Environmental Quality

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January 11, 2015

Heather McTeer Toney
Regional Administrator
U.S. Environmental Protection Agency, Region 4
61 Forsyth Street, SW
Atlanta, GA 30303

RE: Standards for Judicial Review

Dear Ms. Toney:

I write in reference to your Oct. 30, 2015, letter expressing concern that citizens' access to judicial review has become unduly restrictive in North Carolina. Frankly, I was surprised by the letter, as North Carolina has historically and consistently provided judicial access to citizens beyond what is required or afforded by federal law. North Carolina recognizes the important role our citizens play in protecting the environment. We will continue to protect the public's voice in the permitting process. Interestingly, a comparison between federal and North Carolina requirements to challenge an environmental permit indicates that the federal government's standard is more restrictive than the opportunities afforded to North Carolina citizens.

In your letter, you cite two ongoing cases regarding permits issued by the North Carolina Department of Environmental Quality, or NCDEQ. Consistent with regulations and agreements, we provided your agency with draft permits for your review. In neither case did your staff object to the permits nor did they identify any inconsistencies with the Clean Water Act (CWA) or Clean Air Act (CAA). Of course, your approval does not mean that additional input from the public should be ignored.

With respect to third party challenges, your letter raised the issue of whether North Carolina provides judicial access to third parties consistent with requirements under the CWA and the CAA. When EPA approved our permitting authority, it had reviewed our programs and agreed that North Carolina law satisfies the minimum federal requirements related to judicial review. With respect to the Title V program under the CAA, you based your approval, in part, on representations made in our 1993 Attorney General's opinion. However, your letter cites two ongoing cases that you believe do not satisfy EPA requirements for access to the courts. I believe your concerns are unfounded for the following reasons.

1) You appear to misunderstand how the North Carolina Attorney General and our judges interpreted North Carolina laws. Below you will find what our Attorney General's office said, both in the past when discussing third party rights in North Carolina, as well as what it argued in the Carolinas Cement case (*N.C. Coastal Fed'n v. N.C. Dep't of Env't & Natural Res.*, 12 EHR 02850 (NCOAH, Sept. 23, 2013)). We also include an excerpt from Judge Beecher Gray, a pre-eminent expert in administrative law, generally, and third party appeal rights, in particular. The statements made by our Attorney General's office and the judge are consistent and differ from the interpretation your letter presented. We recognize that your interpretation may have been urged by a special interest advocacy group, but we would encourage you to objectively review what those officials charged with interpreting our laws had said.
2) The cases you cited actually illustrate that North Carolina provides third parties with fair and ample access to judicial review. In the Carolinas Cement case, the third party challenger was actually granted judicial review but ultimately failed to establish an element of their claim. In the Martin Marietta case (*Sound Rivers. v. N.C. Dep't of Env't & Natural Res.*, 15 CVS 262 (Sup. Ct., Nov. 9, 2015)), the Superior Court remanded the case after finding that the administrative law judge erroneously denied standing to the third party challenger, illustrating that North Carolina law indeed provides third parties access to the courts.

North Carolina goes beyond the federal minimum elements required for program approval with respect to access to the courts. On the specific question of public participation in CAA/Prevention of Significant Deterioration (PSD) permitting, North Carolina provides third parties with access to judicial review irrespective of the fact that such access is not required as a minimum element of PSD program approval. *See* 40 CFR 51.166. In contrast, both the CAA/Title V program and the CWA/National Pollutant Discharge Elimination System (NPDES) permitting programs explicitly require third party access to the courts. There has been confusion on this difference, but North Carolina's laws provide for third party access to judicial review even in the PSD program. This is an important point and, while it may not be recognized by some academic observers, it further illustrates how North Carolina's provisions for citizen access and participation go beyond federal minimums.[1]

The following provides a brief discussion of the relevant North Carolina statutes and uses the two cases you cited to illustrate how North Carolina law provides access to judicial review for third parties. Our review of the federal process determined that the federal process is more restrictive than any of the CWA and Title V minimum elements and, therefore, restricts the ability of citizens to challenge federal permits.

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[1] This confusion may stem from an Environmental Appeals Board case where the issue of whether the minimum elements for an approvable PSD program included judicial review. The only support EPA offered for an affirmative response was reference to a case involving only Title V and did not reference PSD permitting.

Citizen Access under North Carolina Law

North Carolina's Administrative Procedure Act (NC APA) was initially adopted in 1974 and provided "person[s] aggrieved" access to judicial review without regard as to whether those persons are third parties. North Carolina's NPDES program was initially approved by the EPA in 1975. At that time, North Carolina provided citizen access to judicial review through the NC APA despite the fact that EPA regulations did not require states to provide judicial review for approval. Not for another 19 years did your agency revise the minimum elements for approval to include a requirement for judicial review. Your amended regulation provided that a state

> [m]ust provide an opportunity for *judicial review in State court* of the final approval or denial of permits by the State that is sufficient to provide for, encourage, and assist public participation in the permitting process. A State will meet this standard if State law allows an opportunity for judicial review that is the same as that available to obtain judicial review in federal court of a federally-issued NPDES permit. A state will not meet this standard if it narrowly restricts the class of persons who may challenge the approval or denial of permits (for example, if only the permittee can obtain judicial review, if persons must demonstrate a pecuniary interest in order to obtain judicial review, or if persons must have a property interest in close proximity to a discharge or surface waters in order to obtain judicial review.) 40 CFR §123.30 (emphasis added).

This language provides a general standard for evaluating state programs and includes examples of state rules that are presumptively acceptable and those that are not. In 2009, your agency stated in federal court that "[n]othing in the CWA or EPA's regulations requires state programs to provide the same opportunity for judicial review of permitting decisions as is required for federally issued permits. Instead, EPA's regulations adopt the standards set forth in the CWA: state programs must provide an opportunity for judicial review sufficient to promote, assist, and encourage public participation in the permitting process."[2]

In proposing to approve North Carolina's Title V permit program under the CAA, the EPA determined that the North Carolina Attorney General's opinion submitted on behalf of North Carolina "adequately address[es] the thirteen provisions listed at 40 CFR 70.4(b)(3)(i)-(xiii)." 60 FR 44805 (August 29, 1995) (final interim approval at 60 FR 57357 (November 15, 1995) including the requirement to provide citizen access to judicial review). The North Carolina Attorney General specifically addressed judicial review and stated that

> [t]he limitation on access to judicial review in those provisions is certainly not more restrictive, and is in all likelihood less restrictive than the standing requirements of Article III of the United States Constitution. The state statute granting the right to

[2] Brief of Appellee-Respondent at 13-14, *Akiak Native Comm et al. v. US EPA, et al.*, No. 08-74872 (9th Cir. Aug. 21, 2009)

> judicial review, G.S. 143-215.5(b) grants the right to all 'person[s] aggrieved' by the final permit decision. 'Person aggrieved' is defined in G.S. 150B-2 to mean 'any person or group of persons of common interest directly or indirectly affected substantially in his or its person, property, or employment by an administrative decision.' This is at least as broad as the minimal standing requirements of Article III enunciated by the U.S. Supreme Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130 (1992). Therefore, it is the opinion of this office that the limitations on access to judicial review contained in G.S. 143-215.5(b) and the standing requirements embodied in the term 'person aggrieved' do not exceed the corresponding limits on judicial review imposed by the standing requirements of Article III of the United States Constitution.

North Carolina Attorney General's statement (November 5, 1993) at 14-15. This opinion confirms that the right to judicial review under the CAA/Title V program turns on "person aggrieved" and that this standard is at least as broad as Article III.

Federal Citizen Access

The EPA's Environmental Appeals Board (EAB) is a federal administrative forum in which remedies must be exhausted as a prerequisite for access to the courts and is comparable to North Carolina's Office of Administrative Hearings (OAH), which is the state administrative forum. This is one respect, among others, in which EAB is analogous to OAH, but there are also differences perhaps more striking than the similarities:

- The hearing officers at the EAB are EPA employees, whereas the Administrative Law Judges of OAH are appointed by the Chief Justice of the North Carolina Supreme Court and are independent of the Department of Environmental Quality.
- Review before the EAB is available to any "interested person." The term "interested person" is not defined, but it repeats the term used at Section 509 of the Clean Water Act which provides for judicial review of permits in the Court of Appeals (the term is absent from Section 307 of the CAA). The use of the term in the CAA context strongly suggests that an "interested person" is one who satisfies the requirements of Article III standing. Were that not the case, the "interested person" who had her case heard by the EAB might not be able to get review in the Court of Appeals for lack of standing. Review in OAH and state courts is available to any "person aggrieved," as discussed and defined, *supra*.
- There are, apparently, under EPA rules, two barriers for "interested persons" to access judicial review. A petitioner who filed comments on the draft permit or participated in the public hearing may petition the EAB to review *any* condition of the permit decision. However, if a person failed to provide, in sufficient detail, why EPA's responses to comments were irrelevant, erroneous, insufficient, or an abuse of discretion, irrespective of whether that person has a demonstrable pecuniary or property interest, that person may petition for review "only to the extent of the changes from the draft to the final permit decision." Unlike the EPA rules, which could deny judicial review to a person who

otherwise had Article III standing, there are no threshold requirements under North Carolina law for a petitioner to have participated in the review or comment period in order to challenge a permit. *Any* permit applicant, permittee, or *third party* who is dissatisfied with a decision to issue, deny, or condition a permit, irrespective of whether that person participated in the public comment process, may commence a contested case in OAH to challenge any term of a permit or to challenge the issuance or denial of a permit *in toto*, provided that petitioner can show that she is a "person aggrieved." In the Carolinas Cement case, for example, one of the petitioners had not participated in the public comment process. Notwithstanding, neither OAH nor the NC APA placed limits on that petitioner's right to challenge any term of the permit by which it showed it was aggrieved.

- The EAB, in its sole discretion, may grant or deny a petition. In contrast, a North Carolina Administrative Law Judge can dismiss a petition but must base the dismissal on grounds provided in Rule 12 of the North Carolina Rules of Civil Procedure (similar to Rule 12 of the Federal Rules of Civil Procedure). Petitioners whose petition has been denied or dismissed may appeal to the courts, provided they can make the required showing of standing.

For jurisdictions where EPA is the permitting authority, the EAB includes a number of procedural requirements, unrelated to Article III, that must be satisfied to obtain judicial review. These include a statement of the reasons supporting the review, a demonstration that issues raised were raised during the public comment period, and a showing that a challenged condition is based on a finding of fact or conclusion of law that is clearly erroneous, an abuse of discretion, or a policy consideration which the EAB should, in its discretion, review.[3]

North Carolina provides its citizens easier access to judicial review when compared to the hurdles in the federal process a citizen must overcome to challenge an air or water permit. Your procedures can even be more restrictive for obtaining judicial review under an Article III court. EPA's position on review by EAB, in response to comments objecting to the substantial showing required to justify an appeal, was that review "should only be sparingly exercised."[4] NCDEQ finds your agency's restrictions on citizens' access, specifically in cases that involve environmental justice concerns, to be troublesome.[5]

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[3] *See, Native Village of Kivalina IRA Council v. EPA*, 687 F.3d 1216 (9th Cir., 2012), in which Kivalina was denied access in Federal Court to review by the EAB because its petition for review "did not argue or explain why the EPA's responses [to its comments] were incorrect," "did not sufficiently engage the EPA's responses to public comments," "did not demonstrate why the [EPA's] responses to comments were clearly erroneous or otherwise warranted review," and "did not adequately address the EPA's responses about the sufficiency" of permit requirements. These were judgments by EPA employees in an EPA forum that resulted in denial by the 9th Circuit Court of Appeals of judicial review. Under the federal review process, these citizens, who would have clearly satisfied Article III standing, were denied judicial review.

[4] 45 Fed. Reg. 33290, 33412 (May 18, 1980).

[5] *See* Footnote 3.

Illustrations of North Carolina APA

Under the NC APA, persons aggrieved, subsequent to being granted judicial review, must demonstrate that they will be substantially prejudiced by the agency's decision (*e.g.*, the permit). As will be illustrated below, this is a separate and distinct element of the judicial review. In the Carolinas Cement case, it was the failure to satisfy the showing of substantial prejudice required by the NC APA on which summary judgment was granted by the Administrative Law Judge. The Carolinas Cement was actually three separate cases on each of three iterations of one air quality permit. None of the cases were decided on the issue of standing. Access to judicial review is measured by the standard applied for standing. The Administrative Law Judge explicitly found that the Petitioners had standing as "persons aggrieved."[6] Thus, claims that North Carolina inappropriately put restrictions on citizen access to appellate forums are false.

In the first case, filed in April 2012, the Administrative Law Judge dismissed four of the eighteen claims based on failure to state a claim upon which relief could be granted and for lack of subject matter jurisdiction. The petitioner withdrew another of its eighteen claims. Importantly, the Administrative Law Judge granted the Petitioner's motion for summary judgment on standing holding that the Petitioner had alleged sufficient facts to demonstrate that they were "persons aggrieved" with standing to challenge the permit.[7] However, the Administrative Law Judge found that the Petitioner, despite more than a year of discovery, had failed to prove that element of its case.[8,9] The citizen groups were afforded access to OAH and, subsequently, to Superior Court because they had made the requisite showing for standing under the APA; thus, they were entitled to develop and produce evidence to meet their burden but, in cross-motions for summary judgment, came up short.

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[6] *N.C. Coastal Fed'n v. N.C. Dep't of Env't & Natural Res.*, 12 EHR 02850 at p.2 (NCOAH, Sept. 23, 2013). It should be noted that the ALJ in these cases, Judge Beecher Gray, was also the author of the seminal decision in *Empire Power*, upheld by North Carolina's Supreme Court, that recognized third party appeals in OAH (in addition to appeal rights already recognized in Superior court). In other words, this ALJ's decision in *Empire Power* greatly broadened citizen access to the citizen-access process that your agency had already found sufficient prior to that decision.

[7] Petitioners' Motion for Partial Summary Judgment is GRANTED IN PART to the extent the MOTION sought a determination as to whether Petitioners are "persons aggrieved" with standing to commence this contested case. *See*, N.C. Gen. Stat. § 150B-23(a); *Empire Power Co. v. Dep't of Env't Health & Natural Res.*, 337 N.C. 569, 588, 447 S.E.2d 768, 779 (1994).

[8] *Id.*

[9] In contrast to the judicial review provided in this case and the massive discovery, depositions, expert reports, briefings, written decisions at the Office of Administrative Hearings, the North Carolina Environmental Management Commission, and the NC Superior Court (currently on appeal at the North Carolina Court of Appeals), the EPA concluded that California's judicial review procedures were acceptable despite the fact that for power plants, judicial review is dependent solely on the discretion of the California Supreme Court. Moreover, the EPA specifically found that even a petition from a citizen seeking judicial review that is denied by the California Supreme Court, at its discretion, without even so much as a written opinion, satisfied the EPA's judicial review requirement. 77 Fed. Reg. 65305 (October 26, 2012) (EPA approval of San Joaquin Valley Unified Air Pollution Control District's PSD program response to comments).

The issue of Article III is not relevant because the NC APA already provides judicial review using a less restrictive "person aggrieved" standing requirement. ("[w]hether or not Petitioners could satisfy Article III standing is irrelevant to this case since petitioners had their day in court. They were not denied judicial review. They were not denied standing. They simply did not prove an essential element of their case, substantial prejudice."[10]) The position advanced by the North Carolina Attorney General throughout the proceeding was consistent with the 1993 Attorney General's opinion. For example, it was argued "whether Petitioners have demonstrated Article III standing is irrelevant since they were not denied judicial review. [The department] never contested whether petitioners had standing under *Empire Power*."[11]

In the second case, following a modification to the permit, petitioners filed again, making the same claims but did not challenge the modified terms. The result in the second case was, predictably, a repeat of that of the first case. Following another permit modification, petitioners filed yet again, alleging essentially the same claims. The third case was also resolved on cross-motions for summary judgment, with the added rationale that petitioners were collaterally estopped from raising the same issues yet a third time.

Petitioners appealed the decisions from OAH to the North Carolina Superior Court. Petitioners had access to the reviewing court by virtue of their demonstration of standing as a person aggrieved. The decision was upheld on judicial review after a full and fair opportunity to brief and argue the cases. In upholding the Administrative Law Judge, the Superior Court stated that "[p]etitioners had ample time and opportunity to conduct discovery in an effort to establish the elements of their claims. In fact, the discovery period . . . was over a year." *N.C. Coastal Fed'n v. N.C. Dep't of Env't & Natural Res.*, 13 CVS 015906, 14 CVS 007436, 14 CVS 009199 at p.7 (Sup. Ct., Mar. 25, 2015). The Petitioners demonstrated that they were "person[s] aggrieved" entitling them to judicial review and were provided ample opportunity to prove their case at the administrative level and at the Superior Court level.

In the Martin Marietta case, the Administrative Law Judge granted a third party intervenor's motion for summary judgment on the basis that the citizen-petitioners had failed to show that they were "persons aggrieved," and, alternatively, on the substantive issues. It is critical to note that this department took no position as to whether Petitioners had made the showing that they were "persons aggrieved." The respondent-intervenors advanced the argument that the citizen-petitioners were not "person[s] aggrieved" under the NC APA. As you are aware, on appeal, the Superior Court examined the issue of "person aggrieved" (*i.e.*, "standing" under the NC APA) and found that the citizen-petitioners had standing *and remanded the matter for a full plenary hearing in OAH.* It is unclear to NCDEQ in what conceivable way this would be a case that "limit[ed] citizen access to judicial review of environmental permits in North Carolina." To the contrary, it is an example of the breadth of citizen access to such review.

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[10] Brief of Respondent at 30, *N.C. Coastal Fed'n v. N.C. Dep't of Env't & Natural Res.*, 13 CVS 015906, 14 CVS 007436, 14 CVS 009199 (Wake County Sup. Ct., Sept. 19, 2014).

[11] Brief of Respondent, *supra* note 10, at 30.

Conclusion

It is not clear to me whether your concern is based on misrepresentations of the facts of these cases, an unfamiliarity with the facts, a misinterpretation of the law and rules, or some other basis. The threshold for citizen access to OAH or to the state appellate courts has not changed since the early 1990's, when citizen access was dramatically expanded. Although you state in the second paragraph of your letter that an explanation was forthcoming as to how the decisions cast serious doubt on whether North Carolina's NPDES and CAA/PSD programs satisfy federal requirements for access to judicial review, that explanation has never materialized. Instead, the letter simply concludes that undue restriction on citizen access may have occurred and that affirming decisions by North Carolina courts would jeopardize North Carolina's authorization to implement the NPDES and CAA/PSD programs.

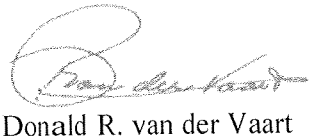
Read as a general statement of the need to provide citizen access to judicial review of permits, this letter could have gone to any state program in the country. In the context of the two particular cases to which your letter refers, your concern appears to rest on an assertion with a highly questionable foundation. In the Carolina Cement case, standing, or lack of citizen access to judicial review, was not the issue on which the petitioners lost; in the Martin Marietta case, the court *reversed* the OAH dismissal based on lack of standing (as one of two alternative bases, the second of which was substantive).

Your expression of concern under these circumstances suggests that the federal government believes that any third party challenge to a permit must be allowed to proceed, irrespective of its merits, unlike your own position vis-à-vis review in the EAB. Advancing such a belief is a disservice to both the regulated community as well as meritorious claims of third parties who seek administrative and judicial review of environmental permits. As evidenced by the discussion above, the department has demonstrated a continuous commitment to ensure persons aggrieved by permit decisions have their claims heard.

We trust that this discussion above will satisfy your concerns regarding third party appeals in North Carolina and provide you with an opportunity to review and revise your federal procedures to ensure that they, like North Carolina's process, provide appropriate access to judicial review.

If questions remain, please contact my General Counsel, Sam Hayes, at 919-707-8616 to discuss possible changes you would seek to the statutory language that the Courts have interpreted in the two cases described above. We look forward to discussing this matter with you at your convenience to get a better understanding of your purpose in sending it.

Sincerely,



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