

1 State of Arkansas
2 89th General Assembly
3 Regular Session, 2013
4

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:
31

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 ~~and;~~

4 (i) Be stayed if the party requesting the appeal is
 5 the permit applicant; or

6 (ii) Stand if the party requesting the appeal is a
 7 person other than the permit applicant;

8 (C) Notwithstanding subdivisions (c)(6)(A) and (B) of this
 9 section, upon application by ~~any~~ a party, the commission may provide for a
 10 stay, modify the terms of a stay, or terminate a stay under appropriate
 11 circumstances to avoid substantial prejudice to ~~any~~ a party; ~~and~~

12 (D)(i) Upon application by a party other than the permit
 13 applicant for the stay of a permit or the part of a permit that is the
 14 subject of the appeal, the commission may require the filing of a surety bond
 15 or other security with the commission in favor of the permit applicant before
 16 granting a stay of the permit decision.

17 (ii) The amount of the bond or other security
 18 required under subdivision (c)(6)(D)(i) of this section shall be:

19 (a) Determined in accordance with regulations
 20 promulgated by the commission under §§ 8-4-201 and 8-4-202; and

21 (b) Sufficient to compensate the permit
 22 applicant for any costs and other damages resulting from the delay caused by
 23 the stay of the permit that is the subject of the appeal in the event the
 24 appeal is dismissed or the permit is affirmed.

25
 26 SECTION 2. Arkansas Code § 8-4-222 is amended to read as follows:

27 8-4-222. Appeals – Entitlement.

28 An appeal may be taken from ~~any~~ a final order, rule, regulation, or
 29 other final determination of the Arkansas Pollution Control and Ecology
 30 Commission under §§ 8-4-223 – 8-4-229 by those parties that have standing and
 31 have exhausted their administrative appeals ~~to the circuit court of the~~
 32 ~~county in which the business, industry, municipality, or thing involved is~~
 33 ~~situated, in the manner provided in §§ 8-4-223 – 8-4-229.~~

34
 35 SECTION 3. Arkansas Code § 8-4-223, concerning notice of appeal of a
 36 final determination of the Arkansas Pollution Control and Ecology Commission,

1 is amended to add an additional subsection to read as follows:

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

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

10
 11 SECTION 4. Arkansas Code § 8-4-224(a)(1), concerning the parties to an
 12 appeal of a final determination by the Arkansas Pollution Control and Ecology
 13 Commission, is amended to read as follows:

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

18
 19 SECTION 5. Arkansas Code § 8-4-225 is amended to read as follows:
 20 8-4-225. Appeals – Venue.

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

27
 28 SECTION 6. Arkansas Code § 8-4-226, concerning the requirements for
 29 the Arkansas Pollution Control and Ecology Commission's response to an
 30 appeal, is amended to add an additional subsection to read as follows:

31 (d) With respect to an appeal that is before the Court of Appeals as
 32 the result of a motion to transfer an appeal under § 8-4-223(d), the
 33 requirements applicable to the commission's response and the record shall be
 34 determined under the Rules of Appellate Procedure – Civil.

35
 36 SECTION 7. Arkansas Code § 8-4-227 is amended to read as follows:

1 8-4-227. Appeal – Review by circuit court.

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

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

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

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

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

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

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

32
33 SECTION 8. Arkansas Code § 8-4-230(a)(1), concerning temporary
34 variances and interim authority, is amended to read as follows:

35 (a)(1) Unless otherwise expressly prohibited by ~~preemptive~~ federal
36 law, the Director of the Arkansas Department of Environmental Quality may,

1 for compelling reasons and good cause shown, grant:

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

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

7
 8 SECTION 9. Arkansas Code § 8-4-230(b), concerning temporary variances
 9 and interim authority, is amended to read as follows:

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

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

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

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

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

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

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

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

31 ~~(D)~~ (C) A Whether a review of the operational history of
 32 the requesting facility reveals relevant information; and

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

35
 36 SECTION 10. Arkansas Code § 8-4-230(e)-(h), concerning temporary

1 variances and interim authority, is amended to read as follows:

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

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

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

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

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

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

28 (g)(1) An applicant that ~~has been~~ is denied a temporary variance or
29 interim authority or that ~~had~~ has a temporary variance or interim authority
30 revoked or a third party that submitted timely objections during the
31 application review and permit issuance process ~~provided for~~ described in
32 subsection (e) of this section may appeal the director's final decision to
33 the Arkansas Pollution Control and Ecology Commission upon written request
34 made within ten (10) days after notice of the director's decision.

35 (2)(A) ~~Such an action~~ Unless otherwise agreed to by the party
36 requesting review of the director's decision, an appeal under subdivision

1 (g)(1) of this section shall be processed as a permit appeal under § 8-4-205
2 considered by the commission at the next regularly scheduled commission
3 meeting following submission of the written request.

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

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

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

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

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

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

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

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

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

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

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

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

30 (h) ~~Any~~ A party that submits an objection to the director's decision
31 under subdivision (e)(2) of this section and is aggrieved by a commission
32 decision on a request for a temporary variance or interim authority may
33 appeal as provided by applicable law.

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