

Response to Public Comments
Regulation Changes to Title 18, Chapter 50 of the Alaska Administrative Code
Air Emission User Fees

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The Department proposed changes to the air permit emission fee regulations in 18 AAC 50 on June 1, 2006, and originally accepted public comment from June 1 through July 3, 2006. Due to additional requirements imposed by the Department of Law, the department issued a supplemental public notice on July 10, 2006, and accepted additional comments on the regulation package from July 10 through August 11, 2006. This document responds to comments received during both comment periods and at the public hearing held on June 27, 2006.

The Department received written comments from the following:

- A) Alaska Oil and Gas Association (AOGA)
- B) Chugach Electric Association (CEA)
- C) Copper Valley Electric Association (CVEA)
- D) Harvey Consulting (on behalf of the North Slope Borough)
- E) Anchorage Sand and Gravel (AS&G)
- F) Dana Olson (General Public)

The Department received oral testimony at the public hearing from:
Dana Olson (General Public)

The Department requested and received clarification on comments from:
Alaska Oil and Gas Association (AOGA)

The Department received written comments after the comment period deadline from:
Johnny Aiken, Planning Department Director, North Slope Borough

The comments from Johnny Aiken were received after the legal deadline by which they had to be received in order to be considered. Therefore, the Department is barred from considering the comments as part of this rule making.

Comments received on the proposed regulation changes were directed at several common themes:

- A) Emission Fees become effective January 1, 2007.
AOGA, CEA, and CVEA requested that the fee increase become effective on the Calendar year 2007 to allow for internal budget request/allocations.
- B) The Fee Report be reviewed and audited by a qualified independent third party.
AOGA, CEA, and CVEA requested that a third party audit of the report be done.

- C) Pursue other funding sources.
AOGA, CEA, and CVEA were supportive of ADEC pursuing other funding sources for General Funds and changes in AS 37.10 (which sets the 149% rate).
- D) Fee based on annual program cost through FY 2008
AOGA, CEA, and CVEA suggested that ADEC implement a “smaller” fee increase for FY 2007 and 2008. Comments were not specific for how to address fee rates for FY 2009-10. AS 46.14.250 (g) requires a 4 year emission fee review.
- E) Avoidance Group.
AOGA and CVEA recommended that ADEC charge Emission Fees to the Avoidance Group.

Individual comments were provided in addition to the common themes:

- F) Title 1 Funding:
AOGA recommends a change in State statute on fee recovery for Title 1, as federal regulation does not require full recovery. Funding recommendation is an increase in General Funds or Federal Funds.
- G) Title 5 Cost Analysis.
AOGA recommends ADEC re-evaluate the projected number of hours cited in the Fee Study to renew Title 5 permits. It is perceived that the estimate of Title 5 permit renewal cost as excessively high.
- H) Opposed to Emission Fee.
AS&G is opposed to any fee increase.
- I) Request for Extension.
Harvey Consulting felt that inadequate public notice had been provided and requested a 30-day public comment period extension.
- J) General Comments.
Written comments and oral testimony from the general public were not directed or specific to the emission fee changes but generally directed at ADEC and the Air Programs.

Responses to the specific comments as they pertain to the Air Emissions User Fee changes are as follows:

Comment A: Fees become effective January 1, 2007

“...any increases in emission fees not become effective until January 1, 2007...”—
CEA and CVEA

“We recommend that the timing for regulation adoption, and the resultant billing cycle for these new fees, be timed such that companies operating on a calendar year basis have the opportunity to budget now for any increase in their next year’s budget.”—
AOGA

Response:

ADEC recognizes that some companies operate on a budget based on the calendar year. It may be difficult for such companies to adjust their budgets for fee changes that occur in the middle of their budget year. ADEC will re-draft the regulation language such that new emission user fees will not be effective until January 1, 2007, or later. This will allow companies to budget and plan to have the appropriate funds available to fully fund services of the Program.

Comment B: Fee Report be reviewed and audited by an independent third party

“...requests that ADEC have this report reviewed and audited by a qualified independent third party firm to ensure the accuracy of the financial calculations.”—
CEA and CVEA

Response:

ADEC agrees to an independent third party assessment of the Final Report. An assessment will ensure that the approach used in the development of the report and the new fees accurately included all contributing factors for fully funding the Air Permits Program. The department will commit to having the assessment done within the next two fiscal years.

Such an assessment must be funded. The May 31, 2006, Draft Fee Rate Evaluation Report did not account for the cost of a third party assessment. The cost of the assessment will need to include the expense of the qualified contactor and must account for the increases in technical and administration staff time related to the assessment. ADEC estimates the cost for the third party assessment and ADEC staff time will be \$100,000. The additional \$100,000 expense of the assessment will be included in the new emission fee rate in FY07. The emission fee includes the increase in cost for the assessment of the Emission Fee Study.

Comment C: Pursue other funding sources

“...explore...increased general funds to help offset the costs of the Title 1 program; (and) changes to Statue AS 37.10 to reflect actual costs of salary and benefits for Program employees.”—CEA and CVEA

“AOGA recognizes that the permit administration fee structure may need to be statutorily amended, given that 149% does not recover employee costs any longer due to the newly-required PERS escalating contribution. We are committed to working with DEC and other stakeholders in the original HB361 legislation to (1) determine the appropriate rate, and (2) seek legislative changes.”—AOGA

Response:

ADEC agrees that any increase in other funds for the air permit program would reduce the emission fee rate required to fully fund the program. However, statutory changes are beyond the scope of any regulation change. At this time, we are required to adopt new emission fee rates based on current statutes and funding sources, not on possible future changes to statutes and funding sources. ADEC will reevaluate the emission fee rates at least every four years, as required by statute.

ADEC will support any effort by the stakeholders to amend the statutory direct service rate or to secure additional general funds for the Title 1 permit program. ADEC will reevaluate the emission fees in conjunction with the required evaluation of the permit administration fees in FY09 and can adjust the emission fees to account for any statutory changes at that time. Commentators are encouraged to work with the department, outside of the regulatory process, to investigate and effect appropriate statutory changes to air permit funding sources.

Comment D: Fee based on annual program cost

“...requests that ADEC consider and evaluate a smaller per ton increase that would fund the Program through Fiscal Year 2008.”—CEA and CVEA

“...recommend DEC re-evaluate the level of fees which would be required only fund the program through FY08...Finally, a fundamental component of this approach includes retention of a third-party qualified to assess efficiency and to determine an appropriate fee based on that assessment and revised statutory fee authority during the second year of this phased approach.”—AOGA

“...In our comments we recommended DEC set an emission fee based on the level of fees which would be required to fund and administer the program through FY08, rather than FY10. We are not recommending that the fee sunset at that time. ...”—AOGA

Response:

ADEC recognizes that the regulated community has concerns about an emission fee rate that are based on projected costs into the future. The emission fee rate will be established in regulation for FY07, FY08, and **FY09**, based on the projected program costs for each of the individual fiscal years. The Emission fee will not be based on an average rate projected into future years. An Emission Fee based on the expected cost for each fiscal year will result in balancing the annual costs of the program with the annual expected revenue. The annual rates per fiscal year (a Title 5 and a Title 1 rate for each state fiscal year) will fully fund the Air Program to provide the required service to the regulated community.

Under AS 46.14.265, the Title 1 program funding must be financed through non-dedicated funds. Therefore, the emission fee structure must allow for all Title 1 related work to be financed through such non-dedicated funds. Relying on non-dedicated funds to support an entirely fee-based program requires attention to fund availability and timing of payments to ensure adequate finances are available to pay for the program during the beginning of the fiscal year. It could also create problems if fees are received near the end of the fiscal year, especially if the fee is for a service that will be completed the following fiscal year. Non-dedicated funds must either be completely spent by the end of the fiscal year or returned to the state's general fund. In both cases, the funds are not available for financing the specific work during the following fiscal year. An annual per fiscal year rate for Title 1 emissions provides for the fiscal management issues related to the non-dedicated funds. The funds are available in the fiscal year when the work is completed. Establishing the fee rates by fiscal year enables the Title 1 program (as well as the Title 5 program) to have appropriate levels of funds available to pay for the work as it is accomplished.

The annual rates per fiscal year will set emission fees based on the level of funding which would be required to support the program through FY07 and FY08 as requested by public comments.

The department has written regulations to enact an emission fees for FY07 based solely on the costs related to FY07. The Title 5 rate for FY07 will be less than would be required to cover the program's expenses because the department will apply \$600,000 of the existing CAPF funds toward the Title 5 fee rate. Therefore, the additional assessment required in January 2007 will be \$8.04/ton for Title 5 and \$5.02/ton for Title 1, for a combined emission fee of \$13.06/ton. This fee will be effective January 1, 2007, as per the previous comments (see Response to Comment A).

The largest annual projected work load will be in FY08, as a large number of Title 5 permits originally issued in FY03 will need to be renewed in FY08. Therefore, the funds needed to fully support the work load in FY08 will result in an increased fee rate for that year.

Beginning in FY08, the department will implement a fee of \$26.28/ton for Title 5 and \$5.52/ton for Title 1, for a combined emission fee of \$31.80/ton.

Beginning in FY09, the department will implement a fee of \$27.24/ton for Title 5 and \$6.13/ton for Title 1, for a combined emission fee of \$33.37/ton.

Under AS 46.14.260(g), the department is required to evaluate the emission fees set under this proposal in four years. However, the department plans to evaluate the emission fees by January 2009, in conjunction with the review of fixed permit administration fee study required by AS 37.10.050. This will allow for opportunities during two legislative sessions to explore other funding options before the rates are adjusted in FY09.

ADEC acknowledges that we will be hiring a contractor to do an assessment of the fee report completed in support of the current regulation change (see Response to Comment B). The contractor's analysis of the report and any recommendations they may provide will be taken into consideration by ADEC as part of the reevaluation of all fees, both emission fees and permit administration fees, which will be completed as required by AS 37.10.050. ADEC believes this should address the commenter's concerns about evaluating the fees and the program. ADEC does not plan to contract for a separate analysis of the program beyond the assessment of the fee report.

Comment E: Charge the Avoidance Group emission fees

"... pursue collecting emission fees from permit holders who have voluntarily taken a permit avoidance limit to stay out of the Title V program." - CEA

"Emission fees should be assessed for the "permit avoidance group"..." - AOGA

Response:

ADEC initially reviewed this option in the May 31, 2006, Draft Fee Report. ADEC was evaluating all sources to determine if emission fees were assessed on all sources and determine the potential revenue from those sources' emission fees. The Draft Fee Report

only looked at the Potential to Emit (PTE) tonnages of the Avoidance Group for possible emission fees revenues. The Avoidance group sources generally represent small, rural electric power generators. These smaller sources have not been assessed emission fees in the past.

ADEC further examined the equitability of charging Title 5 emission fees to these sources in response to public comments.

Assessing the full Title 5 fee to this source group is not equitable to the associated level of work. ADEC spent 304 technical hours processing 30 permit avoidance requests from February 2005 – July 2006. The direct permit administration fees collected from the Avoidance Group pay for 71% of the program’s cost associated with the group. However, the estimated revenue from emission fees (assessed on PTE) is 2000% more than is needed to cover the indirect costs of processing the requests. Table 1 outlines these expenses and revenue.

| | ORL | PAEL |
|--|-----------|-----------|
| Total work spent on avoidance (technical hours Feb 2005 – July 2006) | 278.75 | 24.75 |
| Total avoidance cost (Technical hours x \$155/technical hour) | \$43,206 | \$3,836 |
| Revenue from Direct Fees on Avoidance (Feb. 2005 to July, 2006) | \$31,840 | \$1,540 |
| | | |
| Amount of Total avoidance cost not covered by direct fees | -\$11,366 | -\$2,296 |
| Estimated Revenue from a full PTE charge on Avoidance (tons x 4 year Average fee of \$25.42/ton) | \$76,870 | \$192,404 |

Table 1 - Avoidance Group Expenses and Revenue

The initial revenue estimate was based on fees for the PTE tons. Under 18 ACC 50.410(c), a source can pay for only the actual tons emitted. It is anticipated the Avoidance sources will only pay on actual tons emitted, which would significantly reduce the anticipated revenue from that which is based on PTE. In addition, the billing and administrative cost for collecting a significantly smaller bill may exceed any revenue received.

Furthermore, assessing emission fees would require additional and costly regulation changes. Air Quality Control Regulations, 18 AAC 50.410, currently allow billing of assessable emissions to stationary sources subject to a permit. The authorization for Avoidance is not considered a permit. The Avoidance authorizations are for sources that have avoided needing for a permit. Authorizations issued under 18 AAC 50.225, 18 AAC 50.230, or 18 AAC 50.508(6) are not currently defined as a permit under 18 AAC 50.990. Including the Avoidance Authorizations in the definition of a permit would require a regulation change. The cost and time needed to enact the regulation change will not justify the anticipated increased revenue.

Based upon the additional detailed review since the release of the May 31, 2006, Draft Report and proposed regulations, ADEC will not charge the avoidance group the emission fee, on the finding that the emission fee will place an inequitable cost burden on sources which is not supported by the associated work, that would require a costly regulation change, and that associated revenues would not cover the related billing and accounting collection costs. In addition, imposing emission fees for the first time for this group would further strain the smaller communities' limited funding options.

Comment F: Title 1 funding

“The State’s statute on fee recovery for the Title 1 program should be amended so that full cost recovery is not required.”—AOGA

Response:

ADEC understands that the commentator would like to see changes in the funding structure for the Title 1 permits. Such a change cannot be done as part of a regulatory project, and is rather an issue that requires legislative action. Therefore, changes will not be made to the regulations based on a potential future change in the funding structure. Any changes that are in effect by FY09 will affect the fee analysis ADEC has committed to perform in that year (see Response to Comment C).

Comment G: Title 5 cost analysis

“We believe the estimate of hours required for Title V renewals is excessively high. The analysis performed by DEC assumed that the Program will provide the same quality of Title 5 permit services as in prior years...”--AOGA

Response:

The Fee Report did take into account Title 5 Permit Renewal work level estimates based on the historical records of Title 5 Renewals. The majority of the initial Title 5 permits were issued PRIOR to November 2003. Historical renewal data from FY03 to FY05 was used to project the technical hours needed per renewal permit action. It is anticipated that renewals will require less time than an initial new permit action. However, a review of technical hours spent on recent permit renewals indicated that some actions may require even more hours than originally predicted due to changes in federal rules or complications stemming from compliance concerns. The numbers presented within the Report represent our best estimates at this time.

The comment did not provide any specific support data. See Response to Comment B for discussion of fee study assessment that will be done. Additionally, the Department will be doing an analysis of permit administration fees in FY09, at which time a reevaluation of the emission fees is planned. As a part of that fee evaluation project, any over or under estimation of the time needed to renew permits upon which the current fees are based can be corrected and the fees recalculated accordingly.

Comment H: Opposed to increase in emission fees

“...is not in favor of these proposed increases in user fees. Within a period of four years, these fees have increased in excess of 500%. ...

When these emission fees were first instituted and subsequently increased we had asked if this was sufficient to provide for the State’s needs. The answer was a resounding yes, followed by an increase. Our resistance to this substantial increase is that we suspect, based on historical evidence, that the increases will not end here and continued increases, quite frankly, are capable of putting our industry at risk.”—

AS&G

Response:

ADEC appreciates the fact the any increase in fees affects the regulated community’s bottom line. The State is mandated by the Federal Clean Air Act to maintain the Air Quality Program in such a manner that it is self supporting. As required by AS 46.14.250, the Air Permits Program is supported by a mix of Emission Fees and Permit Administrative Fees. The analysis shows that expected fee receipts will be insufficient to fully fund the permits services as required by the Federal Clean Air Act (CAA) at the service levels desired by the public stakeholders.

When the previous emission fee rate was set, the direct permit administrative costs were based on a staff rate of \$78/hr. Since that time, statutory changes enacted by the legislature in AS 37.10 required changes to 18 AAC 50.400 which eliminated the \$78/hr. rate, established flat fee rates for some services, and decreased the direct hourly rate. The changes to 18 AAC 50.400 have reduced revenues to the program from permit administrative fees, which must be covered by an increase to the emission fees.

The emission fees study is based on projected work levels though FY10. ADEC will reevaluate the emission fee rate in conjunction with the required evaluation of the Permit Administrative Fees in FY09. Please see Sections 3.10 and 4.4 of the Emission Fee Study for a more complete discussion of the issue.

Comment I: Request for extension

“This letter requests that ADEC issue a revised, complete Public Comment Draft for another 30 day public review period. The public review document provided...during the current 30 day public review period (June 1, 2006 – July 3, 2006) were initially incomplete and were later substantially modified only a few days prior to the close of public comment on June 27, 2006.”

ADEC has provided a supplemental public notice of proposed changes to the regulations, and the public comment period was open through 5:00 PM on August 11, 2006.

The original public notice, the Fee Report, and the proposed regulations were posted on two separate web pages on June 1, 2006, (Proposed Permits-- <http://www.dec.state.ak.us/air/ap/calendar.htm>, and Regulations Information-- <http://www.dec.state.ak.us/air/ap/regulati.htm>). The Fee Report was also available on two additional pages (Air Permits-- <http://www.dec.state.ak.us/air/ap/mainair.htm>, and the Division page-- <http://www.dec.state.ak.us/air/>).

The Appendices were posted on the same four pages on June 16, 2006.

The Supplement was posted on the same pages on June 26, 2006. The supplement was not a change in structure or approach but rather it was an update to the fee rate calculation.

Copies of the current notice are available on-line at <http://www.dec.state.ak.us/air/ap/regulati.htm>.

Comment J: General comments

“Fees for air permits violates (sic) SIP portion of STIP, and section 706 of APA (Federal), and local and special acts (AK Constitution) The Federal Administrative code is not discretionary where it requires the decision to be in entirety; citing section 706 of APA (Federal). I cite reference to deficiency of giving administrative notice in a format not yet complete. ...”—Dana Olson

The Alaska Constitution and Section 706 of the Federal Administrative Procedure Act (APA) do not prevent revisions of Air Quality Control regulations in part. The Alaska Statutes (AS 46.14.250) require that emission fees be assessed on permitted facilities based on tons of air pollutants emitted and that the department shall periodically evaluate the fees and revise them as needed to cover the costs of running the Air Permits program. The proposed revisions to 18 AAC 50 reflected in this regulation revision package are intended to meet the requirements of AS 46.14.250.

Regarding whether proper public notice was given for the public comment period, see Response to Comment I.

The remaining comments received in this particular written comment document addressed other topics not related to the emission fee revisions proposed in the regulation package under consideration. Therefore, ADEC has no further response to comments.

Oral Testimony: General comments

Oral testimony was received from one commenter during the Public Hearing on June 27, 2006. The commenter was at the public hearing and entered oral testimony as well as submitted written comments. She submitted and testified on ADEC’s responsibilities to make regulatory and permitting decisions in entirety based on requirements of the Federal Administrative Procedures Act and AS 46.03.040. See Response to Comment J.

There were no direct comments regarding the proposed emission fees changes which are the topic of this regulation revision package. Therefore, ADEC has no additional response to comments received during the public hearing.