

IPDES Administrative Appeals

Two Main Decisions to Make

- What appeal process to use.
- Who hears the appeals.

Appeal Process

- There are no CWA requirements, which allows states the discretion to set up the process.
- Two types of appeal processes:
 - Record review; and
 - An adjudicatory appeal process.

Record review—appeal is based solely on record developed during permitting.

Adjudicatory appeal—trial like proceeding in which new evidence may be introduced.

Record Review

- Appeal is based solely on the record that is developed during the permitting process
- EPA NPDES EAB appeals are record reviews
- Advantages of the process:
 - Help ensure best information when a permitting decision is made.
 - Potentially reduce number of appeals.
 - Shorter more efficient process
 - Would avoid delays in reaching a final decision
 - Consistent with federally delegated permitting program.

Disadvantages of Record Review

- Disadvantages of record review:
 - No opportunity for cross examination of witnesses
 - Would require an amendment of the EPHA
 - New process for DEQ

Adjudicatory Process

- Trial like proceeding. Discovery, examination and cross-examination of witnesses.
- Process DEQ currently uses; process outlined in the Idaho Administrative Procedures Act.
- Advantages of the process:
 - Easiest to adopt
 - Since there is an opportunity for examination and cross-examination, arguably more opportunity to explore facts relevant to the permit

Disadvantages of Adjudicatory Process

- Disadvantages of the Adjudicatory Process:
 - Can challenge DEQ on facts not available when the permit decision was made
 - Discourages full development of information during permit process
 - Encourages appeals
 - More time-consuming and costly

Other states and EPA

- EPA uses a record review process
- Nevada uses a record review process
- Other neighboring states use some sort of adjudicatory process

Recommendation

- DEQ recommends record review.
- Based on the advantages outlined:
 - Best way to ensure most informed permit decisions
 - Reduce appeals
 - More efficient and less costly and time consuming
 - Fits better with notice, comment permitting process

Who Hears IPDES Appeals

- CWA conflict of interest requirements: No board or body that approves permits, including issuing permits and appeals of permits, can include as a member any person who receives, or has during the previous 2 years received, a significant portion of income directly or indirectly from permit holders or applicants.

Options

- Amend EPHA to restrict membership of existing Board
- Create a new Board or appointed individual that only hears NPDES permit appeals
- Appeals heard by DEQ's Director

Other Agencies and States

- Some Idaho agencies have appeals heard by Directors; others by Boards
- Alaska, appeals heard by Commissioner—like DEQ Director
- Other neighboring states all have multi-member boards