level of seriousness that would justify initiating withdrawal proceedings," EPA says, adding that "should be reserved for serious and widespread deficiencies in program implementation." Less impactful issues should be addressed through EPA's regular oversight, working with states on issues of concern, EPA says.

On the conflict of interest charge, EPA says ADEM reports that one commission member who initially recused himself from NPDES matters later completed his financial disclosure form and determined that he did not have a disqualifying conflict. EPA says it has no information contradicting this determination.

The deferred issues from the interim response fall under two categories: general adequacy of penalty assessments and insufficiency of resources to implement NPDES program.

"EPA has conferred with ADEM over these issues and continued its evaluation of ADEM's penalty assessment amounts and assessment policies and procedures, and EPA has also continued its evaluation of the general adequacy of ADEM's NPDES program implementation in the face of tight budget constraints," the final response says. "Based on that further evaluation, EPA has determined these remaining issues do not warrant the initiation of withdrawal proceedings."

With regard to adequacy of penalty assessments, the environmental groups charged ADEM failed to recover economic benefit amounts, failed to adequately consider culpability and had an over-emphasis on consistency.

EPA agrees that there is room for further improvement in ADEM's procedures for recovering economic benefit, but it adds that based on ADEM's recent performance and the trend of continuing improvement, withdrawing the state's NDPES authority is not warranted. "EPA finds that, as a general matter, ADEM's penalty assessments are adequate, i.e., the assessments reflect an appropriate consideration of relevant penalty factors," the final report says.

Economic Benefit

Recovery of economic benefit is an important component of an adequate penalty assessment, because the deterrent effect of penalties cannot be achieved if violators reap economic rewards from non-compliance, EPA says, suggesting two ways ADEM could achieve a more consistent recovery of economic benefit in enforcement cases.

One option is to separate the injunctive and penalty components of its enforcement action and initiate the penalty action only after the engineering report has been completed. The other option is to estimate the costs of the upgrades/compliance measures typically necessary for similar violations at other facilities, or based on preliminary engineering assessments in cases where this has occurred.

"In EPA's view, a conservatively estimated economic benefit assessment would be preferable to the complete failure to recover any economic benefit that is occurring in this subset of ADEM enforcement cases," the response says.

In the interim response, EPA indicated that it was unable to confirm that ADEM's penalty amounts were appropriate to the violations. But the agency says in its final response that a "June 2016 on-site file review confirmed that ADEM is now generally considering gravity penalty factors in its penalty assessments and documenting its consideration of gravity penalty factors."

EPA also says that it has had concerns over the years that ADEM's penalty assessments were poorly explained and documented -- something it noted in the interim response. This lack of documentation made it difficult to determine whether ADEM's penalty assessments were adequate, but it also made it difficult to assess the petitioners' claim that ADEM's penalties reflected an over-emphasis on consistency with assessed penalties in other similar cases, EPA says.

But because of the progress ADEM has shown in its penalty assessments on consideration of gravity penalty factors and economic benefit, and in documenting its penalty calculations, EPA finds the allegation of over-emphasizing consistency does not warrant the initiation of withdrawal proceedings.

Budget Cuts

ADEM has faced significant budget cuts in recent years, which EPA says “understandably prompted concern by Petitioners and EPA about ADEM's ability to maintain an adequate NPDES program.”

For example, ADEM's general fund budget was reduced to \$280,000, earmarked for permitting animal feeding operations, in 2016, down from \$1.2 million in 2015. To offset its reduced legislative appropriation, ADEM increased its NPDES and other permitting fees by 20 percent.

These cuts in legislative appropriations and fee increases followed previous cuts, and while ADEM has sought to maintain its funding levels through permit fee increases, Alabama law requires dedication of permit fees to the cost of developing and issuing permits, EPA says. This forces ADEM to fund NPDES enforcement activity exclusively from federal funds, such as EPA's CWA section 106 grant program.

But, EPA says, an allegation of insufficient funding, staff or resources, by itself is not a valid basis for withdrawal of a state program. “While EPA agrees that resources can be reduced to a point that a state is unable to implement an adequate NPDES program, there is no measurable standard for determining resource adequacy,” the final response says.

Even with the funding constraints, EPA says its review of ADEM's performance indicates the state continues to make due with limited resources and is fulfilling its minimum NPDES program obligations. “Accordingly, while EPA will continue to monitor ADEM's performance and the impact of any further budget reductions as part of its regular oversight, at this time EPA has determined that the allegations relating to insufficiency of resources do not warrant the initiation of program withdrawal proceedings,” the final response says.

But, if ADEM's program implementation deteriorates due to a lack of funding, including problems with permit backlogs, inspection rates and enforcement activity, “EPA may reopen this issue to initiate withdrawal proceedings,” the response says. -- *Lara Beaven* (lbeaven@iwpnews.com^[4])

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