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## Environmental law

### Hear Me Now

The availability of hearings before the NJDEP or the courts

By David P. Steinberger

Every day, the New Jersey Department of Environmental Protection (“NJDEP”) makes many decisions which disappoint the agency’s varied stakeholders. The avenues by which parties may be unhappy with NJDEP decisions are seemingly endless. If a party is aggrieved by an NJDEP decision, what options are there? This article will explore some of the possibilities.

Under the New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-1 *et seq.* (the “APA”), whether a hearing before an administrative law judge is available depends upon the status of the aggrieved party. Procedurally, an aggrieved party submits a hearing request to the NJDEP Commissioner’s office. If the Commissioner determines that the petitioner has standing and the request has merit, then the Commissioner will transfer the matter to the Office of Administrative Law to be handled as a contested case before an administrative law judge. A “permit decision” is defined to mean “a decision by a state agency to grant, deny, modify, suspend or revoke any agency license, permit,

*Steinberger is a member in the Environmental Law Department of Cole, Schotz, Meisel, Forman & Leonard in Hackensack.*

certificate, approval, chapter, registration or other form of permission required by law” N.J.S.A. 52:14B-3.2. This definition is quite broad and would include most, if not all, public agency decisions.

Where the party wishing to challenge the NJDEP “permit decision” is the party directly involved in, or impacted by, the permit decision, that party has a right to contest the NJDEP “permit decision” through a contested case hearing before an administrative law judge. N.J.S.A. 52:14B-10(c). The analysis is more complex with respect to the rights of parties other than an applicant to obtain a trial-like administrative hearing.

The APA declares that state agencies may not promulgate rules which allow third parties to appeal from permitting decisions unless such hearings are authorized by federal or state statute. N.J.S.A. 52:14B-3.1d. Third parties are defined to include “any person other than: [a.] An applicant for any agency license, permit, certificate, approval, chapter, registration or other form of permission required by law; [b.] A State agency; or [c.] A person who has particularized property interest sufficient to require a hearing on constitutional or statutory grounds.” N.J.S.A. 52:14B-3.2.

There are therefore two means by which a third party has a right to an adjudicatory hearing before an agency — either there is specific statutory entitlement to a hearing or due process considerations require a hearing. To establish a due process right, the party must “demonstrate a particularized property interest of constitutional significance that is directly affected by an agency’s permitting decision.” *In re*

*NJPDES Permit No. NJ0025241*, 185 N.J. 474, 482 (2006). In *NJPDES Permit*, the court noted that “third parties are generally not able to meet the stringent requirements for constitutional standing in respect of an adjudicatory hearing” and that in New Jersey, “there has been legislative recognition of the benefits derived from a rigorous review standard when inquiring into the particularized property interest that generates a third-party hearing right.”

In addition to the standing requirements, in order to obtain an administrative hearing a third party must also demonstrate that there are disputed material facts warranting a trial-like administrative hearing. “[A]n evidentiary hearing is mandated only when the proposed administrative action is based upon disputed adjudicatory facts.” *Spalt v. New Jersey Dep’t of Envtl. Prot.*, 237 N.J. Super 206, 212 (App. Div. 1989). As explained in *High Horizons Development Company v. Dep’t of Transportation*, 120 N.J. 40 (1990), “adjudicative facts have been defined ... as facts pertaining to parties and their business and activities. Adjudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. In contrast, legislative facts, the determination of which will not normally require a trial-type hearing, do not usually concern the immediate parties, but are the general facts which help the tribunal decide questions of law and policy and discretion.”

When disputes arise between the NJDEP and a party conducting a site remediation, there are several options, including a “chain of command” dispute resolution

process or, an expedited dispute resolution or a proceeding before the Technical Review Panel.

As set forth in the rules governing "Department Oversight of the Remediation of Contaminated Sites," N.J.A.C. 7:26C-1.1, *et seq.*, and guidance relating to the Technical Review Panel, the process always involves first trying to reach a resolution with the case manager. See e.g., N.J.A.C. 7:26C-1.4(b)-(h). In the "chain of command" approach, if discussions with the case manager prove unsuccessful, a written request for dispute resolution can be sent to the case manager's section chief. If the requester is not satisfied with the section chief's response, then another written request can be submitted to the applicable bureau chief. If that fails, the next written request goes to the applicable assistant director, and the next letter then goes to the applicable director. Finally, the last letter goes to the director, assistant commissioner and commissioner for resolution. The commissioner-level decision is required within 21 days of the written request. A response to each of the "preliminary" letters is required within seven days of the written request. The NJDEP regulations also establish an expedited review option which circumvents the initial steps and allows for the request for dispute resolution to be submitted directly to the commissioner. See N.J.A.C. 7:26C-1.4(i).

If the "chain of command" or expedited review options prove unsuccessful to the party conducting the remediation, that party must go through the NJDEP's alternative dispute resolution process before the matter will be deemed a contested case and sent by the commissioner to the Office of Administrative Law for a hearing. See N.J.A.C. 7:26C-1.4(j)-(k). Finally, both the "chain of command" and expedited review options are significantly limited because they do not apply to, among other things, "[t]echnical issues which arise during Department oversight of remediation" or legal issues. See N.J.A.C. 7:26C-1.4(l)2 and 3.

To address technical disputes, the NJDEP has established a process whereby the NJDEP will assemble an internal "Technical Review Panel" to review the remediation dispute. To obtain a technical

panel review of a technical dispute related to a site remediation, the remediating party must first follow a process set forth in the NJDEP's guidance. The first steps towards resolving the dispute are the same as those set forth above. The aggrieved party must first attempt to reach an agreement with the case manager, and then the case manager's immediate supervisor. The process continues up the chain of command until the case manager's bureau chief determines the issue. If the bureau chief's response/resolution is still unsatisfactory, then the aggrieved party can seek review by the Technical Review Panel. The request for such review must be in writing and directed to the assistant commissioner of the Site Remediation and Waste Management program. The request must include a summary of the issue, the history of the attempted dispute resolution and the identification of any applicable deadlines. The party may also request a meeting before the Technical Review Panel. Finally, no new information may be presented in the request.

The Technical Review Panel will not be convened if the dispute (i) involves an enforcement action, (ii) addresses natural resource damage assessments, (iii) relates to a party's liability for the cleanup or (iv) involves a matter of policy. If a Technical Review Panel is convened, it will consist of three assistant director-level employees or their designated manager. A designated manager cannot be the bureau chief who previously reviewed the dispute. There is no required deadline for the Technical Review Panel to issue its determination.

Access to the courts to challenge agency decisions generally requires that the petitioner first exhaust all of its administrative remedies. Rule 2:2-3(a)(2) provides that a litigant may not generally seek appellate review of an administrative decision when "there is available a right of review before any administrative agency or officer, unless the interest of justice requires otherwise." Furthermore, in *Abbott v. Burke*, 100 N.J. 269 (1985), the New Jersey Supreme Court noted that "[in] general, available and appropriate administrative remedies should be fully explored before judicial action is sanctioned."

The court cited three significant policy reasons for requiring exhaustion of admin-

istrative remedies: "(1) the rule ensures that claims will be heard, as a preliminary matter, by a body possessing expertise in the area; (2) administrative exhaustion allows the parties to create a factual record necessary for meaningful appellate review; and (3) the agency decision may satisfy the parties and thus obviate resort to the courts."

Yet, the court also indicated that "the preference for exhaustion of administrative remedies is one of convenience, not an indispensable pre-condition." Nevertheless, it is only in limited circumstances that a court will permit a litigant to circumvent the exhaustion requirement. Those situations include "when the administrative remedies would be futile; when irreparable harm would result; when jurisdiction of the agency is doubtful; or when an overriding public interest calls for a prompt judicial decision." Additionally, the exhaustion doctrine is often inapplicable "when only a question of law need be resolved. However, even in cases involving only legal questions, jurisdiction should remain with the agency where the agency is in a special position to interpret its enabling legislation can conclusively resolve the issue . . . and can provide relief for the plaintiff." *Triano v. Div. of State Lottery*, 306 N.J. Super. 114, 122 (App. Div. 1997).

The NJDEP provides an alternative to OAL hearings and litigation through its Office of Dispute Resolution. This NJDEP office allows the parties to prove the use of Alternative Dispute Resolution. According to the NJDEP, "[t]he Office of Dispute Resolution provides a forum other than the administrative and trial courts for resolution of disagreements between the department and affected parties. This forum serves a dual purpose: to reduce costly and protracted legal proceedings at taxpayer expense and establish more meaningful lines of communication among environmental regulators and the regulated community."

As can be seen, there are many considerations which must be made in determining how to respond to an unfavorable NJDEP determination. As would be expected, the process will often be lengthy and costly. Given the courts and administrative law judges' general deference to agency expertise, there can be significant hurdles to reversing NJDEP determinations. ■