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LDEQ's Denial of Hearing Request Overturned

A district court decision recently overturned an LDEQ denial of our client's request for hearing. While LDEQ has some discretion in denying hearing requests, LDEQ's discretion is limited by the constitution and applicable statutes. Not every LDEQ denial is proper.

Background: LDEQ usually has one of three responses to a request for hearing by a permittee or a respondent: deny the request, enter into Informal Dispute Resolution (IDR), or grant the request. When it determines that the matter is easily resolvable, LDEQ usually grants the request (and the matter is transferred to the Division of Administrative Law (DAL) for handling) or enters into IDR. However, in matters that are contested, controversial, or perhaps when LDEQ knows its position may be indefensible, LDEQ has denied hearing requests. This is important for two reasons: 1) unless the permittee or respondent files an expensive application for judicial review with the 19th JDC, the permit action or compliance order/penalty assessment will become final; and 2) LDEQ can appeal from an adverse decision in the 19th JDC. On the other hand, current law prohibits LDEQ from appealing any adverse decision rendered against it in the DAL. The permittee or respondent, however, can appeal. LDEQ's denial of the hearing request may be designed to avoid potentially contested adjudications in the DAL, from which LDEQ can not appeal, so that the adjudication occurs in the 19th JDC, from which LDEQ can appeal.

Facts: LDEQ ordered a landowner to close a landfill (i.e., submit a closure plan and put two feet of clay over the disposal area) on its property that had been operated by other entities. In other words, the respondent owned the land but others operated the landfill. The landowner requested a hearing on the order, stating that LDEQ had no legal authority to order the landowner to close the landfill. LDEQ summarily denied the hearing request, requiring the landowner to file an expensive request for judicial review in the 19th JDC. The landowner claimed that the LDEQ was wrong to deny the request for hearing for the following reasons: 1) the order was actually a compliance order and the statute states that a respondent has a "right" to a hearing; 2) the order was not a permit action and the statute dealing with hearing requests on permit actions (which does allow some discretion in certain situations) was not applicable; and 3) the landowner's constitutional rights to due process were abridged by the denial of the hearing request.

The Result: On December 14, 2009, Judge Bates of the 19th JDC ruled that the order issued by LDEQ was not a permit action and that the statute dealing with hearing requests was not applicable. She ordered the LDEQ to grant the landowner's hearing request for a proper administrative adjudicatory hearing. This means that the order must be tried in the DAL, from which LDEQ can not seek judicial review.

Who Pays: Applicable law allows a permittee or respondent who prevails to seek repayment from LDEQ for all costs and up to \$7,500 is litigation expenses, including attorney's fees. In this case, the landowner has filed a Motion to Assess Fees and Costs against LDEQ, requesting that the landowner's costs and attorney's fees be paid by LDEQ. That motion is pending.

Take-Away: While everyone wants to work with LDEQ to achieve compliance and a good working relationship, there are times when it is in the client's best interest to contest an enforcement or permit action. So, here's the thing you should know: Each request for hearing should meet the terms of the law governing hearing requests and be written such that it contains the proper language to support arguments on appeal should LDEQ deny the request. Also, each denial should be closely reviewed to determine whether any arguments exist to contest the denial and get the denial overturned. A permittee or a respondent has only thirty days to request a hearing or contest a denial.



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