

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

A Bill

HOUSE BILL 1685

5 By: Representative Branscum
6

For An Act To Be Entitled

8 AN ACT TO AMEND THE ARKANSAS WATER AND AIR POLLUTION
9 CONTROL ACT; TO STREAMLINE THE PROCESS FOR REVIEW OF
10 CERTAIN DETERMINATIONS OF THE ARKANSAS DEPARTMENT OF
11 ENVIRONMENTAL QUALITY AND THE ARKANSAS POLLUTION
12 CONTROL AND ECOLOGY COMMISSION; TO AMEND THE APPEAL
13 PROVISIONS OF THE ARKANSAS WATER AND POLLUTION
14 CONTROL ACT; TO PROVIDE FOR A DIRECT APPEAL OF A
15 DETERMINATION BY THE ARKANSAS POLLUTION CONTROL AND
16 ECOLOGY COMMISSION TO THE COURT OF APPEALS; TO MAKE
17 CONFORMING CHANGES; AND FOR OTHER PURPOSES.
18
19

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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28

29 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:
30

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

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

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

36 (B) The issuance, modification, or revocation of a permit



1 or that part of a permit that is the subject of the appeal shall ~~be stayed,~~
 2 ~~and:~~

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

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

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

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

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

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

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

24
 25 SECTION 2. Arkansas Code § 8-4-222 is amended to read as follows:

26 8-4-222. Appeals – Entitlement.

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

33
 34 SECTION 3. Arkansas Code § 8-4-223, concerning notice of appeal of a
 35 final determination of the Arkansas Pollution Control and Ecology Commission,
 36 is amended to add an additional subsection to read as follows:

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

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

9
10 SECTION 4. Arkansas Code § 8-4-224(a)(1), concerning the parties to an
11 appeal of a final determination by the Arkansas Pollution Control and Ecology
12 Commission, is amended to read as follows:

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

17
18 SECTION 5. Arkansas Code § 8-4-225 is amended to read as follows:
19 8-4-225. Appeals – Venue.

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

26
27 SECTION 6. Arkansas Code § 8-4-226, concerning the requirements for
28 the Arkansas Pollution Control and Ecology Commission's response to an
29 appeal, is amended to add an additional subsection to read as follows:

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

34
35 SECTION 7. Arkansas Code § 8-4-227 is amended to read as follows:
36 8-4-227. Appeal – Review by circuit court.

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

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

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

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

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

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

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

31
 32 SECTION 8. Arkansas Code § 8-4-230(a)(1), concerning temporary
 33 variances and interim authority, is amended to read as follows:

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

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

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

6
 7 SECTION 9. Arkansas Code § 8-4-230(b), concerning temporary variances
 8 and interim authority, is amended to read as follows:

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

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

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

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

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

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

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

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

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

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

34
 35 SECTION 10. Arkansas Code § 8-4-230(e)-(h), concerning temporary
 36 variances and interim authority, is amended to read as follows:

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

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

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

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

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

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

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

34 (2)(A) ~~Such an action~~ Unless otherwise agreed to by the party
 35 requesting review of the director's decision, an appeal under subdivision
 36 (g)(1) of this section shall be processed as a permit appeal under § 8-4-205

1 considered by the commission at the next regularly scheduled commission
 2 meeting following submission of the written request.

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

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

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

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

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

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

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

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

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

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

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

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

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

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