

# **Navigating the Permitting Process Part II: Legal Issues**

**Carolinas Air Pollution  
Control Association**

**Presentation by:  
Beth Partlow**

**Law Offices of Elizabeth B. Partlow, LLC  
Columbia, South Carolina**



# Presentation Outline

- Administrative Procedure Act
- Contested Case Petitions
- Hearings in the Administrative Law Court/Office of Administrative Hearings
- Judicial Review
- Conclusions



# Administrative Procedure Act

- **Contested Case**

- **NC:** a proceeding involving a dispute between an agency and a person involving that person's rights, duties, or privileges. N.C.G.S. § 150B-2 (2).
- **SC:** a proceeding including, but not restricted to, ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing. S.C. Code Ann. §1-23-310(3)



# “Legal rights, duties, or privileges”

- Permittee
- Neighbors
- Citizen groups



# Administrative Procedure Act

- North Carolina:

“It is the policy of this state that any dispute between an agency and another person that involves the person’s rights, duties, or privileges. . .should be settled through informal procedures. . . .If the agency and the other person do not agree to a resolution of the dispute through the informal procedures, either the agency or the person may commence an administrative proceeding to determine the person’s rights, duties, or privileges, at which time the dispute becomes a ‘contested case.’” N.C.G.S. 150B-22.



# Commencing the Contested Case— North Carolina

- **File in Office of Administrative Hearings**
  - **Permittee:** within 30 days after DAQ notifies the applicant or permittee of its decision
  - **“Person aggrieved”:** within 30 days after DAQ provides notice of its decision on a permit application, as provided in G.S. 150B-23(f), or by posting the decision on a publicly available Web site.



# Commencing the Contested Case— South Carolina

- **DHEC Board review first**

- Staff decision becomes the final agency decision fifteen calendar days after notice of the staff decision has been mailed to the applicant, unless a written request for final review accompanied by a filing fee is filed with the department by the applicant, permittee, licensee, or affected person
- DHEC Board has 60 days to hold a final review conference



# Commencing the Contested Case— South Carolina

- Contents of petition for Board review
  - “The applicant or affected party shall state the reasons for protesting the staff decision and may provide evidence to support amending, modifying, or rescinding the staff decision.”  
S.C. Code Ann. § 44-1-60 (F)(1).
  - Recent ALJ opinion dismissed neighbor’s request for contested case hearing based in part on failure to raise issues to DHEC Board  
*Weaver v. DHEC* (No. 19-ALJ-07-0084-CC filed Aug. 16, 2019)



# Commencing the Contested Case— South Carolina

- **File petition in Administrative Law Court within 30 days after**
  - (1) notice is mailed to the applicant, permittee, licensee, and affected persons that the board declined to hold a final review conference; or
  - (2) the sixty-day deadline to hold the final review conference lapses and no conference has been held; or
  - (3) the final agency decision resulting from the final review conference is received by the parties.



# Must you have a lawyer to file a contested case petition?

- **Individuals—no.**
- **Corporations**
  - **South Carolina: yes.**
  - **North Carolina: no.**
    - A business entity may be represented by (i) an officer, (ii) a manager or member-manager (LLC) (iii) an employee who gets a Form W-2, if the business entity authorizes the representation in writing, or (iv) an owner of the business entity, if the business entity authorizes the representation in writing and if the owner's interest in the business entity is at least 25%.
    - Form provided by OAH



# North Carolina: Is the permit stayed by filing the appeal?

- It depends.
  - If filed by the permit applicant or permittee, the permit decision is stayed.
  - If filed by a “person aggrieved” other than the permit applicant or permittee, the permit decision is not automatically stayed. The Administrative Law Judge may order a stay.



# South Carolina: Is the permit stayed by filing the appeal?

- Yes.
  - 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; however, matters not affected by the request may not be stayed by the filing of the request. If the request is filed for a subsequent license related to issues substantially similar to those considered in a previously licensed matter, the license may not be automatically stayed by the filing of the request. If the requesting party asserts in the request that the issues are not substantially similar to those considered in a previously licensed matter, then the license must be stayed until further order of the Administrative Law Court.

Note that this provision applies to “timely” requests for hearing.

S.C. Code Ann. § 1-23-380 (H).



# South Carolina: Is the permit stayed by filing the appeal? (cont.)

- Procedure to lift stay:
  - Motion 90 days after contested case initiated.
  - Hearing on motion within 30 days.
  - Court shall lift stay unless party requesting hearing proves (i) the likelihood of irreparable harm if the stay is lifted, (ii) the substantial likelihood that the party requesting the contested case and stay will succeed on the merits of the case, (iii) the balance of equities weigh in favor of continuing the stay, and (iv) continuing the stay serves the public interest.
  - Court must issue order not later than 15 days after hearing.



# Presenting a Case in the ALC or OAH

- Prehearing statements
- Discovery
- Witnesses and subpoenas
- Expert witnesses
- Sworn testimony and cross-examination



# Reasons to overturn agency decision-North Carolina

- Agency exceeded its authority or jurisdiction.
- Agency acted erroneously.
- Agency failed to use proper procedure.
- Agency acted “arbitrarily and capriciously.”
- Agency failed to act as required by law.



# Reasons to overturn agency decision-South Carolina

- Administrative Law Judge is finder of fact and makes a *de novo* determination on the issues raised by the petition for contested case hearing



# Review of Administrative Decision— South Carolina

- Within 30 days of receipt of decision of ALJ, file notice of appeal in Court of Appeals following SC Appellate Court rules.
- No automatic stay except that the serving 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; matters not affected by the notice of appeal are not stayed. ALJ or Court of Appeals may order stay.



# Review of Administrative Decision— South Carolina (cont.)

Review is on the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court may affirm the decision or remand the case, or it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the decision is:

- (1) in violation of constitutional or statutory provisions;
- (2) in excess of the statutory authority of the agency;
- (3) made upon unlawful procedure;
- (4) affected by other error of law;
- (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.



# Review of Administrative Decision— North Carolina

- Within 30 days of service [not receipt] of OAH order, file petition in Superior Court in county where person aggrieved resides
- Petition must explicitly state what exceptions are taken to the decision or procedure and what relief the petitioner seeks



# **Review of Administrative Decision— North Carolina**

Court review is on the record. The court may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:

1. In violation of constitutional provisions;
2. In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
3. Made upon unlawful procedure;
4. Affected by other error of law;
5. Unsupported by substantial admissible evidence in view of the entire record as submitted; or
6. Arbitrary, capricious, or an abuse of discretion.



# Conclusion and Summary

- You must go through the administrative process to challenge the terms of a permit. Be careful of deadlines.
- Review of administrative decisions in the courts is limited in scope. Put on your best case in the administrative tribunal.
- A case may be settled at any point in the process.

