

Idaho Pollutant Discharge Elimination System Administrative Appeal Options Discussion Paper #6



**State of Idaho
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1 Clean Water Act Requirements

The federal Clean Water Act (CWA) regulations require that states seeking to administer a National Pollutant Discharge Elimination System (NPDES) program must ensure an opportunity for judicial review in State Court of the final approval or denial of permits that is sufficient to provide for, encourage, and assist public participation in the permitting process (40 CFR 123.30). No requirement exists for a state to include an administrative appeal process in its NPDES permit program. Therefore, the Idaho Department of Environmental Quality (DEQ) is free to adopt the administrative appeal process it believes would work best for the agency and Idaho citizens.

2 Types of Appeal Processes

Two main processes are available to challenge DEQ's final permit decision: adjudicatory process and record review.

2.1 Adjudicatory Process

An adjudicatory hearing process is a trial-like proceeding in which the parties are allowed to conduct discovery, introduce new evidence, and examine and cross-examine witnesses. The Hearing Authority presides over the appeal process, hears and weighs the evidence presented, and makes a decision reflected in an order that includes findings of fact and conclusions of law.

The adjudicatory process is currently used by DEQ for all permit appeals. The process is mandated by the Environmental Protection and Health Act (EPHA) and the Idaho Administrative Procedures Act (IDAPA), and is reflected in the "Rules of Administrative Procedure before the DEQ Board of Environmental Quality" (IDAPA 58.01.23). The EPHA provides that any person aggrieved by an action or inaction of DEQ shall be afforded an opportunity for a hearing as provided in the IDAPA. The IDAPA provides for an adjudicatory hearing process that results in an order. The order can then be appealed to District Court.

2.1.1 Advantages

Using this process for Idaho Pollutant Discharge Elimination System (IPDES) appeals would be the easiest to implement because the process is already in place. A citation in the IPDES rules to the existing Rules of Administrative Procedure before the DEQ Board would be the only action necessary.

An adjudicatory process also provides the opportunity for examination and cross-examination of witnesses and thereby gives a person challenging a permit decision a chance to fully explore the facts relevant to the permit decision. Using the adjudicatory process following a public notice and comment period, gives a person challenging a permit two separate opportunities to influence the outcome of the permit process.

2.1.2 Disadvantages

Using the current adjudicatory process means that an agency decision may be challenged based upon facts that were not available to the agency when the permit decision was made. The IDAPA allows the opportunity during the contested case to introduce new evidence and testimony although it was not before the agency when it made the permitting decision that is being appealed.

Since a person can wait until after the permit decision and introduce new evidence in a challenge, the current process actually discourages the full development of information during the permit process. If interested parties had to submit all relevant information to the agency during the permitting process, DEQ would be better informed and would arguably make better permitting decisions.

If interested parties could only provide information during the permitting process, it would be more likely that issues would be resolved during the permit process. By allowing a second chance to provide the agency with information and argument, the current contested case appeal process actually encourages permit appeals.

An adjudicatory process can be time-consuming and costly. A trial-like proceeding with discovery and witness testimony and cross-examination takes more time and money than an appeal based solely on the permitting record.

2.2 Record Review

In a record review process, the agency provides notice and an opportunity for comment and a public meeting or hearing during the permitting process, and makes its decision regarding the permit based upon the information available and collected during the permit development and comment period. An appeal of the permit is then based solely on the record upon which the agency made its permitting decision. Under this process, no new evidence is introduced; there is no discovery and no examination or cross-examination of witnesses. Instead, the parties submit briefs or similar documents that set forth legal arguments and citations to facts that are in the administrative record. The Hearing Authority then makes its decision based upon the record and the briefs submitted by the parties. This decision can be appealed to District Court.

2.2.1 Advantages

A record review would require that interested persons provide all relevant information to DEQ during the permit process, which ensures that the agency has the best information upon which to make its decision. Other advantages of the record review process include the following:

- Would preclude appeals that currently happen simply as a way to present additional argument and information
- Is a shorter more efficient process and thus would be less time-consuming and costly to the permit applicant and the public
- Would avoid delays in reaching a final decision on the permit, since the process is much shorter than an adjudicatory process

- Is consistent with the federally delegated programs that DEQ implements and is consistent with the appeal process allowed by the US Environmental Protection Agency (EPA)

2.2.2 Disadvantages

The disadvantages of the record review process include the following:

- Would not allow an opportunity for cross-examination of witnesses, which may reduce the opportunity to develop facts relevant to the permit
- Would require an amendment of the EPHA and the development of new appeal rules
- Is a new process for DEQ and DEQ-regulated entities

2.3 Other Considerations for Permit Appeals

Several variations on the two main options exist for an appeal process:

1. **An adjudicatory process in which the Hearing Authority may deny the request for a review of the final permit decision.** Some states use an adjudicatory process, but unlike the current DEQ process, allow the Hearing Authority to deny a request for review. For example, under Alaska's permit appeal process, an interested person may file a request for an adjudicatory hearing to review the final permit decision of the Alaska Department of Environmental Conservation. However, the Hearing Authority is authorized to deny a review altogether, to allow a review but just based upon the existing record, remand the permit decision to the agency, or grant the adjudicatory hearing.
2. **A process in which the contested case proceeding is used to develop the permit itself.** Under this process, an adjudicatory process is initiated after the application for a permit is received by the agency. A notice is issued of the receipt of the application, and any person concerned with the application may file a protest. An evidentiary hearing is then set to consider the protest. At the conclusion of the hearing, the Hearing Authority weighs the evidence submitted and makes a permitting decision. The Idaho Department of Water Resources (IDWR) uses this process to issue water appropriation permits (Idaho Code §42-203A and §42-1701A(1) and (2)).
3. **Permit appeals are heard by different Hearing Authorities and through different processes.** Several states allow a permit applicant to request an adjudicatory appeal of a permit, while restricting third parties to a judicial review, which is a record review.

2.4 Appeal Processes Used by EPA and Other Western States

2.4.1 US Environmental Protection Agency

EPA final permit decisions may be appealed to the Environmental Appeals Board (EAB). The EAB is a permanent, four-member body that hears administrative appeals under all major environmental statutes. EAB appeal is a record review that is initiated by a petition, followed by a response from EPA, and then a reply by the petitioner. The petition, response, and reply set

forth the legal arguments of the parties and the facts in the record that support those arguments. The EAB makes its decision based upon the permitting record and the arguments presented by the parties.

2.4.2 Nevada

A person aggrieved by a final permit decision may appeal the decision to the Nevada Environmental Commission. Any appeal of the issuance or denial of a permit is restricted to evidence submitted to the agency before the issuance of the permit decision, except for limited circumstances. The commission applies the judicial standard of review (e.g., the commission determines whether the permit decision was arbitrary and capricious). Therefore, in Nevada, the review is a record review.

2.4.3 Alaska

Alaska permit decisions are appealed to the Alaska Commissioner of the Department of Environmental Conservation. The commissioner is equivalent to Idaho's DEQ director. The commissioner may appoint an administrative law judge. As noted above, a person may appeal the final permit decision by filing a request for an adjudicatory hearing. This request may be denied, or the commissioner may hear the case just on the permit record or allow the adjudicatory hearing.

2.4.4 Montana

Montana provides two separate permit appeal routes. An applicant for a permit may appeal the final permit decision by filing for a petition for a contested case with the Montana Department of Environmental Quality Board. This is an adjudicatory hearing process where new evidence may be introduced, and there is an opportunity for examination and cross-examination of witnesses. A third party, however, has no right to a contested case appeal. Instead, a third party dissatisfied with a permit decision must initiate a case in state district court. The third party appeal is a record review, and the court applies the judicial review standard (i.e., was there substantial evidence for the decision, was it arbitrary and capricious, or an abuse of discretion).

2.4.5 Washington

Washington appeals of final permit decision are heard by the Pollution Control Hearings Board. The appeals are adjudicatory proceedings. However, the board may decline the request for an adjudicatory hearing.

2.4.6 Oregon

Oregon allows an applicant to appeal a final permit decision by requesting a contested case hearing, which is an adjudicatory process. The appeal is heard by an administrative law judge appointed by the Office of Administrative Hearings. The administrative law judge's decision may be appealed to the Environmental Quality Commission. It appears that only permit applicants have a right to an administrative appeal through a contested case. Third parties, therefore, apparently may appeal a decision by going to Oregon District Court, which presumably is a record review.

2.5 Recommendation Regarding Appeal Process

DEQ recommends a record review appeal process. This process is the best mechanism to ensure DEQ receives the best information during the permitting process and therefore makes the most informed permit decision. A record review would also be more efficient and less costly. A record review would avoid appeals that are initiated simply as another chance to submit information and arguments that could have been submitted during the public comment process. Therefore, a record review may reduce the number of appeals.

3 Hearing Authority

3.1 Clean Water Act Conflict-of-Interest Provisions

The CWA and federal CWA regulations provide that state NPDES programs must ensure that any board or body that approves all or portions of permits shall not 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 for a permit (CWA, §304(i)(2)(D)). EPA regulations define board or body to include any individual who has or shares authority to approve all or portions of permits either in the first instance, as modified or reissued, or on appeal (40 CFR 123.25(c)(1)(i)). Significant portion of income means 10% or more of gross personal income for a calendar year, except that it means 50% or more of gross personal income if the recipient is over 60 years of age and is receiving that portion under retirement, a pension, or similar arrangement (40 CFR 123.25(c)(1)(ii)).

3.2 Current DEQ Authorities

A permit appeal currently would be heard by the DEQ Board. No provisions exist in the DEQ authorities that preclude board members from having a conflict of interest as defined in the CWA.

3.3 Conflict-of-Interest Provisions and Hearing Authority for Permit Appeals

The following options exist to address conflict of interest provisions and determine the hearing authority for permit appeals:

1. **Amend the EPHA to restrict membership of the existing board.** DEQ could retain the current process of routing permit appeals to the DEQ Board but amend Idaho Code so that the members are restricted to those who meet CWA conflict-of-interest requirements. The Clean Air Act (CAA) has a similar conflict-of-interest provision, except the CAA requires that a majority of the board members not have a conflict as a result of an air quality permit. The existing board, therefore, would have to meet both CWA and CAA conflict-of-interest requirements.
 - a. Advantages—The DEQ Board consists of seven members appointed by the governor with expertise in different areas regulated by DEQ. The board serves as

a relatively independent check on the authority of DEQ and its director. This option would retain this independent check on the agency.

- b. Disadvantages—This option would require replacement of the majority of the existing board members. It may be relatively difficult to find replacement members who meet both CWA and CAA conflict-of-interest requirements and still have expertise in areas regulated by DEQ.
2. **Create a new board that only hears NPDES permit appeals.** The existing board could be retained and a new board that meets CWA conflict-of-interest requirements could be created that only hears NPDES permit appeals.
 - a. Advantages—This option would avoid having to replace existing board members who could continue to use their expertise and experience to adopt rules and hear appeals other than NPDES permit appeals. It may also be somewhat easier to find members who meet CWA conflict-of-interest requirements only rather than both CWA and CAA requirements.
 - b. Disadvantages—It would be complicated and more difficult to manage two independent boards for a single agency. It would also be less efficient and more costly to have two boards.
 3. **Have the appeals heard by the DEQ director.** Under this option, all IPDES permit appeals would be determined by the DEQ director. The existing board could be retained to adopt rules, hear all other appeals, and carry out its other functions. A variation on this would be to have all appeals, not just the IPDES appeals, heard by the director and retain the board only for rulemaking and other functions.
 - a. Advantages—It would be far easier to meet the conflict-of-interest requirements with just a single person as the Hearing Authority. In addition, the director would likely have the experience and knowledge of DEQ programs to understand and decide permit appeals. This option would still retain the existing board for other functions.
 - b. Disadvantages—The director is ultimately responsible for the actions of the agency in issuing permits, and therefore, the director would appear to be less impartial than a governor-appointed board. This function would also be a new and relatively significant duty for the director.

3.4 Other Idaho Agency and State Approaches

Other Idaho agencies use boards or commissions to hear appeals from agency actions. For example, some Idaho Department of Lands appeals are heard by the Land Board. IDWR, on the other hand, is an example of an agency that uses its director as the authority to hear appeals. In Alaska, the permit appeals are heard by the agency commissioner, who is like the DEQ director. The other western states reviewed use multimember boards or commissions. In each of these states, state law prohibits membership that has a CWA conflict of interest.