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CLIENT ALERT

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New Maryland Law Changes Key Judicial Review Provisions

Maryland Governor Martin O'Malley signed HB 1549 into law on May 19, 2009, changing Maryland law regarding judicial review of permitting decisions in two important ways. First, administrative challenges to many permit decisions will no longer be allowed and review will only be available in Court — in the state Circuit Court where the proposed activity will occur. Second, the new law broadens the provisions for parties seeking standing to challenge permits, thereby allowing more parties and stakeholders the opportunity to file lawsuits challenging state permitting decisions in Court.

The law, entitled "Standing - Miscellaneous Environmental Protection Proceedings and Judicial Review," applies to permitting and licensing decisions by the Maryland Department of the Environment (MDE) and the Board of Public Works, becomes effective January 1, 2010.

Administrative Review No Longer Available and Changes to Judicial Review Procedures

Under the new legislation, challenges to permits issued (or denied) under the Maryland Environmental Article must be brought in the Circuit Court for the county where the proposed activity will occur when the challenges pertain to certain types of permits or licenses. The law prohibits challenges to these permits/licenses at the administrative level — specifically prohibiting a contested case hearing and requiring that a petition for judicial review must be filed within thirty (30) days of the publication of a notice of final determination.

The new law applies to the following permitting/licensing matters: ambient air quality control, landfills/incinerators, discharge pollutants, structures used for sewage sludge storage or distribution, controlled hazardous substance facilities, hazardous materials facilities, low-level nuclear waste facilities, water appropriation and use, nontidal wetlands, gas and oil drilling, surface mining, private wetlands, and licenses to dredge and fill on State wetlands.

Under the law, judicial review will be based on the administrative record created before the Department/Board at the issuance stage and will be limited to objections raised during the public comment period, unless the objections were not "reasonably ascertainable" during the public comment period or arose after the comment period. Section 1-606 also explicitly defines what constitutes the record for review:

- the permit application and any supporting data;
- any draft permit issued by the agency;

- any notice of intent from the agency to deny/terminate the permit;
- any fact sheet explaining the basis for the agency determination;
- all documents mentioned in the fact sheet explaining basis for the determination;
- all non-privileged/non-confidential information contained in the supporting file for the permit;
- all comments submitted during the comment period and/or on the draft permit;
- any tape/transcript of any public hearings held on the application; and
- any response by the agency to submitted comments.

The impacts of these changes on the review provisions of permitting and licensing decisions are varied. The new procedures will expedite the review process by cutting out the intervening step of the contested case hearing which is beneficial when the permittee is under a time constraint for a new permit. Removal of the intervening administrative hearing process will also save time and reduce costs. However, the new review provisions mean that the record is essentially closed at the point of permit issuance. This will make it more difficult to prevail on judicial challenges because there is no real opportunity to test the expertise of the decisionmaker and courts will tend to defer to the agency in the absence of compelling evidence that the agency was wrong. This will put a real premium on creating an extensive and complete administrative record from the time the permit application is filed to issuance of the final permit.

Changes to the Standing Provisions — Easier Access to Court for Groups Seeking to Challenge Permits

In enacting this new law, the legislature sought to broaden the standing provisions in current Maryland law to comport with standing thresholds established under federal law. Currently, Maryland law limits standing to those individuals "aggrieved" by an agency decision. In the context of challenging permit decisions, Maryland courts, in the past, have required an individual to own or have an ownership interest in land adjacent to or within sight/sound range of the property that is the subject of the permit. Maryland courts have also denied associations or organizations standing to sue where it had no property interest separate and distinct from its members. The legislation now provides that a person (including associations/organizations) can seek judicial review of the agency decision if: a) the federal standing thresholds are met, and b) the party is either the applicant or participated in the public comment process by submitting written or oral comments (unless, of course, no opportunity for public participation was provided). Thus, no longer will environmental groups be required to show an ownership interest in order to challenge a permit and merely attending a public meeting or sending a letter during the public comment process will provide standing for the group. Consequently, the number of environmental groups filing lawsuits to challenge permits is expected to increase.

For more information about this topic, please contact Jim Elliott. Hunton & Williams LLP provides legal services to corporations, financial institutions, governments, and individuals as well as to a broad array of other entities. We regularly advise clients on various state and federal permitting issues.

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