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Via Federal eRulemaking Portal
Docket ID No. EPA–HQ–OGC–2019–0406
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Re: Florence Copper Inc.'s Comments on the Proposed Rules – "Modernizing the Administrative Exhaustion Requirement for Permitting Decisions and Streamlining Procedures for Permit Appeals," 84 Fed. Reg. 66084 (December 3, 2019) – Docket ID No. EPA–HQ–OGC–2019–0406

Dear U.S. Environmental Protection Agency ("**EPA**"):

Florence Copper Inc. ("**FCI**") hereby submits comments on the above-referenced rulemaking concerning the Environmental Appeals Board ("**EAB**").

A. THE PROPOSED RULES WOULD MAKE THE BAR FOR JUDICIAL REVIEW TOO LOW, TO THE DETRIMENT OF PERMITTEES.

The proposed rules that would allow a non-EPA party to avoid the EAB review process and take the permit dispute directly to court[1] would disadvantage many permittees covered by the rules. This is because: (a) permit appeals are often filed by project opponents who dispute EPA's decision to issue the permit; (b) in those appeals, the permittee usually sides with EPA in defense of the permit decision; (c) most of the time, the EAB affirms the permit decision; and (d) absent EAB review, the courts would be less deferential in their judgment of the permit decision—i.e., more likely to remand the permit, leading to substantial project delay.

In short, the several months' time it takes to go through the EAB review process is worth it, because it armors the permit decision against judicial review and remand. This is particularly the case where the issues in dispute involve questions of law. In such cases, the courts are more likely to grant *Chevron* or *Auer* deference to EPA's decision to issue the permit if the questions of law in the dispute have first been addressed by the EAB or appropriate

[1] Proposed § 124.19(d)(3)(i)-(ii), (d)(4), (g).

Headquarters Office.[2] The opportunity to justify such deference in the record of the permit decision would be lost under the provisions of the proposed rules that would allow a project opponent to avoid an appeal before the EAB and channel the dispute directly to court.

1. Bypassing EAB Review Would Make Permit Decisions Less Defensible on Judicial Review.

It would be highly detrimental to RCRA, UIC, NPDES and PSD permitting efforts to allow a party opposed to the permit, after the conclusion of the alternative dispute resolution ("**ADR**") convening meeting, to channel all further disputes over the permit directly to court.[3] The undersigned's experience is that: (i) most permit applicants wish, alongside EPA, to develop an administrative record of a permit decision that is defensible on judicial review;

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[2] *See, e.g., Alaska Wilderness League v. EPA*, 727 F.3d 934, 937 (9th Cir. 2013) ("The EPA exercised its 'authority through a formal process that included . . . public notice and comment . . . and [a] reasoned EAB decision[ ] upholding the air permits at issue.' As we have already held in *REDOIL*, the EAB proceeding was 'a formal adjudication that warrants *Chevron* deference.'") (quoting *Resisting Envtl. Destruction on Indigenous Lands v. EPA*, 716, F.3d 1155, 1161 (9th Cir. 2013)); *In re Lyon Cnty. Landfill*, 406 F.3d 981, 984 (8th Cir. 2005) ("EAB decisions . . . are formal adjudications consistent with the Administrative Procedure Act . . . and due *Chevron* deference.") (citing *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001)); *Sultan Chemists, Inc. v. EPA*, 281 F.3d 73, 79 (3d Cir. 2002) (holding that an EAB proceeding is a formal adjudication to which courts should defer under *Mead* if the statutory language is ambiguous); *Piney Run Pres. Ass'n v. Cnty. Com'rs of Carroll Cnty.*, 268 F.3d 255, 267-68 (4th Cir. 2001) (noting that an earlier EAB decision articulating a reasonable statutory interpretation is entitled to Chevron deference); *Pepperell Assocs. v. EPA*, 246 F.3d. 15, 22 (1st Cir. 2001) ("To the extent that the EAB's decision reflects a gloss on its interpretation of the governing EPA regulations, a reviewing court must also afford those policy judgments substantial deference, deferring to them unless they are arbitrary, capricious, or otherwise 'plainly' impermissible.") (citations omitted); *see also Upper Blackstone Water Pollution Abatement Dist. v. EPA*, 690 F.3d 9, 20-21 (1st Cir. 2012) (stating judicial deference to EPA's expertise and interpretation of its own regulations "goes to the entire agency action, which here includes both the EPA's permitting decision and the EAB's review and affirmance of that decision.").

[3] *See* 84 Fed. Reg. at 66088/2 ("If the parties do not agree to proceed with either the ADR process or an EAB appeal, the notice of dispute would be dismissed, the permit would become final and it could be challenged in federal court.").

(ii) *Chevron* and *Auer* deference, to the extent applicable, help make the permit record defensible on judicial review; and (iii) *Chevron* or *Auer* deference is applicable when the EAB or appropriate Headquarters Office has, based on its judgement of the parties' arguments and public policy considerations, issued a ruling on the legal issues in dispute and the ruling becomes part of the permit record. By allowing the party opposed to the permit essentially to veto a proceeding before the EAB, the proposed rules would forfeit the opportunity of the EAB or Headquarters Office to issue dispositive interpretations of the statutes or rules in dispute, thereby lessening the judicial deference accorded the permit decision.

2. EPA Headquarters Needs to Make Policy, Not the Courts.

FCI supports any reform of the rules that assigns to the Administrator, through the General Counsel or other appropriate Headquarters Office, interpretations of first impression of statutes and rules. In FCI's own recent experience, a dispute over the meaning of an EPA rule, the resolution of which would have had precedent-setting consequences for the reliance interests underlying hundreds of similarly situated permits nationwide, would have been resolved based solely on the reasoning of the EAB's three-judge panel with input only from the parties to the appeal. Such a result, had the appeal not been dismissed on other grounds, would have been inappropriate. Policy making on legal issues of first impression that has the potential to affect an entire class of stakeholders should be made—whether by rulemaking or decision on a contested permit—only by the Administrator or Headquarters Office that the Administrator delegates to make that policy.

Proposed § 1.25(e)(2)(iii) begins to address the problem described in the preceding paragraph by giving the Administrator, through the General Counsel, the authority to issue a legal interpretation of any applicable statute or rule that is binding on the EAB. While FCI believes this provision does not go far enough to solve the problem (see section B of these comments), as the proposed rules are written, neither the Administrator nor the General Counsel would have an opportunity to weigh in on the legal interpretation of a statute or rule that is in dispute if the balance of the rules allow the project opponent to avoid an appeal before the EAB and channel the dispute directly to court. In other words, proposed § 1.25 (e)(2)(iii) is clearly undermined by proposed §§ 124.19(d)(3)(i)-(ii) and 124.19(g).

One way to avoid this result would be to revise proposed § 124.19(d)(4) so that, rather than deprive the Regional Administrator of any say on how to proceed, it requires the Region to seek the General Counsel's input concerning any legal question that is in dispute and the resolution of which could have national, precedent-setting implications, i.e., constitute policy

making. A process by which the Region could seek the General Counsel's input is suggested in section B of these comments. Absent such process: (a) the court on judicial review would make the policy; (b) EPA's opportunity to influence the court's *de jure* policy making would be limited to its judicial review response brief; and (c) EPA's legal position would not be entitled to the full measure of *Chevron* or *Auer* deference that applies to agency policy making.

B. THE PROPOSED RULES DO NOT ADEQUATELY PRESERVE EPA HEADQUARTERS' ABILITY TO MAKE POLICY ON LEGAL ISSUES MATERIAL TO THE PERMIT DISPUTE AND THE RESOLUTION OF WHICH WOULD HAVE NATIONAL, PRECEDENT-SETTING IMPLICATIONS.

To the extent that the proposed rules would afford the Administrator, through the General Counsel, a role in the interpretation of a legal statute or rule, the meaning or applicability of which is material to the permit dispute, they are completely silent on (1) the process by which the General Counsel might be apprised of the opportunity to exercise that role and (2) when it would be appropriate for the General Counsel to weigh in on the dispute.[4] This silence increases the chance, described in section A.2 of these comments, that EPA will be deprived of the opportunity to make policy on legal questions before the courts decide them.

In order to avoid this problem, the final rules should include provisions along the following lines:

- Any party, including the permit applicant, may petition the Administrator to issue, through the General Counsel or other Headquarters Office, a dispositive legal interpretation of any statute or rule identified in the parties' filings in the dispute, whether those filings were made in the ADR proceeding or in the appeal before the EAB. In addition, the Region must petition the Administrator to issue, through the General Counsel or other Headquarters Office, a dispositive legal interpretation of any statute or rule if the Region determines that an interpretation of the statute or rule: (i) is necessary to resolve the dispute; and (ii) could have national, precedent-setting implications.

- Until (i) the Administrator, General Counsel or other Headquarters Office either issues the dispositive legal interpretation in response to the petition or expressly declines to do

[4] *See* Proposed § 1.25(e)(2)(iii); 84 Fed. Reg. at 66090/1.

or (ii) 120 days have passed since the Administrator's receipt of the petition, neither the Settlement Judge nor the EAB may issue a legal interpretation of the same statute or rule. FCI believes a 120-day waiting period would be a reasonable component of the administrative exhaustion requirement.

C. OTHER PROVISIONS OF THE PROPOSED RULES WOULD BE DETRIMENTAL TO PERMITTEES.

The proposed rules include several provisions that, if promulgated, would hamper EPA's ability to develop a record of careful deliberation of a permit decision and deprive parties whose interests are aligned with the permittee of the ability to participate in contested case policymaking in advance of judicial review. Most notable of these is the elimination of the opportunity for *amici curiae* to file briefs in EAB proceedings.[5] FCI appreciates that EPA's intention here is to "hasten the resolution of permit appeals by 15 days."[6] However, the 15 days entailed by the current *amicus* rules have substantial merit when the legal issue in dispute is such that its resolution would affect an entire class of stakeholders. As indicated in sections A and B of these comments: (1) it is preferable for a permit record to show that EPA made a well-informed policy decision on such legal issues before the courts consider them; and (2) the better informed EPA's decision on such legal issues, the more robust the judicial deference that is accorded the decision under *Chevron* or *Auer*. Therefore, FCI recommends that, if the final rulemaking eliminates the opportunity for *amicus curiae* briefing, an exception be made for briefing on legal issues in the dispute (i) concerning which no binding precedent exists in the case law or EPA rulemakings and (ii) the resolution of which would affect a class of stakeholders. The rules could provide that the motion for permission to file the *amicus* brief must include a demonstration that conditions (i) and (ii) exist.

Two other provisions of the proposed rules would make final permit decisions less defensible on judicial review. These are the proposal to establish a 60-day limit on the EAB's decision making on the permit dispute, measured from the date of oral argument or the filing

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[5] 84 Fed. Reg. at 66088/3 (proposing to delete § 124.19(e)).

[6] *Id.*

of the last brief, whichever is later;[7] and the proposal to limit the length of EAB opinions, by setting a numerical limit on either the words or pages of the opinion.[8] As explained in Section A of these comments: (a) permit appeals are often filed by project opponents who dispute EPA's decision to issue the permit; (b) in those appeals, the permittee usually sides with EPA in defense of the permit decision; (c) most of the time, the EAB affirms the permit decision. Thus, anything in the appeal rules or permit record that indicates the EAB may have conducted less than a robust review of the permit decision—because of an imposed time limit on the review or a page-limit on EAB's ability to explain its review—would make judicial review courts less inclined to accord *Chevron* or *Auer* deference to EPA's decisions on the legal questions in dispute, to the detriment of many permittees. For these reasons, FCI recommends that the proposed 60-day limit be abandoned and that no limit be placed on the length of EAB's opinions.

Finally, FCI is concerned about the proposal to include in the rules a provision that would effectively make EAB's decisions on questions of law "precedential" only if the General Counsel approves the publication of the decision.[9] If such a provision is going to be included in the final rules, then the rules should include a procedure by which the parties to the appeal can petition to General Counsel to publish the decision. But, for the reasons stated in the balance of this comment letter, it would be better if all EAB decisions are deemed precedential except those that are declared otherwise by the Administrator or General Counsel.

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[7] The proposed rules would entirely delete the provision, currently at 40 C.F.R. § 124.19(h), that explicitly authorizes the EAB to hold oral argument "on its own initiative or at its discretion in response to a request by one or more of the parties." As a result, the proposed rules confer on EAB the authority to hold oral argument only by implication: at proposed § 124.20(e)(3) (stating "[t]he . . . statement requesting oral argument (if any)" does not count toward a brief's word limitation); and at proposed § 124.20(i)(1)(ii) (stating the EAB must issue its decision within 60 days after the final brief has been submitted or "[o]ral argument is concluded"). FCI recommends that a provision be added to the final rules that explicitly states oral argument shall be held at the EAB's discretion in response to a request by a party to the appeal.

[8] 84 Fed. Reg. at 66089/1.

[9] *Id.* at 66090/1.

Florence Copper Inc. appreciates your consideration of the above comments. If you have any questions, please do not hesitate to let me know at 602-319-4021.

Sincerely,

George A. Tsiolis, Attorney at Law
Attorney for Florence Copper Inc.

cc: Rita P. Maguire, Executive Vice President & General Counsel, Florence Copper Inc.