



## DAILY NEWS

# 11th Circuit Backs Broad EPA Discretion On NPDES Withdrawal Decisions

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In a case of first impression, the U.S. Court of Appeals for the 11th Circuit has ruled that EPA has broad discretion to decide whether to revoke a state's delegated Clean Water Act (CWA) discharge permitting authority, even when the state's permit program has not always complied with the water law's requirements.

"The EPA's discretion is not unlimited, but neither is it as constrained as Petitioners would suggest. The agency must faithfully administer the CWA and its implementing regulations, but its decision to commence withdrawal proceedings is largely a discretionary one," the 11th Circuit says in its unanimous [Sept. 12 decision](#) in *Cahaba Riverkeeper v. EPA*.

The court also finds that the EPA's decision not to commence withdrawal proceedings in the face of specific alleged CWA violations by Alabama was not arbitrary, capricious, or an abuse of discretion, or otherwise not in accordance with the law.

Judge Darrin P. Gayles of the U.S. District Court for the Southern District of Florida, who sat by designation on the three-judge panel of the 11th Circuit, wrote the opinion on behalf of himself, Chief Judge Ed Carnes and Judge Elizabeth L. Branch.

"The upshot of the decision is that EPA may permit State [National Pollutant Discharge Elimination System (NPDES)] program deficiencies to continue unabated if EPA can offer a 'reasonable' rationale for doing so," attorney David Ludder, who represents the environmental groups in the case, said in a Sept. 12 statement. The only way to address the ruling is for EPA to change its regulations, something that is unlikely to happen during the Trump administration, he said.

During [oral argument](#) in the case last year, attorneys focused their statements on the discretion question.

But the judges then seemed concerned about the environmental and other effects if EPA is forced to take on NPDES permitting not only in Alabama but potentially dozens of other states that have similar deficiencies.

However, the court's ruling focuses squarely on the scope of EPA's discretion.

"The central question in this appeal is whether the EPA acted within the bounds of permissible discretion. The antecedent issue, therefore, is the scope of the EPA's discretion to commence withdrawal proceedings. The parties equally misrepresent the other's position. Petitioners contend that the EPA seeks unlimited discretion; the EPA claims that Petitioners argue for no discretion," the 11th Circuit says.

[The litigation](#) stems from a series of petitions environmental groups filed with EPA Region 4 between 2010 and 2012, raising concerns that Alabama's NPDES program was violating the CWA by not meeting minimum federal standards for the permitting program and had "neglected responsibilities," in part due to a series of budget cuts.

## Room For Improvement

EPA rejected the petitions, while acknowledging Alabama's program had significant room for improvement, and in arguments to the 11th Circuit said the CWA provides broad discretion in how to respond to such petitions and that requiring automatic withdrawal proceedings is contrary to cooperative federalism.

CWA section 402, which deals with the NPDES program, says that whenever the EPA administrator determines that a state is not administering the program in accordance with the law, and the state does not take appropriate corrective

action within 90 days, "the Administrator shall withdraw approval of such program."

Environmentalists insist that if EPA decides the state's compliance is lacking, then the agency must commence withdrawal proceedings.

But the court says it is not persuaded. While EPA's CWA implementing regulations enumerate the conditions under which withdrawal is appropriate, they indicate that the decision to withdraw a state's NPDES authority is ultimately a discretionary one, the court says.

"In other words, the Administrator may withdraw authority under certain conditions but is not compelled to do so. The EPA's interpretation of the regulation is consistent with the statute," the ruling says, noting that EPA has long rejected the idea that program withdrawal should be mandatory for any violation by a state because such a requirement would be draconian.

"This Court need not pinpoint the precise conditions under which the EPA should exercise its discretion to initiate withdrawal proceedings. It is enough to observe that the EPA is not required by statute or regulation to commence withdrawal proceedings over any single violation," the ruling says, adding that environmentalists concede this point.

Turning to the specific alleged CWA violations in Alabama, the court says none of them required EPA action. For example, the court says that even if Alabama's imperfect notice procedure for discharges does not fully comply with the CWA, the EPA's decision not to commence withdrawal proceedings was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

The court makes similar findings regarding Alabama's conflict of interest requirements for members of its

Environmental Management Commission, annual inspection policy and enforcement of state agencies' compliance with the CWA.

Ludder said the decision allows EPA to excuse non-compliance with the minimum federal requirements of the NPDES program regulations, which contravenes the CWA requirement that state NPDES programs "shall at all times be in accordance with the minimum federal requirements."

"The remedy for this adverse decision is to revise the EPA regulations to require that EPA 'shall' commence proceedings to withdraw program approval if it finds cause that a State is not administering its NPDES program in accordance with the minimum federal requirements," Ludder said. "This could be initiated by a petition for rule-making, but that will have to await a more sympathetic administration." -- *Lara Beaven* ([lbeaven@jwpnews.com](mailto:lbeaven@jwpnews.com))

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