

Title V Petition to Object Rule Revisions: Impacts on Air Permitting

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On February 5, 2020 the EPA issued a final rule revising the process for petitions to object under the Title V permitting system.

The rule was proposed on August 24, 2016.

The goal was to **streamline** and **clarify** the process of submission and review of Title V permits.

Those who are affected by this rule are primarily people who would submit a petition on a proposed Title V permit, though **state, local, and tribal permitting authorities, and businesses** subject to Title V permits will also be indirectly affected by these changes.

There are three major changes in the new rule.

First, the EPA has developed an electronic submission service for petitions as its preferred method of filing.

Second, there are new requirements for format and content of the petitions to describe information expected by, and necessary for, the agency to effectively review a petition objecting to a permit.

Third, the EPA now requires permitting authorities to respond in writing to **significant comments** it receives during the comment period.

The permitting authority must also provide certain documents, including the **statement of basis** and the **response to comments document**, to EPA along with the **proposed permit** in order to kick off the 45-day review period.

Finally, EPA intends- where practicable- to make key dates publicly available on the EPA Regional websites (*i.e.*, the end of the agency's 45-day review period and the end of the 60-day period in which a petition can be submitted).

This was originally proposed as a **“second notice”**.

Title V Petition to Object Refresher

Title V of the Clean Air Act (“CAA”) establishes an operating permit program.

Section 505 of the CAA requires permitting authorities to submit each **proposed** title V permit to the EPA Administrator (“Administrator”) for review for a 45-day period before issuing the permit as final.

The Administrator shall object to issuance of the permit if the Administrator determines that the permit contains provisions that are not in compliance with the applicable requirements under the CAA.

If the Administrator does not object to the permit during the 45-day EPA review period, any person may petition the Administrator within 60 days after the expiration of the 45-day review period to take such action.

Key CFR Revisions

1. EPA revised 40 C.F.R. 70.7 and added new regulatory language requiring the permitting authority to respond in writing to **significant comments** received during the public participation process for a draft Title V permit.

2. EPA revised 40 C.F.R. 70.4(b), 70.7(h), and 70.8(a) to specifically identify that the **statement of basis** document is a required document, to be included during the public comment period and the EPA's 45-day review period.

3. Finally, the EPA revised part 70 to require that any proposed permit that is transmitted to the agency for its 45-day review must include both the **statement of basis and the written response to comments** (where applicable)* among the necessary information as described in 40 CFR 70.8.

*See **sequential vs. concurrent** review discussion below

APPLICABLE ARKANSAS STATUTORY PROVISIONS

Ark. Code Ann. § 8-4-230

(e)(1)(A) Whenever the department proposes to grant or deny any permit application, it shall cause notice of its **proposed action** to be published in either:

(i) A newspaper of general circulation in the county in which the facility that is the subject of the application is located; or

(ii) In the case of a statewide permit, in a newspaper of general circulation in the state.

(B) The notice shall afford any interested party thirty (30) calendar days in which to submit comments on the **proposed permit action**.

(C)(i) **At the conclusion of the public comment period, the department shall provide a final written permitting decision regarding the permit application.**

Ark. Code Ann. § 8-4-230

(2)(A)(i) The department's final decision shall include a response to each issue raised in **any public comments** received during the public comment period. The response shall manifest reasoned consideration of the issues raised by the public comments and shall be supported by appropriate legal, scientific, or practical reasons for accepting or rejecting the substance of the comment in the department's permitting decision.

(ii) For the purposes of this section, response to comments by the department should serve the roles of both developing the record for possible judicial review of an individual permitting action and as a record for the public's review of the department's technical and legal interpretations on long-range regulatory issues.

APPLICABLE APC&EC REGULATIONS

Reg.8.207 PUBLIC NOTICE OF **DRAFT** PERMITTING DECISION

(A) When the Director issues a **draft** permitting decision, notice of the draft permitting decision shall be published in a newspaper of general circulation in the county in which the facility or activity proposed to be permitted is located, or, for a statewide permit, in a newspaper of statewide circulation.

Reg.8.208 PUBLIC COMMENT ON DRAFT PERMITTING DECISION

(A) Any interested person may submit to the Department written comments, data, views, or arguments on the **draft** permitting decision during the public comment period. Reg.8.214 provides that only those persons who submit public comments on the record shall have standing to appeal a permitting decision to the Commission.

(B) The public comment period shall begin on the day the notice is published and shall expire on the thirtieth (30th) calendar day after publication of the notice, unless otherwise required by law or regulation.

Reg.8.211 FINAL PERMITTING DECISION

(A) Director's Decision

(1) The Director shall issue the final permitting decision in writing. The Director's decision shall be made upon consideration of the completed application, the public comments on the record, if any, and any other materials provided by law or regulation applicable to the application or other matter to be considered in the decision. The Director may impose special conditions upon the issuance of a permit.

(2) The Director's final decision shall include a response to each issue raised in any public comments received during the public comment period, if any. In the case of any discharge limit, emission limit, environmental standard, analytical method or monitoring requirement, the record of the proposed action and the response shall include a written explanation of the rationale for the proposal, demonstrating that any technical requirements or standards are based upon generally accepted scientific knowledge and engineering practices. 2-8 For any standard or requirement that is identical to a duly promulgated and applicable regulation, this demonstration may be satisfied by reference to the regulation. In all other cases the Department must provide its own justification with appropriate reference to the scientific and engineering literature or written studies conducted by the Department.

Reg. 26.602 Public participation

All initial permit issuances, significant modifications, minor modifications, and renewals shall afford the public the opportunity to comment. (A) Public notice shall be given:

- (1) By publication of notice of application receipt by the Department, in a newspaper of general circulation in the county in which the proposed facility or activity is to be located, in accordance with the Arkansas Pollution Control and Ecology Commission's Regulation Number 8, Administrative Procedures (Regulation No. 8) (minor permit modification applications are exempt from this requirement). In the event the local newspaper is unable or unwilling to publish the notice, notice may be published in a newspaper in general circulation through the State;
- (2) By the availability for public inspection in at least one location in the area where the source is located and in the Department's central offices of the permit application submitted by the owner or operator and the Department's draft permitting decision and analysis of the effect of the proposed emissions on air quality;
- (3) By publication of a notice of the Department's **draft permitting decision** in a newspaper of general circulation in the county in which the proposed facility or activity is to be located, in accordance with Regulation No. 8. In the event the local newspaper is unable or unwilling to publish the notice, notice may be published in a newspaper in general circulation through the State;
- (4) To the mayor of the community in which the source is located;
- (5) To the county judge of the county in which the source is located;
- (6) To persons on a mailing list developed by the Department, including those who request in writing to be on the list; and (7) By other means if necessary to assure adequate notice to the affected public.

Reg. 26.603 Transmission of permit information to the Administrator

(A) The Department shall provide to the Administrator a copy of each permit application (including any application for permit modification), each **proposed** permit, and each final part 70 permit. The applicant may be required by the Department to provide a copy of the permit application (including the compliance plan) directly to the Administrator. Upon agreement with the Administrator, the Department may submit to the Administrator a permit application summary form and any relevant portion of the permit application and compliance plan, in place of the complete permit application and compliance plan.

(B) The Department shall keep for five (5) years such records and submit to the Administrator such information as the Administrator may reasonably require to ascertain whether the State program complies with the requirements of the Act or of 40 C.F.R. Part 70, as promulgated July 21, 1992, and last modified June 3, 2010 (75 FR 31607).

Reg. 26.605 EPA objection to **proposed** permit

(A) The Administrator will object to the issuance of any **proposed** permit determined by the Administrator not to be in compliance with applicable requirements or requirements under this regulation. No permit for which an application is required to be transmitted to the Administrator may be issued if the Administrator objects to its issuance in writing within forty-five (45) days of receipt of the **proposed permit** and all necessary supporting information.

...

(D) If the Department fails, within ninety (90) days after the date of an objection under Reg. 26.605(A) **to revise and submit a proposed permit in response to the objection**, the Administrator will issue or deny the permit in accordance with the requirements of the Federal program promulgated under title V of the Act.

Reg. 26.606 Public petitions to the Administrator

If the Administrator does not object in writing to a **proposed** part 70 permit, any person may petition the Administrator within sixty (60) days after the expiration of the Administrator's forty five (45) day review period to make such objection. Any such petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period, unless the petitioner demonstrates that it was impracticable to raise such objections within such period, or unless the grounds for such objection arose after such period.

Duties of Permitting Agency

Significant Comments

According to rule revisions, permitting authorities are required to respond to **significant comments** made during the public comment period for Title V permits.

Significant comments include, but are not limited to, comments that concern whether the Title V permit includes terms and conditions addressing federal applicable requirements and requirements under 40 CFR part 70, **including adequate monitoring and related recordkeeping and reporting requirements.**

Though this requires the state permitting authority to respond to significant comments, it does not preclude the agency from responding to “insignificant comments.”

The purpose of requiring an agency to respond to significant comments is to ensure the agency's consideration of relevant factors. *Sherley v. Sebelius*, 689 F.3d 776, 783 (D.C. Cir. 2012).

It is the responsibility of the permitting agency to determine if a comment submitted during the public comment period is significant.

Sequential v. Concurrent Review

The final rule distinguished between the two review processes, thereby legitimizing concurrent or parallel review, and identified the different document(s) required for each.

Sequential review is the most common and involves the public comment period closing before the proposed permit is sent to the EPA for its 45-day review.

Permitting agencies that use **concurrent** review conduct the public comment period and the 45-day EPA review simultaneously. This is typically used for permits that are not expected to receive significant public comment.

For **sequential** review, the permitting authority must submit the statement of basis and the written response to comments (if a significant comment was made during the period) with the proposed permit.

Under this system, the 45-day review period will not begin until the EPA has received all materials.

For **concurrent** review, the permitting authority must submit the statement of basis with the proposed permit to begin the 45-day review period. Because the public comment period is not yet complete, the written response to comments is not due at this time.

However, if the permitting authority receives a significant comment during this period, the EPA will no longer consider the submitted permit a **proposed** permit. If this happens, the permitting will need to consider the comment, make any necessary revisions, prepare a written response to the comment, and submit a revised proposed permit with the EPA with the written response to comment, the statement of basis, and any other required supporting information. The **resubmission** must also include any revisions that were made to address the public comment in order to start the 45-day review period.

EPA DIDN'T FINALIZE "SECOND NOTICE" REQUIREMENT

EPA proposed to revise 40 CFR 70.7(h)(7) to require that within 30 days of sending the proposed permit to the EPA, that permitting authorities provide notification that the proposed permit and the response to comments document are available to the public.

Adverse comments expressed concern that the proposed requirement would create a “second notice” that would have been burdensome and unnecessary.

EPA agreed.

COMMENTS ON DEQ PERMITS

Sun Bio

The Environmental Paper Network -North America, the Center for Biological Diversity, and the Dogwood Alliance submitted comments voicing concerns over procedural deficiencies in the permitting process, particularly related to public comment.

Sun Bio

The groups alleged that ADEQ rushed the process and circumvented Clean Air Act requirements. Specifically, they took issue with the **concurrent review process**, and argue that the process ignores the requirement that ADEQ solicit comments on the **draft permit** and **submit a proposed permit** to the EPA that takes those comments into consideration. The groups cite *Sierra Club v. Whitman* for the proposition that a state's submission of a draft permit to the EPA does not begin the 45-day review period. *Sierra Club v. Whitman*, No. 01-01991-ESH, Slip Gp. at 16-17 (D.D.C. Jan 30, 2002). The court explained that because a draft permit is not subject to public comment before submission, then it cannot trigger the 45-day review period that a proposed permit does. *Id.*

Sun Bio

To cure these issues, the groups proposed that:

“EPA must object because not requiring ADEQ to withdraw the draft permit, consider and address public comments, and then submit a proposed permit to EPA is inconsistent with EPA's own Title V policies and practice. **Concurrent review is unlawful in any circumstance**, as explained above, and the fact that EPA has sometimes considered a draft permit from a state where there was no public comment or hearing (and where no commenter challenged it) does not make it lawful. Regardless, at least in the circumstances at issue here, EPA must require that based on its own practice, the draft permit must be withdrawn and the state must only issue a proposed permit to EPA after considering and addressing public comments.”

Sun Bio

Although this proposal was not adopted in full by the EPA in its new rules discussed above, the new requirement that the permitting authority must withdraw a draft permit if it receives a significant comment closely tracks with the final part of the groups' proposal.

Georgia Pacific

In January of 2018, Earthjustice raised concerns about ADEQ's concurrent review process in supplemental comments submitted on behalf Crossett Concerned Citizens for Environmental Justice (CCCEJ) regarding a Title V permit for Georgia Pacific's Ashley County paper mill. CCCEJ claimed that ADEQ's process attempted to "rush through this draft permit without adequate public participation, consideration of public comments, or review by the EPA."

Georgia Pacific

Earthjustice also complained that ADEQ failed to properly notify members of the community and interested stakeholders of the permitting process. According to the supplemental comments, ADEQ only sent notice to the public via a mailing list the night before the hearing. Earthjustice alleged that this, coupled with the concurrent review process, frustrated community members' ability to participate in the public comment phase and rendered the entire process unlawful.

Questions?

For any follow-up questions or clarifications,
please contact me at:

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