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Thank you for the opportunity to comment on the proposed changes to the Arkansas Pollution Control and Ecology Commission's Regulation No. 8 (Reg. 8). Updating administrative procedures is always a difficult undertaking, and I hope you find the following comments helpful in revising Reg. 8.

Reg. 8.204 "Permitting decision."

The proposed regulation deletes ~~administrative permit amendment~~ in the third line. An administrative permit amendment is a permitting decision, albeit not one subject to public comment. See draft Reg. 8.302. The term "administrative permit amendment" is referenced, rightly so, in the permitting section of Reg. 8 and should not be stricken from the definition of permitting decision.

Also, the term ~~variances~~ in the next to the last line is proposed to be stricken. I believe it is well established that any variance from permit conditions is a permitting decision. The "temporary" variances provided in Ark. Code Ann. § 8-4-230 are not the only permit variances provided under state law and regulations. For example, see Reg. 6.104 (A)(5) incorporating by reference 40 CFR §124.62 (Decision on variances), the legal authority for which is **required** under state NPDES permit programs according to 40 CFR § 123.25 (35). Accordingly, the term "variances" in the definition of "permitting decisions" provided in Reg.8.204 should not be stricken.

Reg. 8.204 (6)(a), governing exemptions from filing disclosure statements, provides, "not including transfers," under subsection (viii) for water permit modifications. This same language, "not including transfers," should be added to permit modifications for solid waste permits (ix) and air permits (xi) in order to be consistent with the requirements of Reg. 8.311.

Reg. 8.314 (B) omits how a member of the public can participate in any Commission-initiated review of a Director's decision where no comment period is provided. A mechanism should be provided for interested members of the public desiring to participate in the Commission-initiated review of such permitting decisions to be allowed to become parties to the proceedings.

Standing

Agency actions are supposed to be readily reviewable by the Commission as evidenced by state environmental laws, which repeatedly provide the Commission shall have the power and duty upon a majority vote, to "initiate review of **any** director's decision." (Emphasis added.) Ark. Code Ann. §§ 8-1-203 (b)(8) (General Provisions); 8-4-201 (b)(8) (Arkansas Water and Air Pollution Control Act); 8-4-304; 8-6-207 (b)(8) (Arkansas Solid Waste Management Act); and 8-7-209 (b)(9) (Arkansas Hazardous Waste Management Act).

Standing determines who gets their foot into the courtroom. Standing for a third party to seek Commission review of a Director's decision is readily established by filing comments during a public comment period. This is a small hurdle, easily jumped, and is the standing requirement specified in state law for permits (Ark. Code Ann. § 8-4-205(b)(1)) and enforcement orders (Ark. Code Ann. § 8-4-103 (d)((4)(A)(i)) and adopted in Reg. 8. However, there are Director's decisions that provide no public comment period. For example, certain permitting decisions do not require a public comment period (Reg. 8.311) and the decision to renew an interim authority or 90-day temporary variance is exempt

from the public notice requirement (Ark. Code Ann. § 8-4-230 (e)(5)). For these types of administrative decisions, I am not aware of any statutory requirements being specified for standing. But under the existing Reg. 8 administrative procedures, standing for third parties to appeal a Director's decision where there is no comment period is much more difficult to establish than when a public comment period is provided. Standing where no public comment period is provided is addressed in Reg. 8.313 (B), Reg. 8.801(H), Reg. 8.804 (D)(2), and Reg. 8.805 (B). The standing requirement in Reg. 8 for third parties to appeal a Director's decision to the Commission where there is no comment period requires a person to state why he or she "reasonably considers himself or herself injured in his or her person, business, or property." Reg. 8.804 (D)(2). The standing requirement for decisions where there is no public comment period potentially creates a barrier to third party review of agency action except in the limited situations where a third-party plaintiff lives next door to, or owns property next to, the source of the problem, directly uses the subject of regulation (breathes the air, swims in the water), or has a business that is adversely impacted by the agency's action. Although these people clearly should be able to appeal the Director's decision to the Commission, limiting standing to this small group seems too narrow and appears inconsistent with general administrative policy by potentially excluding many people who may otherwise have a legitimate interest in participating in the agency's decision-making and would do so, but for the lack of a comment period. When a comment period is provided, third parties who are interested in, but otherwise may have no direct connection whatsoever with the subject of agency action, are given standing to initiate review of an agency decision simply by submitting written comments.

I may be reading the standing requirement added in Regulation 8 for decisions that are not subject to public comment too narrowly. But it appears that no concrete injury is required for standing to be conferred upon a plaintiff where a public comment period is provided; while a concrete injury of some sort must be demonstrated where there is no public comment period. These distinctly different standing requirements for third parties make no sense in an administrative context where regulatory bodies theoretically welcome public involvement in environmental decision-making. It would seem that in both instances (public comment period or no public comment period), any member of the public who can clearly articulate an interest in the subject matter protected by the relevant statute or regulation should have standing to appeal any Director's decision to the Commission. Equalizing the standing requirements in this way allows interested third parties to participate in decisions who otherwise would be excluded from the regulatory process. Maintaining an unnecessary barrier to public participation in seeking review of a Director's decision can have the unintended consequence of shielding agency action from public scrutiny and Commission review.

I note where public comment is offered, the potential issues on appeal are narrowed by the comments filed during the public comment period. However, the ability to narrow issues should not serve as a basis for barring review by a third-party where no public comment is offered. Where no public comment period is provided, the issues identified for appeal still would need to be clearly stated in the Request for Hearing and determined by the Commission to be proper issues for appeal.

Finally, equalizing the standing requirements for third parties does not eliminate the other procedural and evidentiary protections provided in any Commission review proceeding. Standing has been described as the gatekeeper to courts. Equalizing the standing requirements in an administrative agency context simply allows third-parties who have an interest in environmental decision-making to be able to seek Commission review of a Director's decision.

Therefore, I suggest that the language in Reg. 8.313(B) should be revised to read as follows:

Any person who states facts which show an interest in the subject regulated under state law shall have standing to appeal the final decision to the Commission where no public comment period is provided for any of the following decisions:

Similar language changes also should be made to Reg. 8.801(H), Reg. 8.804 (D)(2), and Reg. 8.805 (B); although I understand that the standing provisions of those sections were not proposed to be changed in the draft rule submitted for public comment.

Thank you for the opportunity to comment on the proposed changes to Regulation No. 8.

Sincerely,
Ellen Carpenter