

Alabama Environmentalist Press 11th Circuit for EPA Oversight for State Permitting

July 27, 2018 KAYLA GOGGIN

ATLANTA (CN) — Attorneys representing seven Alabama environmental groups asked the 11th Circuit on Friday to revoke the Alabama Department of Environmental Management's authority to issue water discharge permits on behalf of the Environmental Protection Agency.

The Cahaba Riverkeeper and other environmental groups requested a judicial review of the EPA's denial of their petition to withdraw Alabama's authorization to administer the National Pollutant Discharge Elimination System permit program.

Duties under the permit program include facility inspections for companies that discharge large amounts of waste water, complying with public notice requirements when permits are issued, and ensuring that people with conflicts of interest do not serve as members of the Environmental Management Commission.

The EPA issued a January 2017 order refusing to commence proceedings to withdraw its approval of Alabama's permit program.

The riverkeepers allege that Alabama consistently fails to adhere to the NPDES permit program, which is designed to prevent harmful discharges into bodies of water. The groups specifically point to twenty-six failures by Alabama to administer its EPA-approved NPDES permit program.

The riverkeepers claim that Alabama fails to meet the minimum requirements for public notice of NPDES permits and failed to prevent three people from serving as members of the Environmental Management Commission despite their alleged conflicts of interest.

Chief among the riverkeepers' concerns is the allegation that Alabama falls far below the EPA's standard for facility inspections.

The environmental organizations allege that Alabama inspected just 54 percent of its major waste water dischargers in 2010.

The riverkeepers say Alabama law leaves them without proper recourse to effect change.

The state grants sovereign immunity to state agencies, preventing them from being made defendants in state civil court lawsuits and severely limiting the riverkeepers' legal options to enforce state compliance with NPDES program requirements.

But the EPA refused to initiate the withdrawal process to take back permitting authority, finding that the state's failures to properly administer the NPDES permit program "are not serious and widespread."

The EPA found that Alabama's current procedures meet the "goals" of EPA policy although they differ from the agency's minimum requirements.

Attorneys representing the plaintiffs asked the three-judge panel to find that the EPA's refusal to withdraw approval of Alabama's NPDES permit program is not in accordance with its own standards.

Attorney David Ludder argued on behalf of the riverkeepers that the EPA's decision was improperly arbitrary.

“The rules say they are to make a determination based on whether the state has met the minimum requirements under the regulation. I don’t see how that involves discretion. It’s not about whether they feel program withdrawal is appropriate. Discretion comes in at the end of the process if the EPA finds the state has not complied with guidelines,” Ludder said.

But Simi Baht, an attorney representing the EPA, argued that exercising discretion in cases like this is exactly what the EPA should be doing.

“Withdrawal is an extreme remedy. The EPA does not consider it a remedy for state non-compliance,” Baht said. “The solution is not to call for federal takeover of the permit program. All we’re deciding here is whether withdrawal proceedings shall commence. The regulation doesn’t say that EPA shall commence withdrawal.”

“So even if you find deficiency in the state program, you don’t need to begin the withdrawal process?” Chief U.S. Circuit Judge Ed Carnes asked.

“Our position is that EPA has discretion to commence withdrawal,” Baht replied, adding that the EPA has never initiated withdrawal proceedings against a state.

“What would compel the EPA to initiate [withdrawal proceedings]?” U.S. District Court Judge Darrin Gayles asked.

“The EPA is especially concerned about its resources. The guiding principal is that withdrawal proceedings are basically an enforcement tool. But EPA can leverage power via other means, like putting conditions on state grants. Withdrawal proceedings use a lot of resources. EPA can better use its resources working with Alabama,” Baht explained.

“But isn’t the EPA regulatory team massive?” U.S. Circuit Judge Elizabeth Branch asked, prompting laughter from the courtroom spectators.

“I’m not sure the EPA would call it that,” Baht said with a chuckle, perhaps intimating that the agency’s recent budget cuts have left its resources stretched.

The EPA’s budget was cut by \$100 million for the 2019 fiscal year.

“The EPA’s goal is to ensure clean water quality, not take over state permitting,” Baht said.

The judges did not indicate when they might issue a decision in the case.