

# Fond du Lac Band of Lake Superior Chippewa

## Reservation Business Committee

1720 Big Lake Rd.  
Cloquet, MN 55720  
Phone (218) 879-4593  
Fax (218) 879-4146



December 31, 2019

U.S. Environmental Protection Agency  
Office of General Counsel  
1200 Pennsylvania Ave, NW  
Mail Code 2301A  
Washington, DC 20460  
Attn: Mark Talty

Chairman  
**Kevin R. Dupuis, Sr.**  
Secretary/Treasurer  
**Ferdinand Martineau, Jr.**

Dist. I Representative  
**Wally J. Dupuis**

Dist. II Representative  
**Bruce M. Savage**

Dist. III Representative  
**Roger M. Smith, Sr.**

Executive Director,  
Tribal Programs  
**Miyah M. Danielson**

Executive Director,  
Tribal Enterprises  
**Terry Savage**

**Subject: Docket ID #EPA-HQ-OGC-2019-0406 – Modernizing the Administrative Exhaustion Requirement for Permitting Decisions and Streamlining Procedures for Permit Appeals**

### Introduction

The Fond du Lac Band of Lake Superior Chippewa (“the Band”) is a federally recognized tribe with a Reservation located in northeastern Minnesota. The Band retains hunting, fishing and gathering rights on more than 8 million acres of territory in Northeastern Minnesota ceded to the United States government under the Treaties of 1837 and 1854. The Band also exercises Treaty Rights in the 1837 and 1842 Ceded Territories of Wisconsin and Michigan. The Band has Treatment as an Affected State for air related activities that take place near the Reservation and/or other tribal lands.

### Proposal

On December 3, 2019, EPA published a proposed rulemaking in the Federal Register that seeks to streamline and modernize the permits appeal process, as conducted through the EPA’s Environmental Appeals Board (EAB). This proposal would apply to permits issued by or on behalf of EPA under the Clean Water Act, the Clean Air Act, the Safe Drinking Water Act, and the Resources Conservation and Recovery Act.

### Concerns Regarding the Proposal

The Band opposes this proposal for the following reasons:

- EPA has made no attempt to justify any of the seven proposals. The docket contains no supporting information whatsoever to support the need for any of these items, nor any type of analysis as to what impacts may result from them.
- EPA failed to consider tribal implications of this proposal and to conduct the appropriate tribal consultation.
- EPA failed to consider the Environmental Justice implications of these proposed actions.
- The length of time provided for public comment was too short given that it took place over the end-of-year holidays.

The following is a list of the seven proposed actions and the Band's response to each.

- The first item proposes an “opt out” approach to Alternate Dispute Resolution (ADR) as opposed to the current “opt in” approach. The Band sees this as a push toward litigation, because the proposal means that the parties would have only one meeting with a Settlement Judge before they must decide unanimously to proceed either with the ADR or with an EAB appeal. If the parties fail to agree on a course of action, the notice of dispute would be dismissed and the permit under appeal would automatically be issued. At that point, the only recourse for the petitioner would be an appeal in federal court, which can be an expensive and time consuming step. This opens up the potential for parties to act in bad faith, with no intention of agreeing on a course of action so that litigation is the only option. This would favor large corporations, who have more financial resources than tribes, environmental advocates, or community action organizations. The Band also feels that allowing for only one meeting of the parties is insufficient for each party to fully grasp the details of the other party's position and to consider steps forward.

In proposing this item, EPA failed to offer any supporting documentation as to the need for this change. Additionally, EPA did not even attempt to analysis the potential outcomes of this proposal, nor did it offer any examples of how other federal agencies manage these situations. In this item, EPA also seeks comments on whether all issues raised in the notice of dispute should be required to continue through the ADR process or EAB appeal rather than only those issues of concerns that all parties agree should proceed. The Band urges EPA to allow all issues to continue through the process.

- The second proposal seeks to clarify the scope and standard of the EAB's review to eliminate the provision granted by 40 CFR 124.19(a)(4)(i)(B) that allows the EAB to review an exercise of discretion “or an important policy consideration”. First, since this provision is found in the Code of Federal Regulations, it is unclear whether EPA has the ability to eliminate it. Further, EPA again provides no analysis of the need for this change, nor on the impacts it may have or whether other federal agencies have also sought to eliminate this provision.
- EPA's third proposal seeks comment on the elimination of amicus curiae participation by interested parties. The Band opposes this suggestion as it could impact tribes who, due to a lack of resources or other reasons, do not choose to file appeals of their own, but rather file amicus briefs to supplement appeals brought by other parties. While EPA points out that interested parties could still file public comments on these cases, this is not an acceptable substitute – the decision on whether to consider amicus briefs should lie with the court, not the EPA. This proposal would diminish the proper role of the courts. Further, amicus filers can be given the opportunity to participate in oral arguments before an appellate court, something that is not an option for those who submit public comments. Additionally, public comments can be voluminous and there can be no guarantee that a court will read in detail all of the comments that have been submitted, or that comments will be given proper consideration. Also, amicus briefs can be filed by parties who may have missed the deadline for public comments or may not have understood or been aware of an important issue until the petitioner brought their claim. Lastly, amici are often filed by non-profit advocacy organizations, representing the interests of the general public – it is these interests that will suffer as a result of this action. In the FR item, EPA estimates that elimination of these briefs will save 15 days for each appeal. This seems like a steep price to pay for a mere 15 days. As in the other proposals, EPA has failed to adequately demonstrate the need or the appropriateness of this item, nor has it demonstrated its legal authority to make this change.

- The fourth proposal suggests elimination of the EAB’s authority to review Regional permit decisions *sua sponte*, or on its own initiative, meaning that the EAB can review items in a permit at its own discretion, rather than in response to an appeal by a private party. EPA suggests making this change because the EAB rarely invokes this authority and because *sua sponte* reviews could delay permit issuance. The Band believes that *sua sponte* review should remain an option open to the EAB because its elimination would unfairly tie the hands of the Board if they identify an issue with a permit that others have not brought forward and would diminish the interests of the general public. The EPA also failed to provide adequate documentation supporting the need and appropriateness of this proposal.
- The fifth item proposed by the EPA suggests setting a 60-day limit for the EAB to issue a final decision once an appeal has been fully presented. There is not enough information or detail provided in the FR notice for the Band to comment on this suggestion. EPA has failed to make a case for the need for this provision or to analyze the impacts that could result from this action. The EPA also seeks comments on whether to limit filing extensions to one request per party, with a maximum extension of 30 days. The Band opposes these limits because tribes, community groups, or environmental groups may need extra time in appeal situations due to their limited resources. EPA additionally seeks comments on limiting the length of EAB opinions to “only as long as necessary to address the issues”. This proposal is baseless and wholly unsupported by the FR notice. There is no evidence that EAB opinions are already any longer than “necessary” and it is unclear what measure EPA would use to find portions of an opinion to be “unnecessary”. The Band opposes this proposal.
- The sixth item in the FR notice seeks to impose twelve-year terms for EAB judges, subject to renewal by the Administrator. Alternately, the judge can be reassigned within the EPA. Again, EPA has provided no basis for this proposal – no information was provided for why the current structure of the EAB is inadequate or inappropriate and no information was provided as to how other federal agencies approach the issue of term limits.
- In its seventh proposal, EPA seeks to establish a mechanism for dispositive legal interpretation by the Administrator. It is impossible to comment on this proposal because absolutely no details have been provided as to the meaning of the term “dispositive legal interpretation”, what criteria would be involved for its use, or whether the Administrator would even have to meet with either of the parties before its use. If this would mean that the Administrator could dismiss any case before the EAB at any time, then this would violate the petitioner’s right to due process and improperly give the EPA judicial power. The FR notice mentions a “mechanism by which the Administrator, through the General Counsel, can issue a dispositive legal interpretation in any matter pending before the EAB or on any issue addressed by the EAB” but provides no further detail as to what this mechanism might be or what criteria would be utilized in its application. The FR notice does not specify whether this mechanism would apply retroactively or only to future cases. There is also no analysis of what impact this would have on either petitioners, permittees, or permitting agencies.

In general, the only consideration in any of these proposals is the fastest possible issuance of permits. The Band argues that the American system of government is not necessarily intended to be speedy, but rather to produce the best results possible. Further, the EPA has not adequately demonstrated that the current process is too slow.

**Tribal Consultation**

Despite the requirements of Executive Order 13175 to consult with tribal nations when considering policies that would impact tribal communities, EPA failed to conduct any outreach or consultation with tribes. This rule will impact tribes because they could be involved in appeals to the EAB, either as a petitioner, permittee, permitting authority, or through filing amicus curiae briefs or public comments. This FR item is also in error by finding that this action would not have tribal implications.

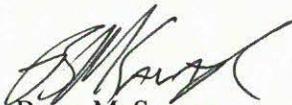
**Environmental Justice**

In addition to neglecting tribal consultation, EPA did not fulfill its requirements to consider the Environmental Justice implications of this proposal. Tribes, environmental groups, and community action groups will be disadvantaged due to the time constraints, the elimination of amicus curiae briefs, and the other implications described above.

**Conclusion and Recommendations**

In conclusion, the Band believes that these proposals should not be finalized for the reasons outlined above. Thank you for this opportunity to provide comments. For further discussion, please call Joy Wiecks of my staff at 218-878-7108.

Sincerely,



Bruce M. Savage  
Vice Chair, Reservation Business Committee  
Fond du Lac Band

c.c. Sean Copeland – FDL Legal Counsel  
Ben Giwojna – EPA R5