

US EPA ARCHIVE DOCUMENT

TAB H

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY

REGULATION No. 8

ADMINISTRATIVE PROCEDURES

## ADMINISTRATIVE PROCEDURES

## PART I. STATEMENT OF PURPOSE AND DEFINITIONS

## Section 1. Purpose and Intent

It is the purpose of this Regulation No. 8 to provide for the administrative procedures to be followed by the Department of Pollution Control and Ecology and to delineate the respective administrative duties of the Director of the Department and the Commission on Pollution Control and Ecology and to delegate to the Director all necessary authority, pursuant to Ark. Stat. Ann. Section 82-1903(b), and to otherwise authorize the Director to discharge the functions of that office specified herein. Proceedings for the following actions shall comply with the provisions hereof: all permits issued or denied; all grants or denials of permit renewals, reissuances, revisions, modifications, and transfers; all assessments of permit fees; all grants or denials of exemptions, variances or waivers, certifications pursuant to Section 404 of the federal Water Pollution Control Act, as amended, and bond reductions or releases; all specific conditions imposed upon permits; all administrative orders issued to violators of permits or regulations, including the assessment of civil penalties for violations, findings of facts and conclusions of law, and the directing and ordering of remedial, abatement, and containment activities to be performed and the termination, suspension, or revocation of permits for cause; and all emergency or imminent hazard administrative orders issued to any person(s) for the purpose of responding to an emergency or imminent hazard or threat thereof to the public health or environment, and all decisions necessary for the administration of the Construction Grants program and all rulemaking proceedings; under the provisions of the Arkansas Water and Air Pollution Control Act, as amended (Act 472 of 1949, as amended), the Arkansas Solid Waste Management Act, as amended (Act 237 of 1971, as amended), the Arkansas Hazardous Waste Management Act, as amended (Act 406 of 1979, as amended), the Arkansas Resource Reclamation Act (Act 1098 of 1979), and Act 817 of 1983 (Fee Schedule for Permits), and the respective regulations promulgated under and pursuant to such Acts. It is the intent of the Commission that the provisions of this Regulation be liberally construed so as to provide a fair opportunity for a hearing on all matters addressed herein to all persons who have a substantial interest and concern in a specific question which is before the Commission and to

prevent undue delay in the administration of matters pending before the Commission.

## Section 2. Definitions

As used herein the following terms have the following meanings:

(a) Adjudicatory hearing - Any public hearing held by the Department under the acts above mentioned in Part I, Section 1, for the purpose of receiving evidence as to violations of laws or regulations or as to other adjudications of facts or issues for which such a hearing is provided hereunder.

(b) Adjudicatory proceedings - All proceedings hereunder except rulemaking proceedings.

(c) Administrative enforcement actions - Administrative proceedings instituted by the Department against persons charged with violations of permits issued by the Department and/or laws and regulations administered by the Department.

(d) Administrative order - Any order issued to any person, other than emergency or imminent hazard orders, by the Department pursuant to the authority of the acts mentioned in Part I, Section 1, hereof.

(e) Chairman - The Chairman of the Arkansas Commission on Pollution Control and Ecology.

(f) Civil penalties - Monetary amounts assessed by the Department against persons for violations of laws and regulations administered by the Department.

(g) Commission - The Arkansas Commission on Pollution Control and Ecology.

(h) Commission review - Proceedings by the Commission hereunder to review administrative orders, emergency and imminent hazard orders, permitting decisions or grants decisions of the Director.

(i) Department - The Arkansas Department of Pollution Control and Ecology, including the Commission on Pollution Control and Ecology, the Director, and staff of the Department.

(j) Director - The Director of the Arkansas Department of Pollution

(k) Emergency orders - Administrative orders issued pursuant to Ark. Stat. Section 82-1906(c) (Section 5(c) of the Arkansas Water and Air Pollution Control Act, as amended). Such orders may be issued by the Director without prior notice or hearing, upon the Director finding that an emergency exists, and may require such actions be taken as deemed necessary by the Director to meet the emergency.

(l) Grant decisions - Final administrative decisions by the Director on all applications for grants pursuant to the Department's administration of the Construction Grants program under Title II of the federal Water Pollution Control Act, as amended, and the acts above mentioned in Part I, Section 1, and the final decisions by the Director on any disputes arising under a grant.

(m) Hearing officer - Those persons designated by the Commission to act as hearing officers in adjudicatory proceedings hereunder.

(n) Imminent hazard orders - Administrative orders issued pursuant to Ark. Stat. Section 82-4208 (Section 8 of the Arkansas Hazardous Waste Management Act, as amended). Such orders may be issued by the Director without prior notice and hearing upon a finding by the Director that the storage, transportation, treatment, or disposal of any waste may present an imminent and substantial hazard to the health of persons or to the environment and that an emergency exists requiring immediate action to protect the public health and welfare and may direct such action be taken as the Director determines necessary to protect the health of persons and/or the environment and to meet the emergency.

(o) Notice of hearing - Written notification of an adjudicatory hearing hereunder. Such notice shall contain the information specified in Part III, Section 6, Part IV, Section 6, Part V, Section 4, or Part VI, Section 3, as applicable.

(p) Notice of violation - Written notification to suspected violators of alleged violations initiating administrative enforcement actions hereunder. Such notice shall contain the information specified in Part V, Section 2, hereof.

(q) Permitting decisions - Final administrative decisions by the Director on all applications for permits; permit renewals, reissuances, revisions, modifications, and transfers; permit fees (including initial fees, annual review fees, and modification fees); exemptions, variances and waivers; certifications pursuant to Section 404 of the federal Water Pollution

(r) Presiding officer - Those persons designated by the Commission to act as presiding officers in rulemaking proceedings hereunder.

(s) Public comment hearing - Any public hearing held by the Department under the acts above mentioned in Part I, Section 1, for the purpose of receiving public comments on permit applications, other permitting decisions, and proposed regulations.

(t) Public notice - Formal notification to the public of proposed hearings on permits, grants, and rulemaking and emergency or imminent hazard actions by either the Director or the Commission. Public Notice requirements shall conform with provisions set forth in this Regulation 8; and shall also conform to all specific requirements contained in the laws specified in Section 1, Part I hereof, and the regulations promulgated thereunder as applicable.

(u) Rulemaking proceedings - Proceedings to adopt and promulgate regulations, or to revise or modify regulations.

(v) Secretary - The designated Secretary to the Commission.

(w) Specific conditions imposed on permits - Any condition to a permit issued by the Director that is not specifically imposed by law or regulation.

(x) Violation - Any instance of noncompliance with the provisions of the Arkansas Water and Air Pollution Control Act, as amended (Ark. Stats. Section 82-1901 *et seq.*), the Arkansas Solid Waste Management Act, as amended (Ark. Stats. Section 82-2701 *et seq.*), the Arkansas Hazardous Waste Management Act, as amended (Ark. Stats. Section 82-4201 *et seq.*), the Arkansas Resource Reclamation Act (Ark. Stats. Section 82-4201 *et seq.*), Act 817 of 1983 and the respective regulations promulgated under and pursuant to such acts.

## PART II. RULEMAKING

### Section 1. Applicability

The requirements of this Part shall be met in the promulgation of any regulations adopted, amended, or repealed by the Commission under the acts hereinabove referenced in Part I, Section 1.

(a) No rule or regulation shall be adopted, amended or repealed by the Commission except for a public hearing. The public hearing provided for in this Part need not comply with the requirements for adjudicatory hearings hereunder in connection with enforcement proceedings and permitting decisions. The public hearing shall be held at such time, place, and in such manner as may be prescribed by the Commission, or Director, and any such person having any interest in the subject matter of the hearing shall be entitled to be heard.

(b) Not less than thirty (30) days prior to a public hearing, or at such time as specific rules or regulations may require, the Commission or the Director shall publish notice of such hearing in one or more newspapers of general daily statewide circulation, or in the cases of proposed rules affecting only certain areas of the state, the Commission or the Director may publish notice of such hearing in one or more newspapers of general circulation within the affected areas, and shall mail such notice to a contact list of all persons who have requested advance notice of rulemaking proceedings. Such notice shall set forth the time and place of the public hearing, contain a general statement of the terms or substance of the proposed rule or regulation, invite the submission of written or oral comments by any person, and state the place or places where copies of the proposed rule or regulation may be examined. Material will be available for review at the Department and in the depositories at least thirty (30) days prior to a hearing. Upon payment of any costs therefor, the Department shall provide copies to any persons requesting such, including any requests by mail.

(c) Except as provided herein, the period for written public comments shall begin on the day that a public notice for a hearing appears in the paper and extend ten (10) days beyond the date of the public hearing. If the tenth day after the hearing falls on a Saturday, Sunday, legal state holiday, or on a day when the Department's central office is closed for other reasons, the deadlines for receiving written comments will be extended to the next working day.

(d) Consideration of oral comments will be limited to those made at the public hearing. Consideration of written comments will be limited to those filed no later than ten (10) days after the public hearing, or within such other time as provided below.

(e) The Commission's Presiding Officer may continue a public hearing until all persons wishing to make comments have been heard. An extension of the period for written public comments of up to twenty (20)

additional days may be granted, if such extension was announced in the public notice for such hearing, or was announced during the hearing. In the event that the Commission or the Commission's Presiding Officer determines that substantial changes to the proposed rule or regulation are necessary, which changes would be subject to regulation entities other than those in the proposed rulemaking or which would impose regulations different in kind from those proposed, another public hearing will be scheduled as provided above to provide opportunity for the public to comment on any proposal incorporating said change.

(f) At any time during a hearing, the Commission's Presiding Officer may determine not to receive additional oral comments at that hearing if he or she finds that additional comments would not serve a useful purpose or would be repetitious or unduly time consuming. Except that persons notifying the Director, or their desire to speak, in writing, prior to the hearing shall be heard.

(g) The Presiding Officer will be the Chairman of the Commission or such other persons as may be designated by the Commission.

(h) The Commission or Director may reduce or waive the hearing notice requirements in emergency situations where the Commission determines that there is an imminent danger to public health or that the public interest otherwise so requires. In the event of such action, a Public Notice of Emergency Rulemaking Action describing the rulemaking and specifying the address and location where copies may be obtained shall be sent to a newspaper of statewide circulation for publication as soon as is practicable after adoption.

(i) Once the period for public comment, as required by statute or regulation, has elapsed, no additional comments will be accepted prior to the Commission's action on the proposed regulation, provided that a Commissioner may ask for clarification of any issues raised during the comment period from the person who raised such issue during the comment period and a transcribed or recorded copy of such statement shall be made a part of the record.

### Section 3. Request for Rulemaking

Any person may file with the Secretary a written request to issue, amend, or repeal any rule or regulation. Such request shall include the name and address of the person making the request. Upon receipt of a request for rulemaking in conformity herewith, the Secretary shall place the matter on the agenda of the Commission for disposition, and shall so in-

form the person filing the request. The Commission shall either deny the request or approve the initiation of rulemaking procedures.

#### Section 4. Filing

The Commission shall file with the Governor, the Secretary of State, and the Circuit Clerk of each county in Arkansas, a certified copy of each rule or regulation adopted by it.

### PART III. PERMITTING DECISIONS

#### Section 1. Applicability

The procedures set forth in this Part apply to all permitting decisions as defined hereinabove in Part I, Section 2.

#### Section 2. Preliminary Procedures

All applications for permits or other matters included within the definition of "permitting decisions" in Part I, Section 2, hereof and all other actions preliminary to the Director's decision including, but not limited to the form of application, public notice, public hearings, public comments, shall be as provided for by law or regulation applicable thereto.

#### Section 3. Decision of Director

(a) The Director shall make a final decision to issue or deny all applications for permits and to impose special conditions upon the issuance of permits and to grant or deny all applications for renewals, reissuances, revisions, modifications, transfers, variances, waivers, exemptions, certifications, bond reductions, or releases, and to make other permitting decisions upon consideration of the completed application, the public comments timely received, if any, and any other materials provided by law or regulations applicable to such application or other matter to be considered in the decision.

(b) The applicant and, if applicable, all persons submitting written comments on the application within the comment period, and all other persons required to be served a copy of the permitting decision by law or regulations shall be served with notice of the decision of the Director. Unless otherwise provided by law or regulation, such notice shall state:

- (1) The name and business address of applicant;
- (2) The type of action for which application was made;
- (3) The Director's decision and date of decision;

(4) A statement that the applicant, all persons submitting written comments during the comment period, and all other persons entitled by law to do so, may request an adjudicatory hearing and Commission review on whether the decision of the Director should be reversed or modified. Such a request shall be in the form and manner required by Section 4 of this Part.

(c) The final decision of the Director shall become effective thirty (30) days after the service of notice of the decision under subsection (b) above, unless:

- (1) A later effective date is specified in the decision; or
- (2) Commission review has been properly requested under Section 4 of this Part within that time.

(d) Nothing herein shall affect the ability of the Department to terminate, suspend or revoke a permit for cause pursuant to the procedures for enforcement actions elsewhere specified in this regulation.

#### Section 4. Request for Commission Review and Adjudicatory Hearing

(a) The applicant, any persons submitting written comments on the application within the public comment period, if any was required on the application, and any other person entitled by law to contest the Director's decision may seek review of such decision by the Commission by filing a written request for review, in conformity with the provisions of Part VII, Section 3, with the Secretary within thirty (30) days after service of the decision.

(b) The request for review shall constitute a request for an adjudicatory hearing, prior to the Commission review, so as to afford the person requesting the review the opportunity to submit evidence, if any, as to whether the Director's decision should be reversed or modified. A request for review shall identify the decision in question and its date and must include a complete and detailed statement identifying the legal and factual objections to the decision, the type of evidence, if any, the petitioner

proposes to introduce, and a statement of the reasons why such evidence was not presented during the public comment period, if any, and whether an opportunity for oral argument before the Commission is requested.

(c) All parties as defined in Part VII, Section 1, hereof, to the proceeding shall be served a copy of the request for review in accordance with the provisions of Part VII, Section 4, hereof upon the filing of a request with the Secretary by the person requesting the review. Failure to make service of the request upon all parties shall constitute grounds for dismissal of the request.

#### Section 5. Response to Request for Review

Any party other than the Director served with a request for review who wishes to participate in the adjudicatory hearing and review shall file a written response to the request with the Secretary within twenty (20) days of service of the request on them. Such response shall conform to the requirements of Part VII, Section 3, hereof. In the event such respondent intends to introduce evidence at the hearing, the responses shall include a complete and detailed statement identifying the legal and factual objections to the request for review and the type of evidence proposed to be introduced and a statement of the reasons why such evidence was not presented during the public comment period, if any.

#### Section 6. Notice of Hearing

Upon receipt of a request for review from a person entitled thereto, the Hearing Officer assigned to the proceeding shall cause a Notice of Hearing to be served upon all parties to the proceeding. The notice shall state the time, date, and place of the hearing and shall be served at least ten (10) days in advance of the scheduled hearing. The notice shall inform all parties of their opportunity to be present and to present evidence and argument on all issues raised by the pleadings, and of their right to be represented by counsel, and of the fact that the hearing will be under oath and will be electronically or stenographically recorded.

#### Section 7. Conduct of Adjudicatory Hearing

Unless resolved by stipulation or settlement of the parties subsequent to the issuance of a Notice of Hearing, an adjudicatory hearing shall be held by the Department at the time and place prescribed in the Notice of Hearing in accordance with the provisions of Part VII hereof

#### Section 8. Review on Commission Initiative

Any member of the Commission may request review of a Director's decision in a permitting matter even if the parties thereto do not. Such a request must be approved by a majority of the Commission. Upon approval, all parties shall be served notice by the Director of the approval and shall file response to such notice with the Secretary within twenty (20) days of such service if they desire to participate in the proceedings on review. If the review under this section results in a reversal of the Director's decision so that a party has not had an opportunity for an adjudicatory hearing on the decision as reversed, the Commission shall provide an opportunity for such hearing and shall thereafter reconsider the matter upon the record.

### PART IV. GRANTS DECISIONS

#### Section 1. Applicability

The procedures set forth in this Part apply to all grants decisions as defined hereinabove in Part I, Section 2.

#### Section 2. Preliminary Procedures

All applications for grants and all other matters included within the definition of 'grant decisions' in Part I, Section 2, hereof and all other actions preliminary to the Director's decision including, but not limited to the form of application, public notice, public hearings, public comments, shall be provided for by law or regulation applicable thereto.

#### Section 3. Issuance of Director's Decision

(a) The Director shall issue a written decision on all grant matters within the time periods specifically required by law or regulations applicable thereto.

(b) The applicant, if any, and all persons submitting written comments on the matter within the comment period, if any, and all other persons required to be served with notice of the decision shall be served with such notice. Unless otherwise provided by law or regulation, such notice shall state:

(1) A description of the matter on which the decision is made in

reasonable detail.

(2) The Director's decision and date of decision.

(3) A statement that all persons submitting written comments during the comment period, if any, and all other persons entitled by law to do so, may request an adjudicatory hearing and Commission review on whether the decision of the Director should be reversed or modified. Such a request shall be in the form and manner required by Section 4 of this Part.

#### **Section 4. Request for Commission Review and Adjudicatory Hearing**

(a) Any person submitting a written comment during the comment period on a grant matter or any other person who is entitled by law to contest the Director's decision, may seek review of such decision by the Commission by filing a written request for review, in conformity with the provisions of Part VII, Section 3, with the Secretary within thirty (30) days after service of notice of the decision.

(b) The request for review shall constitute a request for an adjudicatory hearing prior to the Commission review, so as to afford the person requesting the review the opportunity to submit evidence, if any, as to whether the Director's decision should be reversed or modified. A request for review shall identify the decision in question and its date and must include a complete and detailed statement identifying the legal and factual objections to the decision, the type of evidence, if any, the petitioner proposes to introduce, and a statement of the reasons why such evidence was not presented during the public comment period, if any, and whether an opportunity for oral argument before the Commission is requested.

(c) All parties as defined in Part VII, Section 1, hereof, to the proceeding shall be served a copy of the request for review in accordance with the provisions of Part VII, Section 4, hereof, upon filing of a receipt with the Secretary by the person requesting the review. Failure to make service of the request upon all parties shall constitute grounds for dismissal of the request.

#### **Section 5. Response to Request for Review**

Any party other than the Director served with a request for review who wishes to participate in the adjudicatory hearing and review shall file a written response to the request with the Secretary within twenty (20) days

of service of the request on them. Such responses shall conform to the requirements of Part VII, Section 3, hereof. In the event such respondent intends to introduce evidence at the hearing, the responses shall include a complete and detailed statement identifying the legal and factual objections to the request for review and the type of evidence proposed to be introduced.

#### **Section 6. Notice of Hearing**

Upon receipt of a request for review from a person entitled thereto, the Hearing Officer assigned to the proceeding shall cause a Notice of Hearing to be served upon all parties to the proceeding. The notice shall state the time, date, and place of the hearing and shall be served at least ten (10) days in advance of the scheduled hearing. The notice shall inform all parties of their opportunity to be present and to present evidence and argument on all issues, and of their right to be represented by counsel, and of the fact that the hearing will be under oath and will be electronically or stenographically recorded.

#### **Section 7. Conduct of Adjudicatory Hearing**

Unless resolved by stipulation or settlement of the parties subsequent to the issuance of a Notice of Hearing, an adjudicatory hearing shall be held at the time and place prescribed in the Notice of Hearing in accordance with the provisions of Part VII hereof.

#### **Section 8. Review on Commission Initiative**

Any member of the Commission may request review of a Director's decision in a grants matter even if the parties thereto do not. Such a request must be approved by a majority of the Commission. Upon approval, all parties shall be served notice by the Director of the approval and shall file response to such notice with the Secretary within twenty (20) days of such service if they desire to participate in the proceedings on review. If the review under this section results in a reversal of the Director's decision so that a party has not had an opportunity for an adjudicatory hearing on the decision as reversed, the Commission shall provide an opportunity for such hearing and shall thereafter reconsider the matter upon the record.

## PART V. ENFORCEMENT ACTIONS

### Section 1. Applicability

(a) It shall be the policy of the Department to seek compliance with the laws and regulations administered by it through the cooperation of all regulated parties and to afford suspected violators a reasonable opportunity to resolve violations through informal procedures prior to the initiation of administrative enforcement proceedings hereunder unless the circumstances warrant otherwise.

(b) Nothing contained herein shall in any manner abridge or interfere with the Department's ability to initiate civil proceedings in courts of competent jurisdiction to restrain and abate any violations of the laws and regulations administered by it and to otherwise enforce such laws and regulations without institution of administrative enforcement proceedings hereunder. Further, nothing contained herein shall in any manner abridge or interfere with the Department's ability to seek criminal prosecutions concerning any violation of the laws and regulations administered by it without invoking administrative enforcement proceedings hereunder.

(c) All administrative enforcement actions initiated by the Department under the laws above mentioned in Part I, Section 1, and the respective regulations promulgated thereunder shall be in accordance with provisions of this Part.

### Section 2. Issuance of Notice of Violation

(a) Except as otherwise provided in Part VI, the Director shall not issue an order, except by consent, to any person for violation of the laws and regulations administered by the Department unless and until such person has been served with a Notice of Violation and had the opportunity to request an adjudicatory hearing thereon in accordance with the provisions of this Part.

(b) Whenever the Director determines that there are reasonable grounds to believe that there has been a violation which should be addressed by administrative enforcement proceedings hereunder, the Director shall cause a Notice of Violation to be served upon all persons alleged to be in violation. The notice shall state:

(1) All alleged violations of which the person is accused;

(2) The civil penalty, if any, proposed by the Director to be assessed for each violation;

(3) Corrective actions including time frames therefor to be undertaken, in the Director's judgment, to remedy the violations and/or to otherwise abate or contain any situation causing pollution or the threat thereof;

(4) Any other measures, such as permit suspension or revocation, proposed by the Director to be taken against the alleged violator;

(5) That the alleged violator must file a written response to the Notice of Violation with the Secretary within twenty (20) days of its receipt or the allegations therein will be deemed proven and the Director may thereafter issue an administrative order confirming the allegations as findings of fact and assessing civil penalties therefor and ordering the corrective actions and other matters stated in the Notice of Violation;

(6) That upon filing a written response within the time provided, the alleged violator will be entitled to an adjudicatory hearing upon the allegations and other matters stated in the Notice of Violation.

### Section 3. Response to Notice of Violation - Failure to Respond

(a) Any person served with a Notice of Violation shall file a written response thereto with the Secretary within twenty (20) days of its receipt or the allegations therein will be deemed proven and the Director may thereafter issue an administrative order confirming the allegations as findings of fact and assessing civil penalties therefor and ordering the corrective actions and other matters stated in the Notice of Violation.

(b) A written response to a Notice of Violation shall conform to the requirements of Part VII, Section 3. The response may be in the form of a general denial, or may admit one or more of the allegations and deny others and/or may contest the proposed civil penalties, if any, or the corrective actions or other matters stated in the Notice of Violation.

### Section 4. Notice of Hearing

Subsequent to the time and filing of a written response to a Notice of Violation, the Hearing Officer designated by the Commission shall cause a Notice of Hearing to be served upon all parties. The notice shall state that

all parties have the right to be present at the hearing, to respond and present evidence and argument on all issues involved, of their right to be represented by counsel, and of the fact that the hearing will be under oath and will be electronically or stenographically recorded.

### Section 5. Conduct of Adjudicatory Hearing

Unless resolved by stipulation or settlement of the parties subsequent to the issuance of a Notice of Hearing, an adjudicatory hearing shall be held by the Department at the time and place prescribed in the Notice of Hearing in accordance with the provisions of Part VII hereof.

### Section 6. Issuance of Administrative Order After Adjudicatory Hearing

Within fifteen (15) days after receipt of the Hearing Officer's recommended decision, the Director shall issue and have served on all parties an administrative order which shall include findings of facts, actions ordered to be taken, and civil penalties assessed for violations. The order shall also inform the persons to whom it is directed that they may request review of the order by the Commission by making written application therefor within thirty (30) days of the date of issuance of the order, in accordance with Section 7 of this Part.

### Section 7. Request for Commission Review

(a) Any party to an enforcement action hereunder may seek review of the administrative order issued by the Director in such action by the Commission by filing a written request for review, in conformity with the provisions of Part VII, Section 3, with the Secretary to the Commission within thirty (30) days of issuance of the order.

(b) The request for review shall identify the administrative order in question and shall state the points of law and fact upon which the request is based and whether an opportunity for oral argument before the Commission is requested.

(c) All parties shall be served a copy of the request for review in accordance with the provisions of Part VII, Section 4. Proof of service of the request on all parties shall be filed within thirty (30) days of such service.

### Section 8. Response to Request for Review

Any party to an enforcement action served with a request for review, who wishes to participate in the proceedings on review, shall file a response to the request for review with the Secretary within twenty (20) days of service of the request for review. The response shall include the points of law and fact upon which the response is based and whether an opportunity for oral argument before the Commission is requested. Such response shall be served upon all parties in accordance with the provisions of Part VII, Section 4, at the time of filing.

### Section 9. Commission Initiative - Enforcement/Review

(a) The Commission may initiate administrative enforcement actions either by:

(1) Making a request of the Director to institute administrative enforcement actions hereunder; or

(2) By instituting administrative enforcement actions hereunder by the authority of the Commission rather than by the authority of the Director. When this procedure is utilized, all requirements of this regulation for the "Director" shall be deemed to refer to "Chairman of the Commission"; and the provisions of Part VIII hereof shall be inapplicable to such a proceeding.

(b) Any member of the Commission may request a review of a Director's order in an enforcement action even if the parties thereto do not. Such a request must be approved by a majority of the Commission. Upon approval, all parties shall be served notice by the Director of the approval and shall file response to such notice with the Secretary within twenty (20) days of such service if they desire to participate in the proceedings on review.

## PART VI. EMERGENCY/IMMINENT HAZARD ACTIONS

### Section 1. Applicability

All emergency or imminent hazard orders shall comply with the provisions of this Part.

## Section 2. Issuance of Order

(a) The Director may issue an order to any person in conformity with the requirements of Ark. Stat. Section 82-1906(c) and/or Ark. Stat. Section 82-4208 when the Director deems it necessary to meet an emergency or situation of imminent hazard. Such orders may be verbal or in writing. If originally issued verbally, a written order will be issued to confirm the verbal order as soon as reasonably possible to do so. All written orders will be served upon the person to whom they are directed in accordance with Part VII, Section 4, of this regulation.

(b) Immediately following the issuance of said order, the Director shall cause to be published, in a newspaper covering the affected area or in a newspaper of statewide circulation, a "Notice of Imminent Hazard." The "Notice of Imminent Hazard" shall contain a description of the action, the authority for taking such action, and any other information appropriate to ensure that the public is informed about the action.

## Section 3. Request for Adjudicatory Hearing - Notice of Hearing

(a) Any person to whom an emergency or imminent hazard order is directed may request a hearing thereon by filing a written request therefor with the Secretary within ten (10) days of issuance of the Order.

(b) Such hearing shall be held within ten (10) days of filing the written request with the Secretary, unless otherwise agreed by the person requesting the hearing and the Director. Notice of the time, date, and place of the hearing shall be given to the person requesting the hearing by the Hearing Officer assigned to the case at the earliest opportunity and by means calculated to give actual notice to such person.

## Section 4. Conduct of Adjudicatory Hearing

Unless resolved by stipulation or settlement of the parties, subsequent to issuance of the notice of hearing, an adjudicatory hearing shall be held by the Department at the time and place prescribed in the Notice of Hearing in accordance with the provisions of Part VII hereof.

## Section 5. Issuance of Director's Decision

The Director shall issue a written decision within fifteen (15) days of receipt of the Hearing Officer's recommended decision, which shall either

affirm the original order or modify or vacate it. Such decision shall be served upon the party requesting the hearing in accordance with the provisions of Part VII, Section 4.

## Section 6. Request for Commission Review

Any party to whom an emergency or imminent hazard order has been issued and who has participated in an adjudicatory hearing thereon, as above provided, may seek review of the Director's decision by the Commission by making a request therefor in accordance with the provisions in Part V, Section 7.

## Section 7. Review on Commission Initiative

Any member of the Commission may request review of a Director's decision, on an emergency, or imminent hazard action, even if the parties thereto do not. Such a request must be approved by a majority of the Commission. Upon approval, all parties shall be served notice by the Director of the approval, and shall file response to such notice with the Secretary within twenty (20) days of such service if they desire to participate in the proceedings on review.

# PART VII. ADJUDICATORY PROCEDURES

## Section 1. Parties

The following persons shall be made a party to any adjudicatory proceeding initiated pursuant to these regulations:

- (a) The Director (or his or her designee);
- (b) The permittee or permit applicant or person alleged to be operating without a permit;
- (c) Any person named in an order whose interest would be affected by an order;

(d) If the proceeding follows a notice and comment proceeding on the same matter, any person who has participated by submitting comments during the prior notice and comment proceeding, provided that such person's comments included their name and address. To the extent that

several individuals presented joint comments, notice to the spokesperson for such individuals shall be sufficient.

## Section 2. Filing - Docket

(a) All pleadings in a proceeding conducted under these rules shall be filed by, and/or mailed with the Secretary to the Commission, Arkansas Department of Pollution Control and Ecology, 8001 National Drive, Little Rock, Arkansas 72209.

(b) The effective filing date for documents shall be the date the document is received by the Secretary to the Commission.

(c) Upon receipt of documents initiating a new proceeding, the Secretary of the Commission shall assign such proceeding a docket number.

(d) The Secretary shall establish and maintain a Docket Book for all actions hereunder which are scheduled for an adjudicatory hearing. Such docket shall contain the name of the case, the date(s) of any adjudicatory hearings scheduled, the date(s) of any orders or other final actions by the Director and/or Commission in the matter, and the docket number assigned to the case. The Docket Book shall be available for public inspection, except when in use, during regular business hours.

## Section 3. Form of Documents

(a) Any document filed in any proceeding brought under these regulations shall be captioned with:

- (1) The names of the parties;
- (2) The name of the facility (or proposed facility) to which the document relates; and
- (3) The docket number assigned to the proceeding and the relevant permit number(s), as assigned by the Department.

(b) Each document shall contain a title which identifies the document.

(c) The original of any document filed shall be signed by the person submitting the document or by his attorney and shall state the address and telephone number of the person filing the document.

(d) Subsequent to the service of documents initiating a proceeding, a certificate of service upon all parties shall accompany all documents filed by a party in any proceeding hereunder.

(e) This section has no application to comments submitted during public notice and comment period.

## Section 4. Service and Proof of Return

Initiation of a proceeding hereunder shall be had by the service of pleadings upon all other parties and filing of proof of service in the form of a return receipt where service is by certified mail, or by an acknowledgment by the party served, or by a verified return where service is made personally. Except for pleadings initiating a proceeding hereunder, service by mail shall be presumptively complete upon mailing. Filing of pleadings with the Secretary shall constitute service of such pleadings upon the Director in proceedings under this regulation. Service upon a party represented by an attorney shall be upon the attorney unless the Director otherwise directs.

## Section 5. Intervention

(a) Any person may petition for leave to intervene at any stage of a proceeding provided that if the intervention is not filed in a timely manner, the Hearing Officer may deny the intervention or condition the order granting intervention as appropriate to prevent delays in the proceedings.

(b) A petition for leave to intervene shall state the interest of the petitioner and, if necessary, a statement of why his interest is or may be adversely affected.

(c) The Hearing Officer shall grant intervention where the petitioner

- (1) Timely files a petition to intervene; and
- (2) Had a statutory right to initiate the proceeding in which he wishes to intervene; or
- (3) Has an interest which is or may be adversely affected by the outcome of the proceeding.

(d) If paragraph (c) does not apply, the Hearing Officer may grant intervention as found necessary and appropriate to promote the just and

efficient administration of the acts hereinabove referenced.

## Section 6. Hearing Officer's Powers

(a) One or more Hearing Officers designated by the Commission shall preside over any hearings hereunder.

(1) Any Hearing Officer shall be subject to disqualification for bias, prejudice, interest, or any other cause provided in state statutes, or for any cause for which a judge may be disqualified.

(2) Any party may petition for the disqualification of a Hearing Officer promptly after receipt of notice indicating that the individual will serve, or, if later, promptly upon discovering facts establishing grounds for disqualification.

(3) A person who has served as an investigator, prosecutor or advocate in an adjudicatory proceeding may not serve as a Hearing Officer or assist or advise a Hearing Officer in the same proceeding.

(4) A person who is subject to the authority, direction, or discretion of one who has served as investigator, prosecutor or advocate in an adjudicatory proceeding may not serve as a Hearing Officer or assist or advise a Hearing Officer in the same proceeding.

(5) A person who had participated in a determination of probable cause or other equivalent preliminary determination in an adjudicatory proceeding may not serve as a Hearing Officer or assist or advise a Hearing Officer in the same proceeding.

(6) A person may serve as a Hearing Officer at successive stages of the same adjudicatory proceeding, unless a party demonstrates grounds for disqualification.

(b) The Hearing Officer may exercise the following powers hereunder:

(1) To set the time and place of hearings.

(2) Administer oaths and affirmations.

(3) Issue subpoenas.

(4) Issue appropriate orders relating to discovery, interventions, procedural matters, and motions, and set time frames therefore to promote

just and efficient administration.

(5) Hold conferences and order the holding of conferences or settlement or simplification of issues.

(6) Conduct hearings, rule on motions, offers of proof, discovery, objections, maintain orders, and all other matters necessary to regulate the course of such hearings.

(7) Within thirty (30) days after the hearing, recommend a decision to the Director (for Part V - Enforcement or Part VI - Emergency Proceedings) or to the Commission (for Part III - Permitting or Part IV - Grants Decision), a copy of which shall be submitted to all parties.

(c) Except as otherwise provided hereunder, the jurisdiction of the Hearing Officer shall terminate upon:

(1) In an enforcement or imminent hazard/emergency action upon the filing of a request for Commission review of the Director's order; or

(2) In a permitting or grants matter upon submission of the matter to the Commission; or

(3) In any case, upon the expiration of the time period within which a request for review may be filed.

## Section 7. Recording of Adjudicatory Proceedings - Court Reporter Costs

All adjudicatory hearings conducted hereunder shall be electronically or stenographically recorded by the Department. Any party to an adjudicatory hearing may request the Hearing Officer arrange for the proceeding to be transcribed by a Court Reporter. The party so requesting will be responsible for the cost of the appearance and transcription. Upon making arrangements for such payment, by making a cash deposit with the Secretary in such amount as the Hearing Officer determines, or otherwise arranging for payment to the satisfaction of the Hearing Officer, he shall arrange for such appearance and transcription. No transcription or recording of such proceedings shall be permitted except as provided herein.

Sec. Subpoenas - Issuance, Cost, Service and Return

(a) All parties to an adjudicatory hearing may request that the Hearing Officer issue subpoenas for the attendance of witnesses. The Hearing Officer may deny issuance of a subpoena if necessary in his discretion to prevent undue delay, oppression, harassment, or other injustice to other parties or persons.

(b) Upon issuance, the original and one copy of a subpoena will be delivered to the requesting party who shall be responsible for having the subpoena served in accordance with Rule 45 of the Arkansas Rules of Civil Procedure. All costs of service and witness fees shall be the responsibility of the requesting party. The return copy of the subpoena evidencing service shall be filed with the Secretary or with the Hearing Officer.

**Section 9. Rules of Civil Procedure**

All matters not covered herein shall be governed by the provisions of the Arkansas Rules of Civil Procedure.

**Section 10. Orders Effective During Review**

(a) All orders or decisions or final actions of the Director shall remain in effect and shall be complied with by the parties thereto during the pendency of a review by the Commission, unless stayed pursuant to Part VIII, Section 1.

(b) A party requesting review of a matter hereunder may also request that the Director's order, decision, or final action, or any part hereof, be stayed until Commission review of the matter.

(c) Such request shall be considered and ruled on by the Chairman in accordance with Part VIII, Section 1.

**PART VIII. COMMISSION REVIEW**

**Section 1. Temporary Stay**

(a) If a request or review contains a request for a stay of the Director's decision, order, or final action, or any part thereof, during the pendency of Commission review, the Secretary shall promptly inform the Chairman of

the request for stay. The stay shall be granted in the discretion of the Chairman.

(b) The decision of the Chairman in granting or denying the stay shall be promptly communicated by the Secretary to all parties by mail.

**Section 2. Review of Record and Disposition by Commission**

(a) Upon a receipt of a request for review, the Secretary shall place the matter upon the agenda of the Commission. Failure of the requesting party to file proper proof of service, prior to the scheduled meeting, will result in the matter being stricken from the agenda.

(b) The record before the Commission on review shall consist of:

- (1) The documents constituting the Director's decision;
- (2) All pleadings, motions, and intermediate rulings;
- (3) Evidence received or considered, including the electronic or stenographic recording of the hearing;
- (4) A statement of matters officially noticed;
- (5) Offers of proof, objections, and rulings thereon;
- (6) Proposed findings;
- (7) All staff or Hearing Officer's memoranda or data submitted to the Hearing Officer in connection with his consideration of the case.

(c) The Commission shall rule on each matter for review promptly placed on its agenda. Oral arguments, if requested, will be heard as provided in Section 3 of this Part.

(d) The decision of the Commission upon review of a matter shall be by majority vote and shall be issued in the form of a 'Minute Order' which shall identify the order or decision of the Director being addressed, and the date of the Director's decision, and shall either affirm the decision in whole or in part or reverse the decision in whole or in part. If the decision is reversed in whole or in part, the Commission shall either dismiss the proceeding or the part thereof reversed, if appropriate, or remand the matter or the part thereof reversed with directions to the Director for further proceedings.

The Secretary shall serve a copy of the Minute Order upon all parties to the proceeding within ten (10) days of the Commission meeting.

### **Section 3. Oral Argument - No Additional Documentary Material New Evidence**

(a) If a party requests an opportunity for oral argument before the Commission, the Secretary shall indicate that such request has been made when placing the matter on the agenda pursuant to Section 2(a) of this Part. Oral argument of no more than fifteen (15) minutes will be allowed the party making a request and the opposing party(ies) will be permitted no more than fifteen (15) minutes to respond. No written or documentary materials concerning a matter on review that have not previously been included in the record shall be offered to or considered by the Commission during its review.

(b) If a party requests an opportunity to supplement the record with additional evidence and is able to satisfactorily demonstrate to a majority of the Commission that such evidence is material to the issues and was unavailable at the time of the adjudicatory hearing despite the best efforts of such party to procure such evidence, then the Commission may direct the Hearing Officer take further testimony and evidence in the matter and/or that the Director reconsider the matter based on such additional evidence before the matter is considered by the Commission. The requesting party shall file an affidavit with the Secretary of the Commission describing the circumstances as to why the additional evidence was not available at the time of the adjudicatory hearing and why the information is material to the issues. A copy of the affidavit shall be furnished to all parties at least ten (10) days prior to the date the Commission meets to consider the request.

### **Section 4. Standard of Review**

Upon review of the Director's decision or final action, the Commission may consider the entire matter based upon the record and oral arguments presented and may affirm, reverse and dismiss, or reverse and remand to the Director with directions to modify any findings of fact, conclusions of law, penalties assessed, or actions ordered to be undertaken set forth in the Director's decision or final action.

### **Section 5. Prohibition on Ex Parte Communication**

Unless required for the disposition of ex parte matters specifically

authorized by statute, no party or representative thereof in a pending adjudicatory proceeding initiated as provided in this regulation shall attempt by any means to communicate directly with the Commission or any members thereof except as specifically provided for herein. Any flagrant violation of this section may constitute grounds for denying the relief sought by the offending party. Such communications shall not otherwise be considered by the Commission in reaching its decisions. Any member of the Commission who receives an ex parte communication in violation of this section may be disqualified if necessary to eliminate the effect of the communication.

## **PART IX. APPEALS**

### **Section 1. Finality of Decision**

No order of the Director on any enforcement or emergency or imminent hazard matter, nor any permitting or grants decisions shall be construed to constitute final agency action on the matter unless and until all procedures and remedies hereunder for hearing and review have been completed or the time periods for initiating such procedures have expired.

### **Section 2. Filing of Return and Record - Director's Duties**

Upon service of a notice of appeal, the Director shall, by counsel, file with the court wherein the appeal is lodged a return, including the record of the proceedings in the matter, which shall include all those items specified in Part VIII, Section 2(b), and a copy of the "Minute Order" of the Commission ruling on the matter.

## **PART X. OTHER PROVISIONS**

### **Section 1. Repealer**

All rules or regulations or parts thereof adopted pursuant to the laws and acts mentioned in Part I, Section 1, hereof which are in conflict with the provisions hereof, are hereby repealed to the extent of such conflict.

Section 2. Separability

If any provision of this regulation or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications hereof which can be given [affect] without the invalid provision or application, and to this end, provisions of this regulation are declared to be separable and severable.

Section 3. Effective Date

This regulation shall be in full force and effect as of July 6, 1984.