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2 89th General Assembly
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4

As Engrossed: H3/20/13
A Bill

HOUSE BILL 1687

5 By: Representative Branscum
6 By: Senator J. Dismang
7

For An Act To Be Entitled

9 AN ACT TO AMEND THE ARKANSAS WATER AND AIR POLLUTION
10 CONTROL ACT; TO STREAMLINE THE PROCESS FOR REVIEW OF
11 CERTAIN DETERMINATIONS OF THE ARKANSAS DEPARTMENT OF
12 ENVIRONMENTAL QUALITY AND THE ARKANSAS POLLUTION
13 CONTROL AND ECOLOGY COMMISSION; TO AMEND THE APPEAL
14 PROVISIONS OF THE ARKANSAS WATER AND POLLUTION
15 CONTROL ACT; TO PROVIDE FOR A DIRECT APPEAL OF A
16 DETERMINATION BY THE ARKANSAS POLLUTION CONTROL AND
17 ECOLOGY COMMISSION TO THE COURT OF APPEALS; TO MAKE
18 CONFORMING CHANGES; AND FOR OTHER PURPOSES.
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Subtitle

21 TO STREAMLINE THE PROCESS FOR REVIEW OF
22 CERTAIN DETERMINATIONS OF THE ARKANSAS
23 DEPARTMENT OF ENVIRONMENTAL QUALITY AND
24 THE ARKANSAS POLLUTION CONTROL AND
25 ECOLOGY COMMISSION; AND TO MAKE
26 CONFORMING CHANGES.
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30 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:
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32 SECTION 1. Arkansas Code § 8-4-205(c)(6), concerning hearings upon the
33 denial, revocation, or modification of a water pollution permit, is amended
34 to read as follows:

35 (6) During the pendency of the appeal to the commission:

36 (A) The denial of a permit shall stand;



1 (B) The issuance, modification, or revocation of a permit
 2 or that part of a permit that is the subject of the appeal shall *be stayed*;
 3 (C)(i) Notwithstanding subdivisions (c)(6)(A) and (B) of
 4 this section, upon application by ~~any~~ a party, the commission may provide for
 5 a stay, modify the terms of a stay, or terminate a stay under appropriate
 6 circumstances to avoid substantial prejudice to ~~any~~ a party.

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

11 (a) Actual harm to health; or

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

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

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

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

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

30
 31 SECTION 2. Arkansas Code § 8-4-222 is amended to read as follows:

32 8-4-222. Appeals – Entitlement.

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

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

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

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

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

15
16 SECTION 4. Arkansas Code § 8-4-224(a)(1), concerning the parties to an
17 appeal of a final determination by the Arkansas Pollution Control and Ecology
18 Commission, is amended to read as follows:

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

23
24 SECTION 5. Arkansas Code § 8-4-225 is amended to read as follows:
25 8-4-225. Appeals – Venue.

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

32
33 SECTION 6. Arkansas Code § 8-4-226, concerning the requirements for
34 the Arkansas Pollution Control and Ecology Commission's response to an
35 appeal, is amended to add an additional subsection to read as follows:

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

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

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

6 8-4-227. Appeal – Review by circuit court.

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

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

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

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

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

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

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

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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

1 the requesting facility reveals relevant information; and

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

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

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

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

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

21 (4) ~~Any actions~~ An action taken by the applicant in reliance
22 upon the grant of a temporary variance or interim authority during the
23 application review and permit issuance process ~~are~~ is strictly at the
24 applicant's own risk, and ~~no actions or expenditures~~ an action or expenditure
25 by the applicant during this period ~~shall be construed as accruing~~ does not
26 accrue equities in the applicant's favor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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/s/Branscum

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