

Tips for Obtaining a Variance from Permit Requirements

By Chad Wood, PPGMR Law, PLLC

The Arkansas Department of environmental quality reports that the Director's office has seen a recent increase in the number of requests from permittees and/or permit applicants for a temporary variance or interim permit authority. However, the Department also observes that in a number of recent cases, the Director's office has been unable to grant the temporary variance or interim authority requested because the applicant did not include necessary information that is required under Arkansas statute in order for the Director to do so. In many of these cases, the Department most likely would have otherwise been inclined to work with the applicant to grant some form of relief, which is a frustrating circumstance for both the Department and permittee.

In 2013, in response to a growing number of complaints from permittees that the Department was not reviewing and/or taking action on requests for temporary variances or interim permit authority in a timely enough fashion as to allow the permit applicant meaningful relief, the General Assembly amended the Arkansas statute to require the Director to take action either granting or denying such requests within 10 days of receipt. While that change to the statute was effective for encouraging the Department to act on the requests more quickly, it had the simultaneous effect of forcing the Department to deny--or simply return as unprocessed--requests which do not include sufficient information, where previously the Department would have held the request and allowed the applicant to amend or supplement it's documentation. By their very nature, temporary variances and interim permit authority are intended to afford permittees rapid relief under exceptional circumstances with negligible potential for environmental impact because the relief is limited in time. Therefore, it's in the Department's and applicant's best interests for the initial request to contain the appropriate information and documentation to allow the Department to evaluate and take action on the request as quickly as possible. Department officials hope that sharing this information more broadly with the regulated community will help would-be applicants to include all of the information required under Arkansas statute in the initial request and, in turn, facilitate a faster and more positive response from the Department.

First and foremost, it's essential to know what type of relief is needed. Interim permit authority is appropriate in circumstances where a facility needs to operate and emit/discharge as stated in an application for a permit, but prior to receipt of a final permit. A temporary variance is appropriate when a facility already holding a permit needs to vary from one or more of the permit conditions without committing a compliance infraction (note that this is different from a variance from regulation, which allows a person or persons to deviate from a regulation by the Pollution Control and Ecology Commission). For either type of request, the Department requires a \$200 processing fee; and the Department frequently has to return requests because the applicant

failed to remit the fee with the initial request.

To consider a request for a temporary variance from a permit condition(s), the Department must receive information regarding:

1. The environmental and public health effects of the temporary variance; and
2. Any economic advantage that will be obtained over other similarly situated facilities that are operating according to similar permit conditions but have not requested a variance;
3. Whether strict compliance would result in the substantial curtailment or closing down of a business, plant, or operation;

Additionally, the permittee may submit information concerning the following factors in its request for a temporary variance. While this information is not required by statute, in most cases it will increase the likelihood that the Department will grant the request:

4. Whether strict compliance with permit terms is inappropriate because of conditions beyond the control of the person requesting the temporary variance;
5. Whether the temporary variance request is prompted by recurrent or avoidable compliance problems;
6. A review of the operational history of the requesting facility; and
7. Whether the public interest will be served by a temporary variance.

When submitting a request for interim permit authority, the only information that is strictly required (besides the processing fee) is the information that is contained in the facility's permit application. However, if provided, the Department may consider information concerning numbers 4 through 7, above (if applicable), and also may consider information concerning the following:

8. Whether the applicable permitting applications were timely and completely submitted;
9. Whether there has been a delay in the final permitting action caused by conditions beyond the control of the person requesting the interim authority;
10. Whether contractual or other business obligations will become due before a proper permit can be issued; and
11. Whether the public interest will be served by construction or operation during the application review and permit issuance process.

As with the optional factors for a temporary variance, information provided by the applicant concerning numbers 8 through 11 will probably increase the likelihood that the Department will make a favorable decision on the request.

Finally, an applicant for a temporary variance or interim permit authority should take care to fashion its request so that the relief requested will not be prohibited by federal law. In all instances, the Director

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Endangered Species Listing Requested for 2 Arkansas Snails

The U.S. Fish and Wildlife Service (the Service) has been petitioned to list the Arkansas Mudalia (*Leptoxis arkansensis*) and the Ozark Pyrg (*Pyrgulopsis ozarkensis*) under the Endangered Species Act of 1973. The listing for both species was requested by the Center for Biological Diversity and the Service is currently conducting a status review to decide if listing of either snail is justified.

According to the Service, *The Arkansas mudalia* is a small snail (4.9 to 12.2 mm shell height) with yellowish to dark orange shell and dark orange and black body. It has been collected from tributaries and the main stem of the White River in Arkansas and tributaries and the main stem of the North Fork White River in Arkansas and Missouri. Data suggests preferred habitat is medium to large, quick flowing rivers on gravel and rock substrate. Individuals survive one to two years, and females are unique in that they collect and drag eggs as a clutch before depositing individual eggs on the substrate.

The Ozark Pyrg is portrayed by the Service in the following manner. *The Ozark pyrg* is a very small snail (2.3 – 3.0 mm shell height). It was described in the early 1900s from the White River in Arkansas and the North Fork of the White River in Arkansas and Missouri. Type locality habitat was shallow water over bedrock. Limited surveys in 1997 suggested that the species was

extirpated in Arkansas and extant in one site in Missouri on the North Fork White River, but an individual was found in 2010 in Mud Creek, Randolph County, Arkansas. Little is known about life history or population needs.

If you are interested in more information about these species or their listing contact, Alyssa Bangs with the U.S. Fish and Wildlife Service at (501) 513-4472 or Alyssa_banks@fws.gov.

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is prohibited by statute from granting relief that is expressly prohibited by federal law. However, the applicant is often able to limit its request in a way that avoids conflict with federal law but also provides the necessary relief. If the circumstances surrounding the request are urgent, it may be in the applicant's best interest to engage a consultant or attorney to assist in preparing the request. Last but not least, talk to the Federation and other members about your experiences with temporary variances and interim authority so that we may continue to communicate and advocate for our member's best interests to the Department.

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