



Third-Party Challenges to Permits Difficult to Mount, but a Door Remains Open

In several recent cases, the Appellate Division has further defined the ability of third parties to challenge permits, specifically wetlands-oriented permits, by the New Jersey Department of Environmental Protection ("NJDEP"). These cases reinforce the fact that third parties face substantial hurdles arising from the significant judicial deference given to NJDEP, and from the limited constitutional right to a hearing. Another case, of first impression, also forecloses the ability to use the Environmental Rights Act ("ERA") as a vehicle for challenging a permit. Rounding out current caselaw, though, is a decision that supports the third party.

Continuing the long tradition of giving considerable deference to regulatory permitting decisions, the Appellate Division sustained NJDEP's issuance of a Stream Encroachment Permit for a residential complex adjacent to the Passaic River, despite objections by a neighboring municipality on the grounds of anticipated flooding. I/M/O Stream Encroachment Permit No. 1411-90-0006.5, No. A-5976-97T2 (App. Div. Dec. 7, 1999). Finding that NJDEP issued the permit based upon credible evidence and deferring to the agency's application of its own regulations, the court refused to disturb the permit.

In another case, the court upheld NJDEP's issuance of a general wetlands permit in the face of adverse environmental impacts alleged by a third party, where the agency's decision was supported by the evidence. I/M/O Freshwater Wetlands Statewide General Permit No. 1215-94-0003.4, No. A-1602-96T1 (App. Div. Jan. 27, 2000). The court's deference is especially high in reviewing decisions that involve the agency's technical expertise. See Nuckel v. NJDEP, No. A-4378-96T5 (App. Div. Oct. 27, 1999).

Aside from the deference hurdle, third parties seeking to challenge wetlands or coastal program permits have only limited rights to an adjudicatory hearing. For example, in affirming NJDEP's denial of a third-party hearing request to challenge a wetlands Letter of Interpretation and a Transition Area Waiver issued in connection with a proposed housing development, the court found that there was no statutory right to a hearing. Under the Freshwater Wetlands Protection Act, NJDEP has discretion to deny a third-party hearing request. Nuckel v. NJDEP, No. A-

4378-96T5 (App. Div. Oct. 27, 1999). Nor was there a constitutional right to an adjudicatory hearing, held the court, where the challenger merely lived near the proposed development and feared resultant injury to property. Id. Similarly, a neighbor had no statutory or constitutional right to a hearing to contest an individual wetlands permit for construction of an access road to upland property., I/M/O Freshwater Wetlands Individual Permit To Closter Temple Associates, No. A-236-98T2 (App. Div. Nov. 23, 1999).

Perhaps in light of the difficulties confronted by third parties, a plaintiff in another recent case attempted to challenge a wetlands permit through the ERA. The ERA affords standing to private citizens aggrieved by alleged violations of environmental laws to pursue court action against the violators. Faced with this unprecedented use of the ERA, the Appellate Division held that the ERA cannot be used to collaterally attack a permit that was validly issued by NJDEP. Goldstein v. Johnkins, No. A-2977-98T1 (App. Div. Jan. 27, 2000). Rather, third parties must mount grievances under the appropriate procedures, i.e., adjudicatory hearings.

In the midst of these decisions suggesting that third-party challengers will have little success, the Appellate Decision also has been presented with one situation that it found would give rise to a constitutional right to a hearing. In re Issuance of CAFRA Permit 0102-97-0006.2, No. A-1931-98T1 (App. Div. Jan. 25, 2000). In that case, the challenger appealed NJDEP's denial of a request for a trial-type hearing to contest the issuance of three coastal program permits and a freshwater wetlands permit for a proposed roadway. The court agreed with NJDEP that there was no statutory right to a hearing. It determined, however, that the third party had shown a colorable allegation that the roadway's "unreasonable and discriminatory" alignment near one of the challenger's casinos and an adjacent marina operated by the challenger would threaten to "unfairly impair" the visibility of and accessibility to those destination points. That threat, the court held, is the type of "particularized property right or other special interest" that is a prerequisite to a constitutional right to a hearing on that specific claim.

The decision in favor of a third party, when considered alongside the recent decisions reaffirming the court's deference to NJDEP and the limited ability of a third party to challenge the agency's issuance of a permit, offers valuable guidance when analyzing the merits of mounting or opposing a third-party challenge.

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