

BEFORE THE ARKANSAS POLLUTION CONTROL AND ECOLOGY COMMISSION

IN THE MATTER OF PROMULGATION OF )  
REGULATION NO. 15, ARKANSAS OPEN-CUT )  
MINING AND RECLAMATION CODE )

DOCKET NO. 12-002-R

RESPONSIVE SUMMARY

On February 10, 2012, the Arkansas Department of Environmental Quality, (hereinafter “Department”) filed a Petition to Initiate Rulemaking to promulgate changes to Arkansas Pollution Control and Ecology Commission (hereinafter “APC&EC”) Regulation No. 15, Arkansas Open-Cut Mining and Land Reclamation Code. This petition was granted on February 24, 2012, by the APC&EC’s Minute Order No. 12-09.

On April 5, 2012, the Department held a public hearing concerning the proposed revisions to Regulation No. 15. No formal comments were received, either written or oral, during the hearing. The public comment period ended at 4:30 p.m. on April 19, 2012.

During the public comment period, the Department received written comments from four (4) individuals or organizations. There were two (2) comments that were received after the close of the comment period and these comments were not addressed. Below the Department has captured each of the substantive comments and the Department’s response to each comment that was received during the comment period.

Pursuant to Minute Order 12-09, the Department submits the following Responsive Summary to the comments submitted regarding proposed changes to Regulation No. 15, Arkansas Open-Cut Mining and Land Reclamation Code.

Comment No. 1: Attached are three files associated with MN [Minnesota] rules regarding quarry mining. In my opinion, AR’s surface mining rules need revision to include hydrogeologic impact evaluation of surface mining and the potential effect on nearby water wells similar to MN.

*Response to Comment No. 1: After reviewing the attached files concerning hydrogeologic impact evaluation at open-cut and quarry operations in Minnesota, the Department has determined that this comment was out of the scope of the public noticed changes to Regulation No. 15. It is the Department’s opinion that statutory changes would be necessary to develop such an evaluation program rather than regulatory changes.*

Comment No. 2: [Reg.] 15.312 has the punctuation messed up – it should be:

- (1) The permit application form in duplicate and marked “Transfer of Permit No.”;
- (2) A review fee of one hundred dollars (\$100.00);
- (3) Proof of right to mine as set out in Reg.15.305;
- (4) An acceptable replacement bond instrument; and
- (5) A new disclosure statement as required by Reg.15.302(A)(1)(i).

*Response to Comment No. 2: We agree with the correction of this section’s punctuation and have made the corrections.*

Comment No. 3: What is the authority for allowing the transfer of a permit under proposed Regulation 15.312?

Comment No. 4: Why is the fee for a transferred permit only \$100 in proposed Regulation 15.312(A)(2) while the new permit fee is at a minimum \$200 under A.C.A. § 15-57-311(f)? What is the authority for having a lower fee?

*Response to Comments No. 3 and No. 4: The Arkansas Open-Cut Land Reclamation Act, codified at Ark. Code Ann. § 15-57-301, et. seq., governs the reclamation and restoration of open-cut mining operations to productive use. Ark. Code Ann. § 15-57-302. To that end the General Assembly provided that the “Arkansas Pollution Control and Ecology Commission may adopt and promulgate rules and regulations necessary to administer the provisions of this subchapter.” Ark. Code Ann. § 15-57-307.*

Comment No. 5: Why are the restrictions in proposed Regulation 15.312 (B) different from the restrictions contained in Ark. Code Ann. § 15-57-316(h)(2)(i) and what is the authority for these differences? For example:

A. Under the law, it only discusses the restrictions for obtaining a “new or renewed permit” but under the proposed rule these restrictions are for a “new, renewed, transferred, or modified permit”

B. Under the law, no operator shall be eligible for a new or renewed permit who has had their bond forfeited or who has outstanding substantial unmitigated violations under the Arkansas

Open-Cut Land Reclamation Act but no such requirements are contained in the proposed rule.

*Response to Comment No. 5:*

*A) The purpose of Regulation No. 15.312 is to provide a mechanism whereby permits may be transferred or modified to facilitate continued coverage and regulation of sites that may have a change of ownership or require their permits to be modified to be consistent with conditions at the site. Thus, the Department included the language regarding permit transfers and modifications.*

*B) Pursuant to A.C.A. § 15-57-316(i): “No operator shall be eligible to receive a new or renewed permit who has had a permit revoked, **bond forfeited**, or who has **outstanding substantial unmitigated violations of this subchapter**, including failure to reclaim, unless the department finds upon review a demonstrable change of circumstances justifying an exception to these prohibitions.” [emphasis added].*

*The bond forfeiture provision of Regulation 15.312(B) states “No operator shall be eligible to receive a new, renewed, transferred, or modified permit who has had a permit revoked, unless the Department finds, upon review, a demonstrable change of circumstances justifying an exception to these prohibitions.”*

*The comment expressed a concern that the difference in the language contained in the statute and regulation may have unintended consequences. Under the statutory language, an applicant for a new permit could not receive a permit if the applicant had a prior bond forfeiture or any outstanding substantial unmitigated violations. Because the same statutory language was not included in the language of the regulation, an applicant for a permit transfer or modification arguably may have had a bond revocation or substantial unmitigated violations, but would still be eligible to receive a permit whereas a new applicant could not. This result was not the Department’s intention. The Department agrees that an application for a permit transfer or modification should be denied if the applicant has had a prior bond forfeiture or has had substantial unmitigated violations. Therefore, the Department will make the necessary changes to the proposed regulation as a logical outgrowth of this comment.*

Comment No. 6: Ark. Code Ann. § 15-57-310(e) and (f) could be interpreted to set two different processes, one for gravel mining from land and another for stream bed mining.

*Response to Comment No. 6: The Department also recognized the difference between open-cut mining outside a stream channel and mining inside a stream channel, however not based on Ark. Code Ann. §15-57- 310(e), but on Ark. Code Ann. § 15-57-310(f) and the definition of open-cut mining in 1995 when Ark. Code Ann.§ 15-310(f) was added to the law. The 1996 version of Regulation No. 15 incorporated that difference by having two sets of standards (Reg.15.402 and Reg.15.403) for the two types of mining operations.*

Comment No. 7: I can't tell if the new phrase about requiring permitting even if certain activities are allowed, would apply to stream bed mining. Landowners don't need to be removing gravel from stream beds. There is plenty in surrounding areas outside of the ordinary high water mark. Allowing landowners to mine in a stream with no standards whatsoever should be stopped.

At the very least, landowners should not be allowed to muck around in the stream beds with dozers and build subdivisions on land that is not continuous to the stream itself.

*Response to Comment No. 7: The Department assumes the commenter is referring to the additional language that has been added to the exemptions to make it clear that there are other permits from the Department that may be required for the described activity regardless of the exemption from obtaining an open-cut mining permit. However, this new language would apply to material being removed from a stream under any of the mining law exemptions. The remainder of the comment appears to address the ability of landowners to removal material for their own uses on their own property. This exemption is listed in Ark. Code Ann. § 15-57-310(e). Neither the Department nor APC&EC has the authority to remove this exemption from the statutory language.*

Comment No. 8: ADEQ has an inherent dilemma given you are supposed to be protecting our streams under federal law and you can't possibly do that and allow stream bed mining. Frankly, I'm not sure what should be done and perhaps the issue should be referred to PCEC urging they obtain special

funding to set up a working group to sort this out and make recommendations.

*Response to Comment No. 8:*

*In 1995, the General Assembly passed Act 1110. This act created the Arkansas Gravel Mining Task Force with the charge to study the impact of stream bed mining in Arkansas. The Task Force was to develop a report and make recommendations to the Governor and the Legislative Council by December 1, 1996. The Task Force held monthly meetings and with funds from the Governor's Office, paid for an economic study of in-stream gravel mining produced by Arkansas State University. The task force completed its work and delivered a report in November 1996. All but one of the Task Force's recommendations can be found incorporated in within the Stream Bed Mining Standards of Reg.15.403. Another task force to address the comment would necessary need to be established and funded by the General Assembly.*