

Big Changes in Environmental Permit Appeals Procedures

Act 387 passed by the SC General Assembly has made big changes to the state's procedures for appealing state environmental permits and certifications.

Effective July 1, all permits issued by the South Carolina Department of Health and Environmental Control, including its coastal branch, the Office of Ocean and Coastal Resource Management, will first be issued as "proposed decisions." **Permit applicants and others will now have 15 days to file a request for a "final review" proceeding before an agency 3-person panel. A signed document requesting the review MUST be ACTUALLY RECEIVED by the Clerk of the DHEC Board within 15 days of the proposed decision.**

The "final review" proceeding must be completed within 60 days, and is designed to be a more informal process than appeals to the Administrative Law Court.

After final review, parties may appeal to the Administrative Law Court. Appeals at this level may be filed by mailing a request for a contested case hearing to the ALC and other parties within 30 days of the order in the "final review" proceeding. If no "final review" hearing is held within 60 days, the 30-day appeal time begins at the end of the 60-day period.

The hearing before the ALC will be a trial type hearing under the "contested case" rules of the SC Administrative Procedures Act.

The Administrative Law Court will make the final administrative decision, and there will no longer be appeals to the DHEC Board or the OCRM Appellate Panel. The only avenue of appeal of a decision of the Administrative Law Court is an appeal to the SC Court of Appeals. Appeals to state circuit courts have been eliminated.

Most cases that are already pending will follow the "old" process, and all DHEC and OCRM cases currently pending in the Administrative Law Court may be appealed to the DHEC Board or OCRM Appellate Panel.

Here are the key portions of this new law:

South Carolina Act 387 of 2006 (formerly House bill 3285) - selected portions:

SECTION 2. Section 1-23-380 of the 1976 Code, as last amended by Act 181 of 1993, is further amended to read:

"Section 1-23-380. (A) A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this article, Article 1, and Article 5. This section does not limit utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy. Except as otherwise provided by law, an appeal is to the court of appeals.

(1) Proceedings for review are instituted by servicing and filing a petition in the circuit court notice of appeal as provided in the South Carolina Appellate Court Rules within thirty days after the final decision of the agency or, if a rehearing is requested, within thirty days after the decision ~~thereon~~ is rendered. Copies of the petition notice of appeal shall must be served upon the agency, the Administrative Law Court, and all parties of record.

(2) ~~The~~ Except as otherwise provided in this chapter, the servicing and filing of the petition notice of appeal does not itself stay enforcement of the agency decision. The servicing and filing of a notice of appeal by a licensee for review of a fine or penalty or of its license stays only those provisions for which review is sought and matters not affected by the notice of appeal are not stayed. The servicing or filing of a notice of appeal does not automatically stay the suspension or revocation of a permit or license authorizing the sale of beer, wine, or alcoholic liquor. The agency or administrative law judge may grant, or the reviewing court may order, a stay upon appropriate terms, upon the filing of a petition under Rule 65 of the South Carolina Rules of Civil Procedure.

~~(3) Within thirty days after the service of the petition, or within further time allowed by the court, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review. By stipulation of all parties to the review proceedings, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record.~~

~~(4)~~(3) If, ~~before the date set for hearing,~~ a timely application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file ~~that~~ the evidence and ~~any~~ modifications, new findings, or decisions with the reviewing court.

~~(5)~~(4) The review shall must be conducted by the court ~~without a jury~~ and shall must be confined to the record. In cases of alleged irregularities in procedure before the agency or the Administrative Law Court, not shown in the record, and established by proof thereon may be taken in satisfactory to the court, the case may be remanded to the agency or the Administrative Law Court for action as the court considers appropriate. ~~The court, upon request, shall hear oral argument and receive written briefs.~~

~~(6)~~(5) The court shall may not substitute its judgment for ~~that~~ the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

(B) Review by an administrative law judge of a final decision in a contested case ~~decided by~~

~~a professional and occupational licensing board within the Department of Labor, Licensing, and Regulation, heard in the appellate jurisdiction of the Administrative Law Court, shall must be done in the same manner prescribed in subsection (A) for circuit court judicial review of final agency decisions, with the presiding administrative law judge exercising the same authority as the circuit court court of appeals; provided, however, that a party aggrieved by a final decision of an administrative law judge ~~in such a case~~ is entitled to judicial review of that decision by the ~~circuit court~~ court of appeals under pursuant to the provisions of subsection (A) of this section and pursuant to Section 1-23-610(C).”~~

SECTION 3. Section 1-23-390 of the 1976 Code, as last amended by Act 55 of 1999, is further amended to read:

“Section 1-23-390. An aggrieved party may obtain a review of ~~any~~ a final judgment of the circuit court ~~or the court of appeals under pursuant to~~ this article by taking an appeal in the manner provided by the South Carolina Appellate Court Rules as in other civil cases.”

SECTION 4. Section 1-23-600 of the 1976 Code, as last amended by Act 202 of 2004, is further amended to read:

“Section 1-23-600. (A) A full and complete record must be kept of all contested cases and regulation hearings before an administrative law judge. All testimony ~~shall~~ must be reported, but need not be transcribed unless a transcript is requested by any party. The party requesting a transcript is responsible for the costs involved. Proceedings before administrative law judges are open to the public unless confidentiality is allowed or required by law. The presiding administrative law judge must render the decision in a written order. The decisions or orders of administrative law judges are not required to be published but are available for public inspection unless ~~the~~ confidentiality ~~thereof~~ is allowed or required by law.

(B) An administrative law judge shall preside over all hearings of contested cases as defined in Section 1-23-310 or Article I, Section 22, Constitution of the State of South Carolina, 1895, involving the departments of the executive branch of government as defined in Section 1-30-10 in which a single hearing officer, or an administrative law judge, is authorized or permitted by law or regulation to hear and decide ~~such~~ these cases, except those arising under the Occupational Safety and Health Act, those matters which are otherwise provided for in Title 56, those matters arising under the Consolidated Procurement Code, those matters heard by the Public Service Commission, the Employment Security Commission, the Workers’ Compensation Commission, or ~~those~~ other cases or hearings which are prescribed for or mandated by federal law or regulation, unless otherwise by ~~law~~ statute or regulation specifically assigned to the jurisdiction of the Administrative Law Court.

(C) All requests for a hearing before the Administrative Law Court must be filed in accordance with the court’s rules of procedure. Any party that files a request for a hearing with the Administrative Law Court must simultaneously serve a copy of the request on the affected agency. Upon the filing of the request, the chief judge shall assign an administrative law judge to the case.

(D) An administrative law judge also shall preside over all ~~hearings of appeals from final decisions of contested cases before professional and occupational licensing boards or commissions within the Department of Labor, Licensing and Regulation, or as otherwise provided by law, pursuant to Section 1-23-380 pursuant to the Administrative Procedures Act, Article I, Section 22, Constitution of the State of South Carolina, 1895, or another law, except that an appeal from a final order of the Public Service Commission and the State Ethics Commission is to the Supreme Court or the court of appeals as~~

provided in the South Carolina Appellate Court Rules, an appeal from the Procurement Review Panel is to the circuit court as provided in Section 11-35-4410, an appeal from the Workers' Compensation Commission is to the circuit court as provided in Section 42-17-60, and an appeal from the Employment Security Commission is to the circuit court as provided in Section 41-35-750.

(E) Notwithstanding another provision of law, a state agency authorized by law to seek injunctive relief may apply to the Administrative Law Court for injunctive or equitable relief pursuant to Section 1-23-630. The provisions of this section do not affect the authority of an agency to apply for injunctive relief as part of a civil action filed in the court of common pleas.

(F) Notwithstanding another provision of law, the Administrative Law Court has jurisdiction to review and enforce an administrative process issued by a department of the executive branch of government, as defined in Section 1-30-10, such as a subpoena, administrative search warrant, cease and desist order, or other similar administrative order or process. A department of the executive branch of government authorized by law to seek an administrative process may apply to the chief administrative law judge or his designee to issue or enforce an administrative process. A party aggrieved by an administrative process issued by a department of the executive branch of government may apply to the chief administrative law judge for relief from the process as provided in the Rules of the Administrative Law Court.

(G)(1) This subsection applies to timely requests for a contested case hearing pursuant to this section of decisions by departments governed by a board or commission authorized to exercise the sovereignty of the State.

(2) A request for a contested case hearing for an agency order stays the order. A request for a contested case hearing for an order to revoke or suspend a license stays the revocation or suspension. A request for a contested case hearing for a decision to renew a license for an ongoing activity stays the renewed license, the previous license remaining in effect pending completion of administrative review. A request for a contested case hearing for a decision to issue a new license stays all actions for which the license is a prerequisite; matters not affected by the request may not be stayed by the filing of the request. Requests for contested case hearings challenging only the amount of fines or penalties must be deemed not to affect those portions of orders imposing substantive requirements.

(3) The general rule of subsection (F)(2) does not stay emergency actions taken by an agency pursuant to an applicable statute or regulation.

(4) After a contested case is initiated before the Administrative Law Court, any party may move before the presiding administrative law judge to lift the stay imposed pursuant to this subsection.

(5) A final decision issued by the Administrative Law Court in a contested case may not be stayed except by order of the Administrative Law Court, the court of appeals, or in cases when Section 1-23-610(A) applies, the appropriate board or commission.

(6) Nothing contained in this subsection constitutes a limitation on the authority of the Administrative Law Court to impose a stay as otherwise provided by statute or by rule of court."

SECTION 5. Section 1-23-610 of the 1976 Code, as added by Act 181 of 1993, is amended to read:

"Section 1-23-610. (A) For quasi-judicial review of any final decision of an administrative law judge of cases involving departments governed by a board or commission authorized to exercise the sovereignty of the State, except the Department of Natural Resources and the Department of Health and Environmental Control, a petition by an aggrieved party must be filed with the appropriate

board or commission and served on the opposing party not more than thirty days after the party receives the final decision and order of the administrative law judge. Appeal in these matters is by right. A party aggrieved by a final decision of a board in such a case is entitled to judicial review of that decision by the ~~circuit court~~ Court of Appeals under the provisions of (A) of this section ~~and pursuant to Section 1-23-610(C).~~

(B) For judicial review of ~~any a~~ final decision of an administrative law judge of cases ~~involving departments governed by the single director in which review is not governed by subsection (A), including cases involving the Department of Natural Resources and the Department of Health and Environmental Control,~~ a petition notice of appeal by an aggrieved party must be served and filed with the ~~Circuit court~~ Court of Appeals as provided in the South Carolina Appellate Court Rules in civil cases and served on the opposing party not more than thirty days after the party receives the final decision and order of the administrative law judge. Appeal in these matters is by right.

(C) ~~For judicial review of any final decision of an administrative law judge of cases involving professional and occupational licensing boards within the Department of Labor, Licensing, and Regulation, a petition by an aggrieved party must be filed with the Circuit Court and served on the opposing party not more than thirty days after the party receives the final decision and order of the administrative law judge. Appeal in these matters is by right.~~

The review of the administrative law judge's order must be confined to the record. The reviewing tribunal may affirm the decision or remand the case for further proceedings; or it may reverse or modify the decision if the substantive rights of the petitioner has been prejudiced because of the finding, conclusion, or decision is:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

(D) Where appropriations in the annual general appropriations act, or where fees, fines, forfeitures, or revenues imposed or collected by agencies or commissions were required to be used for the hearing of contested cases, ~~such these~~ appropriations or monies must continue to be used for these purposes after the effective date of this article.”

SECTION 6. Section 1-23-650 of the 1976 Code, as last amended by Act 359 of 1998, is further amended to read:

“Section 1-23-650. (A) Rules governing the internal administration and operations of the ~~administrative law judge division shall~~ Administrative Law Court must be:

- (1) proposed by the chief judge of the division court and adopted by a majority of the judges of the division court; or
- (2) proposed by any judge of the division court and adopted by seventy-five percent of the judges of the division court.

(B) Rules governing practice and procedure before the division court which are:

- (1) consistent with the rules of procedure governing civil actions in courts of common pleas; and

(2) not otherwise expressed in Chapter 23 of Title 1 of the 1976 Code; shall upon approval by a majority of the judges of the ~~division~~ court must be promulgated by the ~~division~~ court and ~~shall be~~ are subject to review as are rules of procedure promulgated by the Supreme Court under Article V of the Constitution.

(C) All hearings before an administrative law judge must be conducted exclusively in accordance with the rules of procedure promulgated by the court pursuant to this section. All other rules of procedure for the hearing of contested cases or appeals by individual agencies, whether promulgated by statute or regulation, are of no force and effect in proceedings before an administrative law judge.”

SECTION 7. Section 1-23-660 of the 1976 Code is amended to read:

~~“Section 1-23-660. Any contested case docketed for hearing before a board or commission abolished by this act shall continue to be under the jurisdiction of such board or commission until the case reaches final disposition at a hearing, with any ruling or adjudication of the board or commission binding. The rules of procedure and review for such boards or commissions in effect on the date of filing of the pending action shall remain in effect until the final disposition of the pending action, other provisions of this chapter notwithstanding. Where a contested case pending before a board or commission abolished by this act is continued under the jurisdiction of such board or commission as provided in this section and where that board or commission is abolished as provided by this act, that board or commission notwithstanding such provision abolishing it shall nevertheless continue in existence for the sole purpose of conducting and bringing to final disposition all such cases. Where any member of that board or commission has assumed another office after the abolition of that board or commission, he shall be considered an ex officio member of his former board or commission for the purposes of this paragraph. Any member of a board or commission abolished who continues to serve in the manner and for the purposes provided by this paragraph is entitled to receive only that mileage, per diem, and subsistence paid to members of state boards, commissions, and committees. There is created within the Administrative Law Court the Division of Motor Vehicle Hearings. The Chief Judge of the Administrative Law Court shall serve as the Director of the Division of Motor Vehicle Hearings. The duties, functions, and responsibilities of all hearing officers and associated staff of the Department of Motor Vehicles are devolved upon the Administrative Law Court effective January 1, 2006. The hearing officers and staff positions, together with the appropriations relating to these positions, are transferred to the Division of Motor Vehicle Hearings of the Administrative Law Court on January 1, 2006. The hearing officers and staff shall be appointed, hired, contracted, and supervised by the Chief Judge of the court and shall continue to exercise their present Department of Motor Vehicle functions, duties, and responsibilities under the auspices of the Administrative Law Court as directed by the Chief Judge and shall perform such other functions and duties as the Chief Judge of the court shall prescribe. All employees of the division shall serve at the will of the Chief Judge. The Chief Judge is solely responsible for the administration of the division, the assignment of cases, and the administrative duties and responsibilities of the hearing officers and staff. Notwithstanding the foregoing, and in addition to the assistant provided for in Section 1-23-580(B), the Administrative Law Court must hire and supervise a law clerk or other assistant solely to assist the judges who hear Department of Motor Vehicle Hearing appeals with the administration of those appeals. The law clerk or other assistant must be selected by a majority of the judges who hear Department of Motor Vehicle Hearing appeals. The position must be funded from the appropriations to hear cases from the Department of Motor Vehicles and shall be filled before the support staff of the division shall assume their functions and duties with the court.~~

The Budget and Control Board shall assist with all necessary actions to be taken to accomplish

this transfer in consultation with the agency head of the transferring and receiving agencies.

Notwithstanding another provision of law, the hearing officers shall conduct hearings in accordance with Chapter 23 of Title 1, the Administrative Procedures Act, and the rules of procedure for the Administrative Law Court, at suitable locations as determined by the Chief Judge. The Department of Motor Vehicles shall continue to provide the existing locations within their facilities for such hearings as prescribed by the Chief Judge. The hearing officers are bound by the Code of Judicial Conduct, as contained in Rule 501 of the South Carolina Appellate Court Rules. Appeals from decisions of the hearing officers must be taken to the Administrative Law Court pursuant to the court's appellate rules of procedure. The Chief Judge shall not hear any appeals from these decisions. Nonetheless, the Chief Judge is not disqualified from, and remains responsible for, adjudicating cases under Section 1-23-600."

SECTION 47. Section 44-1-50 of the 1976 Code is amended to read:

"Section 44-1-50. The board may conduct such ~~hearings~~ administrative reviews as may be required by law, as considered necessary by the board to render a final agency determination in matters involving the issuance, denial, renewal or revocation of permits, licenses, or other actions of the department which may give rise to a contested case, and as necessary to hear appeals from decisions of administrative law judges pursuant to Chapter 23 of Title 1.

The board shall provide for the administrative organization of the department and shall consolidate and merge existing duties, functions, and officers of the former agencies as may be necessary for economic and efficient administration. Provided, however, that the board may appoint such advisory boards as it considers necessary to carry out the functions of Sections 44-1-10 to 44-1-70, and there shall be provided a compensation for their services as provided by the law for members of boards and commissions."

SECTION 48. Chapter 1, Title 44 of the 1976 Code is amended by adding:

"Section 44-1-60. (A) All department decisions involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other actions of the department which may give rise to a contested case shall be made using the procedures set forth in this section.

(B) The department staff shall comply with all requirements for public notice, receipt of public comments and public hearings before making a department decision. To the maximum extent possible, the department shall use a uniform system of public notice of permit applications, opportunity for public comment and public hearings.

(C) The initial decision involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other action of the department shall be a staff decision.

(D) In making a staff decision on any permit, license, certification or other approval, the department staff shall take into consideration all material comments received in response to the public notice in determining whether to issue, deny or condition such permit, license, certification or other approval. At the time that such staff decision is made, the department shall issue a department decision, and shall base its department decision on the administrative record which shall consist of the application and supporting exhibits, all public comments and submissions, and other documents contained in the supporting file for the permit, license, certification or other approval. The administrative record may also include material readily available at the department, or published materials which are generally available and need not be physically included in the same file as the rest of the record as long as such materials are specifically referred to in the department decision. The department decision need not be issued for routine permits for which no adverse public comments have been received.

(E) Notice of the department decision must be sent to the applicant, permittee, licensee, and affected persons who have asked to be notified by certified mail, return receipt requested. The department decision becomes the final agency decision fifteen days after notice of the department decision has been mailed to the applicant, unless a written request for final review is filed with the department by the applicant, permittee, licensee, or affected person.

(F) No later than sixty days after the date of receipt of a request for final review, a final review conference must be conducted by the Board, its designee, or a committee of three members of the Board appointed by the chair. If a final review conference is not conducted within sixty days, the department decision becomes the final agency decision, and an applicant, permittee, licensee, or affected person may request a contested case hearing before the Administrative Law Court, in accordance with the Administrative Procedures Act, within thirty days after the deadline for the final review conference. The department shall set the place, date, and time for the conference; give the applicant and affected persons at least ten days' written notice of the conference; and advise the applicant that evidence may be presented at the conference. The final review conference must be held as follows:

(1) Final review conferences are open to the public; however, the officers conducting the conference may meet in closed session to deliberate on the evidence presented at the conference. The burden of proof in a conference is upon the moving party. During the course of the final review conference, the department must explain the department decision and the materials relied upon in the administrative record to support the department decision. The applicant or affected party shall state the reasons for protesting the department decision and may provide evidence to support amending, modifying, or rescinding the department decision. The department may rebut information and arguments presented by the applicant or affected party and the applicant or affected party may rebut information and arguments presented by the department. Any final review conference officer may request additional information and may question the applicant or affected party, the department, and anyone else providing information at the conference.

(2) After the administrative review, the Board, its designee, or a committee of three members of the Board appointed by the chair shall issue a written final agency decision based upon the evidence presented. The decision may be announced orally at the conclusion of the administrative review or it may be reserved for consideration. The written decision must explain the bases for the decision and inform the parties of their right to request a contested case hearing before the Administrative Law Court. In either event, the written decision must be mailed to the parties no later than thirty days after the date of the administrative review. Within thirty days after the receipt of the decision an applicant, permittee, licensee, or affected person desiring to contest the final agency decision may request a contested case hearing before the Administrative Law Court, in accordance with the Administrative Procedures Act. The court shall give consideration to the provisions of Section 1-23-330 regarding the department's specialized knowledge.

(3) Prior to the initiation of the final conference, an applicant, permittee, licensee, or affected person must be notified of their right to request a transcript of the proceedings of the final conference. If a transcript is requested, the applicant, permittee, licensee, or affected person making the request must be responsible for all costs.

(G) Applicants, permittees, licensees, and affected persons are encouraged to engage in mediation during the final agency review process.

(H) The department may promulgate regulations providing for procedures for final administrative reviews.

(I) Any statutory deadlines applicable to permitting and licensing programs administered by the Department shall be extended to allow for this final review process.”

SECTION 53. This act is intended to provide a uniform procedure for contested cases and appeals from administrative agencies and to the extent that a provision of this act conflicts with an existing statute or regulation, the provisions of this act are controlling.

SECTION 55. The repeal or amendment by this act of any law, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

SECTION 56. If any section, subsection, item, subitem, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this act, and each and every section, subsection, item, subitem, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, items, subitems, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

SECTION 57. This act takes effect on July 1, 2006 and applies to any actions pending on or after the effective date of the act. No pending or vested right, civil action, special proceeding, or appeal of a final administrative decision exists under the former law as of the effective date of this act, except for appeals of Department of Health and Environmental Control Ocean and Coastal Resource Management and Environmental Quality Control permits that are before the Administrative Law Court on the effective date of this act. For those actions only, the department shall hear appeals from the administrative law judges in accordance with the former law. Thereafter, any appeal of those actions shall proceed as provided in this act for review. For all other actions pending on the effective date of this act, the action proceeds as provided in this act for review.

---XX---