

Environmental Alert

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New Jersey Supreme Court Clarifies Rights of Third-Parties to Adjudicatory Hearings

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On January 11, 2006, the New Jersey Supreme Court issued two companion decisions that clarify the limited right of third-parties to contest permit applications at adjudicatory hearings. See *In re NJPDES Permit No. NJ0025241 (A-116-04)*, and *IMO Freshwater Wetlands Statewide General Permits (A-115-04)*. A public notice and comment period is required prior to the issuance of permits. During that period, third-party objectors have the opportunity to provide comments to the permitting agency detailing the bases for any objections. Additionally, if the permit applicant or the permitting agency seeks an adjudicatory hearing, then third-party objectors generally may intervene in the adjudicatory hearing. If, however, no adjudicatory hearing is requested by the parties, then third-parties have limited rights to obtain an adjudicatory hearing. With these new decisions, the Court has clarified the limited nature of those third-party rights.

In the *Freshwater Wetlands* decision, neighboring property owners sought to challenge the issuance of a general permit to fill isolated wetlands. The neighbors alleged concern regarding potential flooding of their properties

caused by filling of the wetlands. They requested an adjudicatory hearing to prove the increased flooding risk. The NJDEP denied their request, and they appealed to the Appellate Division of the Superior Court. That court concurred with the NJDEP's decision, and they appealed to the Supreme Court.

The Supreme Court noted that to obtain an adjudicatory hearing a third-party must show "a particularized property interest sufficient to require a hearing on constitutional...grounds." In other words, to obtain an adjudicatory hearing, third-parties must show that the administrative review procedures have failed to satisfy traditional notions of due process. In that case, the issue of flood protection was properly before the town Planning Board, not the NJDEP, and the neighbors had the opportunity to challenge the proposed flood planning at the Planning Board level. Indeed, the neighbors succeeded in convincing the Planning Board to deny subdivision approval based on the applicant's inadequate flood planning. Consequently, the Supreme Court affirmed the denial of the request for an adjudicatory hearing



because it found that the neighbors' due process rights had been satisfied in another venue (before the Planning Board). Thus, the courts will look at the totality of the factual and procedural record "including the record of separate, but related, cases" in determining whether due process has been satisfied.

In the second case, Clean Ocean Action (COA) sought party status in connection with a Water Pollution Control Act (WPCA) permit application submitted by the City of Asbury Park. The WPCA contains a provision whereby third-party entities with "party" status may obtain adjudicatory hearings, even if they do not meet the particularized property interest standard. To achieve party status, a third-party must meet criteria enunciated in the statute. The first criterion requires the prospective party to raise objections during the public comment period. Another requires that their objections are "likely to affect the permit determination."

COA met the first criterion by properly objecting to the permit. The NJDEP, however, found that COA could not have met the "likely to affect the permit determination" standard since the NJDEP had in fact not changed its permit determination. The Supreme Court affirmed that the NJDEP decision. The Supreme Court found that the NJDEP had fairly evaluated the comments, rejected them, and would not likely

change its position. And, the Supreme Court found that there were no significant factual disputes. Thus, the Appellate Division will only overturn the NJDEP's issuance of a WPCA permit if a third-party challenger has submitted substantive, factual objections in the notice and comment period, and the NJDEP has arbitrarily failed to consider adequately those factual objections in its decision-making.

These decisions will likely speed the resolution of administrative decisions "at the administrative level" because third-parties will have less ability to challenge agency decision-making at an adjudicatory hearing. These decisions, however, do not fetter the rights of third-parties to appeal final administrative decisions to the Appellate Division. Moreover, third-parties must show the agency decision is arbitrary because of appellate deference to the agency, so the ability of third-parties to overturn agency decisions will be lessened.

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