

Department of Legislative Services

Maryland General Assembly

2002 Session

FISCAL NOTE

House Bill 5

(Delegate Hurson)

Environmental Matters

Education, Health, and Environmental Affairs

Environmental Standing - Judicial Review - Title V Operating Permits

This emergency bill expands standing for judicial review of air quality permit decisions.

Fiscal Summary

State Effect: The bill's requirements could be handled with existing budgeted resources. Failure to enact this bill could result in a significant loss of federal highway funds.

Local Effect: Because the bill is not anticipated to significantly increase the number of cases brought for judicial review relative to previous years, the bill's changes could be handled with the existing budgeted resources of the circuit courts.

Small Business Effect: None.

Analysis

Bill Summary: Except for an applicant who seeks judicial review in accordance with the Administrative Procedure Act – Contested Cases, a final decision by the Maryland Department of the Environment (MDE) on the issuance, renewal, or revision of an operating permit issued pursuant to Title V of the federal Clean Air Act Amendments of 1990 is subject to judicial review by any person who: (1) meets the threshold standing requirements under federal constitutional law; and (2) participated in a public participation process through the submission of written or oral comments, unless an opportunity for public participation was not required by statute or regulation. Judicial review must be on the administrative record before MDE and limited to objections raised during the public comment period unless the petitioner demonstrates that the objections

were not reasonably ascertainable during the comment period or that grounds for the objections arose after the comment period. Unless otherwise required by statute, a petition for judicial review must be filed with the circuit court for the county in which any party resides or has a principal place of business.

An applicant for an air quality operating permit may seek judicial review in accordance with the Administrative Procedure Act – Contested Cases. Except for an applicant who seeks judicial review pursuant to that law, a person is not entitled to a contested case hearing regarding Title V operating permits.

Current Law: Pursuant to the federal Clean Air Act, federal regulations require that for a state to gain federal approval of an air quality operating permitting program, state law must provide for expeditious review of permit actions, including applications, renewals, or revisions, and including an opportunity for judicial review in state court of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law.

Under current State law, standing for judicial review of air quality operating permit decisions is governed by the Maryland Environmental Standing Act (MESA). Under MESA, the following persons have standing to bring and maintain specified actions in the courts of equity of this State: (1) the State, or any agency or officer of the State, acting through the Attorney General; (2) any political subdivision of the State or any agency or officer of it acting on its behalf; and (3) subject to some limitations, any other person, regardless of whether the person possesses a special interest different from that possessed generally by the residents of Maryland, or whether substantial personal or property damage to that person is threatened. Non-state residents and organizations that do not have an interest separate and apart from their members do not currently have standing for judicial review of air quality operating permit decisions. Under the Administrative Procedure Act, a party who is aggrieved by the final decision in a contested case is entitled to judicial review of the decision.

Background: Title V of the Clean Air Act, as amended in 1990, requires major sources of regulated air pollutants to obtain a federally-approved operating permit. This operating permit may be obtained in one of two ways: either under a Part 70 program, named after its location in the Code of Federal Regulations (CFR), that is, Part 70 of Chapter I in Title 40; or under a Part 71 program, likewise named after its CFR location. States that have permit programs that meet the requirements of Part 70 are approved by the U.S. Environmental Protection Agency (EPA) to issue their own Title V operating permits. If a state program does not satisfy Part 70 requirements, then the Title V permit must be obtained under a Part 71 federal program.

On May 9, 1995, MDE submitted a Part 70 operating permits program to EPA for approval. In July 1996, EPA gave interim approval to the Part 70 program and instructed MDE that certain conditions must be met in order for the State to get final approval. One of these conditions related to the enactment of State legislation in order to expand Title V standing - that is, to increase the number of persons who would be entitled to challenge the issuance of a Title V permit because of an actual or environmental injury suffered by those seeking judicial relief. Under the time line issued by EPA, MDE was required to submit its revisions to the program to EPA by June 1, 2001.

Legislation that attempted to address EPA's concerns did not pass during the 2001 session. During the 2001 interim, meetings were held among representatives from the business and environmental communities and MDE to discuss potential legislation for the 2002 session. This bill is a result of those meetings.

Because the State failed to meet the June 1, 2001, deadline for revising its standing law, MDE lost federal approval of its Title V air quality operating permit program on December 3, 2001. Major sources that did not hold a Part 70 permit by that date are now required to complete a Part 71 permit application. Part 71 permits are issued directly by EPA or by a state acting on behalf of EPA as a "delegate agency" and using EPA standards and procedures. MDE entered into such a delegation agreement so that it, rather than EPA, can administer the Part 71 program. However, even under a delegation agreement, Part 71 allows for no state-by-state variation, as does Part 70, and MDE must defer to EPA standards. Review of Part 71 permit decisions occurs in EPA and the federal courts.

State Fiscal Effect: This bill would correct deficiencies in State law so that MDE could resume administration of the Part 70 permit program. However, because MDE is currently operating the federal (Part 71) permit program under a delegation agreement with EPA, the bill would have no fiscal impact on MDE. Under the delegation agreement, MDE continues to collect approximately \$4.2 million annually in special fund revenues from permit fees.

MDE advises, however, that if State law is not amended to address the standing issue by December 1, 2002, EPA could impose sanctions on the State that could lead to a significant loss of federal highway funds.

Additional Information

Prior Introductions: HB 203 and HB 1427 of 2001 would have expanded standing for judicial review of air quality operating permit decisions. HB 203 received an unfavorable report by the House Environmental Matters Committee. HB 1427 passed the House; the Senate Economic and Environmental Affairs Committee held a hearing on the bill, but no further action was taken.

Cross File: None.

Information Source(s): Judiciary (Administrative Office of the Courts), Office of Administrative Hearings, Maryland Department of the Environment, Department of Legislative Services

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ncs/jr

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