

STATE OF MISSOURI
DEPARTMENT OF NATURAL RESOURCES

Matt Blunt, Governor • Doyle Childers, Director

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MEMORANDUM

DATE: JUN 25 2007

TO: Robert K. Morrison, P.E.
Water Protection Program, DEQ

FROM: Marty Miller, Legal Counsel
Division of Environmental Quality

SUBJECT: Incomplete Permit Applications

Marty Miller 6/25/07

Questions Presented & Brief Answers:

- (1) Do Clean Water Commission ("CWC") rules prevent the Department from adopting the practice of returning permit applications (and associated fees) to applicants when their applications are deemed incomplete based on the Department's initial completeness screening?

Conclusion: Yes, once the Department receives "an application," 10 CSR 20-6.010(4)(E) requires the Department to give the applicant an opportunity to correct any deficiencies.

- (2) (a) Can the Department "stop the clock" on the 180-day timeframe set forth in § 644.051.13 within which the Department is directed to either issue or deny the application, based on the applicant's failure to submit a complete permit application? (b) If so, can the Department require the preparation of a Water Quality Review Sheet ("WQRS") before a permit application is deemed complete?

Conclusions: (a) Yes, CWC regulations allow the Department to discontinue processing an incomplete/deficient permit application until the applicant corrects such deficiencies, which suggests that the Department can "stop the clock" once it sends the applicant a notice of deficiency. (b) The Department might be able to specifically require permit applicants to develop and submit a WQRS as part of their permit application, if the Department changes its application forms accordingly and provides guidance to applicants on how to develop a WQRS. But if the Department continues the practice of developing WQRSs itself once a permit application is received, then I see no basis for the Department to "stop the clock" on the 180-day timeframe while the WQRS is being developed.

- (3) What does the "good cause" language in § 644.051.13(2) mean?

Conclusion: Although one might argue that this language means the Department need not refund a permit application fee where there was good cause for a delay beyond the statutory 180-day timeframe, the more likely interpretation is that the Department cannot deny a permit without a good reason.

Analysis

1) Incomplete permit applications cannot be returned

Clean Water Commission regulation 10 CSR 20-6.010(4)(E) specifically states that when a permit application is deficient or incomplete, the Department is required to notify the applicant and give the applicant an opportunity to correct the deficiencies:

If an application is incomplete or otherwise deficient, the applicant shall be notified of the deficiency and processing of the application may be discontinued until the applicant has corrected all deficiencies. The department will act after receipt of all documents and information necessary for a properly completed application, including appropriate filing fees and other supporting documents as necessary, by either issuing a notice of operating permit pending, issuing the construction permit or denying the permit. The director in writing, shall give the reasons for a denial to the applicant. Applicants who fail to satisfy all department comments after two (2) certified department comment letters in a time frame established by the department shall have the application returned as incomplete and the construction fees shall be forfeited. The applicant has the right to request that the time frames be extended when additional time is needed. The request must occur within the established time frame, it must be in writing and the department will grant reasonable time extensions.

10 CSR 20-6.010(4)(E) (emphasis added). This regulation prevents the Department from simply returning permit applications (and associated fees) that are deemed incomplete based on the Department's initial completeness screening.

The regulation further states that the Department can (and is arguably required to) return a permit application and retain the applicant's fees once the following circumstances have occurred: (1) the Department has sent the applicant two certified comment letters that establish reasonable timeframes for a response by the applicant, and (2) the applicant fails to either satisfy the Department's comments or submit a written request for an additional time within such timeframes. *See* 10 CSR 20-6.010(4)(E). This further supports the conclusion that the Department is not allowed to return permit applications and fees in other circumstances. Notably, the Department must grant reasonable time extensions.

2) Stopping the clock on the 180-day timeframe

By statute, the Department is required to either issue or deny certain permit applications within 180 days (60 days for certain permits that do not trigger the public participation process) after receiving "an application." *See* § 644.051.13 (RSMo cum. supp. 2002).¹ If the Department fails to meet this timeframe, then the Department must refund the initial application fee within 45 days. *See id.*

¹ Section 644.051 states as follows:

5. The director shall grant or deny the permit within sixty days after all requirements of the Federal Water Pollution Control Act concerning issuance of permits have been satisfied unless the application does not require any permit pursuant to any federal water pollution control act. The director or the commission may require the applicant to provide and maintain such facilities or to conduct such tests and monitor effluents

a) Stopping the clock for incomplete applications

By stating that the Department may discontinue its processing of a deficient application, CWC regulation 10 CSR 20-6.010(4)(E) seems to authorize the Department to “stop the clock” on the 180-day timeframe mentioned above until a “complete” application is submitted.

One might argue that this CWC regulation contradicts the express language of § 644.051.13(4) to the extent that it “adopt[s] permit review times that exceed the time frames established in [§ 644.051.13(1)].” It might also be viewed as an invalid attempt by the CWC to insert the additional word “completed” into the statute. See § 644.051.13(1) (“The department shall issue or deny applications for construction and site-specific operating permits . . . within one hundred eighty days of the department’s receipt of [a completed] application.”).

as necessary to determine the nature, extent, quantity or degree of water contaminant discharged or released from the source, establish and maintain records and make reports regarding such determination.

6. The director shall promptly notify the applicant in writing of his or her action and if the permit is denied state the reasons therefor.

* * *

13. (1) The department shall issue or deny applications for construction and site-specific operating permits received after January 1, 2001, within one hundred eighty days of the department's receipt of an application. For general construction and operating permit applications received after January 1, 2001, that do not require a public participation process, the department shall issue or deny the requested permits within sixty days of the department's receipt of an application.

(2) If the department fails to issue or deny with good cause a construction or operating permit application within the time frames established in subdivision (1) of this subsection, the department shall refund the full amount of the initial application fee within forty-five days of failure to meet the established time frame. If the department fails to refund the application fee within forty-five days, the refund amount shall accrue interest at a rate established pursuant to section 32.065, RSMo.

(3) Permit fee disputes may be appealed to the commission within thirty days of the date established in subdivision (2) of this subsection. If the applicant prevails in a permit fee dispute appealed to the commission, the commission may order the director to refund the applicant's permit fee plus interest and reasonable attorney's fees as provided in sections 536.085 and 536.087, RSMo. A refund of the initial application or annual fee does not waive the applicant's responsibility to pay any annual fees due each year following issuance of a permit.

(4) No later than December 31, 2001, the commission shall promulgate regulations defining shorter review time periods than the time frames established in subdivision (1) of this subsection, when appropriate, for different classes of construction and operating permits. In no case shall commission regulations adopt permit review times that exceed the time frames established in subdivision (1) of this subsection. The department's failure to comply with the commission's permit review time periods shall result in a refund of said permit fees as set forth in subdivision (2) of this subsection. On a semiannual basis, the department shall submit to the commission a report which describes the different classes of permits and reports on the number of days it took the department to issue each permit from the date of receipt of the application and show averages for each different class of permits.

(5) During the department's technical review of the application, the department may request the applicant submit supplemental or additional information necessary for adequate permit review. The department's technical review letter shall contain a sufficient description of the type of additional information needed to comply with the application requirements.

(6) Nothing in this subsection shall be interpreted to mean that inaction on a permit application shall be grounds to violate any provisions of sections 644.006 to 644.141 or any rules promulgated pursuant to sections 644.006 to 644.141.

However, I would argue that the regulation simply clarifies an ambiguity in the statute and adopts a common-sense approach whereby the Department's allotted "permit review time" does not include time spent waiting for the applicant to submit complete information. Notably, the EPA has adopted a similar (but slightly different) approach of considering applications to be received once the applicant has provided complete information and EPA so notifies the applicant. See 40 C.F.R. § 124.3(f) ("The effective date of an application is the date on which the Regional Administrator notifies the applicant that the application is complete . . .");² 40 C.F.R. § 122.21(e)(1) ("For EPA administered NPDES programs,

² EPA regulations state as follows at 40 C.F.R. § 124.3:

(a) Applicable to State programs, see §§ 123.25 (NPDES), 145.11 (UIC), 233.26(404), and 271.14 (RCRA).

(1) Any person who requires a permit under the RCRA, UIC, NPDES, or PSD programs shall complete, sign, and submit to the Director an application for each permit required under §§ 270.1 (RCRA), 144.1 (UIC), 40 CFR 52.21 (PSD), and 122.1 (NPDES). Applications are not required for RCRA permits by rule (§ 270.60), underground injections authorized by rule (§ 144.21-26), NPDES general permits (§ 122.28) and 404 general permits (§ 233.37).

(2) The Director shall not begin the processing of a permit until the applicant has fully complied with the application requirements for that permit. See §§ 270.10, 270.13 (RCRA), 144.31 (UIC), 40 CFR 52.21 (PSD), and 122.21 (NPDES).

(3) Permit applications (except for PSD permits) must comply with the signature and certification requirements of §§ 122.22 (NPDES), 144.32 (UIC), 233.6(404), and 270.11 (RCRA).

(b) [Reserved]

(c) The Regional Administrator shall review for completeness every application for an EPA-issued permit. Each application for an EPA-issued permit submitted by a new HWM facility, a new UIC injection well, a major PSD stationary source or major PSD modification, or an NPDES new source or NPDES new discharger should be reviewed for completeness by the Regional Administrator within 30 days of its receipt. Each application for an EPA-issued permit submitted by an existing HWM facility (both Parts A and B of the application), existing injection well or existing NPDES source or sludge-only facility should be reviewed for completeness within 60 days of receipt. Upon completing the review, the Regional Administrator shall notify the applicant in writing whether the application is complete. If the application is incomplete, the Regional Administrator shall list the information necessary to make the application complete. When the application is for an existing HWM facility, an existing UIC injection well or an existing NPDES source or "sludge-only facility" the Regional Administration shall specify in the notice of deficiency a date for submitting the necessary information. The Regional Administrator shall notify the applicant that the application is complete upon receiving this information. After the application is completed, the Regional Administrator may request additional information from an applicant but only when necessary to clarify, modify, or supplement previously submitted material. Requests for such additional information will not render an application incomplete.

(d) If an applicant fails or refuses to correct deficiencies in the application, the permit may be denied and appropriate enforcement actions may be taken under the applicable statutory provision including RCRA section 3008, SDWA sections 1423 and 1424, CAA section 167, and CWA sections 308, 309, 402(h), and 402(k).

(e) If the Regional Administrator decides that a site visit is necessary for any reason in conjunction with the processing of an application, he or she shall notify the applicant and a date shall be scheduled.

(f) The effective date of an application is the date on which the Regional Administrator notifies the applicant that the application is complete as provided in paragraph (c) of this section.

(g) For each application from a major new HWM facility, major new UIC injection well, major NPDES new source, major NPDES new discharger or a permit to be issued under provisions of § 122.28(c), the Regional Administrator shall, no later than the effective date of the application, prepare and mail to the applicant a project decision schedule. (This paragraph does not apply to PSD permits.) The schedule shall specify target dates by which the Regional Administrator intends to:

- (1) Prepare a draft permit;
- (2) Give public notice;

an application . . . is complete when the Director receives either a complete application or the information listed in a notice of deficiency.”).³

In my opinion, the Department may adopt the approach set forth in the CWC regulation by stopping the clock for incomplete applications. But in order to minimize the tension between the statute, the regulation, and the Department’s approach to this issue, I recommend the following approach:

- Start the clock once an application is received, regardless of its completeness.
- Upon receipt of an application, conduct the completeness review as soon as possible.
- If the application is incomplete or deficient, then: (1) prepare a deficiency notice that fully describes all missing/deficient items and establishes a reasonable timeframe for a response by the applicant, (2) send the notice by certified mail to the applicant, (3) stop counting days once the letter is mailed, and (4) resume counting days once complete information is received.
- If incomplete information is received or the applicant does not respond within the established timeframe, then repeat the process above by sending a second deficiency notice by certified mail.
- If the applicant submits a timely written request for a reasonable extension of time, then grant the request.

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- (3) Complete the public comment period, including any public hearing; and
 - (4) Issue a final permit.

40 C.F.R. § 124.3 (emphasis added).

³ EPA regulations state as follows at 40 C.F.R. § 122.21 (which applies to state NPDES programs):

(a) Duty to apply.

(1) Any person who discharges or proposes to discharge pollutants or who owns or operates a "sludge-only facility" whose sewage sludge use or disposal practice is regulated by part 503 of this chapter, and who does not have an effective permit, except persons covered by general permits under § 122.28, excluded under § 122.3, or a user of a privately owned treatment works unless the Director requires otherwise under § 122.44(m), must submit a complete application to the Director in accordance with this section and part 124 of this chapter. All concentrated animal feeding operations have a duty to seek coverage under an NPDES permit, as described in § 122.23(d).

* * * *

(e) Completeness.

(1) The Director shall not issue a permit before receiving a complete application for a permit except for NPDES general permits. An application for a permit is complete when the Director receives an application form and any supplemental information which are completed to his or her satisfaction. The completeness of any application for a permit shall be judged independently of the status of any other permit application or permit for the same facility or activity. For EPA administered NPDES programs, an application which is reviewed under § 124.3 of this chapter is complete when the Director receives either a complete application or the information listed in a notice of deficiency.

(2) A permit application shall not be considered complete if a permitting authority has waived application requirements under paragraphs (j) or (q) of this section and EPA has disapproved the waiver application. If a waiver request has been submitted to EPA more than 210 days prior to permit expiration and EPA has not disapproved the waiver application 181 days prior to permit expiration, the permit application lacking the information subject to the waiver application shall be considered complete.

40 C.F.R. § 122.21 (emphasis added).

- The clock may remain stopped while the Department waits for information from the applicant, but it should run anytime the Department is reviewing or processing the applicant's submission(s).
- If the applicant fails to submit complete information after two certified letters have been sent as set forth above and all relevant timeframes have expired, then the Department should return the permit application and keep the application fee.
- If the Department fails to issue the permit within 180 days using the counting method described above, then the applicant is entitled to a refund within 45 days of the 180th day. If the Department does not issue such refund within that time, then the applicant may be entitled to interest, attorney fees, and an appeal.

This approach should make it easier to argue that the CWC did not adopt a permit review time that exceeds the 180-day timeframe set forth in the statute, but rather allowed the Department to toll that timeframe while the Department waits for complete information from the applicant.

b) Requiring Water Quality Review Sheets with a permit application

State regulations set forth the contents of a permit application, which includes a catch-all for “[o]ther information necessary to determine compliance with the Missouri Clean Water Law...” See 10 CSR 20-6.010(4)(D)5. Since this appears to be the only legal authority regarding the required contents of an application under state law, the Department may be able to specifically require permit applicants to develop and submit a Water Quality Review Sheet (WQRS) as part of their permit application. However, if this approach is taken, then the Department needs to change its application forms accordingly, and provide guidance to applicants on how to develop a WQRS.

If the Department continues the practice of doing WQRSs itself once a permit application is received, then I see no basis for the Department to “stop the clock” on the 180-day timeframe while the Department develops the WQRS.

3) “Good cause” language

The statute, which is worded rather inartfully, makes a reference to good cause in the context of setting forth the refund requirement. See § 644.051.13(2) (“If the department fails to issue or deny with good cause a construction or operating permit application within the time frames established in subdivision (1) of this subsection, the department shall refund the full amount of the initial application fee within forty-five days...”).

One might argue that this language allows the Department to avoid refunding application fees where there is good cause for a delay beyond 180 days. However, the context of the statute suggests that the Department simply cannot deny a permit without a good reason. See, e.g., § 644.051.4 (“The director . . . shall deny a permit if the source will violate any such acts . . . unless the permit is issued with such conditions as to make the source comply with such requirements within an acceptable time schedule.”); § 644.051.6 (“The director shall promptly notify the applicant in writing of his or her action and if the permit is denied state the reasons therefor.”);

c: Bruce Martin, FSD
Earl Pabst, DEQ
Karl Fett, KCRO
Edward Galbraith, WPP