# Draft - Response to Public Comments
## Air Permit Program Fixed Fee Initiative
## Regulation Adoption Package

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Comments submitted by:
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**Issue: Refund of Renewal Fees Not Utilized:**

**The comment requested that if a company decided that it would not renew a Title V permit that any fixed annual advanced renewal fees that had been paid would be returned and that this be stated in the regulation.**

The department agrees that the pre-paid annual permit administration fees for renewal costs for permits should be returned to the owner / operator if a renewal application is not filed for a Title V permit. The department has added another paragraph to that effect within the regulation in 18 AAC 50.400(c).

**Issue: Retainers for Negotiated Service Agreements:**

**One comment stated that the $5,300.00 retainer fee for Negotiated Service Agreements was too high and that it should be lowered to $3,000.00. The comment stated that this reduced fee was more appropriate for minor permit revisions and that ADEC would not be losing any revenue from lowering the retainer as, once the hourly charges exceeded the $3,000.00, that the hourly charges could be collected as usual. Another comment objected to the $5,300.00 retainer for Negotiated Service Agreements recommending that there be no retainer at all for this process.**
The current regulations call for a $13,000.00 retainer for projects of this size. The department carefully considered the need for retainers as it was drafting the fixed fee regulations and the department has eliminated nine of the retainers currently called for in the regulations and reduced the $13,000.00 retainer down to $5,300.00.

The department believes that the commentators do not completely understand the intent of the $5,300.00 retainer. This retainer is to be used to cover the department's costs when it is preparing to enter into a negotiated service agreement for a complex permit or a construction permit for a major stationary source. The department anticipates that it will be receiving a complete application including a modeling submission and appropriate BACT determination for these types of permits. The department will be required to perform a completeness review and to make an evaluation of the completeness of and appropriateness of the modeling submission and BACT determination. Once that is completed the department must make an estimate of the

number of hours it would take for a permit writer to produce an appropriate construction permit and to evaluate the BACT determination. The department's air dispersion modeling staff must review the completeness and appropriateness of the modeling submittal and make a determination of the length of time it will take to verify the submittal. Once these hour estimates are made department staff will draw up a proposed fee schedule and timeline for the project. Then, department personnel must meet with the owner or operator to negotiate the final permit cost and agree on a schedule for its completion.

The department has estimated that it will take approximately 100 man hours of department time to perform these tasks. In the recent past, all PSD major permits required a $13,000 retainer. The $5,300.00 is a true retainer. If, for some reason, the project, including the evaluation, negotiation process and writing of the permit, takes less than approximately 100 hours, the remainder of the $5,300.00 can be refunded. Department experience has shown that the costs of all PSD permits have always exceeded the $13,000 retainer. This $5,300.00 retainer will cover the department's costs to perform the preliminary review necessary to negotiate the full costs for a PSD permit for a major stationary source. The department believes this level of retainer is appropriate for these purposes.

**Issue: Return of Unused Retainer Portions**

**The comment requested that specific language be included in the regulations to state that the unused portion of any retainer would be returned to any applicant upon the issuance of the permit.**

It is department policy and has been established in practice that unused portions of permit retainers can be refunded to permit applicants after the final permits have been issued at the request of the applicant. This policy is also confirmed in 18 AAC 50.420(i).

**Issue: Fixed Fees for permit modifications for minor sources**

**The comment requested that flat fees be established for permit modifications for minor sources.**

Fixed fees are provided for administrative revisions to minor sources in Table 11. Minor permits are modified using the minor permit procedures in 18 AAC 50.540 through 50.544. Fixed fees are provided for these procedures in Table 10. All possible modifications to minor permits are not listed in Tables 10 and 11. The department was not able to predict all of the possible modifications and set fixed fees for these. However, as the department gains experience with the new regulations for minor permits and fixed fees, there may be additional opportunities to establish fixed fees for other categories of work which are modifications of minor permits. If so, the department will then establish new fee categories in the future.

**Issue: Negotiated Service Agreements for offshore platforms**

**The comment pointed out that proposed 18 AAC 50.401(5) would have included all sources in the area of Cook Inlet when actually the section is only meant to apply to the offshore platforms in Cook Inlet.**

Additional language was added to indicate that the section was only meant to apply to the offshore platforms found in Cook Inlet.

**Issue: Table 11 Labeling Terminology**

**The comment stated that the regulations erroneously referred to permit activities in Table 11 as minor permits when they were actually different types of revisions and permit activities.**

The department agrees and has deleted the term "minor permit" from the regulatory text and referred to the activities as "services".

**Issue: Administrative Revisions for Title 1 Permits**

**The comment questioned whether a Title 1 permit could be revised by the Administrative Revision process.**

Any permit can receive an Administrative Revision.

**Issue: Fixed Fees for Excess Emission Reports**

**The comment objected to the fixed fee for submitting an excess emission report and urged the department to roll the fixed fee into an annual flat fee for compliance costs. The comment also suggested that it would cost both ADEC and the regulated entity more than $26.50 to process the fee payments and that the fees could cause companies to be less likely to report excess emissions or permit deviations.**

The department does not agree that the cost of reviewing and processing an excess emission report should be rolled into the fixed annual compliance fee. This would force companies that rarely if ever report an excess emission to subsidize companies that frequently report such emissions. Requiring that the company reporting the excess emission pay for the excess emission report review is the most correct and fair approach.

The department agrees that it might cost DEC more than $26.50 to process excess emission reports if one considers the cost of documenting the charges, invoicing and tracking the payments in addition to reviewing the reports for possible follow-up action if necessary. The department plans to review its costs for processing excess emissions and deviation reports and make necessary adjustments the next time that the fee regulations are reviewed.

With respect to the fee having a chilling effect on the submission of excess emission reports, DEC believes that the vast majority of companies will continue to make the reports as required and realize that the $26.50 fixed fee is a reasonable cost for the department's efforts to process those reports.

**Issue: Fixed Fees for Source Test Plan review and Source Test Result Review**

**The comment objected to the fixed fees for source test plan review and source test result review. The recommendation was made that these costs be rolled into the annual compliance review fee. The commentator also then commented that it is never clear when a source test is submitted whether the department has reviewed and accepted the source test result. The commentator then stated if a defective source test is repeated and results submitted a second time that a company might have to pay twice for a review that had been paid for once. A last comment implied that the department might appear to be using source test requirements in permits as a "revenue generator" for the department.**

The department is overhauling its process for reviewing source test plans and source test results. The department does plan to review and respond to these submittals, accepting them or rejecting them, in a more timely manner than what has transpired in the past. Again, the department does not agree that these costs should be rolled into the annual compliance review fees for all companies. Requiring the company that performs the source test to pay for the source test plan review and source test result review is the most correct and fair approach.

If the department reviews a source test result and finds that the test was improperly performed or that the data is defective, the source test, to be acceptable, must be repeated. This results in a second source test which must be reviewed as well. It takes the department just as much or more time to review a defective source test as it does to review a repeated successful source test. Both reviews are subject to the fixed fee.

As far as the department deliberately requiring unnecessary source testing as a "revenue generator," the department does not place requirements in permits for the express purpose of creating opportunities for receiving fees and believes it would not be ethical to do so. The only purpose for requesting source testing in a permit is to ensure that the emission unit tested is functioning in such a way that it is meeting emission standards or permit requirements. That is the only reason the department puts a source testing requirement into a permit. It is the duty of the program manager and his / her first lead supervisors to manage this issue properly to safeguard against any abuse as noted by the commentator.

**Issue: Review of fees under 18 AAC 15.190**

**The comment objected to the $110.00 fixed fee for a review of fees under 18 AAC 15.190.**

The $110.00 fixed fee for a review of fees under 18 AAC 50.190 is for staff research and preparation of information necessary for the director to review the matter. The fee is not a fee to recover the director's time costs for deliberating the appeal request. There is no fee charged for that deliberation. This fee is to be assessed after the fee review has been completed. The regulation has been changed to provide discretion for the director to waive all or part of the fee for good cause. For example, if the director's review revealed that the staff should not have levied the contested fee charges for whatever reason and therefore the petitioner's arguments of the appeal were soundly based, the director could decide to waive the entire fee since the fee appeal originated due to an action by the department which was found to be erroneously based.

The department recognizes that there can and will be accounting and clerical errors that will result in questions concerning invoices sent out by the department. Most questions and adjustments regarding invoices are handled by clerical and accounting staff on a "no-fee-to-the-customer" basis. Questions about apparent clerical or accounting errors should not go to the director as an appeal. If the customer feels that the invoice does not contain clerical or accounting errors, but contains charges that he / she concludes must be disputed, the procedures in 18 AAC 15.190 provide that appeal opportunity.

**Issue: Fees for responding to appeals or adjudicatory hearings**

**The comment objected to the department recovering its costs at 149% of staff salary for time spent responding to appeals or adjudicatory hearings brought by the permit applicant and the characterization of this activity as a "designated regulatory service."**

When an applicant disputes and appeals permit terms or conditions the department must expend time preparing a response to the appeal. The costs must be recovered in some fashion. The department believes the most fair way is to simply track the time necessary to research the issues and charge that time back to the company. This activity is just another service the department performs at the applicant's request. The appeal process is part of permitting. Many of these appeals can require extensive documentation which can be quite time consuming.

A fixed fee for this service is not within the framework of the law due to the variability in the level of effort required to respond to appeals. Since appeals are not a common occurrence it makes no sense to recover costs from all companies because the cost is not predictable. Requiring the company that initiates the appeal to pay for the department's costs is the most proper, correct and fair approach. Any other approach to recover these costs would result in the cost being borne by all permittees or through another funding source such as state general funds.

In Alaska Statute AS 37.10.058(3)(E) "direct costs" are defined as not including "costs relating to an appeal of permit issuance by a person other than the applicant for that permit." In other words, if a permit issuance is appealed by a third party, the department's costs to respond to that third party appeal could not be charged to the permit applicant.

That makes sense. But if a permit applicant is the one who appeals, it makes logical sense, that the permit applicant would bear the cost of the appeal. In the latter example, the permittee is willingly requesting a change to the permit, e.g. seeking a permit review. While in the former example, the permittee is not the party generating the agency work of the appeal and has no influence upon its outcome.

**Issue: Revisions and Pre Application Assistance Hourly Fees**

**The comment objects to the department charging for revisions to Title V permits and pre-application assistance at an hourly rate and suggests that the revisions be covered by a fixed fee. The commentator suggests that pre-application assistance be factored into the fixed costs for all permits. The commentator suggests that charging separately for pre-application assistance might have a chilling effect on persons seeking pre-application assistance from the air permitting authority.**

The department does not agree with this assessment. Due to variability in the complexity of possible revision requests, the department was unable to estimate the costs of a typical revision to a Title V permit. The department feels that by charging for revisions on an hourly basis the applicant can receive the service with the least margin for error and will pay what it actually costs the department to perform the work. Having said that, Table 10 of the proposed regulations contains a fixed fee for a minor permit which could be used to make revisions to a Title V permit. Table 11 contains fixed fees for Administrative Revisions to Title V permits. The department believes it has provided the appropriate vehicles for making these revisions with proper flexibility.

With respect to pre-application assistance, the department has been routinely charging for pre-application assistance at the $78.00 per hour rate ever since the rate was established. To our knowledge, this has never had a chilling effect on people seeking the department's advice or utilizing the department's expertise while preparing permit applications. Since it is not possible to predict exactly how much advice a company may require prior to submitting an application, the department feels that the most fair way to charge for pre-application assistance is at the hourly rate.

**Issue: Hourly rate for nonstandard compliance activity**

**The comment objects to the department charging an hourly rate for the preparation of notices of violation, compliance orders, settlement agreements and consent decrees. The suggestion is made that the costs of preparing notices of violation be included in the recurring compliance review costs and that the costs for preparing the other documents be included in negotiated fees for these types of actions.**

The department does not agree with these suggestions. The annual recurring compliance fees are strictly for the review of facility operating reports, inspection activity, review of annual compliance certifications and full compliance evaluations. These activities are performed on a scheduled basis and they are predictable with respect to duration. That is why the department has been able to arrive at a fixed fee for these activities. The other

compliance activities are more properly charged at the hourly rate since preparing these documents will depend on the particular circumstances and the time to prepare these documents is not predictable. The department believes that charging for the preparation of these documents at the hourly rate provides the most accurate and fair method of recovering its costs. If the department were to average the non-compliance work element and apply it across the board to all permittees, the department would be asking the compliant permittees to bear part of the costs for non-compliance that other permittees are generating. We believe it is a more solid principle to have a cost generator be the cost bearer. Using this policy, it is appropriate to require parties that generate unexpected work elements (work that only comes about if a compliance problem is uncovered after routine oversight is performed) to pay the cost of that work.

**Issue: Negotiated Service Agreement categories and guidance for**

**The comment urged the department to convert permit actions described in proposed 18 AAC 50.401 to fixed fees as soon as possible after obtaining sufficient experience and data concerning its costs to produce these categories of permits. The comment requested that the department provide adequate detailed guidance as soon as possible for the negotiated fee process.**

The department believes that the permits and processes identified in 18 AAC 40.401 for the Negotiated Service Agreement process are the largest and most complicated permitting efforts that will be undertaken. That is the reason they are listed as requiring Negotiated Service Agreements. If the department through experience can identify some of these permits or processes as candidates for fixed fees the department will convert the permit or process to a fixed fee the next time the fees are reviewed. While we do not currently expect to re-propose the fee regulations before the 4 year review date set in law, if it is evident that adjustments or a new rate category should be implemented, the department can do so at any time. The department agrees that it needs to provide guidance for the Negotiated Service Agreement process and that it must make every reasonable effort to ensure the success of the negotiation process for the large projects to be funded under negotiated service agreements. It is the intention of the department that the negotiated service agreement process will succeed.

**Issue: Incorrect use of the word "review" vs "revise"**

**The comment pointed out an error in the wording of 18 AAC 50.401(a) (9). The word "revise" should have appeared instead of the word "review."**

The section has been rewritten to clarify that the negotiated fee is for a major stationary source performing a major revision to permit terms and conditions.

**Issue: "Simple" vs "Complex" and classification of the Valdez Marine Terminal**

**The comment was a two part comment objecting to the adjectives "simple" and "complex" as they applied to permit administrative revisions and also to the classification of the Valdez Marine Terminal as a "complex" facility.**

The department agrees that the use of the terms "simple" and "complex" as they applied to administrative permit revisions was confusing and could have opened the door to speculation and controversy. The department has replaced these terms with references to the EPA definitions of administrative revisions in 40 C.F.R. 71.7(d).

Regarding the use of the word "complex" to describe Alyeska's Valdez Marine Terminal, the department believes that the terminal clearly qualifies as meeting the definition of a complex facility since it is the nations largest crude oil loading terminal and has nultiple sources that are regulated under various state and federal technology based emission limits. The department worked closely with the Air Permits Work Group in preparation for drafting these regulations. An Alyeska Pipeline Service Company representative fully participated in these sessions. The Work Group specifically recommended that the Valdez Marine Terminal and four other facilities, due to their size and complexity, be treated as special cases. The Work Group also recommended that the permits for these facilities be the subject of negotiated service agreements.

**Explanation of other changes made by DEC**

**Transition plan for permit applications**

A transition plan was needed to explain how the department was going to handle the fees for sources that were only part way through the permit process. Would the source be required to change over to a fixed fee, negotiated service agreement or hourly rate at 149% of the salary of the permit writer who was working on the permit, or could it continue the permit process and have the permit issued under the previous $78.00 per hour rate?

A new section of the regulations in 18 AAC 50.402 was added to say that applications received prior to the effective date of the new fee regulations, but having no action taken on them, at the request of the permit applicant, would be processed under the new fee regulations. Any retainers submitted under the old fee regulations would be credited to the project for liquidation under the new fee regulations. Another new section 18 AAC 50.400(k)11 says that for applications received prior to the effective date of the regulations where the department has already commenced work on the new permit, these will be processed under the hourly rate that will be in effect as of January 1, 2005.

**Open burning fixed fee**

Further research indicated that the fixed fee for an open burn approval was more appropriately estimated at $200.00. The time involved not only the review of the application and the writing of a specific approval notice, but also staff time to check the meteorological prognostications for the event.

The fixed fee proposed in the original rulemaking was adjusted to base the fee on 3.75 hours of effort raising the proposed fee from $110.00 to $200.00. This fee is only for open burn projects which are specifically designed to avoid smoke incursions into residential areas. A new section was added to 18 AAC 50.400(k)(10) which stated that for open burn projects where there was a possibility of the incursion of smoke into residential areas, these would have to be evaluated on a case by case basis and may require DEC staff participation in the execution of the project to safeguard against or to mitigate the magnitude of smoke impacts on residential areas. These more complex requests would be processed at the hourly rate in effect as of January 1, 2005.