

# **ARKANSAS POLLUTION CONTROL AND ECOLOGY COMMISSION**



## **REGULATION NO. 8**

### **ADMINISTRATIVE PROCEDURES**

**Approved by the PC&E Commission: January 23, 2009**

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## **CHAPTER ONE: GENERAL PROVISIONS**

### **Reg.8.101 TITLE**

The Arkansas Pollution Control and Ecology Commission (“Commission”) adopts Regulation No. 8 pursuant to Arkansas Code Annotated Section 8-1-203(b)(1), (2) and (3). This Regulation shall be known as Regulation No. 8 – Administrative Procedures and may be cited as: Reg. 8.101 et seq.

### **Reg.8.102 PURPOSE AND INTENT**

(A) The purpose of is to set out the administrative procedures that govern the Commission, the Arkansas Department of Environmental Quality (“Department”), and any person appearing in any proceeding or matter before the Commission or the Department

(B) It is the intent of the Commission that the provisions of this Regulation be liberally construed so as to provide a fair opportunity for a hearing on all matters addressed herein to all persons who have standing in a specific question which is before the Commission and to expedite the administration of matters pending before the Commission.

### **Reg.8.103 DEFINITIONS**

As used in this Regulation, unless the context otherwise requires:

(A) **“Adjudicatory hearing”** means any hearing held by the Commission under the laws administered by the Commission or the Department, for the purpose of receiving evidence concerning the adjudication of facts or issues for which a hearing is provided.

(B) **“Adjudicatory proceeding”** means any administrative action allowed by statute, regulation, or permit specifically brought before the Commission to resolve a dispute.

(C) **“Administrative civil penalty”** means any monetary amount assessed by the Director against a person for violation of a statute, regulation, permit, or order administered by the Department, and includes any in-kind services or cash contribution authorized by the Director as partial mitigation of cash penalties for use in projects or programs designed to advance environmental interests.

(D) **“Administrative enforcement action”** means any administrative proceeding instituted by the Department against a person charged with violation of any law, regulation, permit, or order administered by the Department.

(E) **“Administrative Hearing Officer”** means a person designated by the Commission to determine issues of fact and law and render a written Recommended Decision on matters pending before the Commission and to take any other action consistent with the Commission’s statutory and regulatory authority.

(F) **“Administrative Permit Amendment”** means a minor change which is not typically considered a permit modification, as defined by applicable statutes or regulations, or a minor change which does not require public notice and opportunity for comment. For example, typographical corrections or other minor corrections initiated by the Department might be considered administrative permit amendments. Some minor changes requested by the permittee may also qualify as administrative permit amendments. For Air permits, administrative permit amendments are defined in Regulations 18, 19, and 26. The Director, in his or her discretion, may decide whether a proposed revision would be considered an administrative amendment.

(G) **“Administratively complete”** means that all information required by statute, regulation, or application form has been submitted to the Department for the purpose of processing a permit application. An application that is administratively complete is not necessarily technically complete or complete for other purposes.

(H) **“Affiliated person”** means:

(1) Any officer, director, or partner of the applicant;

(2) Any person employed by the applicant in a supervisory capacity over operations of the facility that is the subject of the application which may adversely impact the environment, or with discretionary authority over such operations;

(3) Any person owning or controlling more than five percent (5%) of the applicant's debt or equity; or

(4) Any person who is not now in compliance or has a history of noncompliance with the environmental laws or regulations of this state or any other jurisdiction and who through relationship by affinity or consanguinity or through any other relationship could be reasonably expected to significantly influence the applicant in a manner which could adversely affect the environment.

(I) **“Applicant”** means any person who files an application for a permit or permit renewal; an application for the reissuance of, revision of, modification of, or transfer of a permit; an application for closure/post closure plan approval or modification; an application for a permit exemption, variance or waiver; an application for a certification or license; and an application for a bond reduction or release; or any other application as required by the Department.

(J) **“Chairperson”** means a commissioner elected by the other commissioners to preside over the Arkansas Pollution Control and Ecology Commission.

(K) **“Commission”** means the Arkansas Pollution Control and Ecology Commission.

(L) **“Commission hearing”** means a proceeding in which the Commission reviews an action taken by the Department which includes but is not limited to, enforcement actions and the issuance of administrative orders, permitting decisions, grant or loan decisions, petroleum

storage tank trust fund decisions, tax credit decisions, and other matters.

(M) **“Commission Secretary”** means the designated secretary to the Commission.

(N) **“Consent Administrative Order,” “Permit Appeal Resolution,” and “Settlement Agreement”** all mean an administrative order entered into by agreement of the parties, including the Department.

(O) **“Declaratory Order”** means an order that resolves controversies or answers questions or doubts concerning the applicability of rules, statutes, permits, or orders over which the Commission has authority. A Petition for Declaratory Order may be used only to resolve questions or doubts as to the application of rules, statutes, permits, or orders to the petitioner’s particular circumstances. A Petition for Declaratory Order is not the appropriate means to determine the conduct of another person or to obtain a policy statement of general applicability from the Commission. A petition must describe the impact to the petitioner of the rule, statute, permit, or order.

(P) **“Default Administrative Order”** means a final order issued by the Director to a person who has failed to respond in writing to a Notice of Violation within twenty (20) calendar days of its receipt.

(Q) **“Department”** means the Arkansas Department of Environmental Quality, or its successor, including the Director and Department staff.

(R) **“Director”** means the executive head of the Arkansas Department of Environmental Quality or the executive head’s delegatee.

(S) **“Emergency Order”** means an administrative order issued by the Director pursuant to specific authority provided by any law or regulation administered by the Commission or the Department without prior notice or adjudicatory hearing, upon a finding that an emergency or imminent hazard exists.

(T) **“Grant or loan decision”** means a final administrative decision by the Director on any application for a grant or loan or the Director’s final decision on any dispute related to a grant or a loan.

(U) **“Implementing agreement”** means a plan, order, memorandum of agreement, or other enforceable document issued by the Department under provisions of the Arkansas Hazardous Waste Management Act of 1979, Arkansas Code Annotated § 8-7-201 et seq. or the Remedial Action Trust Fund Act, Arkansas Code Annotated § 8-7-501 et seq., to implement the voluntary cleanup process described in Arkansas Code Annotated § 8-7-1104.

(V) **“Major modification”** means a revision which is not a minor modification or an administrative permit amendment.

(W) **“Minor modification”** means a revision of a permit as defined by any other

regulation or as determined by the Department to be routine or inconsequential in case-specific circumstances and is not an administrative permit amendment.

**(X) “Notice of adjudicatory hearing”** means a written notification to the parties of an adjudicatory hearing. This term does not apply to a notice of public hearing or publication of notice in a newspaper.

**(Y) “Notice of Bond Forfeiture”** means a written notification to a person of alleged violations of any statute, regulation, permit or order administered by the Department or Commission, which constitute grounds for forfeiting a bond to the Department. The Notice of Bond Forfeiture initiates an administrative enforcement action.

**(Z) “Notice of Violation”** means a written notification to a person of alleged violations of any statute, regulation, permit, or order administered by the Department or Commission. The Notice of Violation initiates an administrative enforcement action.

**(AA) “Permit”** means an authorization conferred by the Director pursuant to statute or regulation to construct or operate an existing or a proposed facility.

**(BB) “Permitting decision”** means a final administrative decision by the Director or the Director’s delegatee on all applications for permits, permit renewals, major modifications, minor modifications, administrative permit amendments, permit revocations, interim authority and temporary variances, construction permits, and transfers; closure/post closure plan approvals and modifications; the calculation of permit fees; exemptions, variances and waivers; certifications or licenses; bond reductions or releases; and specific conditions imposed on permits.

**(CC) “Person”** means any individual; corporation; company; firm; partnership; association; trust; joint-stock company or trust; limited liability company; venture; municipal, state, county, or federal government agency, authority or instrumentality; or any other legal entity, however organized.

**(DD) “Presiding Officer”** means the person conducting a public hearing on behalf of the Commission or the Department.

**(EE) “Public comment”** means any written statement received by the Department during the public comment period by letter, electronic mail or facsimile, or any oral statement received on the record during a public hearing.

**(FF) “Public hearing”** means a formal meeting held pursuant to the laws or regulations administered by the Commission or the Department for the purpose of receiving on the record oral or written comments from the public on a permitting decision or on a rulemaking proceeding. A public hearing is not an adjudicatory hearing or a public meeting.

**(GG) “Public Meeting”** means an informal meeting held by the Commission or the Department for the purpose of exchanging information with the public on a permitting decision, on a rulemaking, or on any issue of public interest. A public meeting is not an adjudicatory



hearing or a public hearing. Any comment made at a public meeting is not made on the record and is therefore not received as a “public comment.”

**(HH) “Public notice”** means the published notification of any public hearing, permitting decision, grant or loan decision, rulemaking, enforcement action or any other matter taken by the Commission or the Department as provided in this Regulation or by law.

**(II) “Recommended Decision”** means the written recommendation, including findings of fact and conclusions of law, made by the Administrative Hearing Officer to the Commission at the conclusion of an adjudicatory hearing or after a decision granting or denying the relief sought in the matter.

**(JJ) “Regulation”** means any rule promulgated by the Commission pursuant to the laws it administers. The term “regulation” includes: rule or suspension of the processing of a type or category of a permit or a declaration of a moratorium on a type or category of a permit.

**(KK) “Rulemaking”** means a proceeding to promulgate, adopt, amend or repeal a regulation.

**(LL) “Special conditions”** means the conditions to a permit issued by the Department in its discretion that are not specifically imposed by law or regulation.

**(MM) “Stay”** means the postponement or delay of a decision of the Director or the Commission .

**(NN) “Subpoena”** means a command to appear at a certain time and place to give testimony upon a certain matter. A subpoena duces tecum requires production of books, papers and other things.

**(OO) “Third-party rulemaking”** means any submitted by any person other than the Commission or the Department.

**(PP) “Violation”** means an instance of noncompliance by a person with a provision of a law, regulation, permit or order administered by the Commission or the Department.

## **CHAPTER TWO: PERMITS**

### **Reg.8.201 APPLICABILITY**

Unless otherwise required by another Commission regulation, the following sections of this chapter shall apply to all permitting decisions. However, the requirements of Reg.8.205 through Reg.8.209 and Reg.8.211(A)(2) do not apply to (1) closure/post closure plan approvals or modifications; (2) the calculation of permit fees; (3) exemptions, variances and waivers; (4) certifications or licenses; (5) minor modifications of permits; (6) bond reductions or releases; or (7) administrative permit amendments. In addition to complying with the requirements of this chapter, the Department shall follow any other applicable state or federal public notice requirements. An application for a permit and other matters preliminary to the Director's issuance of a final permitting decision not specified in this Regulation shall be as provided in applicable laws and regulations.

### **Reg.8.202 DIRECTOR AS PERMITTING AUTHORITY**

The Director or the Director's delegatee shall issue all permits. Nothing in this Regulation, including the power to reverse or affirm a permitting decision by the Director, shall be construed to authorize the Commission to issue a permit.

### **Reg.8.203 PERMIT APPLICATION PROCEDURES**

An applicant shall file a permit application with the appropriate division of the Department on forms supplied by or approved by the Department. This may include electronic forms as approved by the Department. The Department will not process an application unless the application is administratively complete.

### **Reg.8.204 NON-COMPLIANCE DETERMINATION**

(A) Purpose -- In order to ensure the continued protection of the public health, safety, and welfare and the environment of this state, upon the determination that any applicant for the issuance or transfer of any permit, license, certification or operational authority, based on the disclosure statement and other investigation which he or she deems appropriate, has exhibited a history of non-compliance or a pattern of disregard for state or federal environmental laws or regulations or for other just cause, the Director may deny the applicant's request for the issuance or transfer of any permit, license, certification or operational authority.

(B) Disclosure Statement – All applicants for the issuance or transfer of any permit, license, certification or operational authority under the environmental laws of this state shall submit a disclosure statement to the Department unless exempted herein or by applicable law. The disclosure statement shall include but not be limited to the following information:

- (1) The full name, business address, and social security number or tax i.d. number of

the applicant and all affiliated persons;

(2) The full name and business address of any legal entity in which the applicant holds a debt or equity interest of at least five percent (5%) or which is a parent company or subsidiary of the applicant, and a description of the ongoing organizational relationships as they may impact operations within the state;

(3) A description of the experience and credentials of the applicant, including any past or present permits, licenses, certifications, or operational authorizations relating to environmental regulation;

(4) A listing and explanation of any civil or criminal legal actions by government agencies involving environmental protection laws or regulations against the applicant and affiliated persons in the ten (10) years immediately preceding the filing of the application, including administrative enforcement actions resulting in the imposition of sanctions, permit or license revocations or denials issued by any state or federal authority, actions that have resulted in a finding or a settlement of a violation, and actions that are pending;

(5) A listing of any federal environmental agency and any other environmental agency outside this state that has or has had regulatory responsibility over the applicant;

(6) Any other information the Director may require that relates to the competency, reliability, or responsibility of the applicant and affiliated persons.

(C) Exemptions - The following persons or entities are not required to file a disclosure statement:

(1)(a) Governmental entities, consisting only of subdivisions or agencies of the federal government, agencies of the state government, counties, municipalities, or duly authorized regional solid waste authorities as defined by law.

(b) This exemption shall not extend to improvement districts or any other subdivision of government which is not specifically instituted by an act of the General Assembly;

(2) Applicants for a general permit to be issued by the Department pursuant to its authority to implement the National Pollutant Discharge Elimination System for storm water discharge or any other person or entity the Commission may by rule exempt from the submission of a disclosure statement.

(3) Nothing in this section, including the exemptions listed herein, shall be construed as a limitation upon the authority of the director to deny a permit based upon a history of noncompliance to any applicant or for other just cause.

(4) Any applicant that is a publicly held company required to file periodic reports under the Securities and Exchange Act of 1934, or a wholly owned subsidiary of a publicly held company, shall not be required to submit a disclosure statement, but shall submit the most

recent annual and quarterly reports required by the Securities and Exchange Commission which provide information regarding legal proceedings in which the applicant has been involved. The applicant shall submit such other information as the Director may require that relates to the competency, reliability, or responsibility of the applicant and affiliated persons.

(5) For a person or entity seeking a renewal of an expiring permit, license, certification, or operational authorization the disclosure requirements of this section shall be met if the entity:

- (a) Discloses any change in previously submitted information; or
- (b) Verifies that the previously submitted information remains accurate; and
- (c) Submits the information on forms developed by the Department.

(6) The Commission may adopt regulations exempting certain permits, licenses, certifications, or operational authorizations from the disclosure requirements and establish reasonable and appropriate disclosure information, if any, required for specific types of permits, licenses, certifications, or operational authorizations based on:

- (a) The scope of a permit, license, certification, or operational authorization; and
- (b) The person or entity that would receive a permit, license, certification, or operational authorization.

(7)(a) Pursuant to the authority of Reg. 8.204(C)(6), the following permits, licenses, certifications, and operational authorizations are exempt from the requirement to submit a disclosure statement:

- (i) Hazardous Waste Treatment, Storage, and Disposal Permit Modifications (Class 1, 2, and 3), as defined in Regulation 23;
- (ii) Phase 1 Consultants, as defined in Regulation 32;
- (iii) Certifications for Operators of Commercial Hazardous Waste Facilities, as defined in Section 264.16(f) of Regulation 23;
- (iv) RST License Renewals, as defined in Regulation 12;
- (v) Laboratory Certifications, as defined in A.C.A. § 8-2-201 et seq.;
- (vi) Individual Homeowners seeking coverage under General Permit ARG5500000;
- (vii) Wastewater Operator Licenses, as defined in Regulation 3
- (viii) Water Permit Modifications for permits issued under the authority of the Arkansas Water and Air Pollution Control Act, A.C.A. § 8-4-101 et seq.;
- (ix) Solid Waste Permit Modifications for permits issued under Regulation 22;
- (x) Solid Waste Landfill Operator License Renewals, as defined in Regulation 27; and
- (xi) Air Permit Modifications for permits issued under Regulations 18, 19, and 26.

(b) The exemption from the requirement to submit a disclosure statement shall not be

construed as a limitation upon the authority of the Director to request any information he or she deems appropriate that may relate to the competency, reliability, or responsibility of the applicant and affiliated persons.

(D) Denial – The Director may deny the issuance or transfer of any permit, license, certification or operational authority if the Director finds:

(1) The applicant has misrepresented or concealed any material fact in the application or disclosure statement, or in any other report or certification required herein, or;

(2) The applicant has obtained or attempted to obtain the issuance or transfer of any permit, license, certification or operational authority by deliberate falsification or omission of relevant information from disclosure statements; or

(3) The applicant has a documented and continuing history of criminal convictions, based upon violations of any state or federal environmental laws or regulations; or

(4)(a) The applicant or a person affiliated with the applicant to the point of significantly being able to influence the practices or operations of the applicant which could have an impact upon the environment has a documented history of violations of state or federal environmental laws or regulations that evidence a history of non-compliance or a pattern of disregard for state or federal laws or regulations; and has either made no attempt or has failed to remediate the disclosed violations.

(b) In making a determination of whether a documented history of violations of state or federal laws or regulations constitutes a history of non-compliance or a pattern of disregard sufficient to deny a permit, the Director shall consider:

(i) The nature and details of the violations attributed to the applicant;

(ii) The degree of culpability of the applicant;

(iii) The applicant's history of violations of state or federal environmental laws or regulations. In determining the applicant's history of non-compliance, the Director shall not consider the applicant's prior violations of environmental laws or regulations if those violations are addressed in a consent administrative order and the applicant is in compliance with that order.

(iv) Whether the applicant has substantially complied with this state's statutes, rules, regulations, permits, and orders applicable to the applicant in this State relative to the activity for which the permit is sought;

(v) Whether the applicant has substantially complied with other states' or jurisdictions' statutes, rules, regulations, permits, and orders applicable to the applicant relative to the activity for which the subject permit is sought;

(vi) Mitigation of the severity of an environmental violation based upon any demonstration of good citizenship by the applicant including, without limitation, prompt payment of administrative civil penalties, civil damages, cooperation with investigations, termination of employment or other relationship with responsible parties or other persons responsible for the activity described in Reg.8.204(B)(4) or other demonstration of good citizenship by the applicant that the department finds acceptable;

(vii) Whether the best interests of the public will be served by denial of the permit; and

(viii) Any other information that the Director may require from the applicant.

#### **Reg.8.205 PUBLIC NOTICE OF PERMIT APPLICATION**

(A) Public notice of an administratively complete application for a permit shall be published in a newspaper of general circulation in the county in which the proposed facility or activity is to be located, or, for a statewide permit, in a newspaper of statewide circulation. The Department shall provide or approve the format of the notice.

(B) The notice shall include:

(1) The name and business address of the applicant;

(2) The type of permit for which the application has been made;

(3) The name of the division reviewing the application;

(4) The date the application was filed;

(5) The city, town or community nearest to the proposed facility; and

(6) A statement that any interested person may request a public hearing on the proposed permit by giving the Department a written request within ten (10) business days of the publication of the notice.

(C) The applicant shall provide proof of publication of the notice to the Department and the proof of publication shall become part of the application file.

(D) The applicant shall pay the costs of publication of notice of an application for a permit. The applicant shall provide proof of payment (i.e., a paid receipt) of all costs of publication.

#### **Reg.8.206 REQUEST FOR PUBLIC HEARING ON APPLICATION FOR PERMIT**

Any interested person may request a public hearing on a permit application. The request shall be in writing and shall state reasons for the necessity of a public hearing. The request must be filed with the appropriate division of the Department within ten (10) business days after

publication of the notice of the permit application. The Department shall have the discretion to decide whether to hold a public hearing, unless otherwise required by law or regulation.

#### **Reg.8.207 PUBLIC NOTICE OF DRAFT PERMITTING DECISION**

(A) When the Director issues a draft permitting decision, notice of the draft permitting decision shall be published in a newspaper of general circulation in the county in which the facility or activity proposed to be permitted is located, or, for a statewide permit, in a newspaper of statewide circulation. When the Department causes the notice to be published, the notice may be combined with other notices of permitting decisions. The Department shall provide or approve the format of the notice and shall keep the proof of publication of the notice in the permit file.

(B) The notice shall include:

(1) The name and telephone number of the division of the Department responsible for the draft permitting decision;

(2) The name and business address of the applicant;

(3) The type of permit for which the permitting decision is proposed to be issued;

(4) The date of issuance of the draft permitting decision;

(5) A brief summary of the draft permitting decision;

(6) A statement that the draft permitting decision is available for copying at the Department;

(7) A statement that the submission of written comments by any person will be accepted by the Department during the public comment period. The appropriate addresses for receiving written comments shall be listed in the public notice; and

(8) A statement that any interested person may request a public hearing on the draft permitting decision during public comment period or the Department may combine the notice of public comment period with the notice of public hearing if it is already known that a hearing will be held.

(C) The applicant shall pay the costs of publication of notice of a draft permitting decision to issue a permit. The applicant shall provide proof of publication and proof of payment (i.e., a paid receipt) of all costs of publication.

(D) All costs of publication for notices of intent to deny a permit or for Department initiated permit modifications shall be the responsibility of the Department.

## **Reg.8.208 PUBLIC COMMENT ON DRAFT PERMITTING DECISION**

(A) Any interested person may submit to the Department written comments, data, views, or arguments on the draft permitting decision during the public comment period. Reg.8.214 provides that only those persons who submit public comments on the record shall have standing to appeal a permitting decision to the Commission.

(B) The public comment period shall begin on the day the notice is published and shall expire on the thirtieth (30th) calendar day after publication of the notice, unless otherwise required by law or regulation. If the last day of the comment period is a Saturday, Sunday, ~~or~~ legal holiday, or other day when the Department's office is closed, the public comment period shall expire on the next day that is not a Saturday, Sunday, legal holiday, or other day when the Department's office is closed.

(C) Prior to the close of the public comment period provided in Reg.8.208(B), the Director may extend the period for written public comments for up to an additional twenty (20) calendar days, through a public notice, if exceptional circumstances warrant.

(D) Written public comments will be accepted if received not later than 4:30 p.m. on the last day of the public comment period. Written public comments may be submitted to the Department by mail or facsimile. Comments may also be submitted by electronic mail if received no later than 4:30 p.m. on the last day of the public comment period. Electronic mail comments must be sent to the electronic mail address specified in the public notice.

(E) The Department shall make available the draft permitting decision and other material relevant to the draft permitting decision for inspection and copying at the Department during the public comment period and shall comply with the relevant provisions of the Arkansas Freedom of Information Act. The Department shall provide copies to any person making a request for copies, including any request by mail, telephone, electronic mail, or facsimile. The Department may charge the actual costs of reproduction, mailing, or transmitting the record by facsimile or other electronic means. The Department may require the requester to pay the copy fee in advance if the estimated fee exceeds twenty-five dollars (\$25.00).

(F) The Department shall consider the written comments received during the public comment period, and in its discretion, shall determine whether to conduct a public hearing on the draft permitting decision.

## **Reg.8.209 PUBLIC HEARINGS**

(A) If the Department decides to hold a public hearing on an application for a permit or on a draft permitting decision, the Department shall schedule the hearing and:

(1) Give notice of the date, time and place of the hearing by first class mail to the applicant, to all persons who have filed a timely written request for a public hearing to all



persons who have submitted public comments on the record, and to all persons who have requested advance notice of the public hearing. If comments are submitted for a group or by a petition, the Director may require the group to designate a representative to receive the notice ;

(2) Give notice of the date, time and place of the hearing by publishing the notice in a newspaper of general circulation in the county in which the proposed facility or activity is, or is to be located; or for a statewide permit, in a newspaper of statewide circulation.

(B) The public hearing will be conducted as follows:

(1) The Department will receive oral public comments at the public hearing. –

(2) A public hearing may continue until all persons wishing to make comments have been heard. The Presiding Officer may establish time limits.

(3) The Presiding Officer may decide not to receive additional oral comments if the comments will not serve a useful purpose or will be cumulative or unduly time consuming.

(4) The Presiding Officer will receive oral public comments from all persons who have informed the Director in writing prior to the hearing of their desire to speak.

(5) To ensure comments are accurately recorded, the Department prefers comments be submitted in writing.

(6) The Presiding Officer may extend the period for written public comments, if announced at the public hearing, for up to twenty (20) calendar days.

#### **Reg.8.210 PUBLIC MEETINGS**

The Department, in its discretion, may hold a public meeting for the purpose of informally exchanging information with the public on a permitting decision.

#### **Reg.8.211 FINAL PERMITTING DECISION**

(A) Director's Decision

(1) The Director shall issue the final permitting decision in writing. The Director's decision shall be made upon consideration of the completed application, the public comments on the record, if any, and any other materials provided by law or regulation applicable to the application or other matter to be considered in the decision. The Director may impose special conditions upon the issuance of a permit.

(2) The Director's final decision shall include a response to each issue raised in any public comments received during the public comment period, if any. In the case of any discharge limit, emission limit, environmental standard, analytical method or monitoring requirement, the record of the proposed action and the response shall include a written explanation of the rationale for the proposal, demonstrating that any technical requirements or standards are based upon generally accepted scientific knowledge and engineering practices.

For any standard or requirement that is identical to a duly promulgated and applicable regulation, this demonstration may be satisfied by reference to the regulation. In all other cases the Department must provide its own justification with appropriate reference to the scientific and engineering literature or written studies conducted by the Department.

(B) Issuance of Final Permitting Decision and Effective Date

(1) The date of issuance of a final permitting decision is the date notice of the decision is served upon the applicant or permittee. Service is deemed complete when the notice is placed in the mail to the applicant or permittee.

(2) The Director's final permitting decision shall contain a certificate of service showing the date of issuance. The certificate shall be signed by the person causing the notice to be placed in the mail.

(3) The effective date of a final permitting decision is the date of issuance, unless a later effective date is specified in the decision.

(C) Notice of Decision-

The Department shall mail by first-class mail notice of the final permitting decision to the applicant or permittee and those persons who submitted public comments on the record. If comments are submitted for a group or by a petition, the Director may require the group to designate a representative to receive the notice. The notice to all of these persons shall be placed in the mail on the same date. The notice shall include:

(1) The name and business address of the applicant or permittee;

(2) The permit application identification number;

(3) A brief description of the final permitting decision;

(4) A certificate of service showing the date the decision was issued; and

(5) A statement that the applicant or permittee and any person submitting public comments on the record may request an adjudicatory hearing and Commission review of the final permitting decision as provided by under Chapter Six of this Regulation.

(D) Payment of Permit Fees and Outstanding Permit, Publication, Annual Review, or Late Fees

The Director shall not issue a final permit until the applicant has paid all applicable permit fees and any outstanding permit, publication, annual review, or late fees owed to the Department.

### **Reg.8.212 PERMIT TRANSFER**

(A) Except for the transfer of hazardous waste permits, an applicant for a transfer of a permit shall submit to the Department a written request for transfer of the permit on a form provided by the Department. The applicant also shall submit to the Department the information required by Reg.8.204 at least thirty (30) calendar days in advance of the proposed transfer date. The permit is automatically transferred to the new permittee unless the Director denies the request to transfer within thirty (30) calendar days of the Department's receipt of the disclosure information. This denial shall constitute a final permitting decision of the Director and may be appealed to the Commission.

(B) Hazardous waste permits must be transferred in accordance with the requirements of Commission Regulation Number 23 and Reg.8.204.

### **Reg.8.213 MINOR MODIFICATIONS**

The final decision of the Director regarding a minor modification of a permit is effective immediately.

### **Reg.8.214 PERSONS WITH STANDING TO APPEAL A PERMITTING DECISION**

(A) Only the applicant or permittee and those persons who submitted timely public comments on the record, if a public comment period was provided, shall have standing to appeal a final permitting decision to the Commission. If no public comment period is provided for the following: (1) closure/post closure plan approvals or modifications; (2) the calculation of permit fees; (3) exemptions, variances and waivers; (4) certifications or licenses; (5) minor modifications of permits; (6) bond reductions or releases; or (7) administrative permit amendments; then any person who reasonably considers himself or herself injured in his or her person, business, or property by any of these decisions shall have standing to appeal the final permitting decision to the Commission.

(B) An applicant, permittee, or any other person with standing who desires to appeal a permitting decision must file a Request for Hearing with the Commission Secretary within thirty days of the date of issuance of the Director's final permitting decision. If a person desires to participate in an existing appeal, that person must file a Petition for Intervention.

(C) Any Request for Hearing or Petition for Intervention shall comply with the provisions of Chapter Six of this Regulation.

### **Reg.8.215 REVIEW ON COMMISSION INITIATIVE**

(A) The Commission may, by majority vote within thirty (30) calendar days of the date of the Director's issuance of a permitting decision, initiate adjudicatory review of the decision, even if the parties do not.

(B) After the Commission decides to initiate review, the Director, the applicant or permittee and all persons who submitted public comments on the record shall be served notice

by the Commission of its decision to review. Any ~~such~~ person ~~so~~ served, other than the Director and the applicant or permittee, desiring to participate in the proceedings on review must file a response to the notice with the Commission Secretary within twenty (20) calendar days of service.

(C) The proceedings on review shall be held in accordance with the provisions of Chapter Six of this Regulation. During the review, the permit applicant or permittee shall be considered an indispensable party.

#### **Reg.8.216 INTERIM AUTHORITY AND TEMPORARY VARIANCES**

(A) Every director's decision to grant or deny a temporary variance or interim authority pursuant to Ark. Code Ann. §8-4-230, shall be publicly noticed in accordance with Reg.8.207 within ten (10) business days of the date of the decision.

(B) Any member of the public may object to the Director's decision within ten (10) business days of the notice.

(1) Objections will be accepted if submitted in accordance with Reg.8.208(D).

(2) Only the applicant and those persons who submitted timely objections shall have standing to appeal the Director's decision.

(3) After consideration of the written objections, the Director may within thirty (30) calendar days of the date of the decision, for compelling reasons or good cause shown, revoke or modify the conditions of the temporary guidance or interim authority.

(4) The Director's revocation or modification of his or her initial decision becomes a final decision for purposes of appeal. Upon issuance, notice of the decision shall be sent to the applicant and those persons who submitted timely objections.

(5) If the Director's initial decision is not revoked or modified within thirty (30) calendar days of the date of the decision, the decision is deemed final for purposes of appeal.

(C) The Director may for compelling reasons or good cause shown, revoke or modify the conditions of any temporary variance or interim authority previously granted. The Director's revocation or modification of his or her prior decision becomes a final decision for purposes of appeal. Upon issuance, notice of the decision shall be sent to the applicant and those persons who submitted timely objections.

(D) Any actions taken by the applicant in reliance upon the grant of a temporary variance or interim authority during the application review and permit issuance process are strictly at the applicant's own risk, and no actions or expenditure by the applicant during this period shall be construed as accruing equities in the applicants favor.

(E) An applicant that has been denied a temporary variance or interim authority or has

had a temporary variance or interim authority revoked during the application review and permit issuance process provided for in this section, may appeal the Director's decision.

(F) An appeal of the Director's decision shall be processed as a permit appeal pursuant to Reg.8.603(A) and (C), provided that:

(1) Any applicant or person who has submitted timely objections on the record must file a request for hearing within ten (10) business days of the date of the public notice of the Director's final decision;

(2) The decision of the Director shall remain in effect during the appeal;

(3) The adjudicatory review shall be completed as expeditiously as possible; and

(4) A final decision shall be issued by the Arkansas Pollution Control and Ecology Commission within sixty (60) calendar days unless all parties agree to extend the review time.

#### **Reg.8.217 APPEAL FROM FINAL COMMISSION DECISION**

The Commission's final decision on a permitting issue is appealable to circuit court. See, Arkansas Code Annotated Sections 8-4-222 - 8-4-229 and Reg.8.701 through Reg.8.703.

#### **Reg.8.218 INAPPLICABILITY**

Nothing in this Chapter shall affect the ability of the Director to terminate, suspend or revoke a permit for cause pursuant to the procedures for enforcement actions as specified in Chapter Four.

## **CHAPTER THREE: GRANT, LOAN, AND TAX CREDIT DECISIONS**

### **Reg.8.301 APPLICABILITY**

The procedures set forth in Chapter Three apply to all grant, loan, or tax credit decisions.

### **Reg.8.302 ISSUANCE OF DIRECTOR'S DECISION**

(A) The Director shall issue a written decision on all grant, loan, or tax credit matters within the time periods specifically required by law or regulation. In the absence of a specified time period, decisions shall be issued no later than thirty (30) calendar days after the Department's receipt of all pertinent written facts and arguments, as determined by the Department.

(1) The date of issuance of a final decision is the date notice of the decision is served upon the applicant. Service shall be deemed complete when the notice is placed in the mail to the applicant.

(2) The effective date of a final decision is the date of issuance as provided in Reg.8.302(A)(1), unless a later effective date is specified in the decision.

(B) The applicant, if any, and all persons submitting public comments on the matter, if a comment period was provided, and all other persons required by law to be served with notice of the decision shall be served with notice. Unless otherwise provided by law or regulation, the notice shall state:

(1) A description of the matter on which the decision is made in reasonable detail;

(2) The Director's decision and date of decision; and

(3) A statement that the applicant, any person submitting public comments on the record during the public comment period, if any, and all other persons entitled by law to do so, may request an adjudicatory hearing and Commission review of the Director's decision.

(C) Any Request for Hearing must be filed with the Commission Secretary within thirty (30) calendar days after the date of issuance of the Director's final decision, as provided in Reg. 8.302(A)(i).

(D) Any Request for Hearing shall comply with the provisions of Chapter Six of this Regulation.

### **Reg.8.303 REVIEW ON COMMISSION INITIATIVE**

(A) The Commission may, by majority vote within thirty (30) calendar days of the date of the Director's issuance of a grant, loan, or tax credit decision, initiate adjudicatory review of

the decision, even if the parties do not.

(B) After the Commission decides to initiate review, the Director, the applicant and all persons who submitted public comments on the record, if a comment period was provided, shall be served notice by the Commission of its decision to review. Any person served with notice, other than the Director and the applicant, desiring to participate in the proceedings on review must file a response to the notice with the Commission Secretary within twenty (20) calendar days of service of the decision.

(C) The proceedings on review shall be held in accordance with the provisions of Chapter Six. In a review of the Director's decision, the grant, loan, or tax credit applicant shall be an indispensable party.

## **CHAPTER FOUR: ENFORCEMENT ACTIONS**

### **Reg.8.401 APPLICABILITY**

(A) The policy of the Department is to seek compliance with the laws and regulations administered by it. The Department may, through cooperative efforts, give suspected violators a reasonable opportunity to resolve violations through informal procedures prior to the initiation of administrative enforcement proceedings unless the circumstances warrant otherwise.

(B) Nothing contained in Chapter Four shall in any manner abridge or interfere with the Department's ability to initiate civil proceedings in courts of competent jurisdiction to restrain or abate any violation of the laws, regulations, or permits administered by it and to otherwise enforce these laws, regulations, and permits without first having instituted administrative enforcement proceedings hereunder. Further, nothing contained in this Chapter shall in any manner abridge or interfere with the Department's ability to seek criminal prosecutions concerning any violation of the laws, regulations, or permits administered by it.

### **Reg.8.402 ISSUANCE OF NOTICE OF VIOLATION**

(A) Except as otherwise provided in Chapter Five (Emergency Actions), the Director may not issue an order, except by consent, to any person for violation of the laws, permits, or regulations administered by the Department unless and until the person has been served with a Notice of Violation and has had the opportunity to request an adjudicatory hearing in accordance with the applicable provisions of Chapter Six of this Regulation.

(B) Whenever the Director determines that reasonable grounds exist to believe that a violation has occurred, may issue a Notice of Violation to be served upon all persons alleged to be in violation. The notice shall state:

- (1) All alleged violations of which the person is accused;
- (2) The administrative civil penalty, if any, proposed by the Director to be assessed for each violation;
- (3) Corrective actions, if any, including time frames, which in the Director's judgment must be undertaken to remedy the violations or to abate or contain any situation causing pollution or the threat of pollution;
- (4) Any other measure, such as permit suspension or revocation, proposed by the Director to be taken against the alleged violator;
- (5) That the alleged violator must file, in accordance with Reg.8.603(C), a Request for Hearing on the Notice of Violation with the Commission Secretary within twenty (20) calendar days of its receipt. If a Request for Hearing is not filed with the Commission Secretary, the allegations will be deemed proven and the Director may issue a Default Administrative Order



affirming the allegations as findings of fact, affirming the assessment of administrative civil penalties, and ordering any corrective actions and other matters, as stated in the Notice of Violation; and

(6) That upon filing a Request for Hearing within the time provided, the alleged violator will be entitled to Commission review and adjudicatory hearing on the allegations and other matters stated in the Notice of Violation. Any Request for Hearing shall comply with the provisions of Chapter Six of this Regulation.

#### **Reg.8.403 FINALITY OF DEFAULT ADMINISTRATIVE ORDER**

A Default Administrative Order is the Director's final order. Except as provided in Reg.8.404 the order may not be reviewed on its merits by the Commission unless the person to whom the order was issued files a Request for Hearing within 30 calendar days of the effective date of the Default Administrative Order alleging that failure to request a hearing on the Notice of Violation was due to excusable neglect. If the Commission finds that the failure to file a Request for Hearing on the Notice of Violation was due to excusable neglect, the party will be allowed an adjudicatory hearing.

#### **Reg.8.404 REVIEW ON COMMISSION INITIATIVE**

(A) The Commission may, by majority vote within thirty (30) calendar days of the effective date of a Consent Administrative Order settling an administrative enforcement action or a Default Administrative Order, initiate adjudicatory review of the order, even if the parties do not.

(B) After the Commission decides to initiate review, the Director and the person to whom the order is issued and all persons who submitted public comments on the record shall be served notice by the Commission of its decision to review. Any person so served with notice, other than the Director and the person to whom the order is issued, desiring to participate in the proceedings on review must file a response to the notice with the Commission Secretary within twenty (20) calendar days of service.

(C) The proceedings on review shall be held in accordance with the provisions of Chapter Six of this Regulation. The person to whom the order is issued shall be considered an indispensable party.

#### **Reg.8.405 PUBLIC NOTICE OF NOTICES OF VIOLATION AND CONSENT ADMINISTRATIVE ORDERS**

(A) On or about the 10th and 25th day of each month, the Director shall cause a list of all Notices of Violation issued; and all Consent Administrative Orders entered into, but not previously noticed, to be published in a newspaper of statewide circulation. The notice shall include:

(1) The identity of the person or facility alleged to be in violation;

- (2) The location by city or county of the alleged violation;
  - (3) A brief description of the environmental media impacted by the alleged violation (e.g. water, air, solid waste, hazardous waste, regulated storage tanks, or mining);
  - (4) The type of administrative enforcement action (i.e., Notice of Violation or Consent Administrative Order);
  - (5) The amount of the proposed administrative civil penalty, if any;
  - (6) A statement that the documents for the administrative enforcement action are available for copying at the Department; and
  - (7) A statement that the submission of written comments by any person will be accepted by the Department.
- (B) The notice provided in Reg.8.405(A) shall also be given to each member of the Commission.
- (C) No public notice shall be required for any Notice of Violation or Consent Administrative Order which has not been executed by the Director.
- (D) If an administrative civil penalty is being assessed for a violation, that occurs within the corporate limits of any municipality in Arkansas, a copy of the public notice shall be delivered to the chief executive officer of the municipality in which the alleged violation occurred along with a copy of any proposed order concerning the violation, and the municipality shall be given a reasonable opportunity to comment on the proposed order consistent with the public notice and comment requirements of the Arkansas Water and Air Pollution Control Act and regulations promulgated thereunder.

#### **Reg.8.406 PUBLIC PARTICIPATION IN ADMINISTRATIVE ENFORCEMENT ACTIONS**

(A) Any person who submits written comments within the public comment period on the issuance of a Notice of Violation shall be given notice of any adjudicatory hearing to be held in the matter. If comments are submitted for a group, the Director may require the group to designate a representative to receive the notice. Any person given notice shall have the right to intervene upon timely filing a Petition for Intervention. Any other person who reasonably considers himself or herself injured or at risk of injury in his or her person, business, or property may petition for permissive intervention upon timely application as provided in Reg.8.604.

(B) Any person who comments on a proposed Consent Administrative Order settling an administrative enforcement action may petition the Commission within thirty (30) calendar days of the effective date of the order to set aside the order and provide an adjudicatory hearing. That person shall file a Request for Hearing with the Commission Secretary. If the

evidence presented by the petitioner is material and was not considered in the issuance of the order, and the Commission finds in light of the new evidence that the order is not reasonable and appropriate, it may set aside the order and provide an adjudicatory hearing. If the Commission denies an adjudicatory hearing, it shall give the petitioner notice of its reasons for the denial. The denial of a hearing shall constitute final Commission action.

**Reg.8.407 EFFECTIVE DATE OF CONSENT ADMINISTRATIVE ORDERS**

(A) No Consent Administrative Order assessing an administrative civil penalty shall be effective until thirty (30) calendar days after publication of notice of the order. However, corrective action may be required to be taken immediately upon execution of the order if the order so states.

(B) Any Consent Administrative Order that does not assess administrative civil penalties shall be effective upon its execution.

**Reg.8.408 EFFECTIVE DATE OF DEFAULT ADMINISTRATIVE ORDERS**

A Default Administrative Order shall be effective upon its issuance by the Director.

## **CHAPTER FIVE: EMERGENCY ACTIONS**

### **Reg.8.501 APPLICABILITY**

All emergency actions shall comply with the provisions of this Chapter and with all laws and regulations administered by the Commission or the Department.

### **Reg.8.502 ISSUANCE OF EMERGENCY ORDERS**

(A) The Director, in his or her discretion, may issue an Emergency Order when necessary to meet an emergency or situation of imminent hazard. The order may be issued verbally or in writing and shall be effective immediately upon its issuance. If originally issued verbally, a written order shall be issued to confirm the verbal order as soon as reasonably possible thereafter. All written orders shall be served upon the person, if any, to whom they are issued.

(B) Immediately following the issuance of an Emergency Order, the Director shall cause a "Notice of Emergency Order" to be published in a newspaper covering the affected area or in a newspaper of statewide circulation. The notice shall contain a description of the action, the authority for taking the action, and any other information appropriate to ensure that the public is informed about the action.

### **Reg.8.503 REQUEST FOR HEARING**

(A) Any person to whom an Emergency Order is issued may file a written Request for Hearing with the Commission Secretary within ten (10) calendar days of the issuance of the order. Any Request for Hearing shall comply with the provisions of Chapter Six of this Regulation.

(B) An adjudicatory hearing shall be held within ten (10) calendar days of filing the written request with the Commission Secretary, unless otherwise agreed by the person requesting the hearing and the Director. Notice of the time, date, and place of the hearing shall be given to the person requesting the hearing by the Administrative Hearing Officer at the earliest opportunity and by any means calculated to give actual notice to that person.

### **Reg.8.504 REVIEW ON COMMISSION INITIATIVE**

(A) The Commission may, by majority vote within ten (10) calendar days of the Director's issuance of an Emergency Order, initiate adjudicatory review of the order, even if the parties do not.

(B) If the Commission decides to initiate review, it shall serve notice of its decision on the Director and the person(s), if any, to whom the order is issued.

(C) In any review, the person to whom the order is issued, if any, shall be considered an indispensable party.

(D) An adjudicatory hearing shall be held within ten (10) calendar days of the Commission's decision to initiate review, unless the person to whom the order is issued, if any, and the Director agree to an extension of time. The Administrative Hearing Officer shall give notice of the time, date, and place of the hearing to the person to whom the order is issued at the earliest opportunity and by any means calculated to give actual notice to that person. The hearing shall be held in accordance with the provisions of Chapter Six of this Regulation.

## **CHAPTER SIX: PRACTICE AND PROCEDURE**

### **Reg.8.601 PARTIES**

The following persons shall, as applicable, be made a party to any adjudicatory proceeding initiated pursuant to this Regulation:

- (A) The Director;
- (B) In the appeal of a permitting decision, the permittee or permit applicant;
- (C) In a proceeding following the issuance of a final permitting decision, any person who has submitted public comments on the record during the public comment period and timely filed a Request for Hearing with the Commission Secretary;
- (D) Any person named in and served with a Notice of Violation or an Emergency Order;
- (E) In a proceeding following the issuance of a Notice of Violation, any person who has submitted public comments on the record during the public comment period and filed a timely Petition for Intervention with the Commission Secretary;
- (F) Any person who has submitted public comment on the record and timely filed a petition to set aside a Consent Administrative Order settling an administrative enforcement action, and has been granted an adjudicatory hearing on the matter;
- (G) Any person who files a Petition for Intervention that is granted; and
- (H) In any other matter in which the Commission approves review of a Director's decision, any person who files a Request for Hearing and the Commission determines him or her to be injured in his or her person, business, or property.

### **Reg.8.602 REPRESENTATION OF CORPORATIONS**

Any corporation in an adjudicatory proceeding must be represented by an attorney who shall file with the Commission Secretary all pleadings and other documents for the corporation in conjunction with that representation.

### **Reg.8.603 REQUEST FOR HEARING**

- (A) Filing.

Any person seeking review of a final decision of the Director must file a written Request for Hearing with the Commission Secretary.

- (B) Filing Deadlines.

(1) An applicant or permittee seeking review of a permitting decision must file a Request for Hearing within thirty (30) calendar days after the date of issuance of the Director's final decision as provided in Reg.8.211(B)(1).

(2) Any other person, who has submitted comments on the record, that seeks review of a permitting decision must file a Request for Hearing within thirty (30) calendar days after the date of issuance of the Director's final decision, as provided in Reg. 8.211(B)(1).

(3) Any person requesting review of a grant or loan decision or a tax credit decision must file a Request for Hearing within thirty (30) calendar days after the date of issuance of the Director's final decision, as provided in Reg. 8.302(A)(1).

(4) Any person seeking review of an Emergency Order must file a Request for Hearing within ten (10) calendar days after the date of issuance of the Order.

(5) Any person served with a Notice of Violation and who seeks review of it must file a Request for Hearing within twenty (20) calendar days after receipt of the Notice of Violation.

(6) Any person who comments on a proposed Consent Administrative Order settling an administrative enforcement action may seek review of the Consent Administrative Order by filing a Request for Hearing within thirty (30) calendar days of the effective date of the Consent Administrative Order.

(7) Any person served with Notice of Bond Forfeiture or a Notice of Violation which forfeits a bond, must file a Request for Hearing within twenty (20) calendar days after receipt of the Notice of Bond Forfeiture or Notice of Violation, unless a different time period or procedure is specified by an applicable regulation.

(8) Any person requesting review of a petroleum storage tank trust fund decision must file a Request for Hearing within thirty (30) calendar days after the date of the final decision of the Director.

(9) Any person seeking review of a director's decision that is not specifically addressed in Reg.8.603 (B)(1), (2), (3), (4), (5), (6), (7), or (8) must file a Request for Hearing within thirty (30) calendar days of the entry of the decision.

(10) A Request for Hearing shall be dismissed if it is not filed within the time periods set out in Reg. 8.603(B)(1) through (B)(9), unless good cause is shown for the late filing.

(C) Contents of a Request for Hearing.

(1) Every Request for Hearing shall include:

(a) A statement identifying the permit action or subject matter being appealed;

(b) The date of the Director's final decision;

(c) A complete and detailed statement identifying the legal issues and factual objections being appealed;

(d) A request for the issuance, modification, or termination of a stay, if desired, as provided in Reg. 8.612(C); and

(e) Certification that a copy of the Request for Hearing has been served on all appropriate parties identified in Reg.8.601;

(f) In addition to the requirement of Reg.8.603(C)(1)(a) through (e), a Request for Hearing that seeks review of a Director's decision that is not specifically addressed in Reg.8.603(B)(1), (2), (3), (4), (5), (6), (7), or (8) must contain a statement asking the Commission to initiate review of the decision and the reasons why that person reasonably considers himself or herself injured in his or her person, business, or property.

(2) Failure to file a Request for Hearing in the form and manner set out in Reg.8.603(C)(1) may result in the dismissal of the Request for Hearing.

#### **Reg.8.604 PERMISSIVE INTERVENTION**

(A) Any person who submitted comments during the public comment periods may petition in a timely manner for permissive intervention in an adjudicatory hearing.

(B) If no public comment period is provided, any person who reasonably considers himself or herself injured in his or her person, business, or property by any decision issued by the Director may also timely petition for permissive intervention in an adjudicatory hearing on the matter.

(C) The contents of a petition for Intervention shall be the same as that set forth in Reg.8.603(C)(1)(a), (b), (c), (d), and (e).

(D) A Petition for Intervention may be denied if it is not filed in the form and manner set out in Reg.8.603(C)(1).

(E) The Administrative Hearing Officer's denial of a Petition to Intervene shall stand unless a written objection is filed with the Commission Secretary within ten (10) business days of the ruling. The Commission Secretary shall place the objection for oral argument before the Commission.

#### **Reg. 8.605 FORM OF PLEADINGS OR OTHER DOCUMENTS**

(A) Every pleading, petition, motion, brief, or other document filed in any adjudicatory hearing or other proceeding before the Commission shall contain the following:

(1) A caption setting forth the name of the Commission as follows: "BEFORE THE



ARKANSAS POLLUTION CONTROL AND ECOLOGY COMMISSION";

(2) The names of the parties follows: "IN THE MATTER OF ...";

(3) The docket number assigned to the case by the Commission Secretary, if available;  
and

(4) A permit number, if applicable.

(B) Each pleading or other document shall contain a title which identifies it (e.g., Request for Hearing, Petition for Intervention, Petition to Initiate Rulemaking, Motion, or Brief).

(C) The original of any pleading or other document shall be signed by the person submitting it or by his or her attorney and shall state that person's mailing address, telephone number, facsimile number, and electronic mail address, if any.

(D) A certificate of service showing all applicable parties identified in Reg.8.601 shall accompany all pleadings and other papers filed by any person in any adjudicatory proceeding.

(E) The requirements of Reg.8.605 do not apply to comments submitted during a public comment period.

#### **Reg.8.606 FILING OF PLEADINGS OR OTHER DOCUMENTS**

(A) All pleadings and other documents to be filed in any proceeding shall be filed with the Commission Secretary and, within one business day of the filing, the person filing shall provide by electronic mail a PDF version of the filing for use on the Commission's web site. If circumstances warrant, the person filing documents may request a waiver of the requirement to submit the documents in a PDF version.

(B) A copy of any Notice of Violation filed with the Commission Secretary shall not be placed on the Commission's docket until a Request for Hearing is filed in accordance with this section and Reg.8.603.

(C) A facsimile or electronic mail sent by midnight central time shall be the effective filing date for a pleading or other document.

(D) Any person filing a pleading or other document with the Commission Secretary shall file an original and one (1) copy (for the Administrative Hearing Officer). The Commission Secretary shall not file any pleading or other document until an original and one copy is provided.–

(E) Notwithstanding the provisions of Reg.8.606(D), the Commission Secretary may accept facsimile or electronic mail copies for filing. Only one copy need be transmitted, and the Commission Secretary shall file that copy. Within three (3) business days of the filing, an original and one (1) copy of the pleading or other document must be received by the

Commission Secretary.

(F) If one or more copies of a pleading or other document are to be returned by mail to the person filing, that person shall provide the additional copies to the Commission Secretary. The person filing also shall provide the Commission Secretary a self-addressed, stamped envelope with proper postage for returning the copies.

#### **Reg.8.607 SERVICE AND PROOF OF RETURN**

(A) A copy of any Notice of Violation, Request for Hearing or Petition for Intervention filed with the Commission Secretary must be served upon all applicable parties identified in Reg.8.601 by certified mail, return receipt requested, or by other means provided in Rule 4 of the Arkansas Rules of Civil Procedure.

(B) A copy of any pleading or other document, other than as provided by Reg.8.607(A), filed with the Commission Secretary shall be served in accordance with Rule 5 of the Arkansas Rules of Civil Procedure upon all parties as identified in Reg.8.601. The pleading or other document shall contain a certificate of service designating the name and address of each party served with a copy of the pleading or other document and the manner (e.g., mail or hand-delivery) in which it was served. The certificate of service shall be signed and dated by the person filing the pleading or other document or by his or her attorney. Service upon a party represented by an attorney is to be made upon the attorney.

(C) Service upon the Director must be made by serving the Chief of the Department's Legal Division.

#### **Reg.8.608 ADMINISTRATIVE HEARING OFFICER'S POWERS**

(A) The Administrative Hearing Officer shall preside over all adjudicatory hearings.

(B) The Administrative Hearing Officer shall be subject to disqualification from any adjudicatory hearing for bias, prejudice, interest, or any other cause provided by law, or for any cause for which a judge may be disqualified. Any party of record may petition for the disqualification of the Administrative Hearing Officer promptly after receipt of notice indicating that the individual will serve or upon discovering facts establishing grounds for disqualification. If disqualified, the Commission shall designate an alternative hearing officer to preside over the adjudicatory hearing.

(C) The Administrative Hearing Officer may exercise the following powers in adjudicatory proceedings:

- (1) To set the time and place of preliminary hearings and adjudicatory hearings;
- (2) Administer oaths and affirmations;
- (3) Delegate authority to the Commission Secretary to sign orders on his or her behalf;

- (4) Issue subpoenas;
- (5) Hold conferences to encourage settlement or simplification of issues;
- (6) Conduct preliminary hearings and adjudicatory hearings; rule on interlocutory motions, evidentiary matters, discovery, and objections; maintain order; and oversee all other matters necessary to promote the just and efficient administration of these hearings;
- (7) Make recommendations to the Commission on dispositive motions and on a request for hearing of a permitting decision in accordance with Reg.8.613; and
- (8) Prepare and transmit a Recommended Decision to the Commission.
- (9) Conduct, on the Commission's behalf, public hearings involving rulemaking.

#### **Reg.8.609 RECORDING OF ADJUDICATORY HEARINGS AND COURT REPORTER COSTS**

(A) The Administrative Hearing Officer shall electronically or stenographically record adjudicatory hearings to take evidence, hearings involving dispositive motions, and hearings on a petition to intervene. The Administrative Hearing Officer may electronically or stenographically record any other hearings, in his or her discretion, or at the request of any party.

(B) Any party to an adjudicatory hearing may request the Administrative Hearing Officer to arrange for the electronic or stenographic recording of any hearing and the transcription of the proceeding by a court reporter. The requesting party shall pay all costs charged by the court reporter.

(C) Only a transcription or recording of a proceeding as provided in Reg.8.609(A) and (B) shall constitute the official transcription or recording of the proceeding.

(D) Any party who cancels an adjudicatory hearing or deposition two (2) or fewer working days prior to the hearing or deposition shall pay for any appearance fees charged by the court reporter for the scheduled appearance.

#### **Reg.8.610 SUBPOENAS**

(A) Any attorney of record to an adjudicatory hearing may issue, or any party of record may request that the Administrative Hearing Officer issue, subpoenas. The Administrative Hearing Officer may, in his or her discretion, deny issuance of a subpoena to prevent undue delay, oppression, harassment, or other injustice to any party. The Administrative Hearing Officer may give written authorization to the Commission Secretary to issue subpoenas on his behalf of the Administrative Hearing Officer.

(B) Upon issuance, the original and one copy of a subpoena will be delivered to the requesting party who shall be responsible for having the subpoena served in accordance with

Rule 45 of the Arkansas Rules of Civil Procedure. All costs of service, witness fees, and mileage fees shall be the responsibility of the requesting party.

### **Reg.8.611 RULES OF CIVIL PROCEDURE**

Procedural matters not addressed in this Chapter shall be governed by the provisions of the Arkansas Rules of Civil Procedure.

### **Reg.8.612 EFFECTIVENESS OF ORDERS DURING COMMISSION REVIEW**

(A) During the pendency of a Commission review:

(1) The denial of a permit shall stand;

(2) The issuance, modification, or revocation of a permit or that part of a permit which is the subject of the appeal shall be stayed, unless otherwise required by state or federal law; and

(3) All other final actions of the Director shall remain in effect and the parties shall comply therewith.

(B) Notwithstanding the provisions of Reg.8.612(A), upon request by any party, the Commission may provide for a stay, modify the terms of a stay, or terminate a stay under appropriate circumstances to avoid substantial prejudice to any party.

(C) A request pursuant to Reg.8.612(B) must be in writing and filed with the Commission Secretary. The Administrative Hearing Officer or the Commission Secretary shall promptly inform the Chairperson of the filing of a request for a stay or for modification or termination of a stay. The Chairperson shall, in his or her discretion, either (1) grant a temporary stay, modify a stay, or terminate a stay, and such action shall be effective until the next regularly scheduled Commission meeting; or (2) direct the Commission Secretary to place the request on the agenda for the next regularly scheduled Commission meeting; or (3) call a special Commission meeting for the purpose of considering the request. The Commission's decision on the request shall be in the form of a Minute Order and shall state which specific terms or condition(s) are affected by the decision. The Commission Secretary shall promptly mail the decision to all parties of record identified in Reg.8.601.

(D) All terms or conditions which are not specifically addressed in the Commission's Minute Order shall be stayed or remain effective as provided in Reg.8.612(A).

(E) To the extent conditions of any new permit are stayed, and if no alternative conditions are specified in the written stay decision, a facility holding an existing permit must comply with the conditions of the existing permit which correspond to the conditions being stayed, unless compliance with the existing conditions would be technologically incompatible with compliance with other conditions of the new permit which have not been stayed. The burden of proving this incompatibility shall rest with the permittee.

(F) The decision regarding a stay is not appealable.

### **Reg.8.613 PRELIMINARY HEARING**

(A) After a Request for Hearing is filed with the Commission Secretary, a preliminary hearing may be held, if necessary, for the Administrative Hearing Officer to consider the simplification of the issues and other matters as may aid in the disposition of the proceeding.

(B) Notwithstanding the provisions of Reg.8.613(A), a preliminary hearing must be held following the filing of a Request for Hearing involving a permitting decision.

(1) The preliminary hearing shall be held within thirty (30) calendar days of the date of filing the request.

(2) Within a reasonable time after the preliminary hearing, the Administrative Hearing Officer shall enter a written decision for the Commission regarding the extent to which, if at all, the request should be granted or denied and which parties should be allowed to participate.

(3) The Administrative Hearing Officer shall determine whether the parties qualify as proper parties under Reg.8.601, whether the issues are properly raised, and whether the pleadings conforms with the applicable requirements in Chapter Six of this Regulation.

(4) Any party aggrieved by the written decision of the Administrative Hearing Officer issued under this subsection may, within ten (10) business days from the date of the decision, request Commission review of the decision.

(5) No person other than the applicant or permittee may raise any issue in the hearing that was not raised during the public comment period on the record, unless the person raising the issue shows good cause why the issue could not, with reasonable diligence, have been discovered and presented during the public comment period.

(C) At any preliminary hearing involving a permitting decision, the Administrative Hearing Officer shall weigh the equities of any request for expedited review and advance the case on the administrative docket as circumstances permit.

### **Reg.8.614 NOTICE OF HEARING**

(A) The Administrative Hearing Officer shall schedule the adjudicatory hearing and other proceedings. In the appeal of a permitting decision, the Administrative Hearing Officer shall schedule the hearing and other proceedings so that the matter will be submitted to the Commission for final Commission action within one hundred twenty (120) calendar days after the preliminary hearing. However, the parties of record may mutually agree to a longer period of time or the Administrative Hearing Officer may establish a longer period of time for just cause.

(B) The Administrative Hearing Officer shall issue, through the Commission Secretary, a Notice of Hearing to all parties of record. The notice shall be served at least ten (10)

business days prior to the scheduled date of the adjudicatory hearing and shall include:

- (1) The time, date, and place of the adjudicatory hearing;
- (2) A statement that all parties of record are entitled to be present at the hearing, be represented by counsel and present evidence and argument on all issues properly raised by any pleading filed in the proceeding;
- (3) A statement that the hearing will be electronically or stenographically recorded; and
- (4) A statement that testimony taken at the hearing will be taken under oath.

#### **Reg.8.615 SETTLEMENTS**

(A) If a matter for which a Request for Hearing has been filed is resolved by a settlement of the parties prior to the hearing, the Department shall give the Commission notice of the resolution of the matter by filing a copy of the executed settlement agreement with the Commission Secretary. The filing of a settlement agreement which contains language stating that the Request for Hearing is withdrawn shall, without further Commission action, cause the docket to be immediately closed.

(B) The Administrative Hearing Officer shall make a report on each settled case to the Commission.

(C) The settled case shall be subject to being reopened upon Commission initiative under Reg.8.215(A), Reg.8.303, Reg.8.404, or Reg.8.504, or in response to a petition under Reg.8.406 to set aside a Consent Administrative Order settling an administrative enforcement action.

(D) If a permit appeal is settled by an agreement to issue a permitting decision, the permitting decision shall follow all the notice and comment procedures set forth in Reg. 8.207 through Reg.8.211.

#### **Reg.8.616 CONDUCT OF ADJUDICATORY HEARINGS**

##### **(A) Presentation of Evidence**

The party of record bearing the burden of proof shall present its evidence first with the opportunity for rebuttal after presentation of evidence by the opposing party(ies) of record, unless the Administrative Hearing Officer otherwise directs for the convenience of the parties and witnesses and in the interest of justice.

##### **(B) Standard of Review**

The standard of review in an adjudicatory hearing is a preponderance of the evidence.

(C) Acceptance of Evidence

(1) The Administrative Hearing Officer shall receive into evidence any testimony or other evidence that is admissible under the Arkansas Rules of Evidence. Where evidence is excluded by the Administrative hearing Officer, the party offering the evidence may make a proffer of the evidence under subsection (a)(2) of Rule 103 of the Arkansas Rules of Evidence. The Administrative Hearing Officer shall have discretion to receive any evidence that may assist in a proper determination of the pertinent facts, even though such evidence might not strictly be admissible under the Arkansas Rules of Evidence. The discretion of the Administrative Hearing Officer to deviate from the customary rules of evidence shall not extend to matters which would impair a privilege established by law.

(2) The Administrative Hearing Officer may in his or her discretion allow a party to introduce testimony by telephonic means if all the parties to the proceeding agree to the procedural manner in which the testimony shall be offered and recorded.

(3) Each party is responsible for providing the Commission Secretary with a PDF version of that party's documentary exhibits which are admitted into evidence at an adjudicatory hearing. If circumstances warrant, a party may request a waiver of the requirement to submit the documentary exhibits in a PDF version.

**Reg.8.617 RECOMMENDED DECISION OF ADMINISTRATIVE HEARING OFFICER**

At the conclusion of an adjudicatory hearing, unless the matter is resolved by stipulation or settlement by the parties prior to the hearing, the Administrative Hearing Officer shall issue a written Recommended Decision to the Commission for action at a regularly scheduled meeting. The Administrative Hearing Officer shall cause the Recommended Decision to be mailed with a certificate of service to all parties of record.

**Reg.8.618 COMMISSION REVIEW**

(A) Commission review of any appealed or contested matter shall be a de novo review of the record compiled by the Administrative Hearing Officer. However, the Commission may vote to consider additional evidence subject to the provisions of Reg.8.620.

(B) The record before the Commission on review shall consist of:

(1) The document constituting the Director's decision;

(2) All pleadings, motions, and intermediate rulings;

(3) All exhibits admitted during the hearing and a transcript or recording of the hearing;  
and

(4) The Recommended Decision of the Administrative Hearing Officer, which shall include any proposed findings of fact and conclusions of law.

(C) The Commission's decision shall be by majority vote of a quorum that shall be issued in the form of a "Minute Order." The Commission's decision may affirm, modify, or reverse the Recommended Decision. Alternatively, the Commission may reverse and remand all or part of the Director's permitting decision or enforcement action to the Director. If the Commission reverses and remands part of the decision or action to the Director for reconsideration, the Commission shall remand with instructions on how the Director is to proceed.

(D) The Commission Secretary shall serve a copy of the Minute Order upon all parties of record to the proceeding no later than ten (10) business days after the Minute Order is executed by the Commission.

(E) The Commission's vote to affirm, modify, or reverse the Recommended Decision shall constitute final Commission action for the purposes of appeal.

#### **Reg.8.619 ORAL ARGUMENT BEFORE THE COMMISSION**

##### **(A) Request for Oral Argument**

(1) Any party of record may request the Commission to hear an oral argument on a Recommended Decision by filing a written request with the Commission Secretary no later than twenty (20) calendar days after the Recommended Decision has been mailed to all parties.

(2) The contents of the request shall be in the following order:

(a) A clear and concise statement of each factual objection and alleged legal error contained in the Recommended Decision.

(b) An argument addressing each factual objection and alleged legal error and citations of decisions supporting each argument, if applicable.

(c) The specific relief sought from the Commission.

(d) The request must contain a proposed Minute Order setting forth proposed findings of fact and conclusions of law on which the Commission is basing its final decision.

(e) Any document, exhibit, or transcript page from the record may be attached as an addendum to the request. Each addendum must be clearly labeled as "Addendum No. \_\_\_\_".

##### **(B) Copies of Request**

A party must file an original and three copies of the request or response to a request, unless the Administrative Hearing Officer or the Commission Secretary require a different number.



(C) Failure to Comply with Time Limitation

(1) Any party failing to file a request for oral argument within the time period set out in Reg.8.619(A)(1) shall not be permitted to present oral argument, unless the party who failed to timely file the request proves that the failure to file before the deadline was due to excusable neglect or the Administrative Hearing Officer modifies the deadline set out in Reg. 8.619(A)(1) for good cause as provided in Reg. 8.619 (G).

(2) A party requesting oral argument past the filing deadline due to excusable neglect must, prior to Commission Review of the Administrative Hearing Officer's Recommended Decision:

(a) File a request for oral argument in accordance with Reg. 8.619(A) and (B); and

(b) File a petition which sets forth the reasons for the party's excusable neglect.

(3) Any party may request a hearing on a petition filed as provided in Reg. 8.619 (C)(2)(b).

(D) Requirements for Opposing Party(ies)

Each party of record may file a response to a request for oral argument. The number of copies filed shall comply with the provisions of Reg.8.619 (B).

(E) Service Upon Parties

Any party filing a request for oral argument or a response must serve all parties of record with a copy of the document as set forth in Reg.8.607.

(F) Appearance on Agenda

A request for oral argument filed at any time on or after the twentieth (20) business day preceding the next regularly scheduled Commission meeting will be removed from the agenda for that meeting. The request will be placed on the agenda for the following regularly scheduled Commission meeting.

(G) Exception to Deadlines

Any of the deadlines contained in Reg.8.619 (A)(1), (D)(2) and (F) may be modified by order of the Administrative Hearing Officer for good cause.

(H) Time allowed for Presenting Oral Argument

(1) The party or parties requesting an oral argument and the party of record supporting the request shall be allowed no more than fifteen (15) minutes each for argument, unless the Commission extends the time. The party(ies) may retain a portion of the fifteen (15)-minute time period for rebuttal by notifying the Chairperson at the beginning of the oral argument.

(2) The opposing party(ies) of record will be permitted no more than a combined total of fifteen (15) minutes to respond, unless the Commission extends the time.

(I) Prohibition on New Evidence

The Commission shall not consider any evidence concerning a matter on review that is not included in the record except as provided in Reg.8.620.

(J) Questioning by Commissioners

Following an oral argument, the Chairperson shall allow each Commissioner to question the attorneys for each party of record or the persons who presented the oral argument. The Commissioners shall not question any other persons, except for the Administrative Hearing Officer.

**Reg.8.620 ADDITIONAL EVIDENCE**

(A) A party of record may request an opportunity to supplement the record with additional evidence. The requesting party must satisfactorily demonstrate to a majority of the Commission that the evidence is material to the issues and was unavailable at the time of the adjudicatory hearing despite the best efforts of the party to procure the evidence. Upon majority vote of a quorum, the Commission may remand the matter to the Administrative Hearing Officer to take further testimony and evidence in the matter or direct the Director to reconsider the matter based on the additional evidence before the matter is considered by the Commission.

(B) The requesting party shall file an affidavit with the Commission Secretary describing the circumstances as to why the additional evidence was not available at the time of the adjudicatory hearing and why the information is material to the issues. A copy of the affidavit and proffered new evidence shall be furnished to all parties of record at least ten (10) business days prior to the date the Commission meets to consider the request.

**Reg.8.621 PROHIBITION ON EX PARTE COMMUNICATION**

(A) No party of record, or representative thereof, to a pending adjudicatory proceeding shall attempt by any means to communicate ex parte with any member of the Commission or the Administrative Hearing Officer regarding that proceeding.

(B) Any flagrant violation of this section may constitute grounds for denying the relief sought by the offending party.

(C) Any member of the Commission or the Administrative Hearing Officer who received an ex parte communication in violation of this section may be disqualified from the proceeding if necessary to eliminate the effect of the communication. Alternatively, other appropriate action may be taken, such as writing a memorandum disclosing the ex parte communication, which shall be filed in the record of the proceeding.

### **Reg.8.622 ACTIONS FOR DECLARATORY ORDERS**

(A) Any permittee or person subject to regulation by the Commission or the Department may petition the Commission for a Declaratory Order as to the applicability of any rule, statute, permit, or order enforced by the Commission or the Department. The petition shall be processed in the same manner as a Request for Hearing.

(B) A Declaratory Order shall constitute final Commission action for the purposes of appeal.

## **CHAPTER SEVEN: APPEALS**

### **Reg.8.701 FINALITY OF DECISIONS**

No order of the Director on any enforcement or emergency matter, any permitting decision, grant or loan decision, tax credit decision, petroleum storage tank trust fund decision, or any other appealable decision shall be construed to constitute final agency action on the matter unless and until all procedures and remedies for hearing and review have been completed or the time periods for initiating those procedures have expired.

### **Reg.8.702 FILING OF APPEAL**

(A) Within thirty (30) calendar days after service of a copy of the Commission's final order, regulation, or other final decision, an appellant may file a notice of appeal with the circuit court of the county in which the business, industry, municipality, or thing involved is situated.

(B) A copy of the notice of appeal shall be served upon the Commission Secretary by personal delivery or by mail with a return receipt requested within ten (10) calendar days of filing the notice of appeal with the circuit court.

(C) The notice of appeal:

(1) Shall state the action appealed from;

(2) Shall specify the grounds of the appeal, including the points of both law and fact which are asserted or questioned by the party appealing; and

(3) May contain any other allegations or denials of fact pertinent to the appeal.

### **Reg.8.703 FILING OF COMMISSION RESPONSE AND RECORD**

(A) Within thirty (30) calendar days after service of the notice of appeal, the Commission shall file with the clerk of the circuit court a response to the notice of appeal and the record of the contested case, regulation or other final decision.

(B) The Commission's response shall consist of any statements, admissions, or denials on the questions of law or fact raised in the notice of appeal as the Commission may deem pertinent.

(C) Any allegations or new matter set out in the response shall be deemed denied by the party appealing unless expressly admitted, and no further pleading shall be necessary.

(D) The record shall consist of:

(1) A copy of any application or petition, all pleadings, or other material paper on

which the appeal is based;

(2) A statement of any findings of fact, rulings, or conclusions of law made by the Commission;

(3) A copy of the final order, regulation, or other final decision on which the appeal is based;

(4) All testimony, exhibits, and other evidence submitted to the Commission; and

(E) The parties may stipulate that only a specified portion of the record is to be filed with the circuit court.

(F) The Commission shall serve a copy of the response by mailing or serving a copy of the response on the party appealing or his or her attorney.

## **CHAPTER EIGHT: RULEMAKING**

### **Reg.8.801 PUBLIC NOTICE**

Prior to the adoption, amendment or repeal of any regulation, the Commission shall give at least thirty (30) calendar days notice of the Commission's intended action on the proposed rulemaking decision.

### **Reg.8.802 PUBLICATION OF NOTICE**

The notice shall be mailed to all persons requesting advance notice. In addition, notice shall be published in appropriate industry, trade, professional or public interest publications chosen by the Commission and at least twice in a newspaper of statewide circulation.

### **Reg.8.803 CONTENTS OF NOTICE**

The notice shall include:

- (A) Reference to the legal authority under which the regulation is proposed;
- (B) Either the terms or substance of the proposed regulation and a description of the subjects and issues involved;
- (C) The time, place, and manner for submission of written and oral comments; and
- (D) A statement that copies of the proposed regulation are available at the Department and in local public library depositories.

### **Reg.8.804 PUBLIC HEARING REQUIRED**

No regulation shall be adopted, amended or repealed by the Commission until after a public hearing is held at least 20 days after the date of public notice, except for an emergency rulemaking as set forth in Reg.8.807.

### **Reg.8.805 PUBLIC HEARING PROCEEDINGS**

(A) The Presiding Officer at a public hearing shall be any Commissioner or the Commission's designee.

(B) At the hearing:

- (1) Any interested person may submit comments, written or oral, on the proposed Regulation.
- (2) Oral comments shall be stenographically or electronically recorded.

(3) At any time during a public hearing, the Presiding Officer may continue the hearing until all oral comments have been heard or may determine not to receive additional oral comments if he or she determines that additional comments would not serve a useful purpose or would be repetitious or unduly time consuming.

#### **Reg.8.806 WRITTEN COMMENTS**

(A) The Commission prefers that all comments be in writing and filed with the Department by mail, facsimile or electronic mail.

(B) The period for receiving written comments shall begin on the day of publication of public notice and shall extend ten (10) business days beyond the date of the public hearing.

(C) Written public comments will be accepted if received no later than 4:30 p.m. on the last day of the public comment period. Written public comments may be submitted by electronic mail if received no later than 4:30 p.m. on the last day of the public comment period. Electronic mail comments must be sent to the electronic mail address specified in the public notice.

(D) The Presiding Officer may extend the period for written comments at the public hearing for up to an additional twenty (20) calendar days beyond the close of the public comment period. If the extended date falls on a weekend or holiday, the comment period will end on the next working day.

#### **Reg.8.807 EMERGENCY RULEMAKING**

(A) If the Commission determines that imminent peril to the public health, safety or welfare requires emergency rulemaking, the Commission may waive or reduce the notice requirements of Reg.8.801 through Reg.8.806.

(B) The Commission must document the facts and reasons justifying emergency rulemaking in a written order.

(C) The imminent loss of federal funding, certification or authorization for any program administered by the Department shall establish a prima facie case of imminent peril supporting emergency rulemaking. In addition, the Department may present any other evidence proving the existence of imminent peril to the public health, safety or welfare.

(D) No regulation adopted pursuant to this Section shall be effective for no more than one hundred and eighty (180) calendar days, unless a longer period is allowed by law.

#### **Reg.8.808 CONTENTS OF RULEMAKING DOCKET**

(A) A rulemaking docket shall include:

(1) A petition containing a caption as set out in Reg.8.605, and a detailed explanation of the proposed regulation;

(2) An attached marked-up copy of the entire regulation or the specific pages of the regulation that are affected, showing all changes that are proposed;

(3) A legislative questionnaire;

(4) A Financial Impact Statement;

(5) The Arkansas Economic Development Commission (“AEDC”) approval letter regarding Act 143 of 2007 (formerly Governor’s Executive Order 05-04) or memorandum explaining why the Act is not applicable;

(6) The economic impact/environmental benefit analysis required by Reg.8.812, if applicable; and

(7) A proposed Minute Order initiating the rulemaking.

(B) Upon satisfaction of the public notice and hearing requirements contained in Reg.8.802 and Reg.8.805, the following shall be submitted to the Commission for final promulgation of the regulation, and shall become part of the rulemaking docket;

(1) The Statement of Basis and Purpose and Responsive Summary as described in Reg. 8.815;

(2) The Final revised regulation;

(3) The Regulation Tracking Sheet; and

(4) The proposed Minute Order adopting the proposed revisions to the regulation.

(C) All documents contained in the rulemaking docket shall be prepared in accordance with the Commission Regulation Formatting and Drafting Guidelines.

#### **Reg. 8.809 THIRD-PARTY PETITION FOR RULEMAKING**

Any person may petition the Commission for the issuance, amendment, or repeal of any regulation.

#### **Reg.8.810 COMMISSION DEADLINE ON THIRD-PARTY PETITIONS**

(A) Within sixty (60) calendar days after the petition is filed with the Commission, the Commission shall either initiate the procedures for adopting the proposed regulation, or deny the petition.

(B) A decision to initiate rulemaking shall not constitute an endorsement of the proposed regulation.



(C) If the Commission denies the petition, the reasons for the denial shall be stated in a written order.

(D) The written order shall constitute a final Commission decision for the purposes of appeal to circuit court.

#### **Reg.8.811 PROCEDURES FOR THIRD-PARTY RULEMAKING**

(A) If the Commission initiates rulemaking in response to a third-party petition, the Commission shall give notice of the proposed regulation as set forth in Reg.8.801 through Reg.8.803, and shall hold a public hearing as required by Reg.8.804 through Reg.8.806.

(B) The Commission shall direct the proponent of a third-party rulemaking to compile or produce portions of the record required by Reg.8.814 and pay the costs associated with publication of the legal notice, rental fees for hearing locations, and copying of documents required by the Commission Regulation Formatting and Drafting Guidelines.

(C) The proponent of a third-party rulemaking shall prepare a proposed Statement of Basis and Purpose and Responsive Summary required by Reg.8.815 for the Commission's review prior to its final decision.

(D) Prior to the close of the public comment period, the Department shall file with the Commission a written comment, for the record, on any proposed third-party proposal to adopt, amend, or repeal all or part of a regulation.

(E) The Department shall prepare its own proposed Statement of Basis and Purpose and Responsive Summary as described in Reg.8.815 after the close of the public comment period.

(F) Upon consideration of the petitioner's and the Department's positions and proposed Statements of Basis and Purpose and Responsive Summaries, the Commission may issue its final decision, or order whatever further rulemaking proceedings it deems appropriate, giving due regard to the right of the public to fair notice as provided by this regulation.

#### **Reg.8.812 ECONOMIC IMPACT AND ENVIRONMENTAL BENEFIT ANALYSIS REQUIREMENTS**

(A) When Economic Impact and Environmental Benefit Analysis is Required: An economic impact and environmental benefit analysis shall be prepared by the proponent of any proposed rulemaking before the Commission unless the rule qualifies as exempt under this subsection. The economic impact and environmental benefit analysis shall be prepared by the proponent of the rulemaking based upon information that is reasonably available. If a rulemaking proposes to alter or amend an existing Commission rule, the analysis shall be restricted to the economic impact and environmental benefit of the proposed changes. The economic impact and environmental benefit analysis must be included in the petition to initiate rulemaking before the Commission for all regulatory changes, unless the proposed rule is exempt under this subsection. A rulemaking shall be exempt from the economic impact and environmental benefit analysis requirements if:

- (1) the proposed rule incorporates or adopts the language of a federal statute or regulation without substantive change;
- (2) the proposed rule incorporates or adopts the language of an Arkansas state statute or regulation without substantive change;
- (3) the proposed rule is limited to matters arising under Regulation No. 8 regarding the rules of practice or procedure before the Commission;
- (4) the proposed rule makes only de minimis changes to existing rules or regulations, such as the correction of typographical errors or the renumbering of paragraphs or sections; or
- (5) the proposed rule is an emergency rule that is temporary in duration.

(B) If the proponent of a proposed rule believes that its proposal is exempt under Reg.8.812(A)(1)-(5) above, the proponent shall state in the petition to initiate rulemaking which exemptions apply and explain why each is applicable.

(C) If the proponent of a proposed rule believes that a portion of its proposed rule is exempt under Reg.8.812(A)(1)-(5) above, but that the remainder is not exempt, the proponent shall:

- (1) prepare an economic impact and environmental benefit analysis for all portions of the proposed rule believed to be non-exempt, and
- (2) identify the portions of the proposed rule believed to be exempt, state which exemptions apply, and explain why each is applicable.

(D) An economic impact and environmental benefit analysis shall be presumed to be adequate for purposes of initiating a rulemaking before the Commission if the analysis is prepared by completing the Economic Impact/Environmental Benefit Analysis form that is attached as Appendix 1 of Regulation No. 8.

(E) Nothing in Reg.8.812 shall be construed as a limitation upon the Commission's discretion to require economic impact and environmental benefit analysis of any proposed rulemaking decision.

### **Reg.8.813 EVALUATION OF ECONOMIC IMPACT/ENVIRONMENTAL BENEFIT**

Following the public comment period, the Commission shall review all comments on the original impact/benefit analysis and include in the Statement of Basis and Purpose and Responsive Summary for the final rulemaking decision a discussion demonstrating reasoned evaluation of the relative impacts and benefits of the regulation. If a change is made to a proposed rule after initiation of the rulemaking proceeding and the change is a logical outgrowth of the regulation proposed in the prior notice within the meaning of Reg.8.816, then

no new Economic Impact and Environmental Benefit Analysis form shall be required.

#### **Reg.8.814 RULEMAKING RECORD**

The Commission shall compile a rulemaking record consisting of, as appropriate:

- (A) Copies of all public notices required by Reg.8.801 through Reg.8.803;
- (B) The proposed regulation as published for public notice;
- (C) In the case of third-party or emergency rulemaking, all documents required by Reg.8.807 through Reg.8.811;
- (D) An electronic or stenographic record of all oral comments received during the public hearing and any supporting materials;
- (E) Copies of all written comments and any supporting materials received during the public comment period or public hearing;
- (F) The economic impact/environmental analysis required by Reg.8.812, if applicable;
- (G) The Statement of Basis and Purpose and Responsive Summary described in Reg.8.815;
- (H) The final regulation adopted by the Commission; and
- (I) In the case of the denial of a rulemaking petition pursuant to Reg.8.808 through Reg.8.811, the petition for rulemaking and the Commission's written order setting out the reasons for denial.

#### **Reg.8.815 STATEMENT OF BASIS AND PURPOSE AND RESPONSIVE SUMMARY**

(A) Before adopting a final regulation, the Commission shall cause to be prepared a concise general statement of the basis and purpose and responsive summary for the regulation.

(1) At a minimum, the Statement of Basis and Purpose shall include:

- (i) An explanation of the necessity for the regulation; and
- (ii) A demonstration that any technical regulation or standard is based upon generally accepted scientific knowledge or engineering practices, with appropriate references to technical literature or written studies conducted by the Department. If a standard or regulation is identical to a regulation promulgated by the United States Environmental Protection Agency, this requirement shall be satisfied by reference to the Code of Federal Regulations.

(2) The Responsive Summary shall group public comments into similar categories and explain why the Commission accepted or rejected the rationale of each category.

### **Reg.8.816 CHANGES IN A REGULATION AS A RESULT OF PUBLIC COMMENT**

If, as a result of comments, the Commission changes a proposed regulation to the extent that the rule would have an effect not previously expressed in the notice required in Reg.8.801 through Reg.8.803, the Commission shall provide another adequate public notice and public comment period. A second public notice and public comment period shall not be required if the final regulation is a logical outgrowth of the regulation proposed in the prior notice.

### **Reg.8.817 INCORPORATION BY REFERENCE**

(A) The Commission may, through incorporation by reference, adopt a regulation that contains all or portions of the provisions of other laws (i.e., statutes or regulations).

(B) Unless a contrary intent is expressly stated, any adoption by specific or descriptive reference to another law shall be construed as though the referenced law were set forth in the Commission regulation line for line, word for word.

(C) The effective date of any regulation that the Commission adopts by reference shall be the effective date of the Commission regulation, not that of the referenced regulation.

(D) Unless the Commission expressly states a contrary intent, the Commission adopts a referenced law as it exists at the date of Commission promulgation. -

(E) Any subsequent changes in the referenced law do not affect the provisions of those regulations adopted by the Commission.

### **Reg.8.818 AMENDMENT OF REGULATIONS**

When amending portions of an existing regulation, the Commission's deliberations shall be restricted to those proposed amendments described in the public notice. Rulemaking proceedings concerning legally required periodic update of regulations shall be restricted to Department staff proposals. Nothing in this section shall be construed as a limit upon the right of third parties to petition for the amendment of a regulation in separate rulemaking proceedings.

### **Reg.8.819 APPEAL OF RULEMAKING DECISION**

Any person who reasonably considers himself or herself injured in his or her person, business, or property by a rulemaking decision may, within thirty (30) calendar days after the rulemaking decision is filed with the Office of the Secretary of State, judicially appeal the decision to the appropriate circuit court, as provided in Arkansas Code Annotated § 8-4-222.

### **Reg.8.820 INTENT AND CONSTRUCTION**

The rulemaking procedures set out in this chapter are merely minimum procedures that must be followed before the Commission adopts a proposed regulation. Nothing in this

Chapter shall be construed as restricting the authority of the Commission in its rulemaking capacity to direct the proponents or opponents of a proposed rule to submit additional factual data or legal briefs as the Commission deems necessary, or to make individual proponents or opponents of a proposed regulation available for questioning by the Commission. The Commission may enter any order as may be necessary to efficiently conduct and conclude any rulemaking proceeding.

## **CHAPTER NINE: OTHER PROVISIONS**

### **Reg.8.901 ADDITIONAL PUBLIC PARTICIPATION REQUIREMENTS**

In addition to the public notice or public hearing provisions set forth in this Regulation, the Commission and the Department shall comply with any other applicable state or federal public notice or public hearing requirements.

### **Reg.8.902 COMMITTEES OF THE COMMISSION**

(A) The Chairperson may appoint one or more committees comprised of Commission members to act in an advisory capacity to the full Commission.

(B) Minutes shall be kept of committee meetings and presented to the full Commission. Tape recordings of committee meetings shall be maintained by the Commission Secretary for a period of not less than one year or as required by specific program record retention requirements.

### **Reg.8.903 SPECIAL MEETINGS**

(A) Special Commission meetings may be called at the discretion of the Chairperson. Alternatively, if two (2) or more Commissioners submit written requests for a special meeting to the Chairperson, the Chairperson shall call a special Commission meeting.

(B) The Chairperson shall call a special Commission meeting by delivering written notice to each Commissioner.

### **Reg.8.904 AGENDA**

The Commission Secretary shall prepare an agenda listing the topics for any Commission meeting and shall deliver it to each Commissioner and the Director.

### **Reg.8.905 REQUEST TO APPEAR BEFORE THE COMMISSION**

(A) Any person may seek to appear before the Commission by submitting a written request to the Commission Secretary.

(B) In the written request, the person must identify the topic and reasons for appearing before the Commission and must state what Commission action the person seeks, if any. Any materials for distribution to the Commission should be included in the written request. The request and all supporting material shall not exceed a total of three (3) double-spaced typewritten pages or four (4) handwritten pages.

(C) The Commission Secretary shall provide the Chairperson with a copy of the written request. At the Chairperson's discretion, the request may be added to the agenda as a specific

business matter. In the event the request is not added to the agenda as a specific business matter, the requesting party may address the Commission during the "Public Comments" portion of the agenda.

#### **Reg.8.906 PUBLIC COMMENTS**

(A) Any person may address the Commission during the time allocated on the agenda for "Public Comments." Any person completing a card available at the meeting shall be allowed to address the Commission before any person not completing a card.

(B) The Chairperson will usually allow any person to speak for five (5) minutes during the "Public Comments" portion of the meeting but shall have the discretion to extend or reduce the five (5)-minute period of time.

(C) Any person who is a party to or a witness in a pending adjudicatory proceeding, or who is an attorney or other representative for a party or person in a matter before the Commission, shall not be allowed to address the Commission on any such pending proceeding or matter during the "Public Comments" portion of the Commission meeting.

#### **Reg.8.907 INAPPLICABILITY**

The provisions of Chapter 1 and Chapter 2 of this Regulation do not apply to the Commission's regulation governing surface coal mining and reclamation pursuant to the Arkansas Surface Coal Mining and Reclamation Act of 1979, as amended, Arkansas Code Annotated §15-58-101 et seq., nor to Commission Regulation No. 20 (Arkansas Surface Coal Mining and Reclamation Code), as amended.

#### **Reg.8.908 REPEALER**

All rules or regulations or parts thereof, adopted pursuant to the laws administered by the Commission or the Department, which are in conflict with the provisions of this Regulation are hereby repealed to the extent of such conflict.

#### **Reg.8.909 SEVERABILITY**

If any provision of this Regulation or its application to any person or circumstance is held invalid, the invalidity of that provision shall not affect other provisions or applications which can be given effect without the invalid provision or application, and therefore, the provisions of this Regulation are declared to be separable and severable.

#### **Reg.8.910 EFFECTIVE DATE**

This Regulation is effective ten (10) calendar days after filing with the Secretary of State, the State Library, and the Bureau of Legislative Research.

# **ARKANSAS POLLUTION CONTROL AND ECOLOGY COMMISSION**



## **REGULATION NO. 8**

### **APPENDIX A**

**Economic Impact/Environmental Benefit Analysis**



# ATTACHMENT 1

## ECONOMIC IMPACT/ENVIRONMENTAL BENEFIT ANALYSIS

*Answer to best of the proponent's ability, as required by APC&EC Regulation 8, Chapter 3.5*

### **STEP 1: DETERMINATION OF ANALYSIS REQUIREMENT (to be included in petition to initiate rulemaking)**

The Arkansas Pollution Control and Ecology Commission's (Commission) Regulation No. 8 requires the Commission to duly consider the economic impact and the environmental benefit of any rule or regulation prior to promulgation. By Act 143 of 2007, the Governor has directed that impacts to small businesses be analyzed prior to adoption of regulations. Furthermore, the Arkansas Legislative Council requires the submission of a Financial Impact Statement and Questionnaire for Filing Proposed Rules and Regulations with the Arkansas Legislative Council and Joint Interim Committee with proposed regulation changes. The following procedures are outlined to provide clarity in the requirements of these various impact statements.

1. Prepare and submit the Financial Impact Statement and Questionnaire for Filing Proposed Rules and Regulations with the Arkansas Legislative Council and Joint Interim Committee required by the Arkansas Legislative Council for all proposed rulemakings.
2. The following analysis is necessary for the Commission to consider the economic impact and environmental benefit of any proposed rule or regulation. This Economic Impact/Environmental Benefit Analysis ("Analysis") must be prepared by the proponent of the rulemaking initiated before the Commission based upon information reasonably available. If a rulemaking proposes to alter or amend an existing Commission rule, the Analysis shall be restricted to the economic impact and environmental benefits of the proposed changes. This Analysis must be included in the Petition to Initiate Rulemaking before the Commission for all regulatory changes, unless the proposed rule is exempt for one or more of the following reasons:

- The proposed rule incorporates or adopts the language of a federal statute or regulation without substantive change;\*

The proposed rule incorporates or adopts the language of an Arkansas state statute or regulation without substantive change;

- The proposed rule is limited to matters arising under Regulation No. 8 regarding the rules of practice or procedure before the Commission;
- The proposed rule makes only *de minimis* changes to existing rules or regulations, such as the correction of typographical errors or the renumbering of paragraphs or sections; or
- The proposed rule is an emergency rule that is temporary in duration.

**If the proposed rulemaking does not require the following Analysis due to one or more of the exemptions listed above, state in the Petition to Initiate Rulemaking which exemptions apply and explain specifically why each is applicable.**

*\*If a proposed rule incorporates or adopts the language of a state or federal statute or regulation but does include one or more substantive change, then the Analysis shall address only the substantive changes.*

<p style="text-align: center;"><b>STEP 2: THE ANALYSIS</b> <b>(to be included in petition to initiate rulemaking, if required)</b></p>
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**Directions for Analysis Completion:**

- 1.** Answer all questions, unless an exemption applies, using information reasonably available.
- 2.** List source(s) for any data used in an answer. If a response cannot be provided to any question because information is not reasonably available, describe the sources consulted or steps taken in an effort to obtain the information in question.
- 3.** Describe any assumptions used.
- 4.** Complete the Economic Impact Statement, if applicable, as required by Act 143 of 2007.
- 5.** Highlight on the attached map the boundary of the geographical area impacted by the proposed rule, unless the proposed rule applies to the entire state.

**This Analysis shall be available for public review along with the proposed rule in the public comment period. The Commission shall compile a response to comments demonstrating a reasoned evaluation of the relative economic impact and environmental benefits.**

**ARKANSAS POLLUTION CONTROL & ECOLOGY  
COMMISSION  
ECONOMIC IMPACT/ENVIRONMENTAL BENEFIT  
ANALYSIS**

**Rule Number & Title:**

**Petitioner:**

**Contact/Phone/Electronic mail:**

**Analysis Prepared by:**

**Date Analysis Prepared:**

**2A. ECONOMIC IMPACT**

1. Who will be affected economically by this proposed rule?

State: a) the specific public and/or private entities affected by this rulemaking, indicating for each category if it is a positive or negative economic effect; and b) provide the estimated number of entities affected by this proposed rule.

Sources and Assumptions:

2. What are the economic effects of the proposed rule? State: 1) the estimated increased or decreased cost for an average facility to implement the proposed rule; and 2) the estimated total cost to implement the rule.

Sources and Assumptions:

3. List any fee changes imposed by this proposal and justification for each.

4. What is the probable cost to ADEQ in manpower and associated resources to implement and enforce this proposed change, and what is the source of revenue supporting this proposed rule?

Sources and Assumptions:

5. Is there a known beneficial or adverse impact to any other relevant state agency to implement or enforce this proposed rule? Is there any other relevant state agency's rule that could

adequately address this issue, or is this proposed rulemaking in conflict with or have any nexus to any other relevant state agency's rule? Identify state agency and/or rule.

Sources and Assumptions:

6. Are there any less costly, non-regulatory, or less intrusive methods that would achieve the same purpose of this proposed rule?

Sources and Assumptions:

## **2B. ENVIRONMENTAL BENEFIT**

1. What issues affecting the environment are addressed by this proposal?

2. How does this proposed rule protect, enhance, or restore the natural environment for the well being of all Arkansans?

Sources and Assumptions:

3. What detrimental effect will there be to the environment or to the public health and safety if this proposed rule is not implemented?

Sources and Assumptions:

4. What risks are addressed by the proposal and to what extent are the risks anticipated to be reduced?

Sources and assumptions:

