

Title 8. Environmental Law

Chapter I. Arkansas Pollution Control and Ecology Commission, Department of Energy and Environment

Subchapter B. Administration

Part 11. Administrative Procedures

Subpart 1. General Provisions

8 CAR § 11-101. Title.

(a) The Arkansas Pollution Control and Ecology Commission adopts Part 11 pursuant to Arkansas Code § 8-1-203(b)(1), (2), and (3).

(b) This part shall be known as Part 11, Administrative Procedures, and may be cited as 8 CAR pt. 11.

8 CAR § 11-102. Purpose and intent.

(a) The purpose of this part is to set out the administrative procedures that govern:

- (1) The Arkansas Pollution Control and Ecology Commission;
- (2) The Division of Environmental Quality; and
- (3) Any person appearing in any proceeding or matter before the commission or the division.

(b) It is the intent of the commission that the provisions of this part be liberally construed so as to:

- (1) 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
- (2) Expedite the administration of matters pending before the commission.

8 CAR § 11-103. Definitions.

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

- (1) "Adjudicatory hearing" means any hearing held by the Arkansas Pollution

Control and Ecology Commission under the laws administered by the Arkansas Pollution Control and Ecology Commission or the Division of Environmental Quality, for the purpose of receiving evidence concerning the adjudication of facts or issues for which a hearing is provided;

(2) "Adjudicatory proceeding" means any administrative action allowed by statute, rule, or permit specifically brought before the Arkansas Pollution Control and Ecology Commission to resolve a dispute;

(3) "Administrative civil penalty" means any monetary amount assessed by the Director of the Division of Environmental Quality against a person for violation of a statute, rule, permit, or order administered by the Division of Environmental Quality and includes any in-kind services or cash contribution authorized by the Director of the Division of Environmental Quality as partial mitigation of cash penalties for use in projects or programs designed to advance environmental interests;

(4) "Administrative enforcement action" means any administrative proceeding instituted by the Division of Environmental Quality against a person charged with violation of any law, rule, permit, or order administered by the Division of Environmental Quality;

(5) "Administrative hearing officer" means a person designated by the Arkansas Pollution Control and Ecology Commission to:

(A) Determine issues of fact and law and render a written recommended decision on matters pending before the Arkansas Pollution Control and Ecology Commission; and

(B) Take any other action consistent with the Arkansas Pollution Control and Ecology Commission's statutory and regulatory authority;

(6)(A)(i) "Administrative permit amendment" means a minor change which:

(a) Is not typically considered a permit modification, as defined by applicable statutes or rules; or

(b) Does not require public notice and opportunity for comment.

(ii) For example, typographical corrections or other minor corrections initiated by the Division of Environmental Quality might be considered administrative

permit amendments.

(iii) Some minor changes requested by the permittee may also qualify as administrative permit amendments.

(B) For air permits, administrative permit amendments are defined in 8 CAR pt. 40, 8 CAR pt. 41, and 8 CAR pt. 42.

(C) The Director of the Division of Environmental Quality, in his or her discretion, may decide whether a proposed revision would be considered an administrative amendment;

(7)(A) "Administratively complete" means that all information required by statute, rule, or application form has been submitted to the Division of Environmental Quality for the purpose of processing a permit application.

(B) An application that is administratively complete is not necessarily technically complete or complete for other purposes;

(8) "Affiliated person" means any:

(A) Officer, director, or partner of the applicant;

(B) 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;

(C) Person owning or controlling more than five percent (5%) of the applicant's debt or equity; or

(D) Person who:

(i) Is not now in compliance or has a history of noncompliance with the environmental laws or rules of this state or any other jurisdiction; and

(ii) 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;

(9) "Applicant" means any person who files:

(A) An application for:

(i) A permit or permit renewal;

(ii) The reissuance of, revision of, modification of, or transfer of a

permit;

(iii) Closure/post closure plan approval or modification;

(iv) A permit exemption, variance, or waiver;

(v) A certification or license; and

(vi) A bond reduction or release; or

(B) Any other application as required by the Division of Environmental

Quality.

(10) "Chairperson" means a commissioner elected by the other commissioners to preside over the Arkansas Pollution Control and Ecology Commission;

(11) "Commission" means the Arkansas Pollution Control and Ecology Commission;

(12) "Commission hearing" means a proceeding in which the Arkansas Pollution Control and Ecology Commission reviews an action taken by the Division of Environmental Quality which includes but is not limited to:

(A) Enforcement actions;

(B) The issuance of:

(i) Administrative orders;

(ii) Permitting decisions;

(iii) Grant or loan decisions;

(iv) Petroleum storage tank trust fund decisions; and

(v) Tax credit decisions; and

(C) Other matters;

(13) "Commission secretary" means the designated secretary to the Arkansas Pollution Control and Ecology Commission;

(14) "Consent administrative order", "permit appeal resolution", and "settlement agreement" all mean an administrative order entered into by agreement of the parties, including the Division of Environmental Quality;

(15)(A) "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 Arkansas Pollution Control and Ecology Commission has

authority.

(B) 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.

(C) 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 Arkansas Pollution Control and Ecology Commission.

(D) A petition must describe the impact to the petitioner of the:

- (i) Rule;
- (ii) Statute;
- (iii) Permit; or
- (iv) Order;

(16) "Default administrative order" means a final order issued by the Director of the Division of Environmental Quality to a person who has failed to respond in writing to a notice of violation within twenty (20) calendar days of its receipt;

(17) "Director" means the Director of the Division of Environmental Quality or the Director of the Division of Environmental Quality's delegatee;

(18) "Division" means the Division of Environmental Quality or its successor, including the Director of the Division of Environmental Quality and Division of Environmental Quality staff;

(19) "Emergency order" means an administrative order issued by the Director of the Division of Environmental Quality pursuant to specific authority provided by any law or rule administered by the Arkansas Pollution Control and Ecology Commission or the Division of Environmental Quality without prior notice or adjudicatory hearing, upon a finding that an emergency or imminent hazard exists;

(20) "Grant or loan decision" means a final administrative decision by the Director of the Division of Environmental Quality on any application for a grant or loan or the Director of the Division of Environmental Quality's final decision on any dispute related to a grant or a loan;

(21) "Implementing agreement" means a plan, order, memorandum of

agreement, or other enforceable document issued by the Division of Environmental Quality under provisions of the Arkansas Hazardous Waste Management Act of 1979, Arkansas Code § 8-7-201 et seq., or the Remedial Action Trust Fund Act, Arkansas Code § 8-7-501 et seq., to implement the voluntary cleanup process described in Arkansas Code § 8-7-1104;

(22) "Major modification" means a revision which is not a minor modification or an administrative permit amendment;

(23) "Minor modification" means a revision of a permit as defined by any other rule or as determined by the Division of Environmental Quality to be routine or inconsequential in case-specific circumstances and is not an administrative permit amendment;

(24)(A) "Notice of adjudicatory hearing" means a written notification to the parties of an adjudicatory hearing.

(B) This term does not apply to a notice of public hearing or publication of notice in a newspaper;

(25)(A) "Notice of bond forfeiture" means a written notification to a person of alleged violations of any statute, rule, permit, or order administered by the Division of Environmental Quality or Arkansas Pollution Control and Ecology Commission, which constitute grounds for forfeiting a bond to the Division of Environmental Quality.

(B) The "notice of bond forfeiture" initiates an administrative enforcement action;

(26)(A) "Notice of violation" means a written notification to a person of alleged violations of any statute, rule, permit, or order administered by the Division of Environmental Quality or the Arkansas Pollution Control and Ecology Commission.

(B) The "notice of violation" initiates an administrative enforcement action;

(27) "Permit" means an authorization conferred by the Director of the Division of Environmental Quality pursuant to statute or rule to construct or operate an existing or a proposed facility;

(28) "Permitting decision" means a final administrative decision by the Director

of the Division of Environmental Quality or the director's delegatee on:

(A) All applications for:

- (i) Permits;
- (ii) Permit renewals;
- (iii) Major modifications;
- (iv) Minor modifications;
- (v) Administrative permit amendments;
- (vi) Permit revocations;
- (vii) Interim authority and temporary variances;
- (viii) Construction permits; and
- (ix) Transfers;

(B) Closure/post closure plan approvals and modifications;

(C) The calculation of permit fees;

(D) Exemptions, variances, and waivers;

(E) Certifications or licenses;

(F) Bond reductions or releases; and

(G) Specific conditions imposed on permits;

(29) "Person" means any:

(A) Individual;

(B) Corporation;

(C) Company;

(D) Firm;

(E) Partnership;

(F) Association;

(G) Trust;

(H) Joint-stock company or trust;

(I) Limited liability company;

(J) Venture;

(K) Municipal, state, county, or federal government:

(i) Agency;

(ii) Authority; or

(iii) Instrumentality; or

(L) Any other legal entity, however organized;

(30) "Presiding officer" means the person conducting a public hearing on behalf of the Arkansas Pollution Control and Ecology Commission or the Division of Environmental Quality;

(31) "Public comment" means:

(A) Any written statement received by the Division of Environmental Quality during the public comment period by letter, electronic mail, or facsimile; or

(B) Any oral statement received on the record during a public hearing;

(32)(A) "Public hearing" means a formal meeting held pursuant to the laws or rules administered by the Arkansas Pollution Control and Ecology Commission or the Division of Environmental Quality for the purpose of receiving on the record oral or written comments from the public on a permitting decision or on a rulemaking proceeding.

(B) A public hearing is not an adjudicatory hearing or a public meeting;

(33)(A) "Public meeting" means an informal meeting held by the Arkansas Pollution Control and Ecology Commission or the Division of Environmental Quality for the purpose of exchanging information with the public on:

(i) A permitting decision;

(ii) A rulemaking; or

(iii) Any issue of public interest.

(B) A public meeting is not an adjudicatory hearing or a public hearing.

(C) Any comment made at a public meeting is not made on the record and is therefore not received as a "public comment";

(34) "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 Arkansas Pollution Control and Ecology Commission or the Division of Environmental Quality as provided in this part or by law;

(35) "Recommended decision" means the written recommendation, including

findings of fact and conclusions of law, made by the administrative hearing officer to the Arkansas Pollution Control and Ecology Commission at the conclusion of an adjudicatory hearing or after a decision granting or denying the relief sought in the matter;

(36)(A) "Rule" means any rule promulgated by the Arkansas Pollution Control and Ecology Commission pursuant to the laws it administers.

(B) The term "rule" includes:

(i) Rule or suspension of the processing of a type or category of a permit; or

(ii) A declaration of a moratorium on a type or category of a permit;

(37) "Rulemaking" means a proceeding to promulgate, adopt, amend, or repeal a rule;

(38) "Special conditions" means the conditions to a permit issued by the Division of Environmental Quality in its discretion that are not specifically imposed by law or rule;

(39) "Stay" means the postponement or delay of a decision of the Director of the Division of Environmental Quality or the Arkansas Pollution Control and Ecology Commission;

(40)(A) "Subpoena" means a command to appear at a certain time and place to give testimony upon a certain matter.

(B) A subpoena duces tecum requires production of:

(i) Books;

(ii) Papers; and

(iii) Other things;

(41) "Third-party rulemaking" means any submitted by any person other than the Arkansas Pollution Control and Ecology Commission or the Division of Environmental Quality; and

(42) "Violation" means an instance of noncompliance by a person with a provision of a law, rule, permit, or order administered by the Arkansas Pollution Control and Ecology Commission or the Division of Environmental Quality.

Subpart 2. Permits

8 CAR § 11-201. Applicability.

(a)(1) Unless otherwise required by another Arkansas Pollution Control and Ecology Commission rule, the following sections of this subpart shall apply to all permitting decisions.

(2) However, the requirements of 8 CAR §§ 11-205 – 11-209 and 8 CAR § 11-211(a)(2) do not apply to:

- (A) Closure/post closure plan approvals or modifications;
- (B) The calculation of permit fees;
- (C) Exemptions, variances, and waivers;
- (D) Certifications or licenses;
- (E) Minor modifications of permits;
- (F) Bond reductions or releases; or
- (G) Administrative permit amendments.

(b) In addition to complying with the requirements of this subpart, the Division of Environmental Quality shall follow any other applicable state or federal public notice requirements.

(c) An application for a permit and other matters preliminary to the Director of the Division of Environmental Quality's issuance of a final permitting decision not specified in this part shall be as provided in applicable laws and rules.

8 CAR § 11-202. Director as permitting authority.

(a) The Director of the Division of Environmental Quality or the director's delegatee shall issue all permits.

(b) Nothing in this part, including the power to reverse or affirm a permitting decision by the director, shall be construed to authorize the Arkansas Pollution Control and Ecology Commission to issue a permit.

8 CAR § 11-203. Permit application procedures.

(a) An applicant shall file a permit application with the appropriate division of the Division of Environmental Quality on forms supplied by or approved by the Division of Environmental Quality.

(b) This may include electronic forms as approved by the Division of Environmental Quality.

(c) The Division of Environmental Quality will not process an application unless the application is administratively complete.

8 CAR § 11-204. Noncompliance 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 noncompliance or a pattern of disregard for state or federal environmental laws or regulations or for other just cause, the Director of the Division of Environmental Quality may deny the applicant's request for the issuance or transfer of any:

- (1) Permit;
- (2) License;
- (3) Certification; or
- (4) Operational authority.

(b) Disclosure statement.

(1) 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 division unless exempted herein or by applicable law.

(2) The disclosure statement shall include but not be limited to the following information:

- (A) The full name, business address, and Social Security number or tax

identification number of the applicant and all affiliated persons;

(B) 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;

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

(D) A listing and explanation of any civil or criminal legal actions by government agencies involving environmental protection laws or rules against the applicant and affiliated persons in the ten (10) years immediately preceding the filing of the application, including:

(i) Administrative enforcement actions resulting in the imposition of sanctions, permit or license revocations, or denials issued by any state or federal authority;

(ii) Actions that have resulted in a finding or a settlement of a violation; and

(iii) Actions that are pending;

(E) 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; and

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

(c) Exemptions.

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

(A)(i) 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.

(ii) 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; and

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

(2) 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.

(3)(A) 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.

(B) 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.

(4) 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) Either:

- (i) Discloses any change in previously submitted information; or
- (ii) Verifies that the previously submitted information remains

accurate; and

(B) Submits the information on forms developed by the division.

(5) The Arkansas Pollution Control and Ecology Commission may adopt rules 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:
 - (i) Permit;
 - (ii) License;
 - (iii) Certification; or
 - (iv) Operational authorization; and
- (B) The person or entity that would receive a:
 - (i) Permit;
 - (ii) License;
 - (iii) Certification; or
 - (iv) Operational authorization.

(6)(A) Pursuant to the authority of 8 CAR § 11-204(c)(5), 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 8 CAR pt. 81;
- (ii) Phase 1 Consultants, as defined in 8 CAR pt. 84;
- (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 8 CAR pt. 80;
- (v) Laboratory Certifications, as defined in the Environmental Laboratory Accreditation Program Act, Arkansas Code § 8-2-201 et seq.;
- (vi) Individual homeowners seeking coverage under General Permit ARG5500000;
- (vii) Wastewater operator licenses, as defined in 8 CAR pt. 22;
- (viii) Water permit modifications for permits issued under the authority of the Arkansas Water and Air Pollution Control Act, Arkansas Code § 8-4-101 et seq.;
- (ix) Solid waste permit modifications for permits issued under 8 CAR

pt. 60;

(x) Solid waste landfill operator license renewals, as defined in 8 CAR

pt. 62;

(xi) Air permit modifications for permits issued under 8 CAR pt. 40, 8 CAR pt. 41, and 8 CAR pt. 42; and

(xii) Asbestos certification renewals, as defined in 20 CAR pt. 860.

(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;

(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;

(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 noncompliance 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 noncompliance 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)(a) The applicant's history of violations of state or federal environmental laws or regulations.

(b) In determining the applicant's history of noncompliance, 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, 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:

(a) Prompt payment of administrative civil penalties;

(b) Civil damages;

(c) Cooperation with investigations;

(d) Termination of employment or other relationship with responsible parties or other persons responsible for the activity described in 8 CAR § 11-204(b)(2)(D); or

(e) Other demonstration of good citizenship by the applicant that the division 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.

8 CAR § 11-205. Public notice of permit application.

(a)(1) 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.

(2) The Division of Environmental Quality 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 Division of Environmental Quality 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 Division of Environmental Quality, and the proof of publication shall become part of the application file.

(d)(1) The applicant shall pay the costs of publication of notice of an application for a permit.

(2) The applicant shall provide proof of payment, i.e., a paid receipt, of all costs of publication.

8 CAR § 11-206. Request for public hearing on application for permit.

(a)(1) Any interested person may request a public hearing on a permit application.

(2) The request shall be in writing and shall state reasons for the necessity of a public hearing.

(3) The request must be filed with the appropriate division of the Division of Environmental Quality within ten (10) business days after publication of the notice of

the permit application.

(b) The Division of Environmental Quality shall have the discretion to decide whether to hold a public hearing, unless otherwise required by law or rule.

8 CAR § 11-207. Public notice of draft permitting decision.

(a)(1) When the Director of the Division of Environmental Quality 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.

(2) When the Division of Environmental Quality causes the notice to be published, the notice may be combined with other notices of permitting decisions.

(3) The Division of Environmental Quality 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 Division of Environmental Quality 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 Division of Environmental Quality;

(7)(A) A statement that the submission of written comments by any person will be accepted by the Division of Environmental Quality during the public comment period.

(B) 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 Division of Environmental Quality 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)(1) The applicant shall pay the costs of publication of notice of a draft permitting decision to issue a permit.

(2) 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 Division of Environmental Quality-initiated permit modifications shall be the responsibility of the Division of Environmental Quality.

8 CAR § 11-208. Public comment on draft permitting decision.

(a)(1) Any interested person may submit to the Division of Environmental Quality written comments, data, views, or arguments on the draft permitting decision during the public comment period.

(2) 8 CAR § 11-214 provides that only those persons who submit public comments on the record shall have standing to appeal a permitting decision to the Arkansas Pollution Control and Ecology Commission.

(b)(1) The public comment period shall begin on the day the notice is published and shall expire on the thirtieth calendar day after publication of the notice, unless otherwise required by law or rule.

(2) If the last day of the comment period is a Saturday, Sunday, legal holiday, or other day when the division'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 division's office is closed.

(c) Prior to the close of the public comment period provided in subsection (b) of this section, the Director of the Division of Environmental Quality 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)(1) Written public comments will be accepted if received not later than 4:30

p.m. on the last day of the public comment period.

(2) Written public comments may be submitted to the division by mail or facsimile.

(3) 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.

(4) Electronic mail comments must be sent to the electronic mail address specified in the public notice.

(e)(1) The division shall make available the draft permitting decision and other material relevant to the draft permitting decision for inspection and copying at the division during the public comment period and shall comply with the relevant provisions of the Freedom of Information Act of 1967, Arkansas Code § 25-19-101 et seq.

(2)(A) The division shall provide copies to any person making a request for copies, including any request by:

- (i) Mail;
- (ii) Telephone;
- (iii) Electronic mail; or
- (iv) Facsimile.

(B) The division may charge the actual costs of reproduction, mailing, or transmitting the record by facsimile or other electronic means.

(C) The division may require the requester to pay the copy fee in advance if the estimated fee exceeds twenty-five dollars (\$25.00).

(f) The division 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.

8 CAR § 11-209. Public hearings.

(a) If the Division of Environmental Quality decides to hold a public hearing on an application for a permit or on a draft permitting decision, the division shall schedule the hearing and:

(1)(A) Give notice of the date, time, and place of the hearing by first-class mail

to:

- (i) The applicant;
- (ii) All persons who have filed a timely written request for a public hearing;
- (iii) All persons who have submitted public comments on the record;
- and
- (iv) All persons who have requested advance notice of the public hearing.

(B) If comments are submitted for a group or by a petition, the Director of the Division of Environmental Quality may require the group to designate a representative to receive the notice; and

(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 division will receive oral public comments at the public hearing;
- (2)(A) A public hearing may continue until all persons wishing to make comments have been heard.

(B) 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 division prefers comments be submitted in writing; and

(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.

8 CAR § 11-210. Public meetings.

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

8 CAR § 11-211. Final permitting decision.

(a) Director of the Division of Environmental Quality's decision.

(1)(A) The director shall issue the final permitting decision in writing.

(B) The director's decision shall be made upon consideration of:

(i) The completed application;

(ii) The public comments on the record, if any; and

(iii) Any other materials provided by law or rule applicable to the application or other matter to be considered in the decision.

(C) The director may impose special conditions upon the issuance of a permit.

(2)(A) 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.

(B)(i) 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.

(ii) For any standard or requirement that is identical to a duly promulgated and applicable rule, this demonstration may be satisfied by reference to the rule.

(iii) In all other cases, the Division of Environmental Quality must provide its own justification with appropriate reference to the scientific and engineering literature or written studies conducted by the division.

(b) Issuance of final permitting decision and effective date.

(1)(A) The date of issuance of a final permitting decision is the date notice of

the decision is served upon the applicant or permittee.

(B) Service is deemed complete when the notice is placed in the mail to the applicant or permittee.

(2)(A) The director's final permitting decision shall contain a certificate of service showing the date of issuance.

(B) 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.

(1)(A) The division 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.

(B) 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) The notice to all of these persons shall be placed in the mail on the same date.

(3) The notice shall include:

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

(B) The permit application identification number;

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

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

(E) A statement that the applicant or permittee and any person submitting public comments on the record may request an adjudicatory hearing and Arkansas Pollution Control and Ecology Commission review of the final permitting decision as provided by under Subpart 6 of this part.

(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 division.

8 CAR § 11-212. Permit transfer.

(a)(1)(A) Except for the transfer of hazardous waste permits, an applicant for a transfer of a permit shall submit to the Division of Environmental Quality a written request for transfer of the permit on a form provided by the division.

(B) The applicant also shall submit to the division the information required by 8 CAR § 11-204 at least thirty (30) calendar days in advance of the proposed transfer date.

(2)(A) The permit is automatically transferred to the new permittee unless the Director of the Division of Environmental Quality denies the request to transfer within thirty (30) calendar days of the division's receipt of the disclosure information.

(B) This denial shall constitute a final permitting decision of the director and may be appealed to the Arkansas Pollution Control and Ecology Commission.

(b) Hazardous waste permits must be transferred in accordance with the requirements of 8 CAR pt. 81 and 8 CAR § 11-204.

8 CAR § 11-213. Minor modifications.

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

8 CAR § 11-214. Persons with standing to appeal a permitting decision.

(a)(1) 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 Arkansas Pollution Control and Ecology Commission.

(2) If no public comment period is provided for, closure/post closure plan approvals or modifications, the calculation of permit fees, exemptions, variances, and waivers, certifications or licenses, minor modifications of permits, bond reductions or releases, or 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)(1) 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 (30) days of the date of issuance of the Director of the Division of Environmental Quality's final permitting decision.

(2) 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 Subpart 6 of this part.

8 CAR § 11-215. Review on commission initiative.

(a) The Arkansas Pollution Control and Ecology Commission may, by majority vote within thirty (30) calendar days of the date of the Director of the Division of Environmental Quality's issuance of a permitting decision, initiate adjudicatory review of the decision, even if the parties do not.

(b)(1) 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.

(2) 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)(1) The proceedings on review shall be held in accordance with the provisions of Subpart 6 of this part.

(2) During the review, the permit applicant or permittee shall be considered an indispensable party.

8 CAR § 11-216. Interim authority and temporary variances.

(a) Every Director of the Division of Environmental Quality's decision to grant or deny a temporary variance or interim authority pursuant to Arkansas Code § 8-4-230,

shall be publicly noticed in accordance with 8 CAR § 11-207 within ten (10) business days of the date of the decision.

(b)(1) Any member of the public may object to the director's decision within ten (10) business days of the notice.

(2) Objections will be accepted if submitted in accordance with 8 CAR § 11-208(d).

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

(4) 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.

(5)(A) The director's revocation or modification of his or her initial decision becomes a final decision for purposes of appeal.

(B) Upon issuance, notice of the decision shall be sent to the applicant and those persons who submitted timely objections.

(6) 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)(1) The director may, for compelling reasons or good cause shown, revoke or modify the conditions of any temporary variance or interim authority previously granted.

(2) The director's revocation or modification of his or her prior decision becomes a final decision for purposes of appeal.

(3) 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 applicant's 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 8 CAR § 11-603(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.

8 CAR § 11-217. Appeal from final commission decision.

The Arkansas Pollution Control and Ecology Commission's final decision on a permitting issue is appealable to circuit court, see Arkansas Code §§ 8-4-222 – 8-4-229 and 8 CAR §§ 11-701 – 11-703.

8 CAR § 11-218. Inapplicability.

Nothing in this subpart shall affect the ability of the Director of the Division of Environmental Quality to terminate, suspend, or revoke a permit for cause pursuant to the procedures for enforcement actions as specified in Subpart 4 of this part.

Subpart 3. Grant, Loan, and Tax Credit Decisions

8 CAR § 11-301. Applicability.

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

8 CAR § 11-302. Issuance of director's decision.

(a)(1)(A) The Director of the Division of Environmental Quality shall issue a written decision on all grant, loan, or tax credit matters within the time periods specifically required by law or rule.

(B) In the absence of a specified time period, decisions shall be issued no later than thirty (30) calendar days after the Division of Environmental Quality's receipt of all pertinent written facts and arguments, as determined by the division.

(2)(A) The date of issuance of a final decision is the date notice of the decision is served upon the applicant.

(B) Service shall be deemed complete when the notice is placed in the mail to the applicant.

(3) The effective date of a final decision is the date of issuance as provided in subdivision (a)(2) of this section, unless a later effective date is specified in the decision.

(b)(1) 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.

(2) Unless otherwise provided by law or rule, the notice shall state:

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

(B) The director's decision and date of decision; and

(C) 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 Arkansas Pollution Control and Ecology 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 subdivision (a)(2) of this section.

(d) Any request for hearing shall comply with the provisions of Subpart 6 of this

part.

8 CAR § 11-303. Review on commission initiative.

(a) The Arkansas Pollution Control and Ecology Commission may, by majority vote within thirty (30) calendar days of the date of the Director of the Division of Environmental Quality's issuance of a grant, loan, or tax credit decision, initiate adjudicatory review of the decision, even if the parties do not.

(b)(1) 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.

(2) 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)(1) The proceedings on review shall be held in accordance with the provisions of Subpart 6 of this part.

(2) In a review of the director's decision, the grant, loan, or tax credit applicant shall be an indispensable party.

Subpart 4. Enforcement Actions

8 CAR § 11-401. Applicability.

(a)(1) The policy of the Division of Environmental Quality is to seek compliance with the laws and rules administered by it.

(2) The division 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)(1) Nothing contained in this subpart shall in any manner abridge or interfere with the division's ability to initiate civil proceedings in courts of competent jurisdiction

to restrain or abate any violation of the laws, rules, or permits administered by it and to otherwise enforce these laws, rules, and permits without first having instituted administrative enforcement proceedings hereunder.

(2) Further, nothing contained in this subpart shall in any manner abridge or interfere with the division's ability to seek criminal prosecutions concerning any violation of the laws, rules, or permits administered by it.

8 CAR § 11-402. Issuance of notice of violation.

(a) Except as otherwise provided in Subpart 5 of this part, Emergency Actions, the Director of the Division of Environmental Quality may not issue an order, except by consent, to any person for violation of the laws, permits, or rules administered by the Division of Environmental Quality 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 Subpart 6 of this part.

(b)(1) Whenever the director determines that reasonable grounds exist to believe that a violation has occurred, he or she may issue a notice of violation to be served upon all persons alleged to be in violation.

(2) The notice shall state:

(A) All alleged violations of which the person is accused;

(B) The administrative civil penalty, if any, proposed by the director to be assessed for each violation;

(C) 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;

(D) Any other measure, such as permit suspension or revocation, proposed by the director to be taken against the alleged violator;

(E)(i) That the alleged violator must file, in accordance with 8 CAR § 11-603(c), a request for hearing on the notice of violation with the Arkansas Pollution Control and Ecology Commission secretary within twenty (20) calendar days of its receipt.

(ii) 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

(F)(i) 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.

(ii) Any request for hearing shall comply with the provisions of Subpart 6 of this part.

8 CAR § 11-403. Finality of default administrative order.

(a) A default administrative order is the Director of the Division of Environmental Quality's final order.

(b)(1) Except as provided in 8 CAR § 11-404, the order may not be reviewed on its merits by the Arkansas Pollution Control and Ecology Commission unless the person to whom the order was issued files a request for hearing within thirty (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.

(2) 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.

8 CAR § 11-404. Review on commission initiative.

(a) The Arkansas Pollution Control and Ecology 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)(1) After the commission decides to initiate review, the Director of the Division of Environmental Quality 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.

(2) 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 Subpart 6 of this part.

(d) The person to whom the order is issued shall be considered an indispensable party.

8 CAR § 11-405. Public notice of notices of violation and consent administrative orders.

(a)(1) On or about the tenth and twenty-fifth day of each month, the Director of the Division of Environmental Quality 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.

(2) The notice shall include:

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

(B) The location by city or county of the alleged violation;

(C) 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;

(D) The type of administrative enforcement action, i.e., notice of violation or consent administrative order;

(E) The amount of the proposed administrative civil penalty, if any;

(F) A statement that the documents for the administrative enforcement action are available for copying at the Division of Environmental Quality; and

(G) A statement that the submission of written comments by any person will be accepted by the division.

(b) The notice provided in subsection (a) of this section shall also be given to each member of the Arkansas Pollution Control and Ecology 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, Arkansas Code § 8-4-101 et seq., and rules promulgated thereunder.

8 CAR § 11-406. Public participation in administrative enforcement.

(a)(1) 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.

(2) If comments are submitted for a group, the Director of the Division of Environmental Quality may require the group to designate a representative to receive the notice.

(3) Any person given notice shall have the right to intervene upon timely filing a petition for intervention.

(4) 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 8 CAR § 11-604.

(b)(1) Any person who comments on a proposed consent administrative order settling an administrative enforcement action may petition the Arkansas Pollution Control and Ecology Commission within thirty (30) calendar days of the effective date of the order to set aside the order and provide an adjudicatory hearing.

(2) That person shall file a request for hearing with the commission secretary.

(3) 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.

(4)(A) If the commission denies an adjudicatory hearing, it shall give the petitioner notice of its reasons for the denial.

(B) The denial of a hearing shall constitute final commission action.

8 CAR § 11-407. Effective date of consent administrative orders.

(a)(1) No consent administrative order assessing an administrative civil penalty shall be effective until thirty (30) calendar days after publication of notice of the order.

(2) 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.

8 CAR § 11-408. Effective date of default administrative orders.

A default administrative order shall be effective upon its issuance by the Director of the Division of Environmental Quality.

Subpart 5. Emergency Actions

8 CAR § 11-501. Applicability.

All emergency actions shall comply with the provisions of this subpart and with all laws and rules administered by the Arkansas Pollution Control and Ecology Commission or the Division of Environmental Quality.

8 CAR § 11-502. Issuance of emergency orders.

(a)(1) The Director of the Division of Environmental Quality, in his or her discretion, may issue an emergency order when necessary to meet an emergency or situation of

imminent hazard.

(2) The order may be issued verbally or in writing and shall be effective immediately upon its issuance.

(3) If originally issued verbally, a written order shall be issued to confirm the verbal order as soon as reasonably possible thereafter.

(4) All written orders shall be served upon the person, if any, to whom they are issued.

(b)(1) 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.

(2) The notice shall contain:

(A) A description of the action;

(B) The authority for taking the action; and

(C) Any other information appropriate to ensure that the public is informed about the action.

8 CAR § 11-503. Request for hearing.

(a)(1) 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.

(2) Any request for hearing shall comply with the provisions of Subpart 6 of this part.

(b)(1) 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 of the Division of Environmental Quality.

(2) 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.

8 CAR § 11-504. Review on commission initiative.

(a) The Arkansas Pollution Control and Ecology Commission may, by majority vote within ten (10) calendar days of the Director of the Division of Environmental Quality'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 or persons, 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)(1) 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.

(2) 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.

(3) The hearing shall be held in accordance with the provisions of Subpart 6 of this part.

Subpart 6. Practice and Procedure

8 CAR § 11-601. Parties.

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

- (1) The Director of the Division of Environmental Quality;
- (2) In the appeal of a permitting decision, the permittee or permit applicant;
- (3) 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 Arkansas Pollution Control and Ecology Commission secretary;
- (4) Any person named in and served with a notice of violation or an emergency order;

(5) 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;

(6) 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;

(7) Any person who files a petition for intervention that is granted; and

(8) 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:

(A) Person;

(B) Business; or

(C) Property.

8 CAR § 11-602. Representation of corporations.

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

8 CAR § 11-603. Request for hearing.

(a) **Filing.** Any person seeking review of a final decision of the Director of the Division of Environmental Quality must file a written request for hearing with the Arkansas Pollution Control and Ecology 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 8 CAR § 11-211(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 8 CAR § 11-211(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 8 CAR § 11-302(a)(2).

(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 rule.

(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 subdivision (b)(1), (b)(2), (b)(3), (b)(4), (b)(5), (b)(6), (b)(7), or (b)(8) of this section 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 subdivisions (b)(1) – (9) of this section, unless good cause is shown for the late filing.

(c) Contents of a request for hearing.

(1)(A) Every request for hearing shall include:

- (i) A statement identifying the permit action or subject matter being appealed;
- (ii) The date of the director's final decision;
- (iii) A complete and detailed statement identifying the legal issues and factual objections being appealed;
- (iv) A request for the issuance, modification, or termination of a stay, if desired, as provided in 8 CAR § 11-612(c); and
- (v) Certification that a copy of the request for hearing has been served on all appropriate parties identified in 8 CAR § 11-601.

(B) In addition to the requirement of subdivisions (c)(1)(A)(i) – (v) of this section, a request for hearing that seeks review of a director's decision that is not specifically addressed in subdivision (b)(1), (b)(2), (b)(3), (b)(4), (b)(5), (b)(6), (b)(7), or (b)(8) of this section 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 subdivision (c)(1) of this section may result in the dismissal of the request for hearing.

8 CAR § 11-604. Permissive intervention.

(a) Any person who submitted comments during the public comment period 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 of the Division of Environmental Quality 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 8 CAR § 11-603(c)(1)(A)(i) – (v).

(d) A petition for intervention may be denied if it is not filed in the form and manner set out in 8 CAR § 11-603(c)(1).

(e)(1) The administrative hearing officer's denial of a petition to intervene shall

stand unless a written objection is filed with the Arkansas Pollution Control and Ecology Commission secretary within ten (10) business days of the ruling.

(2) The commission secretary shall place the objection for oral argument before the commission.

8 CAR § 11-605. 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 Arkansas Pollution Control and Ecology 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 follow "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:

(1) Be signed by the person submitting it or by his or her attorney; and

(2) 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 8 CAR § 11-601 shall accompany all pleadings and other papers filed by any person in any adjudicatory proceeding.

(e) The requirements of this section do not apply to comments submitted during a public comment period.

8 CAR § 11-606. Filing of pleadings or other documents.

(a)(1) All pleadings and other documents to be filed in any proceeding shall be filed

with the Arkansas Pollution Control and Ecology Commission secretary and, within one (1) 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 website.

(2) 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 8 CAR § 11-603.

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

(d)(1) 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.

(2) The commission secretary shall not file any pleading or other document until an original and one (1) copy is provided.

(e)(1) Notwithstanding the provisions of subsection (d) of this section, the commission secretary may accept facsimile or electronic mail copies for filing.

(2) Only one (1) copy need be transmitted, and the commission secretary shall file that copy.

(3) 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)(1) If one (1) 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.

(2) The person filing also shall provide the commission secretary a self-addressed, stamped envelope with proper postage for returning the copies.

8 CAR § 11-607. Service and proof of return.

(a) A copy of any notice of violation, request for hearing, or petition for intervention filed with the Arkansas Pollution Control and Ecology Commission secretary must be served upon all applicable parties identified in 8 CAR § 11-601 by certified mail,

return receipt requested, or by other means provided in Rule 4 of the Arkansas Rules of Civil Procedure.

(b)(1) A copy of any pleading or other document, other than as provided by subsection (a) of this section, 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 8 CAR § 11-601.

(2)(A) 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.

(B) The certificate of service shall be signed and dated by the person filing the pleading or other document or by his or her attorney.

(3) Service upon a party represented by an attorney is to be made upon the attorney.

(c) Service upon the Director of the Division of Environmental Quality must be made by serving the Chief of the Division of Environmental Quality's Legal Division.

8 CAR § 11-608. Administrative hearing officer's powers.

(a) The administrative hearing officer shall preside over all adjudicatory hearings.

(b)(1) 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.

(2) 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.

(3) If disqualified, the Arkansas Pollution Control and Ecology 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;
- (7) Rule on interlocutory motions, evidentiary matters, discovery, and objections;
- (8) Maintain order;
- (9) Oversee all other matters necessary to promote the just and efficient administration of these hearings;
- (10) Make recommendations to the commission on dispositive motions and on a request for hearing of a permitting decision in accordance with 8 CAR § 11-613;
- (11) Prepare and transmit a recommended decision to the commission; and
- (12) Conduct, on the commission's behalf, public hearings involving rulemaking.

8 CAR § 11-609. Recording of adjudicatory hearings and court reporter costs.

(a)(1) The administrative hearing officer shall electronically or stenographically record:

- (A) Adjudicatory hearings to take evidence;
- (B) Hearings involving dispositive motions; and
- (C) Hearings on a petition to intervene.

(2) 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)(1) 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.

(2) The requesting party shall pay all costs charged by the court reporter.

(c) Only a transcription or recording of a proceeding as provided in subsections (a) and (b) of this section 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.

8 CAR § 11-610. Subpoenas.

(a)(1) Any attorney of record to an adjudicatory hearing may issue, or any party of record may request that the administrative hearing officer issue, subpoenas.

(2) 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.

(3) The administrative hearing officer may give written authorization to the Arkansas Pollution Control and Ecology Commission secretary to issue subpoenas on his or her behalf.

(b)(1) Upon issuance, the original and one (1) 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.

(2) All costs of service, witness fees, and mileage fees shall be the responsibility of the requesting party.

8 CAR § 11-611. Rules of civil procedure.

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

8 CAR § 11-612. Effectiveness of orders during commission review.

(a) During the pendency of an Arkansas Pollution Control and Ecology 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 of the Division of Environmental Quality shall remain in effect and the parties shall comply therewith.

(b) Notwithstanding the provisions of subsection (a) of this section, 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)(1) A request pursuant to subsection (b) of this section must be in writing and filed with the commission secretary.

(2) The administrative hearing officer or the commission secretary shall promptly inform the Chair of the Arkansas Pollution Control and Ecology Commission of the filing of a request for a stay or for modification or termination of a stay.

(3) The chair shall, in his or her discretion, either:

(A) Grant a temporary stay, modify a stay, or terminate a stay, and such action shall be effective until the next regularly scheduled commission meeting;

(B) Direct the commission secretary to place the request on the agenda for the next regularly scheduled commission meeting; or

(C) Call a special commission meeting for the purpose of considering the request.

(4) The commission's decision on the request shall be in the form of a minute order and shall state which specific terms or conditions are affected by the decision.

(5) The commission secretary shall promptly mail the decision to all parties of record identified in 8 CAR § 11-601.

(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 subsection (a) of this section.

(e)(1) 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.

- (2) The burden of proving this incompatibility shall rest with the permittee.
- (f) The decision regarding a stay is not appealable.

8 CAR § 11-613. Preliminary hearing.

(a) After a request for hearing is filed with the Arkansas Pollution Control and Ecology 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)(1) Notwithstanding the provisions of subsection (a) of this section, a preliminary hearing must be held following the filing of a request for hearing involving a permitting decision.

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

(3) 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.

(4) The administrative hearing officer shall determine whether the:

- (A) Parties qualify as proper parties under 8 CAR § 11-601;
- (B) Issues are properly raised; and
- (C) Pleadings conform with the applicable requirements in Subpart 6 of this part.

(5) Any party aggrieved by the written decision of the administrative hearing officer issued under this section may, within ten (10) business days from the date of the decision, request commission review of the decision.

(6) 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.

8 CAR § 11-614. Notice of hearing.

(a)(1) The administrative hearing officer shall schedule the adjudicatory hearing and other proceedings.

(2) 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 Arkansas Pollution Control and Ecology Commission for final commission action within one hundred twenty (120) calendar days after the preliminary hearing.

(3) 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)(1) The administrative hearing officer shall issue, through the commission secretary, a notice of hearing to all parties of record.

(2) The notice shall be served at least ten (10) business days prior to the scheduled date of the adjudicatory hearing and shall include:

(A) The time, date, and place of the adjudicatory hearing;

(B) A statement that all parties of record are entitled to:

(i) Be present at the hearing;

(ii) Be represented by counsel; and

(iii) Present evidence and argument on all issues properly raised by any pleading filed in the proceeding;

(C) A statement that the hearing will be electronically or stenographically recorded; and

(D) A statement that testimony taken at the hearing will be taken under

oath.

8 CAR § 11-615. Settlements.

(a)(1) 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 Division of Environmental Quality shall give the Arkansas Pollution Control and Ecology Commission notice of the resolution of the matter by filing a copy of the executed settlement agreement with the commission secretary.

(2) 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 8 CAR § 11-215(a), § 11-303, § 11-404, or § 11-504, or in response to a petition under 8 CAR § 11-406 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 8 CAR §§ 11-207 – 11-211.

8 CAR § 11-616. 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 or parties 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)(A) The administrative hearing officer shall receive into evidence any testimony or other evidence that is admissible under the Arkansas Rules of Evidence.

(B) 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.

(C) 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.

(D) 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)(A) Each party is responsible for providing the Arkansas Pollution Control and Ecology Commission secretary with a PDF version of that party's documentary exhibits which are admitted into evidence at an adjudicatory hearing.

(B) If circumstances warrant, a party may request a waiver of the requirement to submit the documentary exhibits in a PDF version.

8 CAR § 11-617. Recommended decision of administrative hearing officer.

(a) 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 Arkansas Pollution Control and Ecology Commission for action at a regularly scheduled meeting.

(b) The administrative hearing officer shall cause the recommended decision to be mailed with a certificate of service to all parties of record.

8 CAR § 11-618. Commission review.

(a)(1) Arkansas Pollution Control and Ecology Commission review of any appealed or contested matter shall be a de novo review of the record compiled by the administrative hearing officer.

(2) However, the commission may vote to consider additional evidence subject to the provisions of 8 CAR § 11-620.

(b) The record before the commission on review shall consist of:

(1) The document constituting the Director of the Division of Environmental Quality'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)(1) The commission's decision shall be by majority vote of a quorum that shall be issued in the form of a minute order.

(2)(A) The commission's decision may affirm, modify, or reverse the recommended decision.

(B) Alternatively, the commission may reverse and remand all or part of the director's permitting decision or enforcement action to the director.

(3) 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.

8 CAR § 11-619. Oral argument before the commission.

(a) **Request for oral argument.**

(1) Any party of record may request the Arkansas Pollution Control and Ecology 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; and

(E)(i) Any document, exhibit, or transcript page from the record may be attached as an addendum to the request.

(ii) Each addendum must be clearly labeled as "Addendum No.".

(b) **Copies of request.** A party must file an original and three (3) 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 subdivision (a)(1) of this section 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 subdivision (a)(1) of this section for good cause as provided in subsection (g) of this section.

(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 subsections (a)

and (b) of this section; 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 subdivision (c)(2)(B) of this section.

(d) Requirements for opposing party or parties.

(1) Each party of record may file a response to a request for oral argument.

(2) The number of copies filed shall comply with the provisions of subsection (b) of this section.

(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 8 CAR § 11-607.

(f) Appearance on agenda.

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

(2) 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 subdivisions (a)(1) and (d)(2) and subsection (f) of this section may be modified by order of the administrative hearing officer for good cause.

(h) Time allowed for presenting oral argument.

(1)(A) 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.

(B) The party or parties may retain a portion of the fifteen-minute time period for rebuttal by notifying the Chair of the Arkansas Pollution Control and Ecology Commission at the beginning of the oral argument.

(2) The opposing party or parties 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 8 CAR § 11-620.

(j) **Questioning by commissioners.**

(1) Following an oral argument, the chair shall allow each commissioner to question the attorneys for each party of record or the persons who presented the oral argument.

(2) The commissioners shall not question any other persons, except for the administrative hearing officer.

8 CAR § 11-620. Additional evidence.

(a)(1) A party of record may request an opportunity to supplement the record with additional evidence.

(2) The requesting party must satisfactorily demonstrate to a majority of the Arkansas Pollution Control and Ecology 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.

(3) 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 of the Division of Environmental Quality to reconsider the matter based on the additional evidence before the matter is considered by the commission.

(b)(1) 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.

(2) 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.

8 CAR § 11-621. 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 Arkansas Pollution Control and Ecology 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)(1) 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.

(2) 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.

8 CAR § 11-622. Actions for declaratory orders.

(a)(1) Any permittee or person subject to regulation by the Arkansas Pollution Control and Ecology Commission or the Division of Environmental Quality 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 division.

(2) 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.

Subpart 7. Appeals

8 CAR § 11-701. Finality of decisions.

No order of the Director of the Division of Environmental Quality 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.

8 CAR § 11-702. Filing of appeal.

(a) Within thirty (30) calendar days after service of a copy of the Arkansas Pollution Control and Ecology Commission's final order, rule, 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.

8 CAR § 11-703. Filing of commission response and record.

(a) Within thirty (30) calendar days after service of the notice of appeal, the Arkansas Pollution Control and Ecology Commission shall file with the clerk of the circuit court a response to the notice of appeal and the record of the contested:

- (1) Case;
- (2) Rule; or
- (3) 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, rule, or other final decision on which the appeal is based; and

(4) All testimony, exhibits, and other evidence submitted to the commission.

(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.

Subpart 8. Rulemaking

8 CAR § 11-801. Public notice.

Prior to the adoption, amendment, or repeal of any rule, the Arkansas Pollution Control and Ecology Commission shall give at least thirty (30) calendar days' notice of the commission's intended action on the proposed rulemaking decision.

8 CAR § 11-802. Publication of notice.

(a) The notice shall be mailed to all persons requesting advance notice.

(b) In addition, notice shall be published in appropriate industry, trade, professional, or public interest publications chosen by the Arkansas Pollution Control and Ecology Commission and at least twice in a newspaper of statewide circulation.

8 CAR § 11-803. Contents of notice.

The notice shall include:

(1) Reference to the legal authority under which the rule is proposed;

(2) Either the terms or substance of the proposed rule and a description of the subjects and issues involved;

(3) The time, place, and manner for submission of written and oral comments; and

(4) A statement that copies of the proposed rule are available at the Division of Environmental Quality and in local public library depositories.

8 CAR § 11-804. Public hearing required.

No rule shall be adopted, amended, or repealed by the Arkansas Pollution Control and Ecology Commission until after a public hearing is held at least twenty (20) days after the date of public notice, except for an emergency rulemaking as set forth in 8 CAR § 11-807.

8 CAR § 11-805. Public hearing proceedings.

(a) The presiding officer at a public hearing shall be any commissioner or the Arkansas Pollution Control and Ecology Commission's designee.

(b) At the hearing:

(1) Any interested person may submit comments, written or oral, on the proposed rule;

(2) Oral comments shall be stenographically or electronically recorded; and

(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.

8 CAR § 11-806. Written comments.

(a) The Arkansas Pollution Control and Ecology Commission prefers that all comments be in writing and filed with the Division of Environmental Quality by:

(1) Mail;

(2) Facsimile; or

(3) 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)(1) Written public comments will be accepted if received no later than 4:30 p.m. on the last day of the public comment period.

(2)(A) 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.

(B) Electronic mail comments must be sent to the electronic mail address specified in the public notice.

(d)(1) 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.

(2) If the extended date falls on a weekend or holiday, the comment period will end on the next working day.

8 CAR § 11-807. Emergency rulemaking.

(a) If the Arkansas Pollution Control and Ecology 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 8 CAR §§ 11-801 – 11-806.

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

(c)(1) The imminent loss of federal funding, certification, or authorization for any program administered by the Division of Environmental Quality shall establish a prima facie case of imminent peril supporting emergency rulemaking.

(2) In addition, the division may present any other evidence proving the existence of imminent peril to the public:

(A) Health;

(B) Safety; or

(C) Welfare.

(d) No rule adopted pursuant to this section shall be effective for more than one hundred eighty (180) calendar days, unless a longer period is allowed by law.

8 CAR § 11-808. Contents of rulemaking docket.

(a) A rulemaking docket shall include:

(1) A petition containing a caption as set out in 8 CAR § 11-605 and a detailed explanation of the proposed rule;

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

(3) A legislative questionnaire;

(4) A financial impact statement;

(5) The Arkansas Economic Development Commission approval letter regarding Acts 2007, No. 143 (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 8 CAR § 11-812, if applicable; and

(7) A proposed minute order initiating the rulemaking.

(b) Upon satisfaction of the public notice and hearing requirements contained in 8 CAR §§ 11-802 and 11-805, the following shall be submitted to the Arkansas Pollution Control and Ecology Commission for final promulgation of the rule, and shall become part of the rulemaking docket:

(1) The Statement of Basis and Purpose and Responsive Summary as described in 8 CAR § 11-815;

(2) The final revised rule;

(3) The rule tracking sheet; and

(4) The proposed minute order adopting the proposed revisions to the rule.

(c) All documents contained in the rulemaking docket shall be prepared in accordance with the Arkansas Pollution Control and Ecology Commission Rule Formatting and Drafting Guidelines.

8 CAR § 11-809. Third-party petition for rulemaking.

Any person may petition the Arkansas Pollution Control and Ecology Commission for the issuance, amendment, or repeal of any rule.

8 CAR § 11-810. Commission deadline on third-party petitions.

(a) Within sixty (60) calendar days after the petition is filed with the Arkansas Pollution Control and Ecology Commission, the commission shall either initiate the procedures for adopting the proposed rule or deny the petition.

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

(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.

8 CAR § 11-811. Procedures for third-party rulemaking.

(a) If the Arkansas Pollution Control and Ecology Commission initiates rulemaking in response to a third-party petition, the commission shall give notice of the proposed rule as set forth in 8 CAR §§ 11-801 – 11-803 and shall hold a public hearing as required by 8 CAR §§ 11-804 – 11-806.

(b) The commission shall direct the proponent of a third-party rulemaking to compile or produce portions of the record required by 8 CAR § 11-814 and pay the costs associated with publication of the legal notice, rental fees for hearing locations, and copying of documents required by the commission Rule 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 8 CAR § 11-815 for the commission's review prior to its final decision.

(d) Prior to the close of the public comment period, the Division of Environmental

Quality 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 rule.

(e) The division shall prepare its own proposed Statement of Basis and Purpose and Responsive Summary as described in 8 CAR § 11-815 after the close of the public comment period.

(f) Upon consideration of the petitioner's and the division'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 part.

8 CAR § 11-812. Economic impact and environmental benefit analysis requirements.

(a) When economic impact and environmental benefit analysis is required.

(1) An economic impact and environmental benefit analysis shall be prepared by the proponent of any proposed rulemaking before the Arkansas Pollution Control and Ecology Commission unless the rule qualifies as exempt under this section.

(2) The economic impact and environmental benefit analysis shall be prepared by the proponent of the rulemaking based upon information that is reasonably available.

(3) 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.

(4) 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 section.

(5) A rulemaking shall be exempt from the economic impact and environmental benefit analysis requirements if the proposed rule:

(A) Incorporates or adopts the language of a federal statute or regulation

without substantive change;

(B) Incorporates or adopts the language of an Arkansas state statute or rule without substantive change;

(C) Is limited to matters arising under this part regarding the rules of practice or procedure before the commission;

(D) Makes only de minimis changes to existing rules, such as the correction of typographical errors or the renumbering of paragraphs or sections; or

(E) Is an emergency rule that is temporary in duration.

(b) If the proponent of a proposed rule believes that its proposal is exempt under subdivisions (a)(5)(A) – (E) of this section, 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 subdivisions (a)(5)(A) – (E) of this section, 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 nonexempt; 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 this part.

(e) Nothing in this section shall be construed as a limitation upon the commission's discretion to require economic impact and environmental benefit analysis of any proposed rulemaking decision.

8 CAR § 11-813. Evaluation of economic impact/environmental benefit.

(a) Following the public comment period, the Arkansas Pollution Control and Ecology 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 rule.

(b) If a change is made to a proposed rule after initiation of the rulemaking proceeding and the change is a logical outgrowth of the rule proposed in the prior notice within the meaning of 8 CAR § 11-816, then no new Economic Impact and Environmental Benefit Analysis form shall be required.

8 CAR § 11-814. Rulemaking record.

The Arkansas Pollution Control and Ecology Commission shall compile a rulemaking record consisting of, as appropriate:

- (1) Copies of all public notices required by 8 CAR §§ 11-801 – 11-803;
- (2) The proposed rule as published for public notice;
- (3) In the case of third-party or emergency rulemaking, all documents required by 8 CAR §§ 11-807 – 11-811;
- (4) An electronic or stenographic record of all oral comments received during the public hearing and any supporting materials;
- (5) Copies of all written comments and any supporting materials received during the public comment period or public hearing;
- (6) The economic impact/environmental analysis required by 8 CAR § 11-812, if applicable;
- (7) The Statement of Basis and Purpose and Responsive Summary described in 8 CAR § 11-815;
- (8) The final rule adopted by the commission; and
- (9) In the case of the denial of a rulemaking petition pursuant to 8 CAR §§ 11-808 – 11-811, the petition for rulemaking, and the commission's written order setting out the reasons for denial.

8 CAR § 11-815. Statement of Basis and Purpose and Responsive Summary.

- (a)(1) Before adopting a final rule, the Arkansas Pollution Control and Ecology

Commission shall cause to be prepared a concise general Statement of Basis and Purpose and Responsive Summary for the rule.

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

(i) An explanation of the necessity for the rule; and

(ii) A demonstration that any technical rule or standard is based upon generally accepted scientific knowledge or engineering practices, with appropriate references to technical literature or written studies conducted by the Division of Environmental Quality.

(B) If a standard or rule 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.

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

8 CAR § 11-816. Changes in a rule as a result of public comment.

(a) If, as a result of comments, the Arkansas Pollution Control and Ecology Commission changes a proposed rule to the extent that the rule would have an effect not previously expressed in the notice required in 8 CAR §§ 11-801 – 11-803, the commission shall provide another adequate public notice and public comment period.

(b) A second public notice and public comment period shall not be required if the final rule is a logical outgrowth of the rule proposed in the prior notice.

8 CAR § 11-817. Incorporation by reference.

(a) The Arkansas Pollution Control and Ecology Commission may, through incorporation by reference, adopt a rule that contains all or portions of the provisions of other laws, i.e., statutes or rules.

(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 rule line for line, word for word.

(c) The effective date of any rule that the commission adopts by reference shall be

the effective date of the commission rule, not that of the referenced rule.

(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 rules adopted by the commission.

8 CAR § 11-818. Amendment of rules.

(a) When amending portions of an existing rule, the Arkansas Pollution Control and Ecology Commission's deliberations shall be restricted to those proposed amendments described in the public notice.

(b) Rulemaking proceedings concerning legally required periodic update of rules shall be restricted to Division of Environmental Quality staff proposals.

(c) Nothing in this section shall be construed as a limit upon the right of third parties to petition for the amendment of a rule in separate rulemaking proceedings.

8 CAR § 11-819. 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 § 8-4-222.

8 CAR § 11-820. Intent and construction.

(a) The rulemaking procedures set out in this subpart are merely minimum procedures that must be followed before the Arkansas Pollution Control and Ecology Commission adopts a proposed rule.

(b) Nothing in this subpart shall be construed as restricting the authority of the commission in its rulemaking capacity to:

(1) Direct the proponents or opponents of a proposed rule to submit additional factual data or legal briefs as the commission deems necessary; or

(2) Make individual proponents or opponents of a proposed rule available for questioning by the commission.

(c) The commission may enter any order as may be necessary to efficiently conduct and conclude any rulemaking proceeding.

Subpart 9. Other Provisions

8 CAR § 11-901. Additional public participation requirement.

In addition to the public notice or public hearing provisions set forth in this part, the Arkansas Pollution Control and Ecology Commission and the Division of Environmental Quality shall comply with any other applicable state or federal public notice or public hearing requirements.

8 CAR § 11-902. Committees of the commission.

(a) The Chair of the Arkansas Pollution Control and Ecology Commission may appoint one (1) or more committees comprised of Arkansas Pollution Control and Ecology Commission members to act in an advisory capacity to the full commission.

(b)(1) Minutes shall be kept of committee meetings and presented to the full commission.

(2) Tape recordings of committee meetings shall be maintained by the commission secretary for a period of not less than one (1) year or as required by specific program record retention requirements.

8 CAR § 11-903. Special meetings.

(a)(1) Special Arkansas Pollution Control and Ecology Commission meetings may be called at the discretion of the Chair of the Arkansas Pollution Control and Ecology Commission.

(2) Alternatively, if two (2) or more commissioners submit written requests for a special meeting to the chair, the chair shall call a special commission meeting.

(b) The chair shall call a special commission meeting by delivering written notice to

each commissioner.

8 CAR § 11-904. Agenda.

The Arkansas Pollution Control and Ecology Commission secretary shall prepare an agenda listing the topics for any commission meeting and shall deliver it to each commissioner and the Director of the Division of Environmental Quality.

8 CAR § 11-905. Request to appear before the commission.

(a) Any person may seek to appear before the Arkansas Pollution Control and Ecology Commission by submitting a written request to the commission secretary.

(b)(1) 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.

(2) Any materials for distribution to the commission should be included in the written request.

(3) The request and all supporting material shall not exceed a total of three (3) double-spaced typewritten pages or four (4) handwritten pages.

(c)(1) The commission secretary shall provide the Chair of the Arkansas Pollution Control and Ecology Commission with a copy of the written request.

(2) At the chair's discretion, the request may be added to the agenda as a specific business matter.

(3) 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.

8 CAR § 11-906. Public comments.

(a)(1) Any person may address the Arkansas Pollution Control and Ecology Commission during the time allocated on the agenda for public comments.

(2) 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 Chair of the Arkansas Pollution Control and Ecology Commission 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-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.

8 CAR § 11-907. Inapplicability.

The provisions of Subpart 1 and Subpart 2 of this part do not apply to the Arkansas Pollution Control and Ecology Commission's rule governing surface coal mining and reclamation pursuant to the Arkansas Surface Coal Mining and Reclamation Act of 1979, as amended, Arkansas Code § 15-58-101 et seq., nor to 15 CAR pt. 230, Arkansas Surface Coal Mining and Reclamation Code, as amended.

8 CAR § 11-908. Repealer.

All rules or parts thereof, adopted pursuant to the laws administered by the Arkansas Pollution Control and Ecology Commission or the Division of Environmental Quality, which are in conflict with the provisions of this part are hereby repealed to the extent of such conflict.

8 CAR § 11-909. Severability.

If any provision of this part 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 part are declared to be separable and severable.

8 CAR § 11-910. Effective date.

This part is effective ten (10) calendar days after filing with the:

- (1) Secretary of State;
- (2) Arkansas State Library; and
- (3) Bureau of Legislative Research.

Appendix A. Economic Impact/Environmental Benefit Analysis

Link:

<https://CodeOfARRules.arkansas.gov/docs/CARCodeAppendices/Appendices/298/8CARpt.11AppendixA.pdf>