

Timeline for Appealing Actions of TCEQ—New Third Court of Appeals Opinion

For the second time in a year, the Third Court of Appeals in Austin issued a ruling on the proper timeline associated with challenging a decision of the executive director of the Texas Commission on Environmental Quality (“TCEQ”) in the courts. In *Texas Commission on Environmental Quality v. Kelsoe*, __ S.W.3d __, 2009 WL 1161270 (Tex. App.—Austin April 30, 2009), the court ruled that relief from a decision of the executive director is governed by provisions for judicial review set out in Texas Water Code (“Water Code”) Section 5.351 and Texas Health & Safety Code Section 361.321. This decision echoes the opinion of the same court in *West v. TCEQ*, 260 S.W.3d 256 (Tex. App.—Austin July 31, 2008). The *Kelsoe* court determined that an applicant’s motion to overturn the executive director’s decision does not extend the time period for filing a petition for judicial review, and that the 30-day period for filing such a petition begins when the executive director takes final action on an application, which, in this instance, was when Kelsoe’s landfill application was dismissed by the agency as incomplete.

Edwin Kelsoe applied to TCEQ for a solid-waste landfill permit in 2005. By December 2005, the TCEQ’s executive director had already returned the application twice due to deficiencies, and a final December 9, 2005 correspondence stated that Kelsoe’s third revised application was returned as incomplete. On January 3, 2006, Kelsoe filed a motion to overturn the executive director’s decision, and that motion was denied by operation of law on January 23, 2006. Kelsoe filed a petition in Travis County District Court on March 2, 2006 challenging the agency’s decision.

Shortly thereafter, TCEQ filed a plea to the jurisdiction claiming that Kelsoe’s petition had been filed too late to invoke the court’s jurisdiction. The TCEQ argument relied on Water Code Section 5.351, which provides that a person who is “affected by a ruling, order, or decision” of TCEQ must file the petition within 30 days after the effective date of the ruling, order, or decision.”

In its opinion, the trial court agreed with Kelsoe by reasoning that the 30-day period for filing suit began when Kelsoe received notification that TCEQ commissioners would not review the executive director’s decision to return his permit application.

TCEQ appealed the district court’s decision to the Third Court of Appeals, which overturned the district court. The court rejected Kelsoe’s contention that Water Code Section 5.352 governed the petition because that statute allows a party to seek relief when TCEQ fails to act within a reasonable time or promptly. The court recognized the executive director’s determination that the application was incomplete as an “act in a reasonable time on an application” and concluded instead that the petition was governed by Water Code Section 5.351. The court determined that Kelsoe’s 30-day timeline to file a petition to challenge the agency’s

decision began on December 9, 2005 with the executive director's decision to return the application for incompleteness.

Kelsoe also argued that the alleged violations of his constitutional due-process rights allowed him to file suit in district court when he did. The Third Court of Appeals rejected this argument by noting that although the Texas Supreme Court recognized the right for judicial review of an administrative order when the order adversely affects a constitutional right, if a statute provides a right to judicial review, a person raising a constitutional claim must still comply with the statute's filing requirements. The court concluded that Water Code Section 5.351 is the statute that governed this case and held Kelsoe to its requirements.

In analyzing the due process issues in *Kelsoe*, the court discussed the reasoning in *West v. TCEQ*. In that case, West and the Sierra Club sought to overturn a decision by the TCEQ to deny their hearing requests regarding an application for a wastewater discharge permit. In *West*, the Third Court of Appeals ruled that "even constitutional claims must be brought within time and procedures set out in statutes allowing for judicial review." In addition, the opinion held that the Water Code governs the judicial review of TCEQ's decision and that untimely petitions for judicial review deprive the trial court of jurisdiction to consider such petitions.

The court also analyzed in *West* whether the Administrative Procedure Act ("APA") provides the avenue for judicial review of decisions made by the TCEQ. The court disagreed with the argument presented by West and the Sierra Club that the district court erred in its dismissal of their suits because the APA provides an independent right to judicial review of contested case decisions. The court ruled that Section 5.351 of the Water Code provides the procedure for seeking judicial review, and it imposes a 30-day deadline for seeking such a review.

As witnessed in the *West* and *Kelsoe* cases, numerous statutes provide various avenues for judicial review. The Third Court of Appeals, however, has made clear the supremacy of Water Code Section 5.351 in governing the judicial review process for challenges to decisions by the TCEQ. Pursuant to this provision and the opinions of the court, an action by the TCEQ's executive director is appealable to district court within 30 days of such action, without regard to the filing of a motion to overturn with TCEQ Commissioners, and compliance with this 30-day timeline is necessary in order to challenge the agency's action.