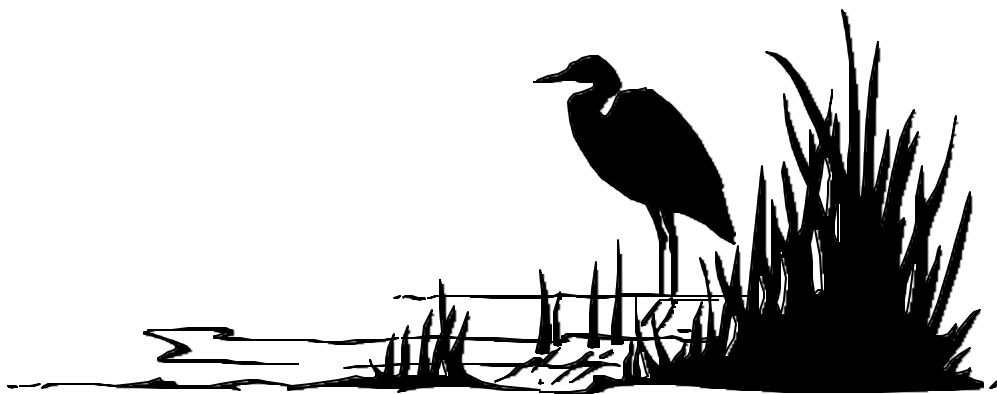


*New York State
Freshwater Wetlands
Appeals Board*



AN APPELLANT'S GUIDE
TO THE
FRESHWATER WETLANDS APPEALS BOARD PROCESS

Introduction.....p. 1

Notice of Appeal.....p. 2

Answer and Appearance.....p. 5

Scheduling.....p. 5

Briefs.....p. 6

Oral Argument.....p. 7

Intervenors and Other Interests.....p. 8

Stays.....p. 9

Decision.....p. 10

General.....p. 10

INTRODUCTION

The Freshwater Wetlands Appeals Board (Board) is a group of citizen-members appointed by the Governor to hear challenges to decisions made by agencies which administer the New York State Freshwater Wetlands Act (Article 24 of the Environmental Conservation Law). The Board's proceedings are less formal than court proceedings but are still subject to rules, set out in Part 647 of Title 6 of the New York Code of Rules and Regulations.

This booklet is a plain language explanation of key requirements of those rules. It is not a replacement for them, nor is it intended to be a detailed summary. It should, however, guide a potential appellant through the basic Freshwater Wetlands Appeals Board process.

NOTICE OF APPEAL

An appeal may challenge any "...final order or determination" of the commissioner of the Department of Environmental Conservation (DEC)¹. The appeal must be initiated within **30 days** of the date of the decision being challenged.

The appeals process is started by a document called the "Notice of Appeal". It may be as simple as a letter, but it should contain at least the following information:

1. the action of the department which is being challenged (mapping, permit issuance/denial, specific delineation, or such);
2. the location of the wetland subject to the appeal (wetland number and/or description of site);
3. the reason(s) for disagreeing with the action of the department which is being challenged (factually wrong, not based on data in the department's records, beyond the department's authority, or otherwise irregular); and,
4. the relief requested (that is, what action is being asked of the Board).

The Notice should raise issues that will be addressed in developing your case, but it should not discuss them in detail.

¹The DEC administers the Freshwater Wetlands Act in most of New York State. In the Adirondack Park, the Adirondack Park Agency administers the Freshwater Wetlands Act. In a few towns, the town government has taken over. In any of these areas, therefore, an appeal of a wetlands decision would be brought against that other agency. The Notice of Appeal must be served on the head of that administering agency, with a copy also sent to the DEC Commissioner. Therefore, the APA or town government will then follow the steps described here for the DEC.

The Notice of Appeal must be sent to both the DEC and the Board, in 2 separate steps, called "serving" the DEC and "filing" with the Board. First, the DEC's copy of the Notice must be "served" by sending it by **certified** or **registered** U.S. mail to:

Erin M. Crotty, Commissioner
New York State Department of
Environmental Conservation
625 Broadway - (14th Floor)
Albany, NY 12233-1010

Next, the original and 5 copies of the Notice must be "filed" with the Board by sending them to:

Freshwater Wetlands Appeals Board
625 Broadway - Room 145
Albany, NY 12233-1070
Attention: Docket Clerk

The Board's copies must be accompanied by an "Affidavit of Service," a notarized statement which certifies that the Commissioner's copy of the Notice of Appeal was properly sent ("served"). Page four is a sample showing the bare minimum which this affidavit must contain.

When the Board receives a Notice of Appeal, it will be assigned a "docket number". These numbers are issued sequentially by year and are used to identify each appeal. The person filing the appeal is called the "appellant" while the challenged agency is the "respondent;" each is a "party" to the appeal. Both appellant and respondent are informed of the docket number assigned to each appeal.

-----MODEL-----

Affidavit of Service

State of New York))

County of _____))

_____(Name)_____, being duly sworn, states: I am over 18 years old, I live at

_____ address _____: on _____ (date) _____, I mailed a copy of the Notice of Appeal to:

Erin M. Crotty, Commissioner
New York State Department of
Environmental Conservation
625 Broadway - (14th Floor)
Albany, NY 12233-1010

by sending it certified/registered U.S. mail.

Your Signature

Sworn to Before Me

this ____ day of _____, 20__.

Notary Public

ANSWER AND APPEARANCE

The DEC's initial response to the Notice of Appeal is called the "Answer and Appearance" and is sent to both the appellant and the Board. It generally responds to ("answers") the points in the Notice and indicates which staff attorney will be the primary contact ("appear") for DEC. All further papers or correspondence about the appeal should be sent to the attorney named in the Answer and Appearance.

SCHEDULING

Once the department has answered, a schedule will be set for DEC to submit its "Record on Appeal" (the file pertaining to the challenged action) and for both sides to submit briefs. The appellant may work with the DEC in preparing the record to ensure that all relevant documents are submitted to the Board. Time periods for submission of the record and briefs may be altered. Requests for schedule changes should be arranged, whenever possible, among the parties ("on consent") before presenting the request to the Board. Such a request may also be made directly to the Board.

BRIEFS

The word "brief" sounds quite legalistic, and to be honest, has discouraged some people from pursuing appeals on their own. The key is to NOT PANIC. A "brief" is nothing more than an orderly written presentation of the arguments on one side of a case. While model forms are available, no specific formal structure is actually required. For the sake of those who will be reading the briefs, however, the brief should be clearly organized. A simplified general format for an appellant's brief could be:

1. Introduction, which summarizes the arguments to be developed;
2. Individual Points or Arguments, using facts, figures, or quotations as needed, with narrative to explain each point; and
3. Conclusion, which briefly reviews the arguments and relates them to the relief requested in the Notice of Appeal.

The "initial brief" is to be submitted by the appellant. Because the general rules for reviews such as those done by this Board presume that an agency's decision is correct unless proven wrong, the appellant is said to "bear the burden of proof". In other words, the appellant must show in some detail exactly why the challenged decision is believed wrong.

The DEC will then submit its brief, in which it will attempt to counter the points raised by the appellant. Finally, the appellant may (but is not required to) reply in a 2-page letter to the points raised by the DEC.

Each appellant must serve (by regular mail) one copy of its brief on the DEC attorney named in the Answer and Appearance and then file the original plus five copies and an affidavit of service on DEC with the Board. DEC will provide the appellant with a copy of its brief. If an appellant chooses to submit a reply to DEC's brief, that reply must be served and filed in the same manner as the brief.

ORAL ARGUMENT

The Board does not hold full hearings on most appeals but may hold "oral argument" if it is requested to do so by either side. Oral argument is, essentially, a chance to highlight points from the brief in an effort to persuade the Board to accept one's viewpoint. Sworn witnesses are not called, although the Board will sometimes allow an expert to clarify a technical point.

The Board does not provide a stenographer or transcript for oral argument. If any party wants a transcript, that party must arrange for and pay the stenographer and provide a copy of the transcript to the Board.

If oral argument is desired, it must be requested when a party's brief is submitted. If it is not requested, the Board will decide the case based on the briefs and record ("on the papers").

INTERVENORS AND OTHER INTERESTS

Often, individuals or groups besides the appellant and DEC will be interested in an appeal. If someone wishes to actually participate as a party in the process of the appeal, a written application to intervene must be made to the Board. That application must specifically demonstrate how that person or group has a direct interest in, or could be affected, by the outcome of an appeal. A copy of the application to intervene must also be sent to each party to an appeal. If the intervention request is granted, the intervenor will submit briefs on the same schedule as the party whose position the intervenor supports.

Individuals who wish only to comment may use either of two written submissions: an "amicus curiae" brief or a letter of "limited appearance". The letter is restricted to 2 pages and may be sent by anyone who wishes to offer relatively brief comments or observations on an appeal. "Amicus curiae" means "friend of the court", and an amicus brief is submitted without any right to participate further in the appeal process. The Board must be asked for permission to submit an amicus brief. A copy of the proposed brief must be submitted with that request, and the proposed brief and application must be sent to all parties.

STAYS

A stay is an order which preserves the status quo by temporarily stopping someone from proceeding with an approved action. The Board may grant a stay where it is essential to protect the wetland while the appeal is processed.

Filing and properly serving a stay request puts an automatic temporary stay into effect, until the Board (or at least the chairman) can hear argument on that stay request. The stay request itself must clearly state that a stay is requested, by whom, and the justification for the stay (including both the damage to be avoided and why the requestor believes the appeal itself will succeed). It must also explicitly inform the person actually restrained by the stay (landowner and/or permit holder) that the stay has been requested and that the temporary stay has taken effect.

The stay request must be served in person--that is, hand delivered - by the requestor on the permit holder/landowner and served by mail on the DEC as well as filed with the Board. Affidavits of service must be provided when the Board's copies are filed.

The DEC and the person restrained may file written responses to the stay request. The Board will then schedule argument on the stay as soon as practical. If the Board decides to continue the stay while the appeal is being heard, it may require that the requestor post a bond for the duration of the stay and appeal.

DECISION

A written decision is issued on each appeal. Both the appellant and the DEC are sent copies, and another copy is filed with the County Clerk of the county containing the wetland in question. All decisions made by the Board since 1988 are available through **Westlaw** and **Lexis**. All Board decisions are on file in the Board's office and may be reviewed there.

GENERAL

"Ex parte communications" are any conversations or letters about the issues or substance of a case between the Board and only one party, and they are **NOT** allowed. Therefore, anything substantive sent by an appellant to the Board must also be sent to the DEC. This does not apply to questions about rules, procedures, dates or such, so calls or letters to the Board's office on these matters are entirely appropriate and do not require notice or copies to the opposite party.

The Board is not the DEC and so is not the place to direct records access requests. Wetlands mapping files and permit files are kept in DEC's regional offices. You can arrange to review such files by contacting the regional office covering your county.

Any decision issued by the Board may be challenged by any party to that appeal in New York State Supreme Court for the appropriate county, under Article 78 of New York State's Civil Practice Law and Rules (CPLR).

(FWABGUIDE - DECEMBER2001)

