

Stricken language would be deleted from and underlined language would be added to present law.
Act 1021 of the Regular Session

State of Arkansas
89th General Assembly
Regular Session, 2013

As Engrossed: H3/20/13
A Bill

HOUSE BILL 1687

By: Representative Branscum

By: Senator J. Dismang

For An Act To Be Entitled

AN ACT TO AMEND THE ARKANSAS WATER AND AIR POLLUTION CONTROL ACT; TO STREAMLINE THE PROCESS FOR REVIEW OF CERTAIN DETERMINATIONS OF THE ARKANSAS DEPARTMENT OF ENVIRONMENTAL QUALITY AND THE ARKANSAS POLLUTION CONTROL AND ECOLOGY COMMISSION; TO AMEND THE APPEAL PROVISIONS OF THE ARKANSAS WATER AND POLLUTION CONTROL ACT; TO PROVIDE FOR A DIRECT APPEAL OF A DETERMINATION BY THE ARKANSAS POLLUTION CONTROL AND ECOLOGY COMMISSION TO THE COURT OF APPEALS; TO MAKE CONFORMING CHANGES; AND FOR OTHER PURPOSES.

Subtitle

TO STREAMLINE THE PROCESS FOR REVIEW OF CERTAIN DETERMINATIONS OF THE ARKANSAS DEPARTMENT OF ENVIRONMENTAL QUALITY AND THE ARKANSAS POLLUTION CONTROL AND ECOLOGY COMMISSION; AND TO MAKE CONFORMING CHANGES.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Arkansas Code § 8-4-205(c)(6), concerning hearings upon the denial, revocation, or modification of a water pollution permit, is amended to read as follows:

- (6) During the pendency of the appeal to the commission:
 - (A) The denial of a permit shall stand;



(B) The issuance, modification, or revocation of a permit or that part of a permit that is the subject of the appeal shall *be stayed*;

(C)(i) Notwithstanding subdivisions (c)(6)(A) and (B) of this section, upon application by ~~any~~ a 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~~ a party.

(ii) As used in subdivision (c)(6)(C)(i) of this section, "substantial prejudice" means that the following will occur to the party seeking a stay, a modification of the terms of a stay, or the termination of a stay if the request is denied:

(a) Actual harm to health; or

(b) Adverse economic impact, including without limitation interruption, curtailment, or deferral of business or increased cost of construction or operation;

(D) Upon application by a party for a stay, to modify the terms of a stay, or to terminate a stay, the chair of the commission shall:

(i) Grant a temporary stay, modify the terms of a stay, or terminate a stay effective until the earlier of the next regularly scheduled commission meeting or the next special meeting called for the purpose of considering the application; or

(ii) Place the application on the agenda for the next regularly scheduled commission meeting or call a special commission meeting for the purpose of considering the application if more than thirty (30) days will pass between the receipt of the application and the next regularly scheduled commission meeting; and

(E) Notwithstanding subdivision (c)(6)(D) of this section, the commission shall render a final decision on an application to provide for a stay, modify the terms of a stay, or terminate a stay within thirty (30) days of receipt of the application.

SECTION 2. Arkansas Code § 8-4-222 is amended to read as follows:

8-4-222. Appeals – Entitlement.

An appeal may be taken from ~~any~~ a final order, rule, regulation, or other final determination of the Arkansas Pollution Control and Ecology Commission under §§ 8-4-223 – 8-4-229 by those parties that have standing and have exhausted their administrative appeals ~~to the circuit court of the~~

~~county in which the business, industry, municipality, or thing involved is situated, in the manner provided in §§ 8-4-223—8-4-229.~~

SECTION 3. Arkansas Code § 8-4-223, concerning notice of appeal of a final determination of the Arkansas Pollution Control and Ecology Commission, is amended to add an additional subsection to read as follows:

(d)(1) Within ten (10) business days of service of the notice of appeal required under subdivision (a)(2) of this section, the owner or operator of the business, industry, municipality, or thing involved may file a motion to transfer the appeal from the circuit court to the Court of Appeals.

(2) Upon the filing of a motion under subdivision (d)(1) of this section, the appeal shall be transferred from the circuit court to the Court of Appeals.

SECTION 4. Arkansas Code § 8-4-224(a)(1), concerning the parties to an appeal of a final determination by the Arkansas Pollution Control and Ecology Commission, is amended to read as follows:

(a)(1) The appellant ~~and~~, the Arkansas Pollution Control and Ecology Commission, and the owner or operator of the business, industry, municipality, or thing involved, if applicable, shall, in all cases, be ~~deemed~~ the original parties to an appeal.

SECTION 5. Arkansas Code § 8-4-225 is amended to read as follows:
8-4-225. Appeals – Venue.

The Except as provided in § 8-4-223(d), upon written consent of the parties or for cause shown after hearing upon notice to all parties, the venue of an appeal may be changed by order of the circuit court ~~upon written consent of the parties or for cause shown, after hearing upon notice to all parties,~~ to the circuit court of ~~any~~ a county in which the order, rule, regulation, or decision appealed from would take effect.

SECTION 6. Arkansas Code § 8-4-226, concerning the requirements for the Arkansas Pollution Control and Ecology Commission's response to an appeal, is amended to add an additional subsection to read as follows:

(d) With respect to an appeal that is before the Court of Appeals as

the result of a motion to transfer an appeal under § 8-4-223(d), the requirements applicable to the commission's response and the record shall be determined under the Rules of Appellate Procedure – Civil.

SECTION 7. Arkansas Code § 8-4-227 is amended to read as follows:

8-4-227. Appeal – Review by circuit court.

(a) The appeal shall be heard and determined by the circuit court upon the issues raised by the notice of appeal and response according to the rules relating to the trial of civil actions, so far as applicable.

(b) If, before the date set for the hearing, application is made to the circuit court for leave to present additional evidence and the circuit court finds that the evidence is material and that there were good reasons for failure to present it in the proceeding before the Arkansas Pollution Control and Ecology Commission, then the circuit court may order that the additional evidence be taken before the commission upon such conditions as may be just. The commission may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing circuit court.

(c)(1)(A) The review shall be conducted by the circuit court without a jury and shall be confined to the record, ~~except that.~~

(B) However, in cases of alleged irregularities in procedure before the commission that are not shown in the record, testimony may be taken before the circuit court.

(2) The circuit court shall, upon request, hear oral argument and receive written briefs.

(d) The circuit court may affirm the decision of the commission or vacate or suspend the decision, in whole or part, and remand the case to the commission for further action in conformity with the decision of the circuit court if the action of the commission is:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the commission's statutory authority;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Not supported by substantial evidence of record; or
- (6) Arbitrary, capricious, or characterized by abuse of discretion.

SECTION 8. Arkansas Code § 8-4-230(a)(1), concerning temporary variances and interim authority, is amended to read as follows:

(a)(1) Unless otherwise expressly prohibited by ~~preemptive~~ federal law, the Director of the Arkansas Department of Environmental Quality may, for compelling reasons and good cause shown, grant:

(A) ~~Temporary variances~~ A temporary variance from the requirements of ~~any~~ a permit issued by the Arkansas Department of Environmental Quality; or

(B) Interim authority to construct or operate during the application review and permit issuance process.

SECTION 9. Arkansas Code § 8-4-230(b), concerning temporary variances and interim authority, is amended to read as follows:

(b)(1) In considering ~~any~~ a request for a temporary variance ~~pursuant to~~ under subdivision (a)(1)(A) of this section, the director shall consider:

(A) The environmental and public health effects of the temporary variance; ~~and~~

(B) Any economic advantage obtained by the party requesting the temporary variance over other similarly situated facilities that are operating in accordance with similar permit conditions and ~~which~~ that have not requested a temporary variance; ~~and~~

(C) Whether strict compliance would result in the substantial curtailment or closing down of an existing or proposed business, plant, or operation.

(2) In addition, the director may take into account the following factors in considering a request under subdivision (a)(1) of this section:

(A) Whether strict compliance with permit terms is inappropriate because of conditions beyond the control of the person requesting the temporary variance;

~~(B) Whether strict compliance would result in the substantial curtailment or closing down of a business, plant, or operation;~~

~~(C)~~ (B) Whether the temporary variance request is prompted by recurrent or avoidable compliance problems;

~~(D)~~ (C) A Whether a review of the operational history of

the requesting facility reveals relevant information; and

~~(E)~~ (D) Whether the public interest will be served by a temporary variance.

SECTION 10. Arkansas Code § 8-4-230(e)-(h), concerning temporary variances and interim authority, is amended to read as follows:

(e)(1) ~~Every~~ The director's decision to grant or deny a temporary variance or interim authority to construct or operate shall be issued within ten (10) days of receipt of the request for the temporary variance or interim authority and shall be publicly noticed in a newspaper of general circulation in the state within ~~ten (10)~~ five (5) business days of the director's decision. The applicant shall be responsible for the expense of the publication of ~~any a~~ decision to grant a temporary variance or interim authority. The department shall be responsible for the expense of the publication of ~~any a~~ decision to deny a temporary variance or interim authority.

(2) ~~Any member of the public~~ A person may object to the director's decision within ten (10) business days of the notice.

(3) ~~Any~~ A temporary variance or interim authority granted by the director is contingent upon the right of ~~the public~~ any person to object.

(4) ~~Any actions~~ An action 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~~ is strictly at the applicant's own risk, and ~~no actions or expenditures~~ an action or expenditure by the applicant during this period ~~shall be construed as accruing~~ does not accrue equities in the applicant's favor.

(5) The ~~ten-day~~ public notice requirement under this section shall not apply to a the director's decision to grant an extension of a temporary variance or interim authority.

(f) The director may also for compelling reasons or good cause shown revoke or modify the conditions of ~~any a~~ temporary variance or interim authority previously granted.

(g)(1) An applicant that ~~has been~~ is denied a temporary variance or interim authority or that ~~had~~ has a temporary variance or interim authority revoked or a third party that submitted timely objections during the application review and permit issuance process ~~provided for~~ described in

subsection (e) of this section may appeal the director's final decision to the Arkansas Pollution Control and Ecology Commission upon written request made within ten (10) days after notice of the director's decision.

(2)(A) ~~Such an action~~ Unless otherwise agreed to by the party requesting review of the director's decision, an appeal under subdivision (g)(1) of this section shall be processed as a permit appeal under § 8-4-205 considered by the commission at the next regularly scheduled commission meeting following submission of the written request.

(B) ~~Provided, however, that~~ However:

(i) The decision of the director shall remain in effect during the appeal;

(ii) The ~~adjudicatory~~ commission's review shall be completed as expeditiously as possible; and

(iii) A final decision shall be issued by the ~~Arkansas Pollution Control and Ecology Commission~~ commission within ~~sixty (60)~~ thirty (30) days unless all parties agree to extend the review time.

(C)(i) The commission may affirm, amend, modify, or revoke the director's final decision.

(ii) An affirmation of the director's final decision shall be based on the determination by the commission that the:

(a) Director adequately considered all relevant and applicable factors under subsections (b) and (c) of this section in arriving at the final decision; and

(b) Public interest will be served by the affirmation of the director's final decision.

(iii) An amendment, modification, or revocation of the director's final decision shall be based on a determination by the commission that the:

(a) Director's final decision was unduly burdensome, impractical, or unreasonable given the circumstances;

(b) Director failed to adequately consider the applicable factors under subsections (b) and (c) of this section; or

(c) Public interest will be served by the amendment, modification, or revocation of the director's final decision.

(h) ~~Any~~ A party that submits an objection to the director's decision under subdivision (e)(2) of this section and is aggrieved by a commission

decision on a request for a temporary variance or interim authority may appeal as provided by applicable law.

/s/Branscum

APPROVED: 04/10/2013