

Written comment deadline for this draft – June 26, 2015

204. APPEAL PROCESS [40 CFR 124.19]

01. Petition for Review of a Permit Decision. Appeal from a final IPDES permit decision issued under Section 107 (Decision Process), to the Hearing Authority is commenced by filing a petition for review with the Department's Hearing Coordinator within the time prescribed in Subsection 204.01.b.

a. Any person who is aggrieved by the final permit decision may file a petition for review as provided in this section. A person aggrieved includes the permit holder or applicant, any person or entity who filed comments or who participated in the public hearing on the draft permit, or any person or entity with legal standing to challenge the final permit decision.

b. A petition for review must be filed with the Department's Hearing Coordinator within twenty-eight (28) days after the Department serves notice of the final permit decision under Section 107 (Decision Process). A petition is filed when it is received by the Department's Hearing Coordinator at the address specified in Subsection 204.13.

c. In addition to meeting the requirements in Subsection 204.06, a petition for review must:

- i.** Identify the permit condition or other specific aspect of the permit decision that is being challenged;
- ii.** Set forth the legal and factual basis for the petitioner's contentions;
- iii.** Set forth the relief sought;
- iv.** Set forth the basis for asserting that the petitioner is an aggrieved person. If the petitioner is not a permit holder or applicant or did not file comments or participate in a public hearing on the draft permit decision, then the petition must set forth the basis for the petitioner's legal standing to challenge the permit decision; and

02. Public Notice of the Petition for Review. Within fourteen (14) days of the date a petition for review has been filed, the Hearing Authority must give reasonable notice to the public of the petition

03. Administrative Record Filed By the Department. The Department shall file a certified copy of the administrative record, as identified in Section 600 (Administrative Record), with an index within twenty-eight (28) days of the date the Petition for Review was filed

04. Participation by the Permit Applicant or Permit Holder. A permit applicant or permit holder who did not file a petition but who wishes to participate in the appeal process must file a notice of appearance within twenty-eight (28) days of the date the Petition for Review was filed.

05. Petition to Intervene. Any person who has a direct and substantial interest in the outcome of the Petition for Review may file a Petition to Intervene.

a. The Petition to Intervene must set forth the interest of the intervener, and why intervention would not unduly broaden the issues and cause delay or prejudice to the parties.

b. Petitions to Intervene must be filed within fourteen (14) days of the notice of filing of the Petition for Review.

c. Any party opposing a Petition to Intervene must file objections within seven (7) days after service of the Petition to Intervene and serve the objection upon all parties of record and upon the person petitioning to intervene.

d. If a Petition to Intervene shows direct and substantial interest in the outcome of the Petition for Review, does not unduly broaden the issues, and will not cause delay or prejudice to the parties, the Hearing Authority shall grant intervention.

06. Content and Form Requirements for Petitions and Briefs. All petitions and briefs filed under this section must:

a. Identify, in the caption, the permit applicant or holder, the permitted facility, and the permit number. The caption should also include the case number, if available at the time of filing, and the title of the document; and

b. Specify on the upper left corner of the first page, the name, address, telephone number, e-mail address, and facsimile number if any of the person filing the document. If the person filing the document is a representative of a party as provided in section 204.11, the document must identify the name of the person or entity represented. No more than two representatives for service of documents may be listed.

07. Augmenting the Administrative Record. Consideration of the Petition for Review by the Hearing Authority is limited to the certified administrative record unless, upon the request of a party, the Hearing Authority allows the record to be augmented. A request to augment the record must be filed within fourteen (14) days of the filing of the certified administrative record, unless intervention is granted, in which case the request to augment must be filed within fourteen (14) days of the date the order granting intervention is issued. The Hearing Authority may allow the record to be augmented if the requesting party shows that the additional information is material, is relevant to the issues raised in the appeal and that:

a. There were good reasons for failure to present the information during the permitting proceeding; or

b. There were alleged irregularities in the permitting proceeding and the party wishes to introduce evidence of the alleged irregularities.

08. Brief of the Petitioner. Once all requests to augment the record and motions to intervene have been determined, the Hearing Authority shall issue an order notifying the parties that the administrative record has been settled and of the date by which the Petitioner must file Petitioner's brief in support of the petition for review. In addition to meeting the requirements of Subsection 204.06, the brief must include:

a. The legal arguments and citations to legal authority that support the allegations in the Petition for Review; and

b. The factual support for the allegations in the Petition for Review, including citations to the administrative record.

c. A statement regarding whether the party desires an opportunity for oral argument.

09. Response Briefs. Unless an alternative date is set by the Hearing Authority, the Department and all other parties must file response briefs within twenty-eight (28) days of the service of the petitioner's brief. In addition to meeting the requirements of Subsection 204.06, the response briefs must include:

a. A response to the arguments and assertions in the petitioner's brief (either in support or opposed);

b. A citation to all legal authorities and facts in the administrative record relied upon; and

c. A statement regarding whether the party desires an opportunity for oral argument.

10. Reply Briefs by the Petitioner. Unless an alternative date is set by the Hearing Authority, the petitioner may file a reply brief within fourteen (14) days after service of response briefs. A petitioner may not raise new issues or arguments in the reply.

11. Representation of Parties. Unless otherwise authorized or required by law, appearances and representation of parties or other persons shall be as follows:

a. A natural person may represent himself or herself or be represented by an attorney or, if the person lacks full legal capacity to act for himself or herself, then by a legal guardian or guardian ad litem or representative of an estate;

b. A general partnership may be represented by a partner or an attorney;

c. A corporation, or any other business entity other than a general partnership, must be represented by an attorney;

d. A municipal corporation, local government agency, unincorporated association or nonprofit organization must be represented by an attorney; or

e. A state, federal or tribal governmental entity or agency must be represented by an attorney.

12. Substitution and Withdrawal of Representatives. A party's representative may be changed and a new representative may be substituted by notice to all parties so long as the proceedings are not unreasonably delayed. Representatives who wish to withdraw from a proceeding must immediately file a motion to withdraw representation and serve that motion on the party represented and all other parties.

13. Filing and Service Requirements.

a. All documents concerning actions governed by these rules must be filed with the Hearing Coordinator at the following address: Hearing Coordinator, Department of Environmental Quality, 1410 N. Hilton, Boise, ID 83706-1255. Documents may also be filed by FAX at FAX No. (208)373-0481 or may be filed electronically. The originating party is responsible for retaining proof of filing by FAX. The documents are deemed to be filed on the date received by the hearing coordinator. Upon receipt of the filed document, the hearing coordinator will provide a conformed copy to the originating party.

b. All documents subsequent to the petition must be served on all parties or representatives, unless otherwise directed by the Hearing Authority.

c. Service of documents on the named representative is valid service upon the party for all purposes in the proceeding.

14. Proof of Service. Every document meeting the requirements for service must be attached to or accompanied by proof of service containing the following certificate:

I hereby certify that on this (insert date), a true and correct copy of the foregoing (insert name of document) was served on the following as indicated below:

(insert names and addresses of parties and method of delivery (first class U.S. mail, facsimile, hand-delivery, or overnight express))

(Signature)

15. Motions. A request for an interlocutory or procedural order or other relief must be made by written motion unless these rules prescribe another form.

a. A motion must state with particularity the grounds for the motion, the relief sought, and the legal argument necessary to support the motion. In advance of filing a motion, parties must attempt to ascertain whether

the other parties concur or object to the motion and must indicate in the motion the attempt made and the response obtained.

b. Any party may file a response to a motion. Responses must state with particularity the grounds for opposition and the legal argument necessary to support the motion. The response must be filed within fifteen (15) days after service of the motion unless the Hearing Authority shortens or extends the time for response.

c. Any reply to a response must be filed within ten (10) days after service of the response. A reply must not introduce any new issues or arguments and may respond only to matters presented in the response.

d. The Hearing Authority may act on a motion for a procedural order at any time without awaiting a response.

e. Parties must file motions for extensions of time sufficiently in advance of the due date to allow other parties to have a reasonable opportunity to respond to the request for more time and to provide the Hearing Authority with a reasonable opportunity to issue an order prior to the due date.

16. Oral Argument. The Hearing Authority may hold oral argument on its own initiative or at its discretion in response to a request by one or more of the parties.

17. Withdrawal of Permit or Portions of Permit by the Department. The Department may, at any time, upon notification to the Hearing Authority and all parties, withdraw the permit or specified portions of the permit and prepare a new draft permit under Section 108 (Draft Permit and Fact Sheet) addressing the portions so withdrawn. The new draft permit must proceed through the same process of public comment and opportunity for a public hearing as would apply to any other draft permit. If applicable, any portions of the permit that are not withdrawn continue to apply, unless stayed under Sections 205 and 206. The appeal shall continue with respect to those portions of the permit that are contested in the appeal that the Department does not withdraw.

18. Request to Dismiss Petition. The petitioner, by motion, may request to have the Hearing Authority dismiss its appeal. The motion must briefly state the reason for its request.

19. Burden of Proof. The petitioner has the burden of proving the allegations in the Petition for Review. Factual allegations must be proven by a preponderance of the evidence.

20. Appointment of Hearing Officers. The Hearing Authority may appoint a hearing officer to hear the Petition for Review. The Hearing Officer shall have all the authority specified in 204.21. Hearing officers may be (but need not be) attorneys. Hearing officers who are not attorneys should ordinarily be persons with technical expertise or experience in issues before the Hearing Authority. The hearing coordinator shall administer the appointment of the hearing officer. Notice of appointment of a hearing officer shall be served on all parties.

21. Scope of Authority of the Hearing Authority. The Hearing Authority shall have the following authority:

a. The authority to set schedules and take such other actions to ensure an efficient and orderly adjudication of the issues raised in the Petition for Review;

b. The authority to hear and decide motions; and

c. The authority to issue an order that decides the issues raised in the appeal and includes findings of fact and conclusions of law. The required contents of an order are set forth in Subsections 204.23 and 204.24.

22. Ex Parte Communications. The Hearing Authority or Hearing Officer shall not communicate, directly or indirectly, regarding any substantive issue in the permit appeal with any party, except upon notice and opportunity for all parties to participate in the communication. The Hearing Authority or Hearing Officer may communicate ex parte with a party concerning procedural matters (e.g., scheduling). When the Hearing Authority or Hearing Officer becomes aware of a written ex parte communication regarding any substantive issue from a party or representative of a party during an appeal, the Hearing Authority shall place a copy of the communication in the file for the case and order the party providing the written communication to serve a copy of the written communication

upon all parties of record. Written communications from a party showing service upon all other parties are not ex parte communications.

23. Alternative Dispute Resolution. Parties to the permit appeal may agree to use a means of alternative dispute resolution.

24. Preliminary Orders Issued by a Hearing Officer. If a Hearing Officer is appointed, the Hearing Officer shall issue a preliminary order.

a. Preliminary orders are orders that will become a final order of the Hearing Authority unless any party appeals to the Hearing Authority by filing with the hearing coordinator a request for review of the preliminary order.

b. Within fourteen (14) days of the service date of the preliminary order, any party may take exceptions to any part of the preliminary order by filing with the hearing coordinator a request for review of the preliminary order. The basis for review must be stated in the request. The Hearing Authority may review the preliminary order on its own motion. If the Hearing Authority determines to review the preliminary order on its own motion, the Hearing Authority shall give written notice to the parties within fourteen (14) days of the issuance of the order. The Hearing Authority shall identify in the notice the issues the Hearing Authority intends to review.

c. If any party files a request for review of the preliminary order, the Hearing Authority shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. The hearing coordinator shall issue a notice setting out the briefing schedule and date and time for oral argument. The Hearing Authority will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived or extended by the parties or for good cause shown.

d. Preliminary orders shall contain the following:

- i. A reasoned statement in support of the decision;
- ii. Findings of fact, with reference to the portions of the administrative record that support the findings. The findings of fact must be based exclusively on the settled administrative record;
- iii. Conclusions of law with respect to legal issues raised in the appeal;
- iv. The preliminary order shall either affirm the permitting decision, or vacate and remand the decision to the Department with instructions;
- v. A statement of the right to request a review before the Hearing Authority and the time and method of filing such a request; and
- vi. A statement of the right to judicial review as set forth in Subsection 204.27 should the preliminary order become final because there has been no request for review.

e. Motions for reconsideration of any preliminary order shall not be considered.

25. Final Orders.

a. Final orders are:

- i. Preliminary orders that have become final under Subsection 204.24, because no party filed a request for review within fourteen (14) days of the service date of the order; or
- ii. An order issued by the Hearing Authority upon review of a preliminary order; or
- iii. An order issued by the Hearing Authority if no hearing officer is appointed and the Hearing Authority hears the appeal in the first instance.

- b. Unless a different date is stated in the final order, the order is effective fourteen upon its service date.
- c. Every final order shall contain the following:
 - i. A reasoned statement in support of the decision;
 - ii. Findings of fact, with reference to the portions of the administrative record that support the findings. The findings of fact must be based exclusively on the administrative record, or if augmented during the appeal, the augmented record;
 - iii. Conclusions of law with respect to legal issues raised in the appeal;
 - iv. The final order shall either affirm the permitting decision, or vacate and remand the decision to the Department with instructions; and
 - v. A statement of the right to judicial review as set forth in Section 204.27.
- d. Motions for reconsideration of any final order shall not be considered.

26. Final Agency Action for Purposes of Judicial Review.

- a. Filing a petition for review is a prerequisite to seeking judicial review of the Department's permitting decision.
- b. For purposes of judicial review under Sections 39-107 and 67-5270, Idaho Code, final agency action or determination regarding an appeal of a permit occurs when:
 - i. A final order that affirms the Department's permitting decision becomes effective;
 - ii. A preliminary order that affirms the Department's permitting decision becomes final;
 - c. An order that vacates and remands the decision to the Department with instructions is not a final agency action for purposes of judicial review.

27. Petition for Judicial Review.

- a. Any person aggrieved by a final agency action or determination by the Department as defined in section 204.26 has a right to judicial review by filing a petition for judicial review pursuant to sections 39-107(6) and 67-5270, Idaho Code.
- b. The petition for judicial review must be filed with the hearing coordinator as set out in Section 204.13 and with the district court and served on all parties. Pursuant to Section 39-107(6), Idaho Code, the petition for judicial review shall also be served upon the Hearing Authority, the Director of the Department, and upon the Attorney General of the State of Idaho. Pursuant to Section 67-5272, Idaho Code, petitions for judicial review may be filed in the District Court of the county in which:
 - i. The hearing was held;
 - ii. The final agency action was taken;
 - iii. The party seeking review of the agency action resides; or
 - iv. The real property or personal property that was the subject of the agency action is located.
- c. Pursuant to Section 67-5273, Idaho Code, a petition for judicial review of a final agency action must be filed within twenty-eight (28) days of the date of the final agency action as set forth in Section 204.26.

28. IPDES General Permits.

a. Persons affected by an IPDES general permit may not file a petition under this section or otherwise challenge the conditions of a general permit in further Department proceedings. Instead, they may do either of the following:

- i. Challenge the general permit by filing an action in court; or
- ii. Apply for an individual IPDES permit under Section 105 (Application for an Individual IPDES Permit), as authorized in Section 130 (General Permits), and may then petition the Hearing Authority review the individual permit as provided by in these rules.

b. As provided in Subsection 130.05(c), any interested person may also petition the Department to require an individual IPDES permit for any discharger eligible for authorization to discharge under an IPDES general permit.

29. Appeals of Variances. [40 CFR 124.64]

a. When the Department issues a permit on which EPA has made a variance decision, separate appeals of the Department permit and of the EPA variance decision are possible. If the owner or operator is challenging the same issues in both proceedings, the EPA Region 10 Administrator will decide, in consultation with the Department, which case will be heard first.

b. Variance decisions made by EPA may be appealed under the provisions of 40 CFR 124.19.

c. Stays for variances other than Clean Water Act section 301(g) variances are governed by Section 205 (Issuance, Effective Date, and Stays of IPDES Permits) and 206 (Stays of Contested Permit Conditions).

205. ISSUANCE, EFFECTIVE DATE, AND STAYS OF IPDES PERMITS [40 CFR 124.60]

01. Appeal of a Permit Decision.

a. As provided in Subsection 206.01, if an appeal of a final permit decision is filed under Section 204 (Appeals Process), the force and effect of the contested conditions of the final permit shall be stayed until final Department action. The Department must notify the discharger and all interested parties of the uncontested conditions of the final permit that are enforceable obligations of the discharger in accordance with Subsection 206.01.c

b. When effluent limitations are contested, but the underlying control technology is not, the notice must identify the installation of the technology in accordance with the permit compliance schedules (if uncontested) as an uncontested, enforceable obligation of the permit.

c. When a combination of technologies is contested, but a portion of the combination is not contested, that portion must be identified as uncontested if compatible with the combination of technologies proposed by the requester.

d. Uncontested conditions, if inseverable from a contested condition, must be considered contested.

e. Uncontested conditions shall become enforceable thirty (30) days after the date of notice under Subsection 205.01.a.

f. Uncontested conditions shall include:

i. Preliminary design and engineering studies or other requirements necessary to achieve the final permit conditions which do not entail substantial expenditures;

ii. Permit conditions which will have to be met regardless of the outcome of the appeal under Section 204 (Appeals Procedure);

iii. When the discharger proposed a less stringent level of treatment than contained in the final permit, any permit conditions appropriate to meet the levels proposed by the discharger, if the measures required to attain that less stringent level of treatment are consistent with the measures required to attain the limits proposed by any other party; and

iv. Construction activities, such as segregation of waste streams or installation of equipment, which would partially meet the final permit conditions and could also be used to achieve the discharger's proposed alternative conditions.

02. Appeal of an Existing Permit. In addition to the requirements of Subsection 206.03.b, when an appeal is filed under Section 204 (Appeals Process) on an application for a renewal of an existing permit and upon written request from the applicant, the Department may delete requirements from the existing permit which unnecessarily duplicate uncontested provisions of the new permit.

206. STAYS OF CONTESTED PERMIT CONDITIONS [40 CFR 124.16]

01. Stays.

a. If a petition for review of an IPDES permit under Section 204 (Appeals Process) is filed, the effect of the contested permit conditions shall be stayed and will not be subject to judicial review pending final Department action. Uncontested permit conditions shall be stayed only until the date specified in Subsection 206.01.b. If the permit involves a new facility or new injection well, new source, new discharger or a recommencing discharger, the applicant will not be issued a permit for the proposed new facility, injection well, source or discharger pending final Department action.

b. Uncontested conditions which are not severable from those contested shall be stayed together with the contested conditions. The Department must identify the stayed provisions of permits for existing facilities, injection wells, and sources. All other provisions of the permit for the existing facility, injection well, or source become fully effective and enforceable thirty (30) days after the date of the notification required in Subsection 206.01.c.

c. As soon as possible after receiving notification from the Hearing Coordinator of the filing of a Petition for Review, the Department must notify the Hearing Authority, the applicant, and all other parties of the uncontested (and severable) conditions of the final permit that will become fully effective enforceable obligations of the permit as of the date specified in Subsection 206.01.b, and the notice must comply with the requirements of Subsection 205.01.

02. Stays Based on Cross Effects.

a. The Department may grant a stay based on the grounds that an appeal to the Hearing Authority under Section 204 (Appeals Process) of one permit may result in changes to another Department-issued IPDES permit only when each of the permits involved has been appealed to the Department.

b. No stay of an EPA-issued NPDES permit shall be granted based on the staying of any Department-issued permit except at the discretion of the EPA Region 10 Administrator and only upon written request from the Department.

03. Permittee Responsibilities. Any facility or activity holding an existing permit must:

a. Comply with the conditions of that permit during any modification or revocation and reissuance proceeding under Section 201 (Modification, or Revocation and Reissuance of IPDES Permits); and

b. To the extent conditions of any new permit are stayed under this section, comply with the conditions of the existing permit which correspond to the stayed conditions, unless compliance with the existing conditions would be technologically incompatible with compliance with other conditions of the new permit which have not been stayed.