

circumstances, and the permitting authority may thereafter issue only a revised permit that satisfies EPA's objection. In any case, the source will not be in violation of the requirement to have submitted a timely and complete application.

**§ 71.27 Public participation and appeal.**

All permit proceedings, including preparation of draft permits, initial permit issuance, permit revisions, and granted appeals, shall provide adequate procedures for public participation, including notice, opportunity for comment, a hearing if requested, and administrative appeal. Specific procedures shall include the following:

(a) *Revision, revocation and reissuance, or termination of permits.* (1) Permits may be revised, revoked and reissued, or terminated either at the request of any interested person (including the permittee) or upon the Administrator's initiative. However, permits may only be revised, revoked and reissued, or terminated for the reasons specified in §§ 71.25(a)(7) and 71.26(e). All requests shall be in writing and shall contain facts or reasons supporting the request.

(2) If the Administrator decides the request is not justified, he or she shall send the requester a brief written response giving a reason for the decision. Denials of requests for revision, revocation and reissuance, or termination are not subject to public notice, comment, or hearings. Denials by the Administrator may be informally appealed to the Environmental Appeals Board by a letter briefly setting forth the relevant facts. The Board may direct the Administrator to begin revision, revocation and reissuance, or termination proceedings under paragraph (a)(3) of this section. The appeal shall be considered denied if the Board takes no action within 60 days after receiving it. This informal appeal is, under 42 U.S.C. 307, a prerequisite to seeking judicial review of EPA action in denying a request for revision, revocation and reissuance, or termination.

(3)(i) Except in the case of administrative amendment of a permit, if the Administrator tentatively decides to revise or revoke and reissue a permit under §§ 71.25(a)(7) and 71.26(e), he or

she shall prepare a draft permit under paragraph (b) of this section incorporating the proposed changes. The Administrator may request additional information and, in the case of a revised permit, shall require the submission of an updated application. In the case of revoked and reissued permits, the Administrator shall require the submission of a new application.

(ii) In a permit revision under this subsection, only those conditions to be revised shall be reopened when a new draft permit is prepared. All other aspects of the existing permit shall remain in effect for the duration of the unrevised permit. When a permit is revoked and reissued under this subsection, the entire permit is reopened just as if the permit had expired and was being reissued. During any revocation and reissuance proceeding the permittee shall comply with all conditions of the existing permit until a new final permit is reissued.

(4) If the Administrator tentatively decides to terminate a permit under §§ 71.25(a)(7) and 71.26(e), he or she shall issue a notice of intent to terminate. A notice of intent to terminate is a type of draft permit which follows the same procedures as any draft permit prepared under paragraph (b) of this section. A notice of intent to terminate shall not be issued if the Administrator and the permittee agree to termination in the course of transferring permit responsibility to an approved State under § 71.21(e).

(5) Any request by the permittee for revision to an existing permit shall be treated as a permit application and shall be processed in accordance with all requirements of § 71.24.

(b) *Draft permits.* (1) Once an application is complete, the Administrator shall tentatively decide whether to prepare a draft permit or to deny the application.

(2) If the Administrator tentatively decides to deny the permit application, he or she shall issue a notice of intent to deny. A notice of intent to deny the permit application is a type of draft permit which follows the same procedures as any draft permit prepared

## Environmental Protection Agency

## §71.27

under this subsection. If the Administrator's final decision is that the tentative decision to deny the permit application was incorrect, he or she shall withdraw the notice of intent to deny and proceed to prepare a draft permit under paragraph (b)(4) of this section.

(3) If the Administrator decides to prepare a draft permit, he or she shall prepare a draft permit that contains the permit conditions under §71.25.

(4) All draft permits prepared under this subsection shall be publicly noticed and made available for public comment. The Administrator shall give notice of opportunity for a public hearing, issue a final decision and respond to comments. For all early reductions permits, an appeal may be taken under paragraph (l) of this section.

(c) *Statement of basis.* The Administrator shall prepare a statement of basis for every draft permit. The statement of basis shall briefly describe the derivation of the conditions of the draft permit and the reasons for them or, in the case of notices of intent to deny or terminate, reasons supporting the tentative decision. The statement of basis shall be sent to the applicant and, on request, to any other person.

(d) *Public notice of permit actions and public comment period*—(1) *Scope.* (i) The Administrator shall give public notice that the following actions have occurred:

(A) A permit application has been tentatively denied under paragraph (b)(2) of this section;

(B) A draft permit has been prepared under paragraph (b)(3) of this section;

(C) A hearing has been scheduled under paragraph (f) of this section;

(D) An appeal has been granted under paragraph (l)(3) of this section.

(ii) No public notice is required in the case of administrative permit amendments, or when a request for permit revision, revocation and reissuance, or termination has been denied under paragraph (a)(2) of this section. Written notice of that denial shall be given to the requester and to the permittee.

(iii) Public notices may describe more than one permit or permit action.

(2) *Timing.* (i) Public notice of the preparation of a draft permit or permit revision (including a notice of intent to deny a permit or permit revision appli-

cation) shall allow at least 30 days for public comment.

(ii) Public notice of a public hearing shall be given at least 30 days before the hearing. (Public notice of the hearing may be given at the same time as public notice of the draft permit or permit revision and the two notices may be combined.)

(iii) The Administrator shall provide such notice and opportunity for participation to Affected States on or before the time that the Administrator provides this notice to the public.

(3) *Methods.* Public notice of activities described in paragraph (d)(1)(i) of this section shall be given by the following methods:

(i) By mailing a copy of a notice to the following persons (any person otherwise entitled to receive notice under this paragraph (d) may waive his or her rights to receive notice for any permit):

(A) The applicant;

(B) Any other agency which the Administrator knows has issued or is required to issue any other permit under the Clean Air Act for the same facility or activity;

(C) Affected States and Indian Tribes;

(D) Affected State and local air pollution control agencies, the chief executives of the city and county where the early reductions source is located, any comprehensive regional land use planning agency and any State, Federal Land Manager, or Indian Governing Body whose lands may be affected by emissions from the regulated activity;

(E) Persons on a mailing list developed by:

(1) Including those who request in writing to be on the list;

(2) Soliciting persons for "area lists" from participants in past permit proceedings in that area; and

(3) Notifying the public of the opportunity to be put on the mailing list through periodic publication in the public press and in such publications as Regional and State funded newsletters, environmental bulletins, or State law journals. (The Administrator may update the mailing list from time to time by requesting written indication of continued interest from those listed. The Administrator may delete from

the list the name of any person who fails to respond to such a request.);

(F) Any unit of local government with authority for regulating air pollution and having jurisdiction over the area where the early reductions source is located and to each State agency having any authority for regulating air pollution under State law with respect to the operation of such source.

(ii) By publication of a notice in a daily or weekly newspaper of general circulation within the area affected by the early reductions source.

(iii) By any other method reasonably calculated to give actual notice of the action in question to the persons potentially affected by it, including press releases or any other forum or medium to elicit public participation.

(4) *Contents*—(i) *All public notices*. All public notices issued under this subpart shall contain the following minimum information:

(A) The name and address of the Administrator or the Administrator's designated agent processing the permit;

(B) The name and address of the permittee or permit applicant and, if different, of the facility regulated by the permit;

(C) The activity or activities involved in the permit action;

(D) The emissions change involved in any permit revision;

(E) The name, address and telephone number of a person from whom interested persons may obtain additional information, including copies of the draft permit, the application, all relevant supporting materials, and all other materials available to the Administrator that are relevant to the permit decision;

(F) A brief description of the comment procedures required by paragraphs (e) and (f) of this section and the time and place of any hearing that will be held, including a statement of procedures to request a hearing (unless a hearing has already been scheduled) and other procedures by which the public may participate in the final permit decision; and

(G) Any additional information considered necessary or proper.

(ii) *Public notices for hearings*. In addition to the general public notice described in paragraph (d)(4)(i) of this

section, the public notice of a hearing under paragraph (f) of this section shall contain the following information:

(A) Reference to the date of previous public notices relating to the permit;

(B) Date, time, and place of the hearing; and

(C) A brief description of the nature and purpose of the hearing, including the applicable rules and procedures.

(5) In addition to the general public notice described in paragraph (d)(4)(i) of this section, all persons identified in paragraphs (d)(3)(i)(A), (B), and (C) of this section shall be mailed a copy of the fact sheet or statement of basis, the permit application (if any), and the draft permit (if any).

(e) *Public comments and requests for public hearings*. During the public comment period provided under paragraph (a) of this section, any interested person may submit written comments on the draft permit or permit revision and may request a public hearing, if no hearing has already been scheduled. A request for a public hearing shall be in writing and shall state the nature of the issues proposed to be raised at the hearing. All comments shall be considered in making the final decision and shall be answered as provided in paragraph (j) of this section. The Administrator will keep a record of the commenters and of the issues raised during the public participation process, and such records shall be available to the public.

(f) *Public hearings*. (1)(i) The Administrator shall hold a hearing whenever he or she finds, on the basis of requests, a significant degree of public interest in a draft permit or permit revision.

(ii) The Administrator may also hold a public hearing at his or her discretion, whenever, for instance, such a hearing might clarify one or more issues involved in the permit decision.

(iii) Public notice of the hearing shall be given as specified in paragraph (d) of this section.

(2) Whenever a public hearing is held, the Administrator shall designate a Presiding Officer for the hearing who shall be responsible for its scheduling and orderly conduct.

## Environmental Protection Agency

## § 71.27

(3) Any person may submit oral or written statements and data concerning the draft permit or permit revision. Reasonable limits may be set upon the time allowed for oral statements, and the submission of statements in writing may be required. The public comment period under paragraph (d) of this section shall be automatically extended to the close of any public hearing under this subsection. The hearing officer may also extend the comment period by so stating at the hearing.

(4) A tape recording or written transcript of the hearing shall be made available to the public.

(g) *Obligation to raise issues and provide information during the public comment period.* All persons, including applicants, who believe any condition of a draft permit is inappropriate or that the Administrator's tentative decision to deny an application, terminate a permit, or prepare a draft permit is inappropriate, must raise all reasonably ascertainable issues and submit all reasonably ascertainable arguments supporting their position by the close of the public comment period (including any public hearing). Any supporting materials which are submitted shall be included in full and may not be incorporated by reference, unless they are already part of the administrative record in the same proceeding, or consist of State or Federal statutes and regulations, EPA documents of general applicability, or other generally available reference materials. Commenters shall make supporting materials not already included in the administrative record available to EPA as directed by the Administrator. (A comment period longer than 30 days may be necessary to give commenters a reasonable opportunity to comply with the requirements of this paragraph (g). Additional time shall be granted to the extent that a commenter who requests additional time demonstrates the need for such time.)

(h) *Reopening of the public comment period.* (1)(i) The Administrator may order the public comment period reopened if the procedures of this paragraph (h) could expedite the decision-making process. When the public comment period is reopened under this

paragraph (h), all persons, including applicants, who believe any condition of a draft permit is inappropriate or that the Administrator's tentative decision to deny an application, terminate a permit, or prepare a draft permit is inappropriate, must submit all reasonably available factual grounds supporting their position, including all supporting material, by a date, not less than 60 days after public notice under paragraph (h)(1)(ii) of this section, set by the Administrator. Thereafter, any person may file a written response to the material filed by any other person, by a date, not less than 20 days after the date set for filing of the material, set by the Administrator.

(ii) Public notice of any comment period under this paragraph shall identify the issues to which the requirements of paragraph (h)(1)(i) of this section shall apply.

(iii) On his or her own motion or on the request of any person, the Administrator may direct that the requirements of paragraph (h)(1)(i) of this section shall apply during the initial comment period where it reasonably appears that issuance of the permit will be contested and that applying the requirements of paragraph (h)(1)(i) of this section will substantially expedite the decisionmaking process. The notice of the draft permit shall state whenever this has been done.

(iv) A comment period of longer than 60 days will often be necessary in complicated proceedings to give commenters a reasonable opportunity to comply with the requirements of this subsection. Commenters may request longer comment periods and they shall be granted to the extent they appear necessary.

(2) If any data, information, or arguments submitted during the public comment period appear to raise substantial new questions concerning a permit, the Administrator may take one or more of the following actions:

(i) Prepare a new draft permit, appropriately modified;

(ii) Prepare a revised statement of basis, a fact sheet or revised fact sheet, and reopen the comment period; or

§ 71.27

40 CFR Ch. I (7-1-04 Edition)

(iii) Reopen or extend the comment period to give interested persons an opportunity to comment on the information or arguments submitted.

(3) Comments filed during the reopened comment period shall be limited to the substantial new questions that caused its reopening. The public notice shall define the scope of the reopening.

(4) Public notice of any of the above actions shall be issued under paragraph (d) of this section.

(i) *Issuance and effective date of permit.*

(1) After the close of the public comment period on a draft permit, the Administrator shall issue a final permit decision. The Administrator shall notify the applicant and each person who has submitted written comments or requested notice of the final permit decision. This notice shall include reference to the procedures for appealing a decision on a permit. For the purposes of this paragraph (i), a final permit decision means a final decision to issue, deny, revise, revoke and reissue, or terminate a permit.

(2) A final permit decision shall become effective 30 days after the service of notice of the decision unless:

(i) A later effective date is specified in the decision; or

(ii) No comments requested a change in the draft permit, in which case the permit shall become effective immediately upon issuance.

(j) *Response to comments.* (1) At the time that any final permit decision is issued, the Administrator shall issue a response to comments. This response shall:

(i) Specify which provisions, if any, of the draft permit have been changed in the final permit decision, and the reasons for the change; and

(ii) Briefly describe and respond to all significant comments on the draft permit raised during the public comment period, or during any hearing.

(2) Any documents cited in the response to comments shall be included in the administrative record for the final permit decision as defined in paragraph (k) of this section. If new points are raised or new material supplied during the public comment period, EPA may document its response

to those matters by adding new materials to the administrative record.

(3) The response to comments shall be available to the public.

(4) The Administrator will notify in writing any Affected State of any refusal to accept recommendations for the permit that the State submitted during the public or Affected State review period.

(k) *Administrative record for final permit.* (1) The Administrator shall base final permit decisions on the administrative record defined in this paragraph (k).

(2) The administrative record for any final permit shall consist of:

(i) All comments received during the public comment period, including any extension or reopening;

(ii) The tape or transcript of any hearing(s) held;

(iii) Any written material submitted at such a hearing;

(iv) The response to comments required by paragraph (j) of this section and any new materials placed in the record under paragraph (j) of this section;

(v) Other documents contained in the supporting file for the permit;

(vi) The final permit;

(vii) The application and any supporting data furnished by the applicant;

(viii) The draft permit or notice of intent to deny the application or to terminate the permit;

(ix) The statement of basis for the draft permit;

(x) All documents cited in the statement of basis; and

(xi) Other documents contained in the supporting file for the draft permit.

(3) The additional documents required under paragraph (k)(2) of this section should be added to the record as soon as possible after their receipt or publication by EPA. The record shall be complete on the date the final permit is issued.

(4) This section applies to all final permits.

(5) Material readily available at the issuing Regional Office, or published materials which are generally available and which are included in the administrative record under the standards of paragraph (j) of this section

(“response to comments”), need not be physically included in the same file as the rest of the record as long as it is specifically referred to in the statement of basis or fact sheet or in the response to comments.

(1) *Appeal of permits.* (1) Within 30 days after a final permit decision has been issued, any person who filed comments on the draft permit or participated in the public hearing may petition the Environmental Appeals Board to review any condition of the permit decision. Any person who failed to file comments or failed to participate in the public hearing on the draft permit may petition for administrative review only to the extent of the changes from the draft to the final permit decision. The 30-day period within which a person may request review under this subsection begins with the service of notice of the Administrator’s action unless a later date is specified in that notice. The petition shall include a statement of the reasons supporting that review, including a demonstration that any issues raised were raised during the public comment period (including any public hearing) to the extent required by these regulations 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, and, when appropriate, a showing that the condition in question is based on:

- (i) A finding of fact or conclusion of law which is clearly erroneous; or
- (ii) An exercise of discretion or an important policy consideration which the Environmental Appeals Board should, in its discretion, review.

(2) The Board may also decide on its initiative to review any condition of any permit issued under this subpart. The Board must act under this paragraph within 30 days of the service date of notice of the Administrator’s action.

(3) Within a reasonable time following the filing of the petition for review, the Board shall issue an order either granting or denying the petition for review. To the extent review is denied, the conditions of the final permit decision become final agency action. Public notice of any grant of review by the Board under paragraph (1) (1) or (2)

of this section shall be given as provided in paragraph (d) of this section. Public notice shall set forth a briefing schedule for the appeal and shall state that any interested person may file an amicus brief. Notice of denial of review shall be sent only to applicant and to the person(s) requesting review.

(4) A petition to the Board under paragraph (1)(1) of this section is, under 42 U.S.C. 307(b), a prerequisite to the seeking of judicial review of the final agency action.

(5) For purposes of judicial review, final agency action occurs when a final permit is issued or denied by EPA and agency review procedures are exhausted. A final permit decision shall be issued by the Administrator:

(i) When the Board issues notice to the parties that review has been denied;

(ii) When the Board issues a decision on the merits of the appeal and the decision does not include a remand of the proceedings; or

(iii) Upon the completion of remand proceedings if the proceedings are remanded, unless the Board’s remand order specifically provides that appeal of the remand decision will be required to exhaust administrative remedies.

(6) Neither the filing of a petition for review of any condition of the permit or permit decision nor the granting of an appeal by the Environmental Appeals Board shall stay the effect of any contested permit or permit condition.

(m) *Computation of time.* (1) Any time period scheduled to begin on the occurrence of an act or event shall begin on the day after the act or event.

(2) Any time period scheduled to begin before the occurrence of an act or event shall be computed so that the period ends on the day before the act or event, except as otherwise provided.

(3) If the final day of any time period falls on a weekend or legal holiday, the time period shall be extended to the next working day.

(4) Whenever a party or interested person has the right or is required to act within a prescribed period after the service of notice or other paper upon him or her by mail, 3 days shall be added to the prescribed time.