

Regulatory Reform and the Proposed Abolition of the
Automatic Stay in Environmental Appeals in South
Carolina: House Bills 4157 and 4792

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Regulatory Reform and the Proposed Abolition of the Automatic Stay in South Carolina Environmental Appeals:

Currently, the South Carolina legislature is considering two bills that will have a pervasive effect on how appeals from certain agencies are handled. These changes in the process of judicial review will effect the South Carolina Department of Health and Environmental Control(DHEC) and Ocean and Coastal Resource Management(OCRM), and will significantly alter the nature and effectiveness of citizen challenges to environmental permitting decisions.(H. 4157, 115th Gen. Assem., Reg. Sess. (SC. 2003); H. 4792, 115th Gen Assem., Reg. Sess. (SC 2003)

South Carolina House Bill 4157(Senate Bill 0634) proposes to abolish the automatic stay that is imposed when a DHEC/OCRM permit is challenged and allow the permitted activity to go forward until the appeal is decided or a temporary injunction obtained.(H. 4157, 115th Gen. Assem., Reg. Sess. (SC. 2003) South Carolina House Bill 4792 proposes an overhaul of the current system of judicial review that, among other things, removes the DHEC board from its appellate review role and circumvents the circuit court by allowing direct review of the Administrative Law Judge(ALJ) by the Court of Appeals. The stated purpose of the bills is to streamline the appeals process and ensure consistency between the ALJ record and the reviewing body.(Report of the Judicial Council, February 26, 2002) The following discussion will examine the bills individually before looking into combined effects of both. When the two bills are viewed

in conjunction with the unique nature of environmental harm, the issue becomes how to achieve the stated goals of efficiency and consistency while insuring meaningful due process and protecting an agency's ability to insure a consistent policy platform.

There are several facts that are helpful in considering the effectiveness of the citizen appeals process in environmental permitting. First, there are many different types of environmental permits that DHEC and OCRM are responsible for administering. (SCDHEC "A General Guide to Permitting in South Carolina", July 2001) Some permits, such as storm water permits, can involve relatively simple calculations and require fewer resources of time and personnel. Other permits, such as OCRM critical area permits, involve more complex considerations of policy and science. Permits for other activities are subject to state implemented federal mandates like the Clean Water Act or Hazardous Waste Management Act and can include detailed periods of public notice and comment.(id) Thus, the term "environmental appeals" encompasses a broad range of activities and fields of expertise that is difficult to simply categorize.

Another fact to consider is the unique nature of environmental harm and the difficulties of providing adequate avenues of redress for those who have been adversely affected. If a permit is erroneously granted or action is taken in violation of the permitting regulations, it is difficult to construct a remedy that will put the aggrieved party in the situation they would have been in had the harm never occurred.(Interview with Robert Guild Esq., Attorney at Law, in Columbia, S.C. March 30, 2004) For example, if a wetland were filled or land clearing took place in violation of the permitting process, planting new trees or removing the dirt would not replace the destroyed forest, repair the destroyed functions and values of the wetland, or address factors potentially

affecting neighboring landowners such as erosion and sediment runoff. If challenged activity is allowed to take place before an appeal is decided and the permit is denied on appeal, similar concerns of redress will arise when traditional remedies like money damages or in court suppression of documents are insufficient.

Bill 4157- How It Works Now And The Current Proposal

Currently, when a decision to issue, expand, or deny a permit is made by DHEC or OCRM in South Carolina, affected citizens can appeal the decision of the staff. Under the current procedures for contested cases, any petition for review stays the permitted activity until the case is heard by an Administrative Law Judge and reviewed by the DHEC Board. The Board review of the ALJ is in an appellate capacity and serves as the final action of the agency. This final agency action means a permittee can legally act on the permit even if a party appeals further to the Circuit Court. The statutory language follows:

a) S.C. Code of Regulations R. 61-72- Procedures for Contested Cases

205. Stay of Department Decisions and Orders.

A. General Rule. A petition for review of an order stays the order. A decision for review of an order to revoke or suspend a license stays the revocation or suspension. A petition for review of a decision to renew a license for an ongoing activity stays the renewed license, the previous license remaining in effect pending completion of administrative review. A petition for review of a decision to issue a new license stays all actions for which the license is a prerequisite; Matters not affected by the Petition shall not be stayed by the filing of the petition. Petitions appealing only the amount of fines or penalties shall be deemed not to affect those portions of orders imposing substantive requirements.

B. Emergency Action. The general rule of Section 205(A) shall not operate to stay emergency actions taken by the Department pursuant to applicable statute or regulation.

C. Lifting of Automatic Stay. After commencement of administrative review, any party may move before the Hearing Officer, or before the Commissioner if no Hearing Officer has been appointed, to lift the automatic stay. Any party may make a written application to the Board to review the decision of the Commissioner or the Hearing Officer. Unless otherwise ordered by the Board, such application shall be decided by the Chairman without oral presentation to the

Board.

D. Stay upon conclusion of Administrative Review. At the conclusion of administrative review, the decision of the Board shall not be stayed except upon order of the Board or a reviewing court.

205(c) is the mechanism in place for lifting the stay, and involves making a written application for review to the commissioner or hearing officer. This mechanism is to guard against bad faith appeals meant to delay and harass. The availability of this safeguard is shown by cases where the stay was lifted. (*Environmentalists, Inc. v. SC DHEC*, Docket No. 96-ALJ-07-0030-CC; *Slovic v. SC DHEC*, Docket No. 99-ALJ-07-196-CC) In *Environmentalists, inc. v. SCDHEC*, three members of Environmentalists inc, challenged the construction permit obtained by Giant Cement Company to construct additional facilities and equipment. Giant's petition to lift the automatic stay was granted when it was shown the permit challengers were not from the area and lacked standing. This case shows how the current safeguards of 205(c) can effectively guard against gratuitous appeals brought by citizens whose rights were not being affected by agency action.(id.)

In *Slovic v SCDHEC* developers wanted to construct two residential areas in North Litchfield. The contested issues involved 1)effective diversion of storm water, 2) the adequacy and potential for appeal of pending wetlands permits, and 3) the long term insurance of adequate vegetative buffer surrounding the wetlands. A consent order was agreed to between the parties that accounted for the concerns of the property owner seeking to build and the citizens that would be affected by that construction. This case demonstrates how the current automatic stay provision is effective in bringing the interested parties to the table to handle the complex issues that often arise in environmental permitting. It further demonstrates the importance of working out the

disputed details of a permit before irreparable environmental harm occurs and protracted, expensive litigation ensues.(for futher examples of lifted stays, see Docket No. 95-ALJ-07-0513-CC). For an example of the motion to lift the stay being denied, see *Home Health of South Carolina, Inc. v. SC DHEC*, Docket No. 95-ALJ-07-0472-CC.

Proposed Bill House 4157, introduced by Rep. Jim Harrison and the Tourism Council, would abolish the automatic stay and allow a stay only when ordered by an Administrative Law Judge under a preliminary injunction showing. (H. 4157, 115th Gen. Assem., Reg. Sess. (SC. 2003) The primary reason given for the bill is to increase administrative efficiency in the appeals process. (Interview with Robert Guild Esq., Attorney at Law, in Columbia, S.C. March 30, 2004)

Proposed Change

a) South Carolina House Bill 4157-

A BILL

TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING SECTION [48-39-155](#) SO AS TO PROVIDE THAT ANY PERMIT DECISION MADE BY THE OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT OR THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL IS NOT SUBJECT TO AN AUTOMATIC STAY BY THE FILING OF A NOTICE OF APPEAL AND THAT A STAY MAY ONLY BE ISSUED BY AN ADMINISTRATIVE LAW JUDGE.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Chapter 39, Title 48 of the 1976 Code is amended by adding:

"Section [48-39-155](#). Notwithstanding any other provision of law or regulation, any permit decision made by the Office of Ocean and Coastal Resource Management or the Department of Health and Environmental Control is not subject to an automatic stay by the filing of a notice of appeal and may only be stayed by order of an administrative law judge in accordance with the powers granted to an administrative law judge in Section [1-23-630](#)."

SECTION 2. This act takes effect upon approval by the Governor.

This proposed abolition of the automatic stay would prevent the DHEC board or OCRM appellate panel from considering the appeals before the landscape is altered. When a permit decision is made, the permit holder could take action despite the unresolved legal challenge to that action. (H. 4157, 115th Gen. Assem., Reg. Sess. (SC. 2003) This raises Constitutional questions under Article I Sec. 22 of the South Carolina constitution as well as questions regarding any actual gains in efficiency. (S.C. Const. Art 1, Sec. 22)

If the stay is abolished, an average citizen would have a significant number of expensive hoops to jump through before obtaining a stay. Under the proposed rule, a stay could be imposed under the circumstances warranting a preliminary injunction. (H. 4157, 115th Gen. Assem., Reg. Sess. (SC. 2003); SCR Civ. P. 65) So, in a very short time frame and under emergency circumstances, the party seeking the stay would have to prove 1)likely success on the merits, 2) that irreparable harm would occur without a stay, 3) that the stay will not cause undue harm to the permittee, 4) and that a stay would serve the public interest. If these onerous burdens are met, the appealing party is required to post a monthly bond to protect the permittee.(id) Depending on the nature, size and scope of the challenged action, these monthly bonds can reach into the millions of dollars. Protecting the permittee can include any costs/contracts incurred based on the supposition that the initial staff decision will be treated as final agency action. So a party who has expended the time and money to get an initial stay is still faced with the expense of the bond and the regular appeals hearing. (Interview with Robert Guild Esq., Attorney at Law, in Columbia, S.C. March 30, 2004) This new rule shifts the burden from the

party seeking to obtain a permit and alter the environment to the party seeking to challenge or amend the permit and seems to place a price tag on who has access to a meaningful appeals process. (Memorandum from Robert Guild Esq. to Council on Coastal Futures Members (May 28, 2003))

Consider the *Slovic v. DHEC* case mentioned above, once the appeal was filed and the permits were stayed, the parties worked through the complex issues and signed a consent order covering several topics that touched on several kinds of permits and issues. (storm water, wetlands, vegetative buffers) The consent order that was signed resolved the issues currently under dispute (size of storm water runoff pipes) and anticipated future challenges on things like the wetlands permit while insuring the parties challenging the order would declare themselves satisfied in the matter. (*Slovic v. SC DHEC*, Docket No. 99-ALJ-07-196-CC) In short, the stay and subsequent hearing provided notice, an opportunity for the issues to be heard, and a chance for evidence to be introduced before the environment was irrevocably impacted.

Under the proposed rule, the challengers would have had to meet the preliminary injunction showing and post a monthly bond large enough to protect the investments of the company in the two planned subdivisions. (Memorandum from Robert Guild Esq. to Council on Coastal Futures Members (May 28, 2003)) If Mr. Slovic was unable to make the showing or able to make it and unable to post the bond, construction would be in full swing until the DHEC board heard the appeal. In 1998-99 DHEC cases took an average of 182.2 days to resolve before the ALJ. (Report to the Judicial Council, James Flanagan and Richard Seamon, p 6 (November, 2000)) Without an automatic stay construction could continue during that time until the DHEC board decided the appeal. A

great deal of construction can occur in 182 days, much of it preliminary work like grading and land clearing that would affect the storm water permit issue. (Interview with Robert Guild Esq., Attorney at Law, in Columbia, S.C. March 30, 2004) Under the current rule, the activity was stayed and multiple issues resolved by lifting the stay through the consent order. (*Slovic v. SC DHEC*, Docket No. 99-ALJ-07-196-CC) Under the proposed bill, assuming Mr. Slovic was unable to make the showing and take astronomical personal financial risks, the activity would have gone forward before and during the appeals process. If the developers permit was upheld, they could face individual challenges to their respective permits in resource consuming, subsequent litigation (such as their 404 wetlands permit, this challenge was actually brought on storm water/NPDES grounds). If the permit were struck down, all parties would face the difficult task of formulating an appropriate remedy where a specific environment has already been impacted. The challenge of redress is even greater in situations that require total cessation of construction and relocation to another site. (Interview with Robert Guild Esq., Attorney at Law, in Columbia, S.C. March 30, 2004)

Constitutional Concerns

Under the South Carolina and United States Constitution, no person may be deprived of life, liberty, or property without due process of law. Parties to a permitting appeal are guaranteed due process of law. (S.C. Const., Art. I, Section 22; *League of Women Voters of Georgetown County v. Litchfield-by-the-Sea*, 305 S.C. 424, 409 SE2d 378 (1991) The South Carolina Legislature amended Article 1 Section 22 in response to the proliferation of agency decisions in everyday life. (Administrative Law, Principles

and Practice, Supp. Richard Seamon, 2003) The pertinent segment of section 22 reads “ No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and opportunity to be heard;” (S.C. Const. Art 1 Sec 22.) This section of the South Carolina Constitution arguably provides increased due process protection based on its “affecting private rights” language and its specific reference to administrative agencies. This increased protection is based in the idea that private rights are often affected by agency actions that might not be total deprivations of life, liberty, or property but require vigilant due process protection nonetheless. (Administrative Law, Principles and Practice, Supp. Richard Seamon, 2003)

Supreme Court precedent has established that Due Process of law must be “meaningful” in order to be effective.(*Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971) There has been debate over what makes due notice and opportunity to be heard meaningful. Generally, a meaningful hearing is required to 1) occur before the contested action takes place or goes forward(notice), 2) ensure everyone has knowledge of the issues to be discussed, and 3) provide opportunity at the hearing to put on evidence of contested issues 4) judicial review.(S.C. Const. art. 1, § 22; *Stono River Env'tl. Protection Ass'n v. South Carolina Dep't of Health and Env'tl. Control*, 305 S.C. 90, 406 S.E.2d 340 (1991); *Ogburn-Matthews v. Loblolly Partners*, 332 S.C. 551, 505 S.E.2d 598 (Ct.App. 1998). If disruption of the environment is allowed before the validity of the permit is established through appeals, all three goals of the meaningful Due Process requirement would be compromised. Allowing a permittee to go ahead with action prevents the preservation of evidence that could be used to effectively evaluate

both sides of the appeal. (Memorandum from Robert guild Esq. to Council on Coastal Futures Members (May 28, 2003) Under the proposed rule, by the time a reviewing court looks at a parcel of property, they are looking at an action underway with no notion of the property before the disturbance. Without a firm grasp on the status quo that the permit challenger is attempting to maintain, it makes it very difficult to assess the degree to which a citizens' rights have been affected and whether or not irreparable harm would occur without a stay. If a fact finder has no notion of the appearance or characteristics of a parcel of land until it has been disturbed, it seems self defeating to argue that any harm would be irreparable because you would be conceding that the harm had already occurred, thus making the burden even harder to meet and the urgency more remote.

The effect of the abolition of the stay would result in a prohibitively expensive appeals process that would serve only the wealthiest citizens and discourage average citizens from engaging in the process. This could improve administrative efficiency through fewer appeals and shorter dockets but at the expense of fundamental constitutional and equitable principles. (Memorandum from Robert guild Esq. to Council on Coastal Futures Members (May 28, 2003) The DHEC board applies the same standard that a court would apply when reviewing final agency decision.(Report to the Judicial Council, James Flannagan and Richard Seamon, p. 9 (November, 2000) Thus, the reviewing body can overturn an agency decision when constitutional violations occur.(id) The removal of the automatic stay could create a colorable Article 1 Section 22 claim in all contested environmental appeals where a stay could have prevented the harm, increasing litigation and hindering efficient resolution.

The abolition of the automatic stay as proposed under House Bill 4157 could create significant questions regarding the meaningful due process requirements as required by the United States Constitution, the South Carolina Constitution, and in all environmental appeals that are considered contested cases under the South Carolina Administrative Procedures Act. Almost all permit appeals qualify as contested cases under the APA. (Administrative Law, Principles and Practice, Supp. Richard Seamon, 2003) The questions of meaningful Due Process coupled with the increased legal showing and bond requirements pose a serious challenge to the future efficacy of the South Carolina citizen appeals process in environmental permitting.

House Bill 4792: Regulatory Reform and Environmental Appeals

Under the current method of judicial review, an appeal of a permitting decision is heard by the Administrative Law Judge Division and then heard by the DHEC board/OCRM appellate panel in its appellate capacity.(S.C. Code Sec. 1-23-610, Supp. 1999) The decision of the reviewing board is final agency action for purposes of the Administrative Procedures Act and review is available to the circuit court and then the Court of Appeals.(id) Proposed Bill 4792 would change the method of Judicial review by: removing the DHEC Board from its appellate capacity, making decisions from the Administrative Law Judge Division final agency action, and providing review of the ALJ decision directly in the Court of Appeals. (H. 4792, 115th Gen Assem., Reg. Sess. (SC 2003) This plan for regulatory reform is the product of a study conducted by the Judicial Council of South Carolina and raises many complex issues of Administrative Law. (Report to the Judicial Council, James Flannagan and Richard Seamon (November, 2000)

The discussion below will be limited to the effect Bill 4792 will have on an agency's ability to present a consistent policy message and the combined effects of Bill 4157 and Bill 4792.(For an indepth discussion of ALJ finality and its sub-issues, please see articles by Rossi and Flannagan)

The Judicial Council of South Carolina was created in 1957 to “ investigate criticisms and suggestions pertaining to the administration of justice; to publish information regarding the work of the courts; and to recommend such changes in the methods of conducting business of the courts as might be desirable.” The Council are either appointed by the Chief Justice or serve ex officio during their terms of office.(S.C. Code Sec. 14-27-10). Bill 4792 was almost entirely based on the Judicial Council Proposed Statute as presented on February 13, 2003. This proposed statute was published as a formal report of the Judicial Council(February 13, 2002) which considered the report of USC Law Professors Richard Seamon and James Flannagan(November 2000).

The Judicial Council came to several conclusions that are reflected in the proposed bill, the relevant conclusions include: 1) The decision of the ALJ should be final agency action in all cases within its jurisdiction with review in the courts and 2) The decisions of the ALJ should be appealed to the Court of Appeals instead of the Circuit court.(id). In recommending the removal of the DHEC board, the Judicial Council cited concerns of efficiency, neutrality and consistency. While replacing the function of the DHEC board with ALJ review could address some of these concerns, it also makes effective control of agency policy much more challenging. (Report to the Judicial Council, James Flannagan and Richard Seamon, p 6 (November, 2000)

The council concluded that the part time nature of a board made up of non-lawyers could not serve the interests of efficiency and consistency as well as a single judge. The report also cites inconsistency in interpretations of regulations between the DHEC board and the ALJ and the failure of the board to interpret the findings of fact compiled by the ALJ under the correct standard of review.(id) However, the rule of precedent for the ALJD is that another ALJ decision is persuasive, not binding and there have been inconsistencies among ALJs in the past.(id) Thus, the solution to one category of inconsistencies could create another among the ALJs themselves. Currently, there is no ALJD standard for insuring consistency on issues that recur in contested cases. The rotation of ALJs from agency to agency could mean that the same issue would be decided differently by different ALJs or even in contravention of agency policy.(Report to the Judicial Council, James Flannagan and Richard Seamon, (November, 2000)) These inconsistencies could work against the stated goal of administrative efficiency by creating confusion as to the applicable law and encouraging any losing party to appeal because another trier of fact could reach a different result. (Report to the Judicial Council, James Flannagan and Richard Seamon, p 6 (November, 2000))

In the re-organization of the Executive branch in which the ALJ was created, DHEC was given special status and retained its policy making board and some independence from the executive branch. This special status was based upon DHEC's responsibility to regulate complex health and environmental matters that require a balancing of science, technology and economics and represents a legislative recognition of the specialized knowledge needed in these matters. (Report to the Judicial Council, James Flannagan and Richard Seamon, p. 6 (November, 2000)) While the problems

involving efficiency and consistency need to be resolved, the current legislation seems to leave DHEC with few safeguards to insure that similar cases are decided similarly while leaving the ALJD to grapple with issues they may not be able to fully understand without extensive consultation with experts or agency personnel.(id p. 24)

Bills 4157 and 4792 as a Practical Matter

Agency review of an ALJ decision is founded upon the rationale that the legislature specifically delegated the responsibility for a particular statutory scheme to the agency and expects that agency to fairly apply that policy to regulated entities. ((Report to the Judicial Council, James Flanagan and Richard Seamon, p. 4 (November, 2000)

The connection between the abolition of the automatic stay and the alteration of the judicial review process may seem attenuated to some but the effect of the two bills taken together can significantly impede the ability of the agency to fulfill its mandate from the legislature. (Interview with Robert Guild Esq., Attorney at Law, in Columbia, S.C. March 30, 2004) Notably, the ALJD imposes an automatic stay when it hears appeals of final agency action from other agencies. Under the current and proposed regulations that rule would not be implicated but similar principles of equity and preservation of the status quo seem to be present in both ALJD rule 34 and the auto stay. (Memorandum from Robert Guild Esq. to Council on Coastal Futures Members (May 28, 2003)

The case of *Citizens for Responsible Growth In Clemson v. South Carolina Department of Environmental Control and Wal-Mart* provides a good framework for demonstrating the adequacy of the current stay provision and the inadequacies of the proposed 4792 reform. In *CRGIC v. DHEC/Wal-Mart*, the issue was the adequacy of

storm water and sediment control calculations that had been done on the 53 acre future site of a Wal-Mart “Supercenter”. The calculations were initially done by DHEC field staff and encompassed the 38 acres of the site that would consist of the building and the parking lot but not the rest of the property. CRGIC appealed the permit decision based on the availability of more effective pollution control measures and the exclusion of the 15 acre outparcel. Under the current regulations, Wal-Mart was stayed from acting on the permit pending completion of the appeal. The ALJ who presided over the contested case hearing upheld the permit, saying that the DHEC staff had properly interpreted the applicable law. Upon DHEC board review of the ALJ, it was determined that the remaining 15 acres was almost certain to be developed(Wal Mart stipulated that the typical development was a gas station, convenience store and fast food restraint) and the decision was remanded to the ALJ to be remanded to the agency. The remand was based on the need to consider the remaining 15 acres in order to effectively “abate, control, and prevent, pollution” in accordance with the Pollution Control Act and, more importantly, established DHEC policy.(*Citizens for Responsible Growth In Clemson v. South Carolina Department of Environmental Control and Wal-Mar* Docket No. 00-ALJ-07-0317-CC)

CRGIC v. DHEC shows the system working to prevent irreparable harm before a meaningful appeal takes place and to give the agency a means of ensuring consistent policy through contested cases. If the two proposed bills were in effect at the time the result would have been much different. The initial appeal would not have stayed the construction and Wal-Mart could have gone forward with development throughout the process. The decision by the ALJ would have been final agency action and the DHEC

board would have had no opportunity to implement the policy and statutes it is charged with administering such as the Pollution Control Act. (H. 4157, 115th Gen. Assem., Reg. Sess. (SC. 2003); H. 4792, 115th Gen Assem., Reg. Sess. (SC 2003)

So, as a practical matter, the DHEC staff member who did the initial field storm water calculations would be the only chance for DHEC to even possibly affect the process. Some proponents of 4792 point to Judicial Review as an adequate safeguard under the proposed system. (Report to the Judicial Council, James Flannagan and Richard Seamon, (November, 2000) Without an auto stay, the shortcomings of judicial review in the environmental appeals process become evident. By the time the case reached the Court of Appeals construction would be at or near completion and the Judge's interpretation of the facts and law could be tempered and qualified by the strong public policy against closing down a productive business. (Interview with Robert Guild Esq., Attorney at Law, in Columbia, S.C. March 30, 2004) Given the complex science and policy issues involved in environmental permitting, this hardly seems like an adequate safeguard. With no supervisory method of ensuring agency action, the agency would only be as good as its field staff and thus as good as its budget to pay qualified field staff. In the current period of State budget crisis, this minimal ability to affect policy seems insufficient considering the unique nature of the regulatory subject matter as recognized by the legislature in restructuring the Executive. (Report to the Judicial Council, James Flannagan and Richard Seamon, (November, 2000)

In regards to the automatic stay, Bill 4792 proposes to reform Section 1-23-380(a)(2) to provide for an automatic stay for appeals of any fines and penalties levied against violators.(H. 4792, 115th Gen Assem., Reg. Sess. (SC 2003) To allow an auto

stay in a monetary fine situation seems unnecessary because on successful appeal the amount of the penalty could be returned to the permittee in full. On the other hand, to disallow an auto stay in situations where irreparable environmental harm could occur and no complete remedy would be available to the prevailing party, would seem counter intuitive and could raise questions of Equal Protection. (Interview with Robert Guild Esq., Attorney at Law, in Columbia, S.C. March 30, 2004) To allow polluters and permit violators to avoid paying their fines while innocent adversely affected citizens have to expend exorbitant amounts of time and money just to get their day in court, is unjust and could easily be construed as a violation of Equal Protection. The stay for parties who have been fined or penalized does not support the efficiency argument put forward by proponents of the abolition of the stay. Notably, the stay provision for fines and penalties was NOT in the Judicial Council's recommended statute and thus presumably not necessary to achieve the Council's stated goals of the reform.(id)

Proposed Safeguards

The aforementioned criticisms of Bills 4157 and 4792 do not undermine the well researched shortcomings of the current system. However, there are several possible amendments that could be applied to the proposed legislation that would help ensure fundamental fairness, encourage consistent policy, and avoid protracted litigation. Bill 4157 should be amended to include uniform notice and comment by the method most likely to give actual notice to affected persons when the permit application is received by DHEC. (Interview with Robert Guild Esq., Attorney at Law, in Columbia, S.C. March 30, 2004) This notice and comment period would help alleviate some of the Article 1,

Section 22 due process concern by allowing citizens to go on the record with evidence of how their rights will be effected.(id) Notice and comment periods are currently required under some state implemented federal programs such as the Hazardous Waste Management Act. (SCDHEC “A General Guide to Permitting in South Carolina”, July 2001) While notice and comment has its disadvantages, it gives residents a chance to tell their side of the story and feel less like a permittee is trying to quietly perpetrate something on their community. Permit applicants will also be able to use the level of public response to gauge the possibility of costly future litigation. (Interview with Robert Guild Esq., Attorney at Law, in Columbia, S.C. March 30, 2004)

The comments will also help build a thorough record for ALJ review if bill 4792 is passed. This notice and comment period should include written replies by the agency to substantive comments from the public as well as a written explanation of the final permit decision based on the administrative record. This detailed record would serve to insure that the final agency action of the ALJ under 4792 is the product of consistent application of delineated agency policy. The record could also assist in overcoming any lack of technical knowledge on the part of the ALJ by including testimony by experts or agency staff. The detailed permit decision will also serve as evidence that due process of law was provided to affected citizens. (Interview with Robert Guild Esq., Attorney at Law, in Columbia, S.C. March 30, 2004)

Ways to mitigate the concerns raised by the abolition of the automatic stay could include a 20 day auto stay to allow for informal agency review of the field staff's calculations and decisions.(id) This informal review could serve to substantially reduce litigation because both parties would have sat down with the agency to resolve unclear

issues and standards out of court. The informal review process could provide for the ALJD to request an agency policy statement to clarify controlling issues of policy. (Report to the Judicial Council, James Flannagan and Richard Seamon, (November, 2000) The combined safeguards of effective notice and comment, a brief automatic stay, and informal agency review of contested cases before the ALJ issues final agency action, help meet the stated goals of efficiency and consistency while protecting the Constitutional integrity of the citizens appeals process and the ability of an agency to present a consistent policy message.

Conclusion

It should be noted that Bill 4157 and Bill 4792 are very different despite the fact that the consequences of both bills may implicate some similar issues. For example, bill 4157 applies only to the DHEC/OCRM Appellate panel and is not supported by research suggesting the abolition of the stay would result in an actual increase in efficiency. (Memorandum from Robert guild Esq. to Council on Coastal Futures Members (May 28, 2003) In contrast, Bill 4792 is the product of careful analysis by the Judicial Council and Professors Flannagan and Seamon and reforms the judicial review process for several agencies. This reform aims to solve specific problems in the current system but could benefit greatly from increased protection to ensure consistent agency policy. The constitutional concerns presented by 4157 affect fundamental rights of due process and need to be addressed. These Due process concerns are highlighted by the unique nature of environmental redress and the existence of ALJ rule 34, which imposes an automatic stay when hearing appeals from final decisions of other agencies.

The fundamental rights of citizens should not be violated for seemingly unsubstantiated claims of efficiency. Additional measures are necessary to insure that environmental permitting agencies have the ability to control the consistency of their policy messages through contested cases.

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