

Northern Ohio Chapter
Air & Waste Association Management
Fall, 2005 Conference

Wednesday, November 9, 2005
Lorain County Carlisle Reservation Visitors Center

Permit Dispute Resolution

Process & Strategy For Successful Ohio EPA Permit Appeals

Frank J. Reed, Jr.

Environmental Legal Counsel

Benesch, Friedlander, Coplan & Aronoff, LLP

What is the general procedure for filing an appeal before the Environmental Review Appeals Commission?

- Statutory Framework of ERAC

The Environmental Review Appeals Commission consists of three members appointed by the Governor with the advice and consent of the senate. Terms of office are six years. Each member must have "extensive experience in pollution control and abatement technology, ecology, public health, environmental law, economics of natural resource development, or related fields." At least one member shall be an attorney. No more than 2 members may be the same political party. At least two members shall represent the public interest. R.C. 3745.02

- The Commission shall appoint a secretary and other staff as necessary to perform its duties. The Commission may retain the services of experts, consultants, and intermittent help. The environmental protection agency shall furnish clerical and stenographic services. Two members shall constitute a quorum. The Commission shall keep a record of its proceedings. Every two years, the Commission shall elect a Chairperson and Vice-Chairperson. The Commission shall submit its own budget and appropriations request separate from Ohio EPA. R.C. 3745.02.

- The Commission must adopt regulations governing the procedure to be followed for hearings before it. The regulations are not governed by R.C. 119, but rather are governed by statute (R.C. 3745.03). The Commission must keep a current register of all appeals filed, hearings pending, or any final action.

Definitions

- "Any person" means "any individual, any partnership, corporation, association, political subdivision, instrumentality, or agency of a state, whether or not the individual or legal entity is an applicant for or holder of a license, permit, or variance from the environmental protection agency, and includes any department, agency, or instrumentality of the federal government that is an applicant for or holder of a license, permit, or variance from the environmental protection agency." R.C. 3745.04.

- "Action" or "act" means "adoption, modification, repeal of a rule or standard, the issuance, modification, or revocation of any lawful order other than an emergency order, and the issuance, denial, modification, or revocation of a license, permit, lease, variance, or certificate, or the approval or disapproval of plans and specifications." R.C. 3745.04.

- "Any person who was a party to a proceeding before the director of environmental protection agency may participate in an appeal of the environmental review appeals commission for an order vacating or modifying the action of the director or local board of health, or ordering the director or board of health to perform an act. The environmental review appeals commission has exclusive original jurisdiction over any matter that may, under this section, be brought before it."

- The Director is the Appellee. The person appealing to the commission is the Appellant. If the appeal involves a license to operate a disposal site or facility, the local board of health or the director of environmental protection, and any party to a proceeding substantially supporting the finding shall be known as the Appellee.

- Requirements for Notice of Appeal

The Appeal must be in writing and must state, "the action complained of and the grounds upon which the appeal is based." The appeal must be filed with the commission within thirty days after notice of the action. The notice of appeal must be filed via U.S. mail or in person. No filings via facsimile will be accepted. Ohio Adm. Code Rule 3746-5-06. The appeal must be served upon the Appellant within 3 days after being filed with the Commission. The appeal must be accompanied by a filing fee of \$70. The Commission may reduce the fee if the Appellant demonstrates by affidavit that payment of the full fee would cause "extreme hardship." R.C. 3745.04. The Appeal must contain the "assignments of error presented for review and the relief sought on appeal."

- Preparation of the Record

Within 7 days after receipt of the notice of appeal, the director of Ohio EPA, local board of health, state fire marshall, state emergency response commission, or the director of the department of agriculture shall prepare and certify to the commission a record of the proceeding, including "all documents and correspondence, and a transcript of all testimony." R.C. 3745.04. This includes "all papers, exhibits, documents, correspondence, and transcript of proceedings relating to the action." Ohio Adm. Code Rule 3746-5-12(A). By agreement of the parties, the Commission may order an indefinite extension for the filing of the certified record so long as the extension will not prejudice any party or unduly delay the proceedings. Ohio Adm. Code Rule 3746-7-01.

Within 7 days, the Appellee must file an answer responding to the assignments of error either admitting or denying each allegation. Ohio Adm. Code Rule 3746-5-08. For good cause shown, the Commission may extend the time for the filing of any pleading. Ohio Adm. Code Rule 3746-5-09.

- Schedule for Hearing

"Upon the filing of the appeal," the Commission must fix the time and place of the hearing. Such notice must be sent by certified mail at least ten days prior to the hearing. The Commission must hold the hearing within 30 days after the appeal is filed, but the Commission may postpone or continue any hearing. The filing of the appeal does not automatically suspend or stay execution of the action. Any party may file a motion to stay at any time. Ohio Adm. Code Rule 3746-5-13. The director must respond within three days after receipt of such motion. Ohio Adm. Code Rule 3746-5-14. The Commission shall schedule a hearing or oral argument within 8 days after the motion is received by the

Commission, but must give at least 24 hours notice to the parties of the date and time of the hearing. Ohio Adm. Code Rule 3746-5-14. The Commission may require the party seeking a stay post a bond. Before setting the amount of the bond, the Commission must take evidence by affidavit or by hearing as to the "pecuniary losses or required expenditure to prevent losses." Neither the "total value of any project," the "potential revenue loss to a governmental unit," nor the "ordinary on-going expenses of the project shall be considered as pertinent nor determinative of the amount of the bond.

Rather, the amount shall be determined exclusively by the “extraordinary expenditures or losses incident to the suspension of the project resulting from a stay.” Ohio Adm. Code Rule 3746-5-15. the bond may be in the form of a pledge of property or security owned. The Commission may suspend or stay execution “pending an immediate determination of the appeal without interruption by continuances, other than for unavoidable circumstances.” R.C. 3745.04

- Pre-Hearing and Discovery

The Commission will generally conduct a "pre-hearing conference" conducted by a single member of the Commission to "simplify and clarify the issues, discuss any need to amend the notice of appeal, obtain stipulations of undisputed fact or authenticate documents, issue subpoenas, take depositions, disclose the names of fact and expert witnesses, exchange documents, or any other matter to avoid undue repetition or complication in the presentation of evidence." Ohio Adm. Code Rule 3746-5-25.

- The Appellee has the burden of proceeding where it has "revoked a license or permit, where it orders a party to take affirmative action to abate air or water pollution or any other condition or nuisance, where it seeks to engage in activities which are objected to as environmentally harmful. The Appellant has the burden of proceeding where there is a refusal to grant, issue, or reissue any license or permit or to approve or disapprove of any plans, standards, regulations, specifications, or action, where there is a refusal to grant any variance from a regulation, conditional, temporary, or supplemental permit, or where a party protests the issuance of a license or permit, or objects to a settlement between the state and private party. Ohio Adm. Code Rule 3746-5-30.

- The parties may engage in discovery that appears "reasonably calculated to lead to the discovery of admissible evidence." The Commission may order the parties to submit a case management schedule establishing discovery deadlines. Parties may take depositions, serve interrogatories, requests for production of documents, or requests for admissions (all of which must be answered within 20 days). A party may subpoena a witness, but must issue such subpoena at least 10 business days prior to any hearing. Ohio Adm. Code Rule 3746-6-06. [Ohio Adm. Code Rule 3746-7-04 states seven business days]. Any party may file a motion with the Commission which shall state with particularity the grounds on which it is based, and set forth the relief sought. Any party may file a response within 10 days after service of the motion. Ohio Adm. Code Rule 3746-6-09.

- If the Commission is reviewing a matter that is adjudicated by the director of environmental protection (R.C. 119.09, R.C. 119.10), the Commission is confined to the record as certified by the director. Normally, new evidence is not permitted. Only if there is newly discovered evidence and the Commission is convinced that the evidence could not have been ascertained prior to the hearing with reasonable diligence, will such new evidence be admitted. See also Ohio Adm. Code Rules 3746-9-01 through 3746-9-05.

- Submission of Evidence

Evidence may be submitted in the form of affidavits, or depositions, so long as it is served three days prior to the hearing. Ohio Adm. Code Rule 3746-5-23. The Commission may inspect any site, including any body of water, industrial plant, building, or other premises, if the Commission believes visiting the premises will have "probative value."

- De Novo Hearings

If no adjudication hearing was conducted, the Commission shall conduct a hearing *de novo* on the appeal. The Commission may, at the request of any party, issue subpoenas for witnesses or books, papers, correspondence, memoranda, agreements, or other documents or records relevant to material. The fees and mileage of witnesses as well as the subpoenas shall be served and returned in the same as those allowed by the common pleas court in criminal cases.

- A witness shall testify under oath administered by a member of the Commission. A witness shall be permitted to be accompanied, represented, and advised by an attorney, whose participation shall be limited to protection of the witness, and may not examine or cross-examine witnesses.

- Trade Secret Designations

Any material designated as a "trade secret" or would divulge "methods or processes entitled to protection" shall be treated as confidential. A party may move the Commission for an order such that any portion of the hearing that relates to trade secrets be "closed" to the public. Ohio Adm. Code Rule 3746-3-06. Attorneys who practice before the Commission must conform to the standards of ethical conduct required in the courts of the state of Ohio or be found "guilty of disorderly conduct, dilatory tactics, or contemptuous language." Ohio Adm. Code Rule 3746-3-08.

- Intervention by other Parties

Any person may seek to "intervene" if the person can demonstrate that his or her participation will "assist in the determination of the issue in question, will not unnecessarily delay the proceeding, and can demonstrate that the person has interest that is or may be inadequately represented by the current parties." Ohio Adm. Code Rule 3746-5-04.

- Standard of Review

If the Commission finds that the action was lawful and reasonable, it shall affirm the action. If the Commission finds the action was unlawful or unreasonable, it shall make a written order vacating or modifying the action. No action of the commission shall be valid unless it has the concurrence of at least two members. Two members constitute a quorum. Any member of the Commission may write a concurring or dissenting opinion. Ohio Adm. Code Rule 3746-3-03. The Commission may order the parties to submit proposed findings of fact and conclusions of law. Ohio Adm. Code Rule 3746-11-04.

A copy of the decision must be mailed by certified mail. R.C. 3745.05. In the event the Commission issues a final order vacating and returning any matter to the agency for further action, such order shall specify the time period which the director shall act. Except in unusual circumstances, such time period shall not exceed thirty days. Within 7 days, the agency may seek an extension of time to comply with the Commission's order. Ohio Adm. Code Rule 3746-11-06.

- Appeal to Court

Any party adversely affected by an order of the environmental review appeals Commission may appeal to the court of appeals of Franklin County. If the appeal arises from an alleged violation of law or regulation, the party may appeal to the judicial district in which the violation was alleged to have occurred. The notice of appeal must be filed with the Commission and the Clerk of courts within 30 days from the date of the decision.

Questions?

Thank you.

Frank J. Reed, Jr.

Environmental Legal Counsel

Benesch, Friedlander, Coplan & Aronoff, LLP

- The filing of the notice of appeal shall not automatically operate as a suspension of the order of the commission. If it appears to the court that an unjust hardship to the appellant will result from the execution of the commission's order, the court may grant a suspension of the order.

- Within 20 days after receipt of the notice of appeal, the Commission must prepare and file a complete record of the proceedings with the Court of Appeals, including a transcript of the testimony. The expense of preparing the transcript shall be taxed as a part of the costs of the appeal. The Court is confined to the record. The Court may grant the admission of additional evidence only when satisfied that such additional evidence is newly discovered and could not have been ascertained with reasonable diligence prior to the hearing.

- Standard of Review

The Court shall affirm the order if it finds that the order is supported by "reliable, probative, and substantial evidence and is in accordance with law." In the absence of such finding, it shall reverse, vacate, or modify the order. R.C. 3745.06.