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Raeanne Gardner
Arkansas Department of Environmental Quality
5301 Northshore Drive
North Little Rock, AR 72118
reg-comment@adeq.state.ar.us

Dear Ms. Gardner:

Re: Comments on Regulation 8 Revisions

On behalf of our client, Entergy Services, Inc. (ESI), PPGMR Law, PLLC submits the following comments concerning proposed changes to Arkansas Pollution Control and Ecology Commission Regulation 8. ESI appreciates the effort of the Department to revise Regulation 8 to attempt to update, clarify, and make more consistent the procedures and applications for individual permits and general permits, rulemaking and enforcement procedures, applications for permits, and appeals of permits, etc. Any revisions to Regulation 8 are important to the ESI and some questions remain regarding some of the draft revisions.

Please consider these comments with regard to the following revisions to Regulation 8 for: Chapter 1 General Provisions - Definitions, Chapter 2 Noncompliance Determinations, Chapter 3 Individual Permits, Chapter 4 General Permits, Chapter 6 Enforcement Actions, Chapter 8 Practice and Procedure, and Chapter 10 Rulemaking:

Chapter 1: General Provisions

I. Applicant: Was the definition for the term “applicant” meant to not include an applicant for a permit renewal or permit transfer of a General Permit (GP)? The term refers to a person who files for “an individual permit,” but also includes a reference to “a person who files a notice of intent for coverage under a general permit.” ESI believes an “applicant” should also specifically include a person who applies for a transfer or renewal of a GP. If so, please revise the term “applicant” as follows (requested changes to the revisions are noted in bold and italics throughout these Comments):

“Applicant” also includes a person who files a notice of intent for coverage under a general permit ***or applies for a transfer or renewal of a general permit.***”

If the intent is not to do so, please explain why not and how failure to include such applicant may affect interpretation of the revisions to Reg. 8 with regard to the rights and duties of an applicant for a transfer or renewal of a GP.

II. Individual permit: A permit can be issued to more than one person. For example, there are some air permits which are issued to separate owners and/or operators. Please consider revising the definition of “person” to include “one or more persons as allowed by applicable law or regulation.”

III. Permitting decision: This term should clarify that it also applies to “denial of coverage under a general permit, denial of transfer of coverage under a general permit, and denial of a modification under a general permit.” Also please consider adding a clarification that “This term does not include a grant of coverage under a general permit to a permittee, or the grant of a modification under a general permit to a permittee,” as shown to be the intent in the newly added Chapter 4 General Permits. See above Comment to Chapter 1 (I) Applicant.

Further, ADEQ should consider adding definitions for “interim authority,” and “variance” as those terms are defined or used in the applicable statutes.

Chapter 2: Noncompliance Determinations

General Comments. While the non-compliance determination is statutory, ESI questions the need for continuation of this procedure. This procedure was enacted before widespread information about a facility’s compliance history was readily available, many transactions are exempt or present limited data based on the structure of the transaction; and it is our understanding that ADEQ’s experience with this procedure and the information generated has not produced any meaningful results. On the other hand, compiling this information prior to closing a transaction has proven to present logistical problems with confidentiality and timing. ESI urges the Department to re-visit this procedure and engage in further discussions regarding what information, if any, is actually needed and when. To the extent that legislative repeals and/or appropriate amendments are needed, ESI believes those efforts are appropriate.

I. Reg 8.201 Purpose. The criteria for the Director to deny the issuance or transfer of a permit are set out in the Arkansas Water and Air Pollution Control Act (the “AWAPCA”,) at Ark. Code Ann. (A.C.A.) Sec. 8-1-106(c). The statute does not include the same factors for the “renewal” of a permit. This new section adds the term “renewal” to the factors used for the Director to deny the renewal of a permit. Please provide the statutory and legal authority for ADEQ to expand the authority of the Director in this regard to include permit renewals.

II. Reg 8.203 Disclosure Statement Contents: The criteria for the contents of a disclosure statement is set out at A.C.A. Sec. 8-1-106 Definitions – Disclosure Statements - Denial of application – Appeal Sec. 8-1-106. In this section ADEQ has included that the disclosure statement shall include the following information “without limitation.” The term “without limitation” is overreaching, not included in the statute, and should be deleted.

III. Reg. 8.204 Exemptions from Filing.

A. Reg 8.204(6) (a) (x) and (xiii): Please change to the proper references which should be:
“(x) Solid Waste Management Facility Operators Licenses, as defined by Regulation 27;”
and
“(xiii) Waste Tire Transporter Licenses, as defined by Regulations 14 and 36.”

B. Reg. 8.204(7) expands the Director's authority to deny individual permits to include other types of authorizations. A.C.A. 8-1-106(3) provides as follows:

"Nothing in this subsection, including the exemptions in subdivision (b)(2) of this section, 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."

The above is statutory. The revision to this subsection expands the authority of the Director to not only deny an individual permit for these reasons, but also for "permit coverage under a general permit, permit transfer, license or certification." With regard to GPs, this additional language appears to be in conflict with other media specific regulations such as ADEQ's Regulation 19 Arkansas Plan of Implementation for Air Pollution Control at Reg. 19.411 (A) and (B) which provides that "To sources that qualify, the Department shall grant the conditions and terms of the general permit." This is a mandate that the Director must grant a GP to a source that qualifies under the terms and conditions of the GP. Please provide whether this provision is intended to take precedence over the mandate in Reg 19.411. The regulated community has relied on this mandate for decades and it should not be changed by any provision of Reg 8.

IV. Reg. 8.205 Denial

Reg 8 is a regulation whose purpose is to set forth the administrative procedures of the Department, the Director, and the Commission for permitting, rulemaking, appeals, etc. Reg 8 is not meant to usurp the authority of the Arkansas state legislature to create new law or law that is conflict with existing statutory law. In this case, several statutes have been enacted defining the scope of the Director's authority to deny the issuance and transfer of permits.

The AWAPCA at A.C.A. 8-4-203(h) (2) Permits Generally specifically states that "only the reasons stated in Secs. 8-1-103(4), 8-1-106(b) (1) and (c) and subdivision (b) (9) of this section constitute grounds for denial of a transfer." Sec. 8-1-103(4) Duties - allows the department to require that "any fee defined in this chapter shall be paid prior to the issuance of any permit." Sec. 8-4-203(b) (9) allows a denial of a transfer "until the proposed new owner has filed and the department has approved the required replacement financial assurance in accordance with the requirements of this section and applicable regulations."

A. That leaves A.C.A. 8-1-106 as the remaining statutory authority which provides the criteria for the Director to deny "the issuance or transfer of any permit, license, certification, or operational authority." This statute also includes the criteria for the Director to consider in the applicant's favor in order to not deny such issuance. Reg 8.205 appears to be overreaching and expanding the authority of the Director to deny an applicant a permit, while limiting the Director's authority to grant an application under the above named applicable statutes. See the added language at Reg 8.205(a) (1) and (4), which language is not contained in A.C.A. 8-1-106(b) (1) or (c). Adding new factors or changing the intent of the statute is not within the purview of Reg 8 and any additional language in the revised Reg 8 which is not provided in or can be referred to as being explicitly provided in state law or statute should be deleted.

1. For example, A.C.A. 8-1-106 does not allow the Director to deny the issuance of a "modification, variance, coverage," however the revised Reg. 8.205 has expanded the Director of the authority to also include the denial of a "modification, variance or coverage" for the added revised factors set out in the

new Reg. 8.205. The terms “modification, variance or coverage” should be deleted from Reg. 8.205 since it is an undue expansion of the Director’s authority and not the intention of the legislature to use such factors for the denial of a “modification, variance or coverage” since those terms are not included by statute.

2. Reg. 8.205(1) is new language which should be deleted in that it is also an expansion of the Director’s authority to deny the issuance of permit, license, certification, operational authority or transfer for “misrepresentation or concealment” of any “material fact”, which terms are not defined and not authorized by any statutory authority. In any event, Reg. 8.205(2) already uses similar language to the statute and covers “deliberate falsification or omission of any relevant information on any disclosure statement,” which should be sufficient in allowing the Director a denial in the event the disclosure statement is deficient by a deliberate falsification or omission.

B. Reg 8.205(4) should be deleted in its entirety since it also appears to be an undue expansion of the Director’s authority to deny the issuance of a permit, license, certification, operational authority or transfer and substantially not linked to any statutory authority. For example,

1. While the term “history of noncompliance” is used in the revisions as defined in A.C.A. 8-1-106, other terms used in Reg 8.205(4) to justify the Director’s denial, such as considering an applicant’s “pattern of disregard for state or federal laws or regulations,” [Reg. 8.205(4) (b)] or an applicant’s failure to remediate disclosed violations [Reg 8.205(4) (a) (ii)], do not appear to be statutorily authorized reasons for denial.

2. A.C.A. 8-1-106(d) (2) allows a denial in the event an applicant has “a history of noncompliance with the environmental laws or regulations of this state or any other jurisdiction.” However, the statute does not include other newly imposed conditions that to determine whether an applicant has “substantially complied,” the Director may consider “the degree of culpability” of the applicant, [Reg 8.205(4)(b)(ii)], which terms are undefined and nebulous; or that the “violations are not repeat violations,” [Reg. 8.205(4)(b)(iii)]; or that mitigation is determined by the Department, rather than the Director, through a “demonstration of good citizenship,” [Reg 8.205(4)(b)(vi)], which term is undefined and broad; or “whether the best interest of the public or environment will be served by the denial of the permit, coverage under a general permit, license, certification, or permit transfer,” [Reg 8.205(4)(b)(vii)] which term again refers to “coverage under a general permit” which is not a term provided in the statute, and appears to be an expansion of statutory authority.

3. In the alternative, Reg. 8.205 should be revised to be in substantial compliance with A.C.A. 8-1-106 as follows:

Reg. 8.205 Denial

The Director may deny the issuance of any permit, license, certification or operational authority or transfer if the Department finds, based upon the disclosure statement and other investigation deemed appropriate that:

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 on any disclosure statement;

(2) The applicant has a documented and continuing history of noncompliance with the environmental laws or regulations of this state or any other jurisdiction. To determine what constitutes a continuing history of noncompliance of the environmental laws or regulations of this state or any jurisdiction sufficient to deny a permit, license, certification or a permit transfer, the Director shall consider:

(i) The nature and details of the noncompliance;

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

(iii) The potential danger to the environment and the public health and safety if the applicant's proposed activity is not conducted in a competent and responsible manner;

(iv) The degree to which past and present activities in this state and other jurisdictions directly bear upon the reliability, competence and responsibility of the applicant; and

(v) Any evidence of rehabilitation following past violations or convictions.

(3) The applicant that owns or operates other facilities in the state is not in substantial compliance with, or on a legally enforceable schedule that will result in compliance with, the environmental laws or regulations of this state;

(4) An affiliated person has a documented and continuing history of noncompliance of the environmental laws or regulations of this state or any jurisdiction and is affiliated with the applicant to such an extent of being capable of significantly influencing the practices or operations of the applicant that could have an impact upon the environment; or

(5) For the reasons stated in A.C.A. Secs. 8-1-103(4), 8-1-106(b) (1) and (c); or A.C.A. 8-4-203(b) (9).

(6) The Director shall not consider the applicant's prior violations of environmental laws or regulations of this state or any other jurisdiction if those violations are addressed in a legally enforceable order or other legally enforceable means and the applicant is in substantial compliance with same.

Chapter 3: Individual Permits

ESI appreciates the effort by ADEQ to seek to provide clarity on the issuance and renewal of Individual Permits and General Permits by providing those procedures in separate chapters, since the procedure for the issuance of a GP or an applicable source to submit a Notice of Intent (NOI) for coverage under a GP is different from an applicant applying for an individual permit. However, certain portions of the draft changes to Chapters 3 and 4 remain unclear to the regulated community on the procedures and we appreciate the Department's consideration of the following comments:

I. Reg 8.303 Permit Application Procedures at Reg 8.303(D)(5) includes a clause that the period for written public comments on a permit appeal may be extended for a period of "no more than" 20 calendar days from the date of the public hearing. It is unclear as to why the Department is limiting its

own authority to grant such an extension for more than 20 calendar days if warranted. Sometimes an extension of more than 20 calendar days for public comments is warranted. Please explain the reason for the limitation.

II. Reg 8.304 Public Notice of Permit Application, pp 3-5; and Reg 8-306 Public Notice of Draft Permitting Decision, pp 3-6. Both Reg 8-304(A) and 8.306(A) require public notices to be “published in a newspaper of general circulation in the county” where the proposed activity or facility to be permitted is located. Department staff and the regulated community have been in agreement that a difficult part of the public notice process is dealing with small town newspapers. The issuance of permits has been delayed waiting on the proofs of publication and invoices from the local newspapers.

The term “newspaper of general circulation in the county” is not defined in Reg 8. Is there any reason not to consider a newspaper of general circulation in the state as a newspaper of general circulation in the county? If so, the change could be reflected as follows:

“to be published in a newspaper of general circulation in the county . . . which would include a newspaper with a statewide circulation.”

III. Reg. 8.312 Minor Modifications has changed the effective date of a minor modification from “immediately” to “upon issuance.” However, there are certain instances when the “issuance” of a minor modification is not necessarily the effective date. For example, ADEQ’s Regulation 26 Arkansas Operating Air Permit Program at Reg. 26.1007 allows implementation of a minor modification immediately after 15 days of the application whether or not ADEQ has issued a written or oral approval or issuance. No “issuance” is necessary for implementation. See also Regulation 19.407(c) which allows for implementation “immediately upon approval.” Approval and issuance may not mean the same thing since neither term is defined in Regulation 8. ESI appreciates the Department consider revising Reg 8 to allow for those effective dates on minor mods that may be reflected in the applicable regulation, as follows:

*“The final decision of the Director regarding a minor modification of a permit is effective upon issuance **unless a different effective date is provided otherwise in another applicable regulation, individual or general permit, or other authorization, in which case the different effective date takes precedence.**”*

IV. Reg. 8.314 Review on Commission Initiative at Reg. 8.314(B) (2) provides the time that a person must file a response to a notice of Commission review of a final permitting decision. The subsection requires that any person “other than the Director and the applicant or permittee” must do so within 20 calendar days of service of the notice.” However, this revision has deleted the term “permittee” and changed the time from 20 to 30 days calendar days. It is unclear as to why the ADEQ made the changes to no longer apply to the permittee, when permittees are automatically considered indispensable parties to final permitting decisions by statute. It is also unclear as to the reason to expand the time for other persons to participate in the proceedings on review by the Commission.

ESI requests that these revisions not be made; and that the provision retains the term “permittee” and retains the time to file at 20 days rather than 30 days. If not, we request that the Department provides the statutory authority upon which it relies to make such changes.

Chapter 4: General Permits

I. Reg 8.404-8.408

A.C.A. 8-4-203(m) sets out provisions for the Department's issuance of a new category of a GP. A GP is defined in that section and the proposed Reg. 8.401 accurately defines the term "general permit" as set out in the statute. However, the procedure and the rights of a GP permittee are murky when an expired GP is in the process of getting renewed or when the Department decides not to renew a GP.

For an existing GP with an expiration date, the AWAPCA at A.C.A. 8-4-203(m) (5)(A)(i) provides that ADEQ shall publish a "notice of intent" to renew or not renew at least 365 days before the expiration of the GP. Further, the AWAPCA at A.C.A. 8-4-203(m)(5)(D) provides that "In the event the department makes a decision not to renew the general permit, existing coverage under the general permit shall continue under the terms of the expired permit until a final decision is reached for an individual permit." The new Reg 8.404(A) has confusing provisions concerning the issuance of a new category GP with the renewal or non-renewal of an existing GP.

For example, draft Reg. 8.402(A) states that these rules apply "unless another Commission regulation requires a different procedure." Draft Reg. 8.402(B) states that public notice should follow these rules plus "any other applicable state or federal requirements." The regulated community needs to know what procedural rules are applicable, and for general permits the most efficient way to accomplish this may be to identify those procedures in the general permit. If there is a procedure in addition to, or different from that provided in Reg. 8, that procedure should be specified in Reg. 8.402 and/or in the General Permit. In order to provide clear guidance to the regulated community, ESI proposes that additional language be added to subsections (A) and (B) as follows:

Reg.8.402 Applicability

(A) Unless another Commission regulation requires a different procedure for a specific type of general permit, this chapter is applicable to all general permit decisions. When a Commission regulation requires a different procedure for a specific type of general permit, that procedure must be clearly stated in the general permit, with reference to the underlying authority. Within ninety (90) days of the effective date of this rule, the Department shall modify any general permit that does not include the provisions required by this rule to specify the different procedure.

(B) In addition to complying with the public notice requirements of this chapter, the Department shall follow any other applicable state or federal requirements regarding public notice for general permits. When applicable state or federal requirements provide for additional public notice for a specific type of general permit, those additional public notice requirements must be clearly stated in the general permit, with reference to the underlying authority. Within ninety (90) days of the effective date of this rule, the Department shall modify any general permit that does not include the provisions required by this rule to specify the public notice requirements.

There should be separate and clear provisions for public notice of (1) the issuance of a new category of a GP by the Department; (2) the renewal or non-renewal of an existing GP by the Department; (3) an NOI submitted by a source or facility to be covered under an existing GP; and (4) the submittal of a renewal

NOI by a source or facility to be covered under a renewed GP; and (5) the transfer of GP coverage another source if the GP allows for a transfer.

Further, there should be a clear procedure for a source to continue to be covered under an existing GP in the event the Department does not meet the deadline of publishing its decision to renew or not renew an existing GP at least 365 days before the expiration of an existing GP. See Reg 8.404(A). Reg 8 should reference the relevant provisions set out above at A.C.A. 8-4-203(m). The way the draft is written now, the issuance of a new GP and a decision to renew or not renew an existing GP is combined, not clarified and thus, confusing, to the regulated community and to the public.

ESI requests that Reg 8.404-408 be revisited and rewritten to clarify the procedures separately as set above, in compliance with A.C.A. 8-4-203(m); and in addition to provide a procedure to the regulated community for a source or facility to be covered under an existing GP in the event renewal deadlines are not met by ADEQ or in the event ADEQ decides not to renew an existing GP.

II. Reg 8.409 Notices of Intent

The statutory and regulatory procedures and duties of an applicant for notice and issuance of an NOI to be covered under an existing GP has historically been confused with the procedures and duties of the Department for issuance of a new or renewed GP. ESI appreciates the efforts to clarify these procedures, with the following comments:

A. Please add/revise Reg 8.409 Notices of Intent as follows: Additions are in italics.

1. *(A) Facilities or sources eligible to construct or operate under a general permit may obtain coverage by submitting a notice of intent to the department.*

Reason for requested change: The above provision is provided at A.C.A. 8-4-203(m) (1) (B) (i) and clarifies eligibility for all general permits.

(B) To sources that qualify for any air general permit, the Department shall grant the conditions terms of the general permit for which it has applied.

Reason for requested change: The above provision is already provided in the Air Code and the SIP at Reg. 19.411(A) and (B) and Reg 18.310(A), and clarifies that for any air general permit, the Department must grant it to a qualified source.

B. No reason for NOIs to be published. The Department has stated that it will be publishing NOIs in a statewide paper. However, only the issuance of a draft permitting decision on the GP and a GP is subject to public notice requirements under A.C.A. 8-4-203(m)(2), not the filing of an NOI. Further, an NOI is not the same as an individual permit application, nor should it be considered as such for publication. The granting of a GP, once an NOI is received by the Department, is not subject to comments or appeal by the public, as the issuance of a permit would be. Since no public comment is allowed to be made to the issuance of a GP to an NOI applicant, and the determination of coverage is not appealable to the Commission by the public, it is unclear as to why the Department finds it

necessary to publish NOIs. Further, deleting this requirement would be less burdensome and expensive on the Department and the applicants.

ESI respectfully requests that the requirement to publish NOIs be deleted. Please provide the legal and statutory reasons why it is necessary to publish NOIs.

In the alternative and in the event it is determined that NOIs must be published according to law or regulation, please revise Reg 8.409(B) as follows:

Reg 8.409(B) The Department shall not **publish** a Notice of Intent unless the document Notice *is administratively complete* and certified . . .

Reason for requested change: The term “administratively complete” is defined at Reg 8.402 and this change clarifies that the NOI won’t be published unless it is administratively complete and, when published, would constructively be deemed administratively complete.

III. Reg. 8.410 Requirement for Individual Permits

A. Reg 8.410(B): A.C.A. 8-4-203(m)(1)(B)(ii) provides that “the director may require a person who has been granted coverage under a general permit to apply for and obtain an individual permit.” Reg 8.410(B) provides factors upon which the Director may require an individual permit to any person who has been granted coverage under a general permit and appears to be a new regulation. Some of the language with regard to the factors is problematic and appears to be over-reaching. For example, Reg 8.410(B) lists the “circumstances” for requiring an individual permit, but provides that those circumstances are “including but without limitation.” That phrase allows the Director to require an individual permit ostensibly for any reason. ESI requests that the term “including but without limitation” be deleted.

Further, while some of the factors provided appear reasonable for the requirement of an individual permit, others are unclear and may be unreasonable since terms are not adequately defined. For example, the Director may require an individual permit if “a change has occurred in the availability of demonstrated technology or practices.” [Reg 8.410(B) (2),] or if “circumstances have changed . . . so the applicant is no longer appropriately controlled under the [GP]” [Reg 8.410(B) (3)]; or if the person is later “determined to be a significant contributor of pollutants.” [Reg 8.410(B) (4).] These terms are nebulous; and it seems that the more reasonable approach is that the reasons to require an individual permit rather than a GP should not be more stringent than the reasons for the denial of a permit as set out in A.C.A. 8-1-106(b) (1) and (c).

Please provide the statute or regulation or any other information upon which the Department is relying to require these factors. Also please provide further explanation as to what is meant by “a change has occurred in the availability of demonstrated technology or practice,” and what type of “circumstances” the Department would rely on to require an individual permit for a GP permittee that is “no longer by appropriately controlled” under the GP; and how much the Department would determine as “a significant” amount of pollutants that would justify requiring an individual permit.

ESI requests that the Department consider revising Reg 8.410(B) to be more in keeping with the language and intent of A.C.A. 8-1-106 as follows:

(B) The Director may require an individual permit in the event (1) a person who has been granted coverage under a general permit is not complying with the conditions of the permit and such noncompliance has substantially adversely affected the protection of the environment; (2) the permittee is no longer eligible to be covered under the permit; or (3) a general permit under which the person is covered is not renewed and individual permits may subsequently be required.

Draft Reg. 8.410 appears to incorporate some of the regulatory concepts of the federal NPDES regulatory program for general permits, and apply those regulatory concepts to all general permits. Due to the intricacies of the media specific regulations, it does not appear that there is a “one size fits all” approach for all general permits. Additionally, subsection (B) seems to provide the circumstances for which an individual permit can be required through the use of the term “under any of the following circumstances” but the next clause “including but without limitation” seems to indicate that there may be additional unstated circumstances. ESI believes that any media specific circumstances for requiring an individual permit should be clearly stated in the general permit, with reference to the media specific regulatory language authorizing such circumstances. Otherwise, no expansion of the statutory language is appropriate.

B. Reg 8.410(C) states that “Any person who is granted coverage under a general permit may be subject to an enforcement action if it is later determined that the person granted coverage did not qualify for the conditions and terms of the permit.”

However, if a person has completed the required forms and supplied the information necessary for the Department to make a determination that coverage under a general permit is appropriate, then why is an enforcement action later appropriate or necessary? Since the conditions of the GP are already established, the Department’s only function at the time it receives an NOI is to decide whether a person’s activity qualifies for coverage under the GP for which it applied. This new requirement insinuates that a permittee could be liable for mistakes made by the Department in its determination of permit coverage, but should only be liable if the permittee deliberately falsified the information in the NOI. ESI requests that Reg 8.410(C) be deleted in its entirety, or, in the alternative, revised as follows:

“Any person who is granted coverage under a general permit shall not be subject to an enforcement action if it is later determined that the person granted coverage did not qualify for the conditions and terms of the permit, unless it is found that the person granted coverage falsified the information in the NOI.”

IV. Reg 8.411 Transfer of Coverage of a GP

General Comments. As stated above, the coordination of the non-compliance determination with the need for expeditious permit transfers has created unnecessary burdens for business transactions. ESI believes that a comprehensive evaluation of this process needs to be undertaken so that Arkansas procedures for transfers of businesses are more in line with other states that streamline the permit transfer process.

A. 30-Day Notice: A.C.A. 8-4-203(m)(2)(C) provides that “General permit coverage is not transferable unless the general permit provides for transfer.” Many if not all of the air GPs include a provision which

allows the GP to be transferred, but also provides that “the applicant for a transfer must submit . . . the disclosure statement required by A.C.A. 8-1-106 at least 30 days in advance of the proposed transfer date.” In Reg 8.203, ADEQ is setting out the 30 calendar day notice. While a GP may require the 30-day notice, the statute does not require it.

This 30-day notice requirement can be problematic for the permittee. In the past, the regulated community has had difficulty in meeting this requirement at times. The parties may have signed non-disclosure agreements, for example, which do not allow notice to a public entity until the parties have reached an agreement on the sale or transfer, which may not happen 30 days prior to the proposed transfer date. It is our understanding that other surrounding states do not have such a 30-day notice requirement.

ESI requests that Reg 8.411(A) be revised to include the phrase “or as soon as practicable” after the term “thirty (30) calendar days.” This revision does not forego the ability of the Department to conduct a review of the applicant’s history to deny the permit within 30 days as set out in Reg 8.411(B).

ESI understands that the GP may still require the notice, but hopefully, if the Department agrees not to require the 30-day notice in Reg 8, the GPs can be modified at some point to withdraw the requirement or add the term “or as soon as practicable,” as set out above.

B. Grounds for denial of transfer. Please consider adding reference to A.C.A. 8-1-106(d) to Reg 8.411(C) to constitute grounds for denial of a transfer for coverage for further clarification. A.C.A. 8-1-106(d) refers to the factors the director shall consider in reaching a decision on denial (and as stated above, this procedure needs to be re-visited).

C. Reg. 8.412 Persons with Standing to Appeal a Permitting Decision.

1. This section should clarify, in a similar manner that should be provided in the Definition Section, that a “final permitting decision” for a GP, applies to issuance of a new GP, a renewal of an existing GP, a denial of coverage under a NOI, or a denial of a transfer of coverage under a GP. The term “final permitting decision” for a GP should specifically provide that it does not include the approval of an applicant’s coverage under an NOI or the approval of a transfer of coverage under a GP. Please consider revising this section accordingly.

2. Further, an applicant for an NOI or transfer of a GP should have automatic standing to appeal a permitting decision to deny, revoke, modify its coverage, transfer of coverage or to deny a modification without the need to submit timely public comments. See the AWAPCA at A.C.A. 8-4-205(a) and (b) (1) and A.C.A. 8-4-203 Permits Generally at Sec. 8-4-203(g). A.C.A. 8-4-205(b)(1) provides that “Only those interested persons, **other than the applicant**, that have submitted comments on the record regarding a proposed permit action during the public comment period shall have standing to request a hearing by commission” Further A.C.A. 8-4-203(g) provides “Only those persons that submit comments on the record during the public comment period **and the applicant** shall have standing to appeal the decision of the department to the . . . Commission.” (Emphasis added.) These statutes confer automatic standing on the applicant for a permit to appeal a permitting decision or request a hearing. Please consider revising Reg. 8.412(A) accordingly to assure that the applicant for an NOI has the same automatic standing.

3. Sec. 8.412(C) provides that a “qualified person” may file a Petition for Intervention in order to participate in an existing appeal. This term is not defined and needs clarification as to the factors to be considered to be a “qualified person.”

D. Reg. 8.413(B) (1) Review on Commission Initiative

As provided above, in the event the Commission initiates review of a “final permitting decision,” it should serve notice on any applicant or permittee affected in addition to the Director in addition to all persons who submitted public comments. Please consider revising Reg 8.413(B) (1) accordingly.

CHAPTER 6 ENFORCEMENT ACTIONS

Reg 8.604 Review on Commission Initiative: Reg 8.604(A) has changed the review time for the Commission to initiate adjudicatory review from 30 days to 45 days. Please explain the reason for the change and provide the authority relied upon to do so.

CHAPTER 8 PRACTICE AND PROCEDURE:

Reg 8.815 Notice of Hearing provides that the section does not apply to “emergency orders, permit variances or interim authority.” Please clarify that the notices of hearing for such actions are provided in the other applicable sections of Regulation 8, such as Reg. 8.315 and Chapter 7.

CHAPTER 10 RULEMAKING

Reg 8.1016(C) Incorporation by Reference has been changed to provide for adoption through incorporation by reference of a state or federal law or regulation for those which are “*in effect at the time of the effective date of the Commission regulation.*” The following sentence which was previously in Reg 8 has been deleted: “*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.*” Please explain how the deleted sentence affects the new term; and clarify the intent as to when a law or regulation shall be deemed in effect in the event of incorporation by reference.

Thank you for your attention to this matter and the opportunity to comment on the pending revisions to Regulation 8.

Sincerely,

PPGMR Law, PLLC



John F. Peiserich
Counsel for Entergy Services, Inc.

cc: Susan Floyd, Entergy Services, Inc.