~~Indicates Matter Stricken~~

Indicates New Matter

COMMITTEE REPORT

April 18, 2013

**H. 3827**

Introduced by Reps. Pitts and Loftis

S. Printed 4/18/13--H. [SEC 4/23/13 12:02 PM]

Read the first time March 19, 2013.

**THE COMMITTEE ON AGRICULTURE, NATURAL**

**RESOURCES AND ENVIRONMENTAL AFFAIRS**

To whom was referred a Bill (H. 3827) to amend Section 44‑1‑60, as amended, Code of Laws of South Carolina, 1976, relating to requests for final review of a decision of the Department of Health and Environmental Control, etc., respectfully

**REPORT:**

That they have duly and carefully considered the same and recommend that the same do pass with amendment:

Amend the bill, as and if amended, by striking all after the enacting words and inserting:

/ SECTION 1. Timely resolutions of disputes with minimal delay regarding determinations and decisions made by the South Carolina Department of Health and Environmental Control promote economic development, ensure the protection of the State’s natural resources and environment, and allow earlier implementation of healthcare projects for the benefit of the State’s citizens. The current process imposes unreasonable and unnecessary delay which may be eliminated by allowing challenges to Department decisions to be made directly to the South Carolina Administrative Law Court.

SECTION 2. Section 44‑1‑60 of the 1976 Code, as last amended by Act 278 of 2010, is further amended to read:

“Section 44‑1‑60. (A) All department decisions involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other actions of the department which may give rise to a contested case shall be made using the procedures set forth in this section.

(B) The department staff shall comply with all requirements for public notice, receipt of public comments and public hearings before making a department decision. To the maximum extent possible, the department shall use a uniform system of public notice of permit applications, opportunity for public comment and public hearings.

(C) ~~The initial decision involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other action of the department shall be a staff decision.~~ The staff’s decision involving the issuance, denial, renewal, suspension, or revocation of permits, licenses, or other action of the department must be in writing and shall constitute a decision by the department as set forth in Subsection (D)(2). In making such a ~~staff~~ written department decision on ~~any~~a permit, license, certification or other approval, the department staff shall take into consideration all material comments received in response to the public notice in determining whether to issue, deny or condition such permit, license, certification or other approval. ~~At the time that such staff decision is made,~~ The department ~~shall issue a department decision, and~~ shall base its department decision on the administrative record which shall consist of the application and supporting exhibits, all public comments and submissions, and other documents contained in the supporting file for the permit, license, certification or other approval. The administrative record may also include material readily available at the department, or published materials which are generally available and need not be physically included in the same file as the rest of the record as long as such materials are specifically referred to in the department decision. The department decision need not be issued for routine permits for which no adverse public comments have been received.

(~~E~~D)(1) Notice of a department decision must be sent by certified mail~~, returned receipt requested to the applicant, permittee, licensee, and affected~~ or electronic mail to the last known mailing address or electronic mail address to the applicant, permittee, or licensee, and persons who have requested in writing to be notified. ~~Affected persons may request in writing to be notified by regular mail or electronic mail in lieu of certified mail.~~ Notice of ~~staff~~ decisions for which a department decision is not required pursuant to subsection (~~D~~C) must be provided by electronic mail or mail~~, delivery, or other appropriate means~~ to the applicant, permittee, licensee, and ~~affected~~ persons who have requested in writing to be notified.

(2) The ~~staff~~ written department decision becomes the final agency decision fifteen calendar days after notice of the ~~staff~~ department decision has been mailed to the applicant, unless a written request ~~for final review accompanied by a filing fee is filed with the department by the applicant, permittee, licensee, or affected person~~ for a contested case is filed with the Administrative Law Court within fifteen calendar days after notice of the department decision is mailed to the applicant, permittee, or licensee, and persons who have requested in writing to be notified of the department decision and served upon the Clerk of the DHEC Board and applicant, permittee, or licensee. The Administrative Law Court shall give consideration to the provisions of Section 1‑23‑330 regarding the department’s specialized knowledge.

~~(3)~~ ~~The filing fee must be in the amount of one hundred dollars unless the department establishes a fee schedule by regulation after complying with the requirements of Article 1, Chapter 23, Title 1. This fee must be retained by the department in order to help defray the costs of the proceedings and legal expenses.~~

(E) A person to whom an emergency order is issued by the department may apply directly to the Administrative Law Court for relief and must be afforded a hearing within forty‑eight hours. Regardless of whether a hearing is held, the department must revoke all emergency orders as soon as conditions or operations change to the extent that an emergency no longer exists.

~~(F)~~ ~~No later than sixty calendar days after the date of receipt of a request for final review, a final review conference must be conducted by the board, its designee, or a committee of three members of the board appointed by the chair. If the board declines in writing to schedule a final review conference or if a final review conference is not conducted within sixty calendar days, the staff decision becomes the final agency decision, and an applicant, permittee, licensee, or affected person requests pursuant to subsection (G) a contested case hearing before the Administrative Law Court. The department shall set the place, date, and time for the conference; give the applicant and affected persons at least ten calendar days’ written notice of the conference; and advise the applicant that evidence may be presented at the conference. The final review conference must be held as follows:~~

~~(1)~~ ~~Final review conferences are open to the public; however, the officers conducting the conference may meet in closed session to deliberate on the evidence presented at the conference. The burden of proof in a conference is upon the moving party. During the course of the final review conference, the staff must explain the staff decision and the materials relied upon in the administrative record to support the staff decision. The applicant or affected party shall state the reasons for protesting the staff decision and may provide evidence to support amending, modifying, or rescinding the staff decision. The staff may rebut information and arguments presented by the applicant or affected party and the applicant or affected party may rebut information and arguments presented by the staff. Any final review conference officer may request additional information and may question the applicant or affected party, the staff, and anyone else providing information at the conference.~~

~~(2)~~ ~~After the final review conference, the board, its designee, or a committee of three members of the board appointed by the chair shall issue a written final agency decision based upon the evidence presented. The decision may be announced orally at the conclusion of the final review conference or it may be reserved for consideration. The written decision must explain the basis for the decision and inform the parties of their right to request a contested case hearing before the Administrative Law Court. In either event, the written decision must be mailed to the parties no later than thirty calendar days after the date of the final review conference. Within thirty calendar days after the receipt of the decision an applicant, permittee, licensee, or affected person desiring to contest the final agency decision may request a contested case hearing before the Administrative Law Court, in accordance with the Administrative Procedures Act. The court shall give consideration to the provisions of Section 1‑23‑330 regarding the department’s specialized knowledge.~~

~~(3)~~ ~~Prior to the initiation of the final review conference, an applicant, permittee, licensee, or affected person must be notified of their right to request a transcript of the proceedings of the final review conference. If a transcript is requested, the applicant, permittee, licensee, or affected person making the request is responsible for all costs.~~

~~(G)~~ ~~An applicant, permittee, licensee, or affected person may file a request with the Administrative Law Court for a contested case hearing within thirty calendar days after:~~

~~(1)~~ ~~notice is mailed to the applicant, permittee, licensee, and affected persons that the board declined to hold a final review conference; or~~

~~(2)~~ ~~the sixty calendar day deadline to hold the final review conference lapses and no conference has been held; or~~

~~(3)~~ ~~the final agency decision resulting from the final review conference is received by the parties.~~

~~(H)~~ ~~Applicants, permittees, licensees, and affected persons are encouraged to engage in mediation during the final review process.~~

~~(I)~~ ~~The department may promulgate regulations providing for procedures for final reviews.~~

~~(J)~~ ~~Any statutory deadlines applicable to permitting and licensing programs administered by the department must be extended to all for this final review process. If any deadline provided for in this section falls on a Saturday, Sunday, or state holiday, the deadline must be extended until the next calendar day that is not a Saturday, Sunday, or state holiday.”~~

SECTION 3. All statutes and regulations must be interpreted to conform with this statutory amendment to allow challenges to department decisions to be filed directly to the South Carolina Administrative Law Court, and to the extent any existing provision in statute or regulation conflicts with this statutory amendment that provision is superseded.

SECTION 4. The repeal or amendment by this act of any law, whether temporary or permanent, does not affect pending actions, rights, duties, or liabilities founded on it, or alter, discharge, release, or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

SECTION 5. If any section, subsection, item, subitem, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this act, and each and every section, subsection, item, subitem, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, items, subitems, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

SECTION 6. This act takes effect upon approval by the Governor. /

Renumber sections to conform.

Amend The Title To Read:

/ TO AMEND SECTION 44-1-60, AS AMENDED, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO REQUESTS FOR FINAL REVIEW OF DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL DECISIONS BY THE BOARD, SO AS TO REMOVE THE BOARD FROM CHALLENGES TO DEPARTMENT DECISIONS AND TO PROVIDE THAT CHALLENGES TO THESE DECISIONS MUST BE FILED WITH THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT /.

NELSON L. HARDWICK for Committee.

**A** **BILL**

TO AMEND SECTION 44‑1‑60, AS AMENDED, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO REQUESTS FOR FINAL REVIEW OF A DECISION OF THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL DECISIONS BEFORE REQUESTING A CONTESTED CASE HEARING BEFORE THE ADMINISTRATIVE LAW COURT, SO AS TO DELETE PROVISIONS ESTABLISHING INITIAL DECISIONS INVOLVING ACTIONS OF THE DEPARTMENT AS STAFF DECISIONS WHICH BECOME DEPARTMENT DECISIONS AND ULTIMATELY FINAL AGENCY DECISIONS IF NOT APPEALED TO THE BOARD AND TO INSTEAD PROVIDE THAT INITIAL STAFF DECISIONS ARE DEPARTMENT DECISIONS AND FINAL AGENCY DECISIONS IF NOT APPEALED AND THAT SUCH APPEALS MUST BE MADE TO THE ADMINISTRATIVE LAW COURT.

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

SECTION 1. Timely resolutions of disputes with minimal delay regarding determinations and decisions made by the South Carolina Department of Health and Environmental Control promote economic development, ensure the protection of the State’s natural resources and environment, and allow earlier implementation of healthcare projects for the benefit of the State’s citizens. The current process imposes unreasonable and unnecessary delay which may be eliminated by allowing challenges to department decisions to be made directly to the South Carolina Administrative Law Court.

SECTION 2. Section 44‑1‑60 of the 1976 Code, as last amended by Act 278 of 2010, is further amended to read:

“Section 44‑1‑60. (A) For purposes of this section:

(1) ‘Licensing’ means the process which results in the grant, denial, renewal, revocation, suspension, annulment, withdrawal, or medication of a permit or license by the department.

(2) ‘License’ or ‘Permit’ means a department franchise, certificate, certification, registration, or similar form of permission or authorization required by law to engage in or conduct the authorized activity.

(B) ~~All~~ Challenges to department decisions involving the ~~issuance, denial, renewal, suspension, or revocation of permits, licenses,~~ licensing or other actions of the department which may give rise to a contested case ~~shall~~ must be made ~~using the procedures set forth in~~ pursuant to this section.

~~(B)~~(C) ~~The~~ Department staff shall comply with all requirements for public notice, receipt of public comments, and public hearings before making a department decision. To the maximum extent possible, the department shall use a uniform system of public notice of permit applications, opportunity for public comment, and public hearings.

~~(C)~~ The initial decision involving the ~~issuance, denial, renewal, suspension, or revocation of permits, licenses, or other action of the department shall be a staff~~ decision licensing or other actions of the department made by staff is deemed to be the department decision and must be in writing.

(D) In making a staff decision on ~~any permit, license, certification or other approval, the department~~ licensing or other action of the department, staff shall take into consideration all material comments received in response to the public notice ~~in determining whether to issue, deny or condition such~~ on the licensing ~~permit, license, certification or other approval~~ matter or an action of the department. ~~At the time that such staff decision is made, the~~ ~~Department shall issue a department decision, and~~ Staff shall base its department decision on the administrative record which ~~shall consist~~ consists of the application and supporting exhibits, all public comments and submissions, and other documents contained in the supporting file for the ~~permit, license, certification, or other~~ ~~approval~~ decision on the licensing matter or on an action of the department. The administrative record ~~may~~ also may include material readily available at the department, or published materials which are generally available and need not be physically included in the same file as the rest of the record as long as ~~such~~ these materials are specifically referred to in the ~~department~~ decision. ~~The department decision need not be issued for routine permits for which no adverse public comments have been received.~~

(E)(1) Notice of a department decision must be sent by certified mail~~, returned receipt requested~~ to the last known mailing address to the licensing applicant~~, permittee, licensee,~~ and affected persons who have requested in writing to be notified~~.~~ unless the licensing applicant, ~~permittee, licensee,~~ or affected persons ~~may request~~ have agreed in writing to be notified by regular mail or electronic mail in lieu of certified mail.

(2) Notice of ~~staff~~ decisions ~~for which a department decision is not required pursuant to subsection (D)~~ on routine licensing matters or other actions of the department from which no adverse public comments have been received must be provided only by regular mail or electronic mail, ~~delivery, or other appropriate means~~ to the licensing applicant~~, permittee, licensee,~~ and affected persons who have requested in writing to be notified.

(F) The staff decision becomes the final agency decision fifteen calendar days after notice of the ~~staff~~ decision has been ~~mailed~~ provided to the licensing applicant and affected persons, unless ~~a written request for final review accompanied by a filing fee is filed with the department by~~ the licensing applicant~~, permittee, licensee,~~ or affected person files a request for a contested case hearing with the Administrative Law Court and served upon the clerk of the Board of the Department of Health and Environmental Control and the licensing applicant and any affected persons, as applicable.

(G)(1) If a contested case hearing has been requested, the challenge to the department decision proceeds pursuant to the Administrative Procedures Act and an appeal of an Administrative Law Judge’s decision must be made to the circuit court.

(2) In conducting a contested case hearing pursuant to this section the Administrative Law Court shall give consideration to the provisions of Section 1‑23‑330 regarding the department’s specialized knowledge.

~~(3)~~ ~~The filing fee must be in the amount of one hundred dollars unless the department establishes a fee schedule by regulation after complying with the requirements of Article 1, Chapter 23, Title 1. This fee must be retained by the department in order to help defray the costs of the proceedings and legal expenses.~~

(H) A person to whom an emergency order is issued by the department may apply directly to the Administrative Law Court for relief and must be afforded a hearing within forty‑eight hours. Regardless of whether a hearing is held, the department shall revoke all emergency orders as soon as conditions or operations change to the extent that an emergency no longer exists.

~~(F)~~ ~~No later than sixty calendar days after the date of receipt of a request for final review, a final review conference must be conducted by the board, its designee, or a committee of three members of the board appointed by the chair. If the board declines in writing to schedule a final review conference or if a final review conference is not conducted within sixty calendar days, the staff decision becomes the final agency decision, and an applicant, permittee, licensee, or affected person requests pursuant to subsection (G) a contested case hearing before the Administrative Law Court. The department shall set the place, date, and time for the conference; give the applicant and affected persons at least ten calendar days’ written notice of the conference; and advise the applicant that evidence may be presented at the conference. The final review conference must be held as follows:~~

~~(1)~~ ~~Final review conferences are open to the public; however, the officers conducting the conference may meet in closed session to deliberate on the evidence presented at the conference. The burden of proof in a conference is upon the moving party. During the course of the final review conference, the staff must explain the staff decision and the materials relied upon in the administrative record to support the staff decision. The applicant or affected party shall state the reasons for protesting the staff decision and may provide evidence to support amending, modifying, or rescinding the staff decision. The staff may rebut information and arguments presented by the applicant or affected party and the applicant or affected party may rebut information and arguments presented by the staff. Any final review conference officer may request additional information and may question the applicant or affected party, the staff, and anyone else providing information at the conference.~~

~~(2)~~ ~~After the final review conference, the board, its designee, or a committee of three members of the board appointed by the chair shall issue a written final agency decision based upon the evidence presented. The decision may be announced orally at the conclusion of the final review conference or it may be reserved for consideration. The written decision must explain the basis for the decision and inform the parties of their right to request a contested case hearing before the Administrative Law Court. In either event, the written decision must be mailed to the parties no later than thirty calendar days after the date of the final review conference. Within thirty calendar days after the receipt of the decision an applicant, permittee, licensee, or affected person desiring to contest the final agency decision may request a contested case hearing before the Administrative Law Court, in accordance with the Administrative Procedures Act. The court shall give consideration to the provisions of Section 1‑23‑330 regarding the department’s specialized knowledge.~~

~~(3)~~ ~~Prior to the initiation of the final review conference, an applicant, permittee, licensee, or affected person must be notified of their right to request a transcript of the proceedings of the final review conference. If a transcript is requested, the applicant, permittee, licensee, or affected person making the request is responsible for all costs.~~

~~(G)~~ ~~An applicant, permittee, licensee, or affected person may file a request with the Administrative Law Court for a contested case hearing within thirty calendar days after:~~

~~(1)~~ ~~notice is mailed to the applicant, permittee, licensee, and affected persons that the board declined to hold a final review conference; or~~

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~~(I)~~ ~~The department may promulgate regulations providing for procedures for final reviews.~~

~~(J)~~ ~~Any statutory deadlines applicable to permitting and licensing programs administered by the department must be extended to all for this final review process. If any deadline provided for in this section falls on a Saturday, Sunday, or state holiday, the deadline must be extended until the next calendar day that is not a Saturday, Sunday, or state holiday.~~”

SECTION 3. All statutes and regulations must be interpreted to conform with this act requiring challenges to Department of Health and Environmental Control decisions to be filed directly to the South Carolina Administrative Law Court requesting a contested case hearing, and to the extent any existing provision in statute or regulation conflicts with this act, that provision is superseded by this act.

SECTION 4. The repeal or amendment by this act of any law, whether temporary or permanent, does not affect pending actions, rights, duties, or liabilities founded on it, or alter, discharge, release, or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

SECTION 5. If any section, subsection, item, subitem, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this act, and each and every section, subsection, item, subitem, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, items, subitems, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

SECTION 6. This act takes effect upon approval by the Governor and applies to decisions made by the Department of Health and Environmental Control on or after this act’s effective date.

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