WHEN ACTUAL NOTICE ISN'T "ACTUAL NOTICE" - THE *HARVILCHUCK* CASE

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Oil and Gas Alert

By: Travis L. Brannon

A recent Commonwealth Court decision may have significant implications for permittees in Pennsylvania obtaining approvals from the Department of Environmental Protection ("Department" or "DEP") under various environmental statutes and regulations. In *Harvilchuck v. DEP*, --- A.3d ----, 2015 WL 3464081 (Pa. Cmwlth. 2015), the Commonwealth Court concluded that where DEP had not published permit issuance notice in the Pennsylvania Bulletin (as is the case with most oil and gas well permits), an objector perfected his appeal of a renewed well-drilling permit even though the objector did not file his appeal with the Environmental Hearing Board within thirty days from the date he received actual electronic notice of the Department's action. Among other things, the decision chips away at principles of administrative finality in the environmental permitting context. It also casts uncertainty on approvals issued by the Department by allowing objectors to appeal within thirty days after they actually obtain the permit in question and learn of its contents rather than thirty days after receiving actual notice of the Department's action.

In Pennsylvania, DEP is the agency charged with issuing various permits under a number of environmental statutes, including operating permits for oil and gas wells under the Pennsylvania Oil and Gas Act. 58 P.S. §§ 601.101, *et seq*. DEP is required to publish some, but not all, of its permit authorizations in the *Pennsylvania Bulletin*. DEP also issues notifications of its actions through its "eNOTICE" system and publishes information regarding its actions on its "eFACTS" web page. Subscribers to eNOTICE receive notice of Department actions that link the subscriber to the eFACTS web page for information regarding a particular action.

When the Department issues a permit, a person adversely affected by that "action" may lodge an appeal to the Pennsylvania Environmental Hearing Board ("EHB" or "Board"), an adjudicative agency that works much like a trial court that holds hearings, hears evidence, and renders decisions on the Department's actions. Under the Pennsylvania Environmental Hearing Board Act, "no action of the department adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action to the board under subsection (g) [relating to the Board's procedural regulations]. If a person has not perfected an appeal in accordance with the regulations of the board, the department's action shall be final as to the person." 35 P.S. § 7514(c). Once final, the doctrine of "administrative finality" generally precludes any future challenge to the Department's action. *Id*.; *Department of Env. Res. v. Wheeling-Pittsburgh Steel Corp.,* 348 A.2d 765, 767 (Pa. Cmwlth. 1975).

In turn, the Board's regulations provide that "jurisdiction of the Board will not attach to an appeal from an action of DEP unless the appeal is in writing and is filed with the Board in a timely manner[.]" 25 Pa. Code. § 1021.52(a). If the Department publishes notice of an action in the *Pennsylvania Bulletin*, an appeal is timely if it is filed within "[t]hirty days after the notice of the action has been published in the *Pennsylvania Bulletin*." 25 Pa.

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Code. § 1021.52(a)(2). If the Department does not publish notice of its action in the *Pennsylvania Bulletin*, an appeal is timely if filed within "[t]hirty days after ***actual notice*** of the action[.]" *Id*. (emphasis added). In addition, the Board's regulations allow a person aggrieved to file an appeal and amend it as of right within twenty days after the original filing to include additional objections. 25 Pa. Code. § 1021.53(a).

In a previous decision, the Commonwealth Court of Pennsylvania defined the type of "notice" that triggers an appeal period under the Board's regulations. In *Milford Township Board of Supervisors v. Department of Environmental Resources*, 644 A.2d 217, 219 (Pa. Cmwlth. 1994), the court concluded that "[c]onstitutionally adequate notice of administrative action is notice which is reasonably calculated to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

In *Harvilchuck*, the Commonwealth Court was called up to decide whether Laurence Harvilchuck ("Harvilchuck" or "objector") perfected his appeal of a renewed well-drilling permit issued to WPX Energy Appalachia, LLC ("WPX") for the "McNamara 39 11H Well" (the "Well") when Harvilchuck received eNOTICE of the Department's action but did not file an appeal within the thirty days from the date of that electronic notice.

On January 1, 2013, Harvilchuck, a subscriber to the Department's eNOTICE service, received email notification that the Department issued a well-drilling permit to WPX. Three days later, Harvilchuck requested records from the Department pursuant to Pennsylvania's "Right to Know" Law ("RTKL") (the state's equivalent to FOIA) and received a copy of the well-drilling permit on January 25, 2013. Harvilchuck timely appealed the original permit on January 28, 2013.

On September 25, 2013, the Department issued a renewed well-drilling permit to WPX. Harvilchuck received email notification on September 27, 2013 (informing him that the permit application had changed) and on September 30, 2013 (informing him that the permit authorization had been updated). Both email notifications linked to the eFACTS web page. On both days Harvilchuck received email notifications, he submitted RTKL requests regarding the permit application and other records, as well as a copy of the renewal permit. After the Department requested several extensions to respond to the RTKL request, the Department provided Harvilchuck with a copy of the renewal permit on October 24, 2013. Harvilchuck did not lodge his written appeal of the renewal permit to the Environmental Hearing Board until November 6, 2013.

The Department filed a motion to dismiss the objector's appeal as untimely because he had "actual notice" of the permit action upon receipt of the eNOTICE email and submission of his RTKL request for a copy of the permit at the latest on September 30, 2013. In response, Harvilchuck argued that he lacked sufficient information to determine whether he was adversely affected by the Department's action until he received an actual copy of the renewal permit on October 24, 2013.

Despite two strong dissents, the Environmental Hearing Board granted the Department's motion to dismiss Harvilchuck's appeal as untimely. Although the EHB stated that eNOTICE and eFACTS together did not constitute actual notice alone, the EHB concluded that Harvilchuck had sufficient information to lodge an appeal to the renewed permit for the Well based on his knowledge of the original permit, the fact that the renewed permit and original permit were identical, and the fact that he received notice on September 30, 2013, informing him that the Department renewed the permit. In addition, the EHB reasoned that Harvilchuck could have lodged his appeal within thirty days of September 30, 2013, and filed a subsequent amendment as of right within twenty days after the original filing.

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On appeal, the Commonwealth Court reversed and remanded the matter back to the EHB. The court concluded that Harvilchuck had "actual notice" on October 24, 2013, when he received the renewal permit from the Department on October 24, 2013. The court reasoned as follows:

- The email notifications did not contain adequate information for the objector to determine whether he was adversely affected by the permit as neither of them contained any information about the contents of the permit;
- The eFACTS webpage did not reveal any information about the contents of the permit and therefore the objector could not determine the permit's effect on him;
- Even though the objector appealed the original permit and knew of its contents, the objector had no way of knowing the renewed permit was identical to the original until he received it on October 24, 2013.

In closing, the court stated that "[q]uite simply, Objector did not have and could not have had sufficient knowledge to appeal the Renewal Permit until he received written notification of DEP's action on October 24, 2013, when DEP provided him with a copy of the permit. Once he received actual notice, he appealed well within the Board's 30–day appeal requirement." *Harvilchuck*, 2015 WL 346408 at *5.

As noted in the introduction, the *Harvilchuck* decision has significant implications for permittees in Pennsylvania obtaining approvals from the Department in at several respects.

At the outset, the court's decision may have been influenced by the fact that the Department delayed in providing a copy of the renewal permit in response to Harvilchuck's RTKL request on September 30, 2013, and then seemed to use that delay against the objector when moving to dismiss his EHB appeal. Although Harvilchuck's RTKL requested called for a number of other public records, an oil and gas permit is a public record subject to disclosure that the Department could have provided relatively promptly. Thus, the *Harvilchuck* case may be one in which a "bad fact" steered the outcome in favor of the objector despite the significantly broader downsides the decision may engender.

For example, neither the Environmental Hearing Board Act, the Board's regulations, nor the Commonwealth Court's previous decision regarding "actual notice" stipulate that an objector has a right to acquire a copy of the permit at issue. The statute, regulations, and court decisions provide that the trigger for an appeal is the date on which the objector has notice of the "action" whether or not the objector has copy of the permit or, for that matter, knows of its contents. The notice of the action is the point at which the objector has the opportunity to challenge the permit. At that point, the objector has thirty days to appeal in writing and has an additional twenty days thereafter to amend its appeal with additional objections if necessary. In cases where notice of DEP's action is not published in the *Pennsylvania Bulletin,* the *Harvilchuck* decision effectively extends the appeal period to something other than within thirty days of "actual notice."

In addition, the Commonwealth Court's decision places no bounds on how long the appeal trigger date may be extended. What if an objector waits two months or two years before asking for and obtaining a copy of the permit? Will the thirty-day appeal period start at that point? The court's decision but leaves these important questions unanswered.

Finally, before *Harvilchuck*, the doctrine of administrative finality foreclosed any challenge to a permit after the thirty-day jurisdictional appeal period lapsed. That doctrine gave permittees some level of certainty that they may

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proceed pursuant to their authorization without the threat of a future challenge to their permit. Under *Harvilchuck*, the jurisdictional appeal period begins on the unknowable date on which an objector actually receives a copy of the permit in question and reviews its contents.

In the end, the Commonwealth Court's decision suggests that permittees may never have the security of a "final" authorization given that objectors may have the opportunity to appeal, at least those permits where a *Pennsylvania Bulletin* notice has not been published, at some indefinite time after the Department approves a permit. In light of the decision, those in the regulated community may wish to monitor the case to see if (1) the Department or the permittee attempt an appeal to the Pennsylvania Supreme Court and, (2) DEP alters its eNOTICE procedures, such as to provide electronic access to final permits on its website. In the meantime, the regulated community should factor this decision into business plans as permittees proceed with their operations under their DEP-issued permits.

KEY CONTACTS



TRAVIS L. BRANNON
PARTNER

PITTSBURGH
+1.412.355.7443
TRAVIS.BRANNON@KLGATES.COM

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