

**BEFORE THE ARKANSAS COMMISSION ON
POLLUTION CONTROL AND ECOLOGY**

**IN RE: REQUEST OF THE SIERRA §
CLUB, AUDUBON, ENVIRONMENTAL §
INTEGRITY PROJECT, TO INITIATE §
RULEMAKING TO AMEND §
REGULATION NOS. 18 AND 26 §
§
§**

DOCKET NO. _____

**PETITION TO INITIATE THIRD PARTY RULEMAKING TO AMEND
REGULATION NO. 26**

COME NOW, Sierra Club, Audubon, and Environmental Integrity Project (hereinafter, "Petitioners"), and, for their request to initiate third party rulemaking, state as follows:

1. This Petition is submitted pursuant to Section 3.4 of Regulation 8 of the Arkansas Pollution Control and Ecology Commission ("APCEC"). As more fully explained below, Petitioners are requesting an amendment to the definition of the term "Air contaminant" in Regulation 26. Specifically, Petitioners are requesting the deletion of the term *carbon dioxide* ("CO₂") from the definition.

2. Regulation No. 26, Chapter 2 (Definitions) contains the following definition:

"Air contaminant" means any solid, liquid, gas, or combination thereof other than water vapor, nitrogen (N₂), carbon dioxide (CO₂), and oxygen (O₂).

3. Petitioners request that the term "carbon dioxide (CO₂)" be deleted from the definition in Regulation No. 26, as follows:

“**Air contaminant**” means any solid, liquid, gas, or combination thereof other than water vapor, nitrogen (N₂), ~~carbon dioxide (CO₂)~~, and oxygen (O₂).

A mark-up version of the proposed change is included as Exhibit A to this Petition.

4. The change is necessary in order to update the definition to reflect federal law and mainstream scientific consensus.

5. The United States Supreme Court, in addressing the issue of whether greenhouse gases, including CO₂, are considered pollutants within the meaning of the federal Clean Air Act, stated:

The Clean Air Act’s sweeping definition of air pollutant includes *any* air pollution agent or combination of such agents, including *any* physical, chemical . . . substance or matter which is emitted into or otherwise enters the ambient air §7602(g) (emphasis added). On its face, the definition embraces all airborne compounds of whatever stripe, and underscores that intent through the repeated use of the word “any.” Carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are without a doubt physical [and] chemical . . . substance[s] which [are] emitted into . . . the ambient air. The statute is unambiguous.

Massachusetts v. EPA, 127 S.Ct. 1438, 1460; 167 L.Ed.2d 248 (2007).

6. Carbon dioxide is a greenhouse gas pollutant that contributes to climate change. See, Massachusetts v. EPA, 127 S.Ct. 1438, 1447-49, 1455; 167 L.Ed.2d 248 (2007) (describing how “the scientific understanding of climate change [has] progressed” since the 1970s and discussing the evidence showing that “[t]he harms associated with climate change are serious and well recognized.”). The international scientific consensus is that the earth’s climate is changing and that human activity is a major factor.

Accelerating global climate change poses a danger to humans and the environment.¹

¹ See generally, Albritton, D.L., et al., Technical Summary, Climate Change 2001: The Scientific Basis. Contribution of Working Group I to the Third Assessment Report of the Intergovernmental Panel on Climate Change (IPCC) (2001); Epstein, P.R. and E. Mills (eds.), Climate Change Futures: Health,

7. The International Panel on Climate Change identified the following impacts as either “likely” or “very likely” to occur as CO₂ concentrations in the atmosphere increase:

- Higher maximum temperatures over most land areas;
- Higher maximum temperatures and more hot days over nearly all land areas;
- Higher minimum temperatures and fewer cold days and frost days over nearly all land areas;
- Reduced diurnal temperature range over most land areas;
- More intense precipitation events over many areas; and
- Increased summer dry conditions and associated risk of drought over most mid-latitude continents.

8. In 2000, the U.S. Global Change Research Program, a federal advisory committee created under the Global Change Research Act of 1990, released its report predicting the effects of climate change on each region of the U.S.² According to the report, effects of climate change on Arkansas are expected to be significant. Increased average temperatures, modest to fairly large increases in precipitation, and more intense rainfalls and droughts associated with El Niño and La Niña weather patterns are expected. *Id.* at 47. The Southeastern United States is prone to frequent natural weather

Ecological and Economic Dimensions (2005); Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2001: Synthesis Report (Summary for Policymakers)* (2001); Overpeck, J.T., et al., “Arctic System on Trajectory to New, Seasonally Ice-free State,” *EOS* (2005); Parmesan, C. and H. Galbraith, *Pew Center on Global Climate Change, Observed Impacts of Global Climate Change in the U.S.* (Sept. 2004); Thomas, C.D., et al., “Extinction Risk from Climate Change,” *427 Nature* 145 (Jan. 8, 2004); World Health Organization, *The World Health Report 2002* (2002); Thomas E. Downing, et al., *Social Cost of Carbon: A Closer Look at Uncertainty* (July 2005); Paul Watkiss, et al., *The Social Cost of Carbon (SCC) Review-Methodological Approaches for Using SCC Estimates in Policy Assessment, Final Report* (Nov.2005); International Panel on Climate Change, *Climate Change 2007: The Physical Science Basis, Summary for Policy Makers* (See, IPCC 2007 - Summary for Policy Makers, Exhibit B).

² National Assessment Synthesis Team, *Climate Change Impacts on the United States: The Potential Consequences of Climate Variability and Change*, U.S. Global Change Research Program, Washington DC, 2000. (See, *Climate Change Impacts on the United States: Assessment Overview, Attachment C.*)

disasters that affect human life and property. These types of weather conditions, which will increase as global climate change worsens, have already caused serious health, welfare, and economic problems in the region. For example, “[t]he southern heat wave and drought of 1998 resulted in damages in excess of \$6 billion and at least 200 deaths.” *Id.* at 48.

9. Simply put, the more CO₂ humans release into the atmosphere, the more serious the impacts on public health and the environment.

10. While Petitioners do assert that unless releases of greenhouse gas pollution, including CO₂, are curbed and significantly decreased, greenhouse gas pollution will pose significant threats to the health, welfare, and economy of Arkansas, it is important to note that this petition for third party rulemaking does *not* seek any additional new regulation of greenhouse gases.

11. With this request, Petitioners are not seeking any proposed regulation that is more stringent than federal requirements. In fact, Petitioners do not seek *any* regulatory standard, effluent limit, procedure or other requirement within the meaning of APCEC Regulation 8, Section 3.5.3.

12. The requested amendment to the definition in Regulation No. 26 would simply update the definition to reflect current mainstream scientific consensus, and would make the definition consistent with federal law.

13. The Questionnaire for Filing Proposed Rules and regulations with the Arkansas Legislative Council and Joint Interim Committee is attached hereto as Exhibit D and is incorporated herein.

14. The Financial Impact Statement is attached hereto as Exhibit E and is incorporated herein.

15. Petitioners have reviewed Act 143 of 2007 (formerly Executive Order 05-04) and have determined that the request herein does not affect small business because the proposed change simply deletes a term from the current definition, and does not propose *any* regulatory standard, effluent limit, procedure or other requirement.

16. The Economic Impact/Environmental Benefit Analysis is attached hereto as Exhibit F and is incorporated herein.

17. The Minute Order to initiate rulemaking is attached hereto as Exhibit G and is incorporated herein.

WHEREFORE, Petitioners request that the Commission initiate a rulemaking to amend Regulation 18 and 26 in the manner requested in paragraph 3 above.

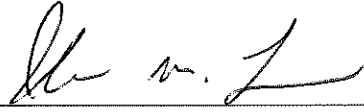
Respectfully Submitted,

Glen Hooks
Regional Representative
Sierra Club
1308 West 2nd Street
Little Rock, AR 72201

Kenneth L. Smith
Executive Director
Audubon Arkansas
Suite 450, 201 East Markham Street
Little Rock, AR 72201

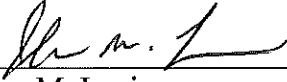
Ilan Levin
Senior Attorney
Environmental Integrity Project
1002 West Ave., Suite 300
Austin, Texas 78701
Tel. (512) 619-7287
Fax. (512) 479-8302

By:



CERTIFICATE OF SERVICE

I, Ilan Levin, state that I have, on this 16th day of May, 2008, served a copy of the foregoing document to Ms. Teresa Marks, Director, ADEQ, 5301 Northshore Drive North Little Rock, AR 72118-5317, via FedEx overnight (next business morning).



Ilan M. Levin