

MARYLAND REGISTER

**Proposed Action on Regulations**

<b>Transmittal Sheet</b>  <b>PROPOSED OR REPROPOSED</b>  <b>Actions on Regulations</b>	<b>Date Filed with AELR Committee</b>	<b>TO BE COMPLETED BY DSD</b>
	07/28/2015	Date Filed with Division of State Documents
		Document Number
		Date of Publication in MD Register

**1. Desired date of publication in Maryland Register: 9/4/2015**

**2. COMAR Codification**

**Title Subtitle Chapter Regulation**  
26 11 02 07, .11 & .12

**3. Name of Promulgating Authority**

Department of the Environment

**4. Name of Regulations Coordinator Telephone Number**  
Carolyn A Jones 410-537-4210

**Mailing Address**

1800 Washington Blvd

**City State Zip Code**  
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**Email**  
carolyna.jones@maryland.gov

**5. Name of Person to Call About this Document Telephone No.**  
Randy Mosier 410-537-4488

**Email Address**  
Randy.Mosier@maryland.gov

**6. Check applicable items:**

- New Regulations
- Amendments to Existing Regulations
  - Date when existing text was downloaded from COMAR online: 9/6/2012.
- Repeal of Existing Regulations
- Recodification
- Incorporation by Reference of Documents Requiring DSD Approval
- Reproposal of Substantively Different Text:

: Md. R  
 (vol.) (issue) (page nos) (date)

Under Maryland Register docket no.: --P.

**7. Is there emergency text which is identical to this proposal:**

- Yes  No

**8. Incorporation by Reference**

Check if applicable: Incorporation by Reference (IBR) approval form(s) attached and 18 copies of documents proposed for incorporation submitted to DSD. (Submit 18 paper copies of IBR document to DSD and one copy to AELR.)

**9. Public Body - Open Meeting**

OPTIONAL - If promulgating authority is a public body, check to include a sentence in the Notice of Proposed Action that proposed action was considered at an open meeting held pursuant to State Government Article, §10-506(c), Annotated Code of Maryland.

OPTIONAL - If promulgating authority is a public body, check to include a paragraph that final action will be considered at an open meeting.

**10. Children's Environmental Health and Protection**

Check if the system should send a copy of the proposal to the Children's Environmental Health and Protection Advisory Council.

**11. Certificate of Authorized Officer**

I certify that the attached document is in compliance with the Administrative Procedure Act. I also certify that the attached text has been approved for legality by Michael Strande, Assistant Attorney General, (telephone #410-537-3421) on June 30, 2015. A written copy of the approval is on file at this agency.

**Name of Authorized Officer**

Benjamin H. Grumbles

**Title**

Secretary of the Environment

**Telephone No.**

410-537-3084

**Date**

July 22, 2015

# **Title 26**

## **DEPARTMENT OF THE ENVIRONMENT**

### **Subtitle 11 AIR QUALITY**

#### **26.11.02 Permits, Approvals, and Registration**

Authority: Environment Article, §§1-101, 1-404, 2-101—2-103, 2-301—2-303, and 2-401—2-404, Annotated Code of Maryland

#### **Notice of Proposed Action**

[]

The Secretary of the Environment proposes to amend regulations .07, .11, and .12 under COMAR 26.11.02 Permits, Approvals, and Registration.

#### **Statement of Purpose**

The purpose of this action is to implement the statutory requirements of Senate Bill 1065 from the 2009 Legislative Session, which were effective on January 1, 2010. The amendments also incorporate requirements of House Bill 554 and House Bill 95 of the 2013 Legislative Session, both of which were effective October 1, 2013.

#### **Background**

Senate Bill 1065 expanded standing for challenges to most of the Department's major permits and substituted direct judicial review for the previous contested case process for those same permits. The most significant impact on the Department's permitting process was the elimination of the Office of Administrative Hearings' (OAH) adjudicatory hearing process. Instead, permits are now issued and are effective upon a final determination, and citizens contesting the issuance of a permit must appeal directly to circuit court. While the Department continues to follow many of the previous procedures governing issuance of permits, the new law required some regulatory and procedural changes.

House Bill 554 required the Department to notify elected officials of permit proceedings within a one mile radius of a source subject to the expanded public participation requirements. Elected officials include mayors, county officials, and state legislators.

House Bill 95 established an alternate public participation process for sources subject to expanded public participation that trigger EPA New Source Performance Standards (NSPS) only. Examples of NSPS only sources include small combined heat and power facilities and medium size boilers. If the NSPS source is also listed as a State permit to operate source, it is not affected by House Bill 95. These sources continue to be subject

to expanded public participation requirements.

#### Requirements

These amendments implement the requirements of Senate Bill 1065, House Bill 554, and House Bill 95 as discussed above.

#### **Comparison to Federal Standards**

There is no corresponding federal standard to this proposed action.

#### **Estimate of Economic Impact**

The proposed action has no economic impact.

#### **Economic Impact on Small Businesses**

The proposed action has minimal or no economic impact on small businesses.

#### **Impact on Individuals with Disabilities**

The proposed action has no impact on individuals with disabilities.

#### **Opportunity for Public Comment**

Comments may be sent to , , , or call , or email to , or fax to . Comments will be accepted through see text below. A public hearing will be held, The Department of the Environment will hold a public hearing on the proposed action on October 6th, 2015 at 10:00 a.m. at the Department of the Environment, 1800 Washington Boulevard, 1st Floor Conference Rooms, Baltimore, Maryland 21230-1720. Interested persons are invited to attend and express their views. Comments may be sent to Mr. Randy Mosier, Chief of the Regulation Division, Air and Radiation Management Administration, Department of the Environment, 1800 Washington Boulevard, Suite 730, Baltimore, Maryland 21230-1720, or emailed to [randy.mosier@maryland.gov](mailto:randy.mosier@maryland.gov). Comments must be received not later than October 6th, 2015, or be submitted at the hearing. For more information, call Randy Mosier at (410) 537-4488.

Copies of the proposed action and supporting documents are available for review at the following locations:

- The Department of the Environment's website at:  
<http://www.mde.state.md.us/programs/regulations/air/Pages/reqcomments.aspx>
- The Air and Radiation Management Administration Office in Baltimore; and
- The regional offices of the Department in Cumberland and Salisbury. Anyone needing special accommodations at the public hearing should contact the Department's Fair Practices Office at (410) 537-3964. TTY users may contact the Department through the Maryland Relay Service at 1-800-735-2258.

#### **Economic Impact Statement Part C**

A. Fiscal Year in which regulations will become effective: FY 2016

B. Does the budget for the fiscal year in which regulations become effective contain funds to implement the regulations?

Yes

C. If 'yes', state whether general, special (exact name), or federal funds will be used:

A combination of Maryland Clean Air Funds (Special) and Air Pollution Control Program Grant Funds (Federal) will be used.

D. If 'no', identify the source(s) of funds necessary for implementation of these regulations:

E. If these regulations have no economic impact under Part A, indicate reason briefly:

The purpose of these amendments is to ensure that the Code of Maryland Regulations (COMAR) is consistent with State statutes that are currently in effect and have been in effect since January 1, 2010 and October 1, 2013. The changes to the State Statute eliminated the public's opportunity to request a contested case hearing on a proposed air quality permit to construct. Instead, the public may seek judicial review. In addition, the Department has been implementing the requirements of House Bill 95 and House Bill 554 since October 1, 2013.

F. If these regulations have minimal or no economic impact on small businesses under Part B, indicate the reason and attach small business worksheet.

The impact to small businesses will be the same as on all affected sources. Any impact will be minimal since it is even less likely that air quality permits to construct for small business will be subject to judicial review. The requirements of House Bill 554 are implemented by the Department. The requirements of House Bill 95 would have a positive impact on small business since if a small business is impacted it would now be subject to a more streamlined permit process.

G. Small Business Worksheet:

Attached Document:

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Downloaded from COMAR Online on 9/6/12

**Title 26 DEPARTMENT OF THE ENVIRONMENT**  
**Subtitle 11 AIR QUALITY**

## Chapter 02 Permits, Approvals, and Registration

Authority: Environment Article, §§1-101, 1-404, 2-101—2-103, 2-301—2-303, and 2-401—2-404, Annotated Code of Maryland

### **.07 Procedures for Denying, Revoking, or Reopening and Revising a Permit or Approval.**

A. [Notification of Denial; Hearings. A denial of a permit to construct, an approval, a State permit to operate, or the State-only enforceable provisions of a Part 70 permit shall be served as summonses are served or by certified mail upon the applicant, and is final unless the applicant requests a hearing before the Department within 15 days after service. When a hearing is requested by the applicant, it shall be held pursuant to the contested case provisions of State Government Article, Title 10, Subtitle 2, and Environment Article, §2-605, Annotated Code of Maryland.] *Denial of Approvals, State Permits to Operate or State-Only Enforceable Provisions of a Part 70 Permit.*

(1) *Denial is final unless the applicant requests a hearing before the Department within 15 days after service.*

(2) *When a hearing is requested by the applicant, it shall be held pursuant to the contested case provisions of State Government Article, Title 10, Subtitle 2.*

(3) *Denials shall be served as summonses are served, or by certified mail upon the applicant.*

#### **B. Denial of Permits to Construct.**

(1) *A denial of a permit to construct a source, except for a permit to construct a source subject to Regulation .12 of this chapter, is a final determination subject to judicial review in accordance with Regulation .11M of this chapter.*

(2) *Notice of the denial of a permit to construct shall be given in accordance with the notice of final determination provisions in Regulation .11L of this chapter.*

[B.]C. Revoking or Reopening a Permit. Except as protected by a permit shield provided in accordance with COMAR 26.11.03.23, the Department may issue an order revoking or reopening a State permit to operate, or the State-only enforceable provisions of a Part 70 permit, for violation of a provision of the permit or this subtitle. An order revoking or reopening a permit shall be served as summonses are served or by certified mail upon the permittee, and is final unless the permittee requests a *contested case* hearing [before the Department] within 15 days after service. When a hearing is requested by the permittee, it shall be held pursuant to the contested case provisions of State Government Article, Title 10, Subtitle 2[, and Environment Article, §2-605, Annotated Code of Maryland].

### **.11 Procedures for Obtaining Permits to Construct Certain Significant Sources.**

#### **A. Applicability.**

(1) (text unchanged)

(2) (text unchanged)

(3) *Before issuing a permit to construct for any of the activities listed in §A(2) of this regulation, at a source that is subject to federal new source performance standards under 40 CFR 60, the Department shall either comply with the provisions of sections E — N of this regulation, or with the following procedures:*

(a) *Electronically post a notice of an application for the permit on the Department's web site in accordance with § 1-602(B)(2) of the Environment Article of the Annotated Code of Maryland;*

(b) *Give notice to the Chief Executive of any County or Municipal Corporation in which any portion of the source is located or is proposed to be located; and*

(c) *Receive comments from the public on the permit application.*

B. Exception for an Approval and for Certain Control Equipment. Notwithstanding the requirements of §A, this regulation does not apply to:

(1) (text unchanged)

(2) [A source that constitutes] *The construction or installation of air pollution control equipment for which a permit to construct is required, as provided in Regulation .09 of this chapter, and that will control an existing source.*

#### **C. — D. (text unchanged)**

#### **E. Notice of Application; Informational Meeting.**

(1) The Department shall require the applicant to send to a newspaper for publication a notice regarding the application that satisfies the requirements of Environment Article, §1-602(a), Annotated Code of Maryland. As determined by the Department, the notice shall provide for an informational meeting or an opportunity for the public to request an informational meeting within 10 days of publication of the notice. If the Department decides to hold an informational meeting because of requests for a meeting, the Department shall publish or require the applicant to publish a notice regarding the informational meeting that satisfies the requirements of Environment Article, §1-602(a), Annotated Code of Maryland. Unless the Department determines otherwise, notice of an informational meeting shall be published not later than 10 days before the meeting is held.

(2) *In addition to the requirements under §E(1) of this regulation, on receipt of an application for a permit to construct subject to this regulation, the Department shall give notice immediately or require the applicant to give notice immediately of the application, by certified mail, to:*

(a) *The governing body of each county or municipal corporation in which any portion of the source is located or is proposed to be located;*

(b) *The governing body of each county or municipal corporation within one mile of the property line of the source or the proposed location of the source;*

(c) Each member of the General Assembly representing any part of a county in which any portion of the source is located or proposed to be located; and

(d) Each member of the General Assembly representing any part of each county within one mile of the property line of the source or the proposed location of the source.

F. — G. (text unchanged)

H. Tentative Determination.

(1) The Department shall prepare a tentative determination regarding the application. The content of the tentative determination shall include:

[(1)] (a) — [(4)] (d) (text unchanged)

[(5)] (e) If the tentative determination is to issue the permit, a draft permit, which [will] shall be available to the public for inspection and copying.

(2) In addition to the content of the tentative determination, the following documents shall be made available to the public for inspection and copying no later than the date of issuance of the tentative determination:

(a) The permit application and all supporting documents submitted with the application;

(b) All non-privileged documents the Department relied upon in making the tentative determination; and

(c) A privilege log that identifies all withheld documents and states the reasons for withholding each document.

I. Notice of Tentative Determination; Public Comment; Public Hearing. The Department shall publish or require the applicant to publish a notice regarding the tentative determination that satisfies the requirements of Environment Article, §1-602[(a)], Annotated Code of Maryland. [As determined by the Department, the] *The notice shall provide the opportunity for written public comment [within] for a period of 30 days [and], which may be extended no more than once by an additional 60 days, upon written request received by the Department within the original comment period. As determined by the Department, the notice shall provide either that a public, nonadjudicatory hearing will be held regarding the tentative determination or that the public may request in writing within 20 days that a public hearing be held. If the Department decides to hold a public hearing because of requests for a hearing from the general public filed in writing within the 20-day request period, or from the applicant, the Department shall publish or require the applicant to publish a notice regarding the hearing that satisfies the requirements of Environment Article, §1-602(a), Annotated Code of Maryland.*

J. Public Comments. If a public hearing is held regarding the tentative determination, the applicant shall attend the hearing and present information concerning the application. Written public comments will be accepted if they are received by the Department at the public hearing or within 5 days after the public hearing *or before the close of the public comment period.* Oral public comments may be made at the public hearing. The Department shall consider all public comments that raise issues of law or material fact regarding an application for a permit or a tentative determination, but only if the issues are pertinent to requirements of the Clean Air Act or State air pollution control law applicable to the proposed permit to construct. Comments raising issues that relate to the location or nature of a proposed source may be considered only if the commenter first demonstrates to the satisfaction of the Department that the Department is required by law to consider the issues.

K. Final Determination.

(1) The Department shall prepare a final determination if:

[(1)] (a) — [(2)] (b) (text unchanged)

[(3)] (c) The final determination is substantively different from the tentative determination[ and all persons aggrieved by the final determination have not waived in writing their right to request a contested case hearing].

(2) *The final determination shall constitute the Department's final decision.*

L. Notice of Final Determination.

(1) If the Department is required to prepare a final determination, as provided in §K of this regulation, the Department shall:

(a) *subject to the requirements of §L(1)(b)(i) — (iii) of this regulation, publish or require the applicant to publish a [n]Notice of [the] [f]Final [d]Determination that satisfies the requirements of Environment Article, §1-602(a), Annotated Code of Maryland:*

(b) *if the final determination differs substantively from the tentative determination, then prior to publishing a Notice of Final Determination pursuant to §L(1)(a) of this regulation the Department may:*

(i) *publish a Notice of Intent to Issue a Final Determination that includes a proposed final determination, and provides the opportunity for written public comment for a period of 30 days on the portion of the proposed final determination that differs substantively from the tentative determination;*

(ii) *consider all public comments submitted on the portion of the proposed final determination that differs substantively from the tentative determination, subject to the criteria set forth in COMAR 26.11.02.11J; and*

(iii) *prepare written responses to public comments submitted on the proposed final determination.*

(2) If the Department is not required to prepare a final determination under §K of this regulation, the Department shall issue or deny the permit and the tentative determination becomes the final determination *and shall constitute the Department's final decision.*

(3) *The Department shall electronically post notice that the tentative determination has become the final determination on the Department's website.*

M. [Contested Case Hearing.

(1) Not later than 15 days after publication of the notice required by §L of this regulation, a person may request a contested case hearing to appeal a final determination to issue or deny a permit subject to this regulation by submitting a written request for adjudication to the Department if the submission contains factual allegations with sufficient particularity to demonstrate that:

(a) The person is aggrieved by the final determination; and

(b) The final determination is legally inconsistent with any provisions of law applicable to the final determination being challenged or based upon an incorrect determination of a relevant and material fact.

(2) In deciding whether a contested case hearing should be conducted, the Department may consider whether the allegations that are the basis for the request were raised with particularity at the public hearing or during the public comment period on the tentative determination.

(3) Procedures for referral of requests for contested case hearings and for conducting these hearings are set forth in State Government Article, Title 10, Subtitle 2, and Environment Article, §1-601 et seq., Annotated Code of Maryland, and COMAR 28.02.01 and 26.01.02. COMAR 26.01.02 applies only to the extent that it contains procedures relating to matters that are not addressed at COMAR 28.02.01.

(4) As provided in Environment Article, §1-605(d), Annotated Code of Maryland, matters related to zoning and land use may not be raised in a contested case hearing except as expressly provided in Environment Article, §1-605(d), Annotated Code of Maryland.]

*Judicial Review.*

*(1) In accordance with § 1-601(c) of the Environment Article, Annotated Code of Maryland, a final determination by the Department to issue or deny a permit to construct subject to § 2-404 of the Environment Article, Annotated Code of Maryland, shall be subject to judicial review at the request of any person who:*

*(a) Meets the threshold standing requirements under Federal law; and*

*(b) Is the applicant or participated in a public participation process through the submission of written or oral comments, unless an opportunity for public participation was not provided.*

*(2) Judicial review shall be on the administrative record before the Department and limited to objections raised during the public comment period, unless the petitioner demonstrates that:*

*(a) The objections were not reasonably ascertainable during the comment period; or*

*(b) Ground for objections arose after the comment period.*

*(3) Unless otherwise required by statute, a petition for judicial review shall be filed with the Circuit Court for the County where the application for the permit states that the proposed activity will occur.*

*(4) A person submitting a petition for judicial review shall file the petition within 30 days after publication of a Notice of Final Determination.*

*(5) Except as expressly provided in § 1-605(d) of the Environment Article of the Annotated Code of Maryland, a party to the judicial review action may not challenge a facility's compliance with zoning and land use requirements.*

*(6) Judicial review under this regulation shall be limited to a record compiled by the Department consisting of:*

*(a) Any permit application and any data submitted to the Department in support of the application;*

*(b) Any draft permit issued by the Department;*

*(c) Any notice of intent from the Department to deny the application or to terminate the permit;*

*(d) A statement or fact sheet explaining the basis for the determination by the Department;*

*(e) All documents referenced in the statement or fact sheet explaining the basis for the determination by the Department;*

*(f) All documents, except documents for which disclosure is precluded by law or that are subject to privilege, contained in the supporting file for any draft permit;*

*(g) All comments submitted to the Department during the public comment period, including comments made on the draft application;*

*(h) Any tape or transcript of any public hearings held on the application; and*

*(i) Any response to any comments submitted to the Department.*

N. For the purposes of this regulation, a notice that satisfies the requirements of Environment Article, §1-602(a), Annotated Code of Maryland, is a notice that is published at least once a week for 2 consecutive weeks in a daily newspaper of general circulation in the geographic area in which the [proposed] source is, or will [to] be, located. The Department may also require the applicant to mail notice to any other person who has requested the notice, or to the person's authorized representative, and may require the applicant to post the notice in the vicinity of the proposed source or at public facilities in the geographic area of the proposed source. The applicant shall bear all costs related to providing the notice.

**.12 Procedures for Obtaining Approvals of PSD Sources and NSR Sources, Certain Permits to Construct, and [,] [Permit to Construct] Case-by-Case MACT Determinations [On a Case-by-Case Basis] in Accordance with 40 CFR Part 63, Subpart B[, and Certain 100-Ton Sources].**

A. Applicability. [Except as provided in §B of this regulation,] [t]The owner or operator of a source shall comply with the procedures in this regulation when applying for the following:

(1) (text unchanged)

(2) [Except as required in] *Unless it is subject to* Regulation .11 of this chapter:

(a) A permit to construct a source that, after the source is in compliance with all other applicable requirements of the State air pollution control law, has the potential to discharge to the atmosphere 100 tons per year (91,000 kilograms) or more of any pollutant except for greenhouse gases;

(b) A permit to construct a source that, after the source is in compliance with all other applicable requirements of the State air pollution control law, is a GHG source to which 40 CFR 52.21(b)(49)(iv) or (v) applies;

(3) A permit to construct a lead source that will discharge 5 tons per year of more of lead or lead compounds measured as elemental lead; or

(4) A [permit to construct a] *case-by-case* MACT determination [on a case-by-case basis] *for a source*, in accordance with 40 CFR Part 63, Subpart B.

B. [Alternative Procedures. The owner or operator of a PSD source or an NSR source may elect to use the procedures of Regulation .11 of this chapter to obtain the approval of the source. In this event, an application for an approval and for a permit to construct shall be submitted concurrently and will be processed simultaneously. The time limits in Regulation .11 of this chapter may be extended by the Department for sources electing to have applications processed simultaneously under that regulation. An approval issued under Regulation .11 of this chapter is not subject to a request for a contested case hearing under Regulation .11M of this chapter.]

*Procedures. The owner or operator of a source subject to this regulation shall comply with the procedures in Sections C. — L. of this regulation.*

C. — L. (text unchanged)