

Citizen groups and NJDEP: Contesting permits gets tougher

By David P. Steinberger

On Jan. 11, 2006, the New Jersey Supreme Court issued two companion decisions affecting the rights of private citizens to have trial-type hearings to contest permit decisions of the New Jersey Department of Environmental Protection (NJDEP). Those two decisions were *IMO Freshwater Wetlands State General Permits*, 185 N.J. 452 (2006) and *In re NJPDES Permit No. NJ0025241*, 185 N.J. 474 (2006).

In both cases, the court seems to reconfirm the idea the general public has only limited grounds to obtain a trial-type hearing to challenge an NJDEP permit decision. This should come as good news to the regulated community, which often is concerned with the delay and cost that accompanies citizen group demands for hearings on permit decisions.

Read together, the two cases lay out the general conditions under which third parties can obtain trial-type hearings to contest permit decisions. The cases do not affect the right of permit applicants to request such hearings: under the Administrative Procedure Act, N.J.S.A. 52:14B-1 *et seq.* (APA), the permit applicant is an interested party.

There are two primary legal bases that give third parties rights to hearings challenging NJDEP permit decisions. The first is where a statute creates a specific right to a hearing; the second where the due process clause of the federal and state constitutions requires it.

Statutory right to hearing
NJPDES Permit addresses a specific statutory right to a hearing under the Water Pollution Control Act, (WPCA), while *Freshwater Wetlands* addresses general due process right to hearings.

The WPCA sets forth the requirements a third party must demonstrate to be afforded "party" status. In *NJPDES Permit*, the issue was whether the citizens group Clean Ocean Action (COA) had made the necessary showing. The court held it did not. In *Freshwater Wetlands*, the issue was whether a group of neighbors had a right to a hearing to challenge a wetlands permit issued for

adjacent property. The court held the neighbors did not have a constitutional right to a hearing.

Standard for obtaining a hearing

As set forth in the APA, a "contested case" means:

"a proceeding, including any licensing proceeding, in which the legal rights, duties, obligations, privileges, benefits or other legal relations of specific parties are required by constitutional right or by statute to be determined by an agency by decisions, determinations, or orders, addressed to them or disposing of their interests, after opportunity for an agency hearing."

The court in *NJPDES Permit* noted the basis for a contested case hearing is either a statutory or constitutional right. To demonstrate a constitutional right to an administrative hearing to challenge an agency's permitting decision, a third-party must show a particularized property interest of constitutional significance directly affected by an agency's permitting decision. "[I]n this State as well as the federal level, third parties generally are not able to meet the stringent requirements for constitutional standing in respect of an adjudicatory hearing." The court continued, "There has been legislative recognition of the benefits derived from a rigorous review standard when inquiring into the existence of a particularized property interest that generates a third-party hearing right."

The court confirmed third-parties do not have an inherent right to a hearing before NJDEP. To get a hearing, those third-parties must have some direct interest that could be harmed by NJDEP's permit decision.

The APA excludes from the definition of a third party "a person who has a particularized property interest sufficient to require a hearing on constitutional or statutory grounds." Such people are interested parties. That distinction is significant because the APA does not allow an agency to "promulgate any rule or regulation that would allow a third party to appeal a permit decision." So for a local citizen group to challenge an NJDEP permitting decision, it must demonstrate it is an interested party with a constitutional right to a hearing before the agency. And to do that, it must demonstrate a particularized property interest of constitutional significance.

In other words, because the agency permitting decision may impinge on a property interest, due process would require a hearing before the agency.

NJPDES Permit

NJPDES Permit was the "easier" case because it did not require analysis of a party's constitutional right to a hearing. Instead, it simply required the court determine whether COA had met the statutory requirements to become an interested



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party. In this case, COA was challenging NJDEP's reissuance of the New Jersey Pollution Discharge Elimination System (NJPDES) permit for Asbury Park. COA had provided negative comments to the NJDEP during the public permit review comment period. Notwithstanding those comments, the NJDEP reissued the permit. COA requested a trial-type hearing before the NJDEP to challenge the permitting decision. In response to the hearing request, NJDEP's commissioner entered an order concluding COA did not meet the statutory requirements to be given "party" status. A hearing was denied.

The commissioner determined COA's hearing request raised no new issues and simply reiterated the same points raised in its initial negative comments submitted to NJDEP. The Appellate Division affirmed.

The New Jersey Supreme Court affirmed the lower court ruling. It noted, however:

"to obtain a hearing right as a 'party' under the WPCA, the requester procedurally must have raised its objections to the [NJ]DEP's permitting decision during the applicable public comment opportunity and, substantively, must present a significant issue of law or fact in the hearing request. The significant issue of law or fact must be one that is 'likely to affect the permit determination.' "

The court further noted that issues of law, policy or discretion do not require hearings, because these are not issues generally amenable to the collection and cross-examination of evidence. Instead, those types of issues should be raised for the agency's consideration during the public comment period. In this case, the court determined COA failed to demonstrate any adjudicative facts were in issue, but instead had only raised procedural, policy and immaterial issues in its hearing request. For those reasons, COA could not be accorded party status.

Freshwater Wetlands

Here, neighbors of a proposed residential subdivision challenged the issuance of a Letter of Interpretation (LOI) and a general permit issued under the Freshwater Wetlands Protection Act. The challengers had submitted negative comments to the proposed LOI and permit during the public comment period. In fact, the neighbors presented enough information to warrant the NJDEP taking two years to issue the LOI and permit — far longer than normal. Essentially, the neighbors claimed that because the general permit allowed certain areas of wetlands to be filled on the developer's property, surface runoff to their properties would increase. The neighbors claimed that increased runoff and potential damage to their properties was their "particularized property interest" in the NJDEP permit decision.

The Appellate Division, in an unpublished decision, determined there was no particularized property interest because the neighbors' fear of increased runoff was purely speculative. The court first noted the neighbors were afforded their due process — they had been closely involved in the two-year LOI process. While they did not get a trial-type hearing, they did get all the process they were entitled to. Second, the court noted the local planning board had the authority to review site-drainage issues, and that the neighbors had fully participated in the planning board proceeding, which was a trial-type hearing.

The New Jersey Supreme Court affirmed the Appellate Division decision. In discussing the neighbor's due process claims, the court stated:

"the process due in any particular case depends on the property interest at stake and the nature of the deprivation threatened by the State's action. Because due process is a flexible and fact-sensitive concept, its demands will be a function of what reason and justice require under the circumstances."

Further agreeing with the Appellate Division, the court indicated "a third-party objector's due process rights may be satisfied by an agency's review process, even absent trial-type procedures." The court noted the NJDEP LOI and permit were not the only approvals the developer needed: it also needed to obtain planning board approval through the municipality's trial-type hearing process. The developer "could not move a spade of earth before it met all the concerns of the Planning Board," including drainage issues. Therefore, the court concluded the neighbors had been afforded ample due process before the NJDEP, and did not have the particularized property interest warranting a hearing before the NJDEP.

Conclusion

For third-party groups to challenge agency permitting decisions through a trial-type administrative hearing, such groups must either demonstrate a statutory right to a hearing or a particularized property interest such that due process requires a hearing.

Where the claimed right to a hearing arises on constitutional grounds, the review undertaken by the agency or court needs to look at the totality of the situation, including all the process afforded the objectors by both the agency and any other governmental authorities, such as municipal boards.

These two recent cases will affect a wide number of permitting programs. For instance, the new Highlands Water Protection and Planning Act does not create a statutory right to a hearing to challenge agency decisions. Therefore, anyone wishing to challenge such decisions through a trial-type hearing will need to demonstrate a particularized property interest that would be impacted. With the new Highlands Act regulations in place for just a year, such a challenge surely will come before the NJDEP and perhaps the courts as well.