BEFORE THE ARKANSAS POLLUTION CONTROL & ECOLOGY COMMISSION

IN RE: PETITION BY CENTRAL ARKANSAS WATER TO INITIATE RULEMAKING TO AMEND REGULATION NO. 8, ADMINISTRATIVE PROCEDURES	))))	08-012-R

2008 OCT 23 PM 1:13

ARKANSAS DEPARTMENT OF ENVIRONMENTAL QUALITY'S RESPONSIVE SUMMARY

Pursuant to Minute Order 08-24, the Arkansas Department of Environmental Quality ("ADEQ" or "Department") submits the following Responsive Summary regarding proposed changes to Regulation No. 8, Administrative Procedures.

On July 25, 2008, the Arkansas Pollution Control and Ecology Commission ("Commission") granted ADEQ's Petition to Initiate Rulemaking to amend Regulation No. 8. The rulemaking will update and amend several sections of the regulation in order to provide clarity and greater ease of use for environmental practitioners and the general public appearing before the Commission in rulemaking and adjudicatory matters.

A public hearing was held on September 9, 2008. Nine (9) oral comments were submitted at the public hearing. The public comment period ended at 4:30 p.m. on September 23, 2008. Sixteen (16) written comments were received on the proposed changes by the end of the public comment period.

ADEQ submits the following responses to the public comments. Pursuant to Ark. Code Ann. §8-4-202(4)(C), this responsive summary will group the public comments into similar categories and explain why each category was accepted or rejected.

EXHIBIT B

Comment 1: Mr. Steve Weaver explained the history of Act 1264 of 1993 from his viewpoint as the former Chief Legal Counsel of ADEQ and a current representative of the Arkansas Environmental Federation ("AEF"). Mr. Weaver stated that the version of Act 1264 that was eventually passed was the result of negotiations with the sponsors of the legislation and that, in the fifteen years since the passage, AEF had disagreed with ADEQ on how to implement the Act. He said that the Commission appointed a subcommittee that brought together stakeholders for several meetings. Mr. Weaver stated that the subcommittee came up with new procedures and new forms, which have been included in the proposed amendments to Regulation No. 8. The Arkansas Environmental Federation endorses the proposed changes.

Response 1: ADEQ acknowledges this comment.

Comment 2: Ms. Mary Rivera stated that ADEQ was proposing to bypass economic impact statements or studies to the detriment of the local economies of the counties of the State. She expressed concern that county governments were not included in the workshops ADEQ held regarding Regulation 8. Ms. Rivera further stated that the new economic impact/environmental benefit analysis procedures and form included in the proposed amendments are of lesser quality than the current procedure.

Response 2: ADEQ acknowledges this comment but respectfully disagrees with the comment. The proposed changes to Regulation No. 8 pertaining to the economic impact/environmental benefit analysis include procedures and a form to be completed for every rulemaking initiated by the Commission unless the proposed rulemaking is specifically exempted from having to complete an analysis. The rulemakings exempt from having to complete the analysis are:

1) The proposed rule incorporates or adopts the language of a federal statute or regulation without substantive change;
2) The proposed rule incorporates or adopts the language of an Arkansas state statute or regulation without substantive change;
3) The proposed rule is limited to matters arising under Regulation No. 8 regarding the rules of practice or procedure before the Commission;
4) The proposed rule makes only de minimis changes to existing rules or regulations, such as the correction of typographical errors or the renumbering of paragraphs or sections; or
5) The proposed rule is an emergency rule that is temporary in duration.

The economic impact/environmental benefit analysis form requires proponents of the rulemaking to consider both the economic impact, which includes potential impacts to local governments, as well as the environmental benefits of the proposal. The economic impact/environmental benefit analysis procedure and form were developed by the Commission's economic impact/environmental benefit subcommittee. The subcommittee held meetings between June 2005 and August 2005. As with all Commission meetings, news releases notifying the public of these meetings were issues and the meetings were open to the public.

The subcommittee came to a consensus on a procedure to implement the requirement for an economic impact/environmental benefit analysis. The subcommittee proposed that the procedure and an accompanying analysis form be included in Regulation No. 8. This rulemaking includes the recommendations of the subcommittee, without revision.

The changes proposed by the subcommittee are consistent with the mandates of Act 1264 of 1993, which tasked the Commission with initiating rulemaking proceedings pertaining to the economic impact/environmental benefit analysis and stated that "the extent of the analysis required under [the Act] shall be defined by the Commission in that rulemaking proceeding." The Act also requires that the analysis "include a written report

which shall be available for public review along with the proposed rule in the public comment period." The analysis form found in Appendix A provides a basis for that written report.

Comment 3: Several commenters requested that the Commission require at least two legislative reviews of the proposed amendments.

Response 3: Minute Order 08-24 states, "ADEQ will submit the proposed rules to the Joint Interim Committee on Public Health and Welfare and/or the Joint Interim Committee on Administrative Rules and Regulations." It is the practice of the Public Health and Welfare Committee to require an administrative agency to present any proposed rules to the Rules and Regulations Committee before presenting the proposed rules to their committee. Thus, ADEQ is required by members of the General Assembly to have every proposed rule reviewed by two legislative committees. In addition, according to the Commission's Regulation Drafting Guidelines at Section V(B), Legislative Council, proponents of a proposed rule must coordinate with both the Public Health and Rules and Regulations Committee for legislative review.

ADEQ is scheduled to present this proposed rule to the Rules and Regulation Committee on November 6, 2008 and to the Public Health Committee on November 10, 2008.

Comment 4: Mrs. Christine Mosier stated that, generally, citizens are allowed three minutes to deliver an affirmative or opposing view to the appropriate committee or Commission. Mrs. Mosier requests that a minimum of five minutes be allowed to each individual that wishes to make a comment.

Response 4: ADEQ acknowledges this comment. It is unclear if Mrs. Mosier is requesting a minimum of five minutes for individual public comments to be applied to the hearings and meetings under this particular rulemaking docket or if she wishes to insert that requirement into Regulation No. 8.

Currently, the "Guide to Commission Operations" that is included at the end of Regulation No. 8 states (in relation to public comments at monthly Commission meeting):

> The Chairman will usually allow any person to speak for five (5) minutes during the "Public Comments" portion of the meeting but shall have the discretion to extend or reduce the five (5)-minute period of time.

At present, this provision does not have the affect of law, but is a guideline to direct the activities of the Commission. This provision is proposed to be adopted verbatim into the body of Regulation No. 8. However, this provision does not guarantee anyone wishing to submit a public comment to the Commission during the public comment portion of a regularly scheduled Commission meeting to have five minutes for that comment. This provision clearly gives the Chairman the discretion to extend or reduce that amount of time. If there are many persons seeking to submit public comments or if the comments are repetitive, the Chairman may seek to reduce the amount of time allowed each speaker.

The Minute Order submitted by ADEQ in this rulemaking, and approved by the Chairman, does limit those persons wishing to submit public comments on the final version of the rule to a maximum of three minutes at the regularly scheduled Commission meeting where the proposed rule is presented for final adoption. Many persons, including the private bar, industry, and public citizens,

are interested in this rulemaking and the Chairman of the Commission has the discretion to extend or reduce the time limit for oral comments, as he deems necessary.

Finally, there were no time limits placed on any oral or written comments submitted during the public hearing on this proposed rulemaking.

Comment 5: Mr. Stan Jorgensen requested that Regulation 8.602 be amended to no longer require corporations to be represented by an attorney in any adjudicatory proceeding. Mr. Jorgensen wants this change because he feels that it imposes a heavy burden on small businesses. He stated that small manufacturers often are not aware of when they reach a point when they are regulated and such situations can easily become enforcement actions. If ADEQ issues a Notice of Violation ("NOV") and the incorporated small business wants to request a hearing on that NOV, the owner will be required to hire an attorney. Mr. Jorgensen states that the cost of legal representation is often more expensive than the penalty proposed by ADEQ and the owner will agree to pay the penalty, even if no crime has been proven.

Mr. Jorgensen compared Reg. 8.602 to a similar provision in the Arkansas Administrative Procedures Act, which allows a corporation to be represented by an attorney, or to appear in person, at an adjudicatory hearing. He also suggested that this provision could be applied to small businesses only and offered the U.S. Government Services Administration definition of "small business" as an example.

Response 5: ADEQ acknowledges this comment but believes a corporation must be represented by an attorney in an adjudicatory proceeding before the Commission. Although individuals may represent themselves, corporations must be represented by licensed attorneys. *All City Glass and Mirror, Inc. v. McGraw Hill Information Systems Co.*, 259 Ark. 520, 750 S.W.2d 395, (1988); see also Ark. Code Ann. §16-22-211.

"[T]he practice of law is not confined to services by an attorney in a court of justice; it also includes any service rendered outside of courts and unrelated to matters pending in the courts." *Undem v. State Board of Law Examiners*, 266 Ark. 683, 692, 587 S.W.2d 563, 568 (1979). An adjudicatory proceeding before the Commission is a trial-type proceeding. A party will be required to file pleadings, motions, briefs, take depositions, answer interrogatories, introduce evidence on the record during the hearing, cross-examine witnesses and otherwise proceed in much the same manner as one would when appearing before any court of record in Arkansas. ADEQ believes that the litigation process constitutes the practice of law before courts of the State in accordance with *Undem* and, therefore, corporations be represented by licensed attorneys.

Comment 6: Mr. Michael O'Malley, Administrative Hearing Officer for the Commission, submitted the following proposed revision to Reg.8.606:

(C) A facsimile or electronic mail sent by midnight central time shall be the effective filing date for a pleading or other document. ~~The effective filing date for a pleading or other document shall be the date it is received by the Commission while the office is open for business. The effective filing date for a~~

~~pleading or other document received when the Commission office is closed shall be the next business day.~~

Mr. O'Malley proposes this revision to offer more flexibility in filing deadlines. This comment is also supported by Beaver Water District.

Response 6: ADEQ agrees with this comment and will change Reg.8.606 accordingly.

Comment 7: Mr. O'Malley also proposes the following change to Reg.8.619:

(B) Copies of ~~Documents for Commissioners~~ Request

A party must file an original and ~~twenty-five (25)~~ three copies of the request or response to a request, unless the Administrative Hearing Officer or the Commission Secretary requires a different number.

Mr. O'Malley proposes this change because the Commission has implemented paperless distribution of its agenda and accompanying materials. Thus, twenty-five paper copies are no longer necessary. This comment is also supported by Beaver Water District.

Response 7: ADEQ agrees with this comment and will change Reg.8.619 accordingly.

Comment 8: The Friends of the North Fork and White Rivers, Inc. ("FNFWR") recommend modification of the language in 8.204(D)(4)(b)(iii) that states that an applicant's history of non-compliance shall not be considered if those matters were settled by a consent order and they complied. FNFWR proposes to add "unless applicant has multiple instances of the same violation or has failed to file for a permit on multiple occasions." FNFWR notes that there are instances where

applicants repeatedly do not file for permits and then when caught, they file, sign a CAO and pay a relatively small penalty.

Response 8: ADEQ acknowledges the comment but believes that FNFWR concerns can be answered by the existing regulation. In following Reg.8.204(D)(b), the Director would look not only at "a history of non-compliance" but, also, "a pattern of disregard for state or federal laws or regulations." The section that FNFWR cites above focuses only the first part of that equation, the history of noncompliance. The Director may look at multiple instances of failing to obtain a permit as a "pattern of disregard" for state laws, which could serve as a separate basis for denying the permit application or renewal request.

Comment 9: FNFWR makes a general proposal that website links to relevant applications, rulings, orders, CAOs, rulemaking petitions, etc., be included in public newspaper notices. FNFWR recommends that email addresses for comments be included across the board when publication is provided. For instance, the public notices for draft and final permitting decisions (Reg.8.205 and 8.207) could include links to the department information or the person to whom requests for hearing should be directed. There could also be a link to a permit application on ADEQ's website or to full draft decision. This would save FNFWR time and ADEQ the headaches of having to send these documents on request, although that service should be continued as well.

Response 9: ADEQ acknowledges this comment. The Department continually seeks to make its website and public information more accessible to the public.

but this comment is best addressed as part of the daily operations of the Department, rather than as a requirement in Regulation No. 8.

Comment 10: FNFWR also suggests a web site where someone could sign up to receive all notices from certain departments or all departments automatically. These could also be categorized by county so someone could subscribe to all public notices for those counties.

Response 10: ADEQ acknowledges this comment. The Department continually seeks to make its website and public information more accessible to the public, but this comment is best addressed as part of the daily operations of the Department, rather than as a requirement in Regulation No. 8.

Comment 11: FNFWR proposes to add to Reg.8.209(B)(1) that "The Department will briefly explain the subject matter of the hearing, answer questions and receive oral public comments...." FNFWR finds that the Department is moving to a model where ADEQ holds public information meetings and then citizens can ask for a hearing or just make comments. FNFWR supports this model. In some meetings, the facilitators will not answer any questions. The distinction between information meetings and comment periods is not clear and creates a mood of misunderstanding. Perhaps more clarity in the notices and purposes of these meetings would help avoid confusion.

Response 11: ADEQ acknowledges this comment. The Department strives to inform the public on permitting decisions and about public hearings. The Department believes that it is important to maintain flexibility in order to maximize public participation in permitting decisions.

Comment 12: FNFWR notes that Reg.8.211(B) provides that a final decision is effective the day it is placed in the mail and the appeal period begins to run that day. Thus, the appeal time is running before people actually receive the ruling. FNFWR also suggests a link to the permitting decision be required as an addition to (C)(3).

Response 12: ADEQ acknowledges the comment but believes the effective date provides consistency and certainty for all interested parties who wish to appeal a permitting decision. If the effective date was when the interested parties received the mailing there would be no way to determine an effective date, as multiple parties would receive the mailing on different days. The adjudicatory review process must work on a date certain to proceed efficiently; therefore, the mailing date is set as the date the permitting decision becomes effective.

Additionally, Ark. R. App. P. 4 states, "[A] notice of appeal shall be filed within thirty (30) days *from the entry of the judgement, decree or order appealed from*." (emphasis added). The effective date of a final permitting decision is analogous to the entry date of a court's judgment, in that the judgment is entered and the time for appeal begins to run before it is served on the parties.

ADEQ cannot be certain if FNFWR's reference to (C)(3) applies to Reg.8.211(C)(3), but assumes that it does. As stated above, the Department seeks to provide adequate information to the public regarding permitting decisions and public hearings but this comment is best addressed as part of the daily operations of the Department, rather than as a requirement in Regulation No. 8.

Comment 13: FNFWR states that Reg.8.216 has been a real problem for their group. FNFWR understands that this regulatory language is consistent with the State statute, but this also creates conflicts with other powers of the Commission to hear and decide appeals. Under this provision, interim authority (immediate permission) and temporary variances to do something otherwise prohibited are not "stayed" while an immediate appeal is taking place. FNFWR would like to see a direct appeal to the Chairperson of the Commission, as provided in 8.612. Immediate notice would need to be provided to commenters who could then ask that 8.612 be invoked and a stay of the Director's decision put in place. This would avoid frivolous stays yet prevent irreversible damage through due process.

Response 13: ADEQ acknowledges this comment. The Department does not have the authority to create an appeal procedure that conflicts with the statute.

Comment 14: FNFWR recommends that Reg.8.701 be changed to provide that interim authority and temporary variances are final orders and subject to immediate appeal to the Commission as provided in Reg.8.612. This would allow a stay to be invoked in a timely fashion where irreversible activity is being allowed. Granting authority outside the usual statutory appeal process in these instances allows activity to begin immediately and, therefore, some sort of review should be available immediately as well.

Response 14: ADEQ acknowledges the comment.

Comment 15: FNFWR recommends that Reg.8.803(D) include a requirement that a link to the draft regulation on the ADEQ website be included in the notice.

Response 15: ADEQ acknowledges the comment. The Department continually seeks to make its website and public information more accessible to the public, but this comment is best addressed as part of the daily operations of the Department, rather than as a requirement in Regulation No. 8.

Comment 16: FNFWR states that the economic impact/environmental benefit analysis looks like a balanced approach, assuming that we are making these decisions based on a modern understanding of the value of our natural resources and a healthy biosphere as an integral part of our lives, our economies and our future.

Response 16: ADEQ acknowledges the comment.

Comment 17: Ms. Phyllis Moore requests that Asbestos Certification Renewal applications be added to the exemption list for submittal of a disclosure statement. Ms. Moore states that the proposed exemption list includes wastewater operator and solid waste landfill operator licenses. The individuals applying for renewal of asbestos certificates would be similar in that they are primarily employees of a facility, such as a state and federal facilities or of contracts and consultants that must submit License Disclosure Forms.

She states that the revised disclosure form does not solve the problem in that the current form must be notarized, and the last date of the disclosure form submittal. Most persons do not remember the last disclosure form date. Completing the form and having it reviewed by ADEQ is a time consuming process both for the individual and the ADEQ staff.

It is Ms. Moore's understanding that one opposition to the exclusion involves verifying of a persons identity. It would appear that should be done and is done by the completion of the application form.

Response 17: ADEQ accepts this comment and will revise Reg.8.204(C)(7)(a) accordingly.

Comment 18: Rep. James Norton stated that §1.1.2 of the existing Regulation No. 8 has been stricken and should be put back in. This is the stated intent of Regulation No. 8 and is used legally to interpret any provision in question. This section is well written and I would think ADEQ would certainly want this left in. Rep. Norton notes that there is an intent section at the end of the regulation which is not adequate.

Response 18: ADEQ acknowledges this comment. Although it is questionable to what extent the intent section is used to interpret Regulation No. 8, ADEQ agrees that the section should be retained, with the following amendment. The phrase "a substantial interest and concern" will be replaced with "standing."

Comment 19: Several commenters requested that language in Reg.8.812(A), Economic Impact and Environmental Analysis Requirements, be changed. They want to see the words "reasonably available" be replaced with "credible data and information along with suitable references." The commenters state that these regulations affect the lives of many of the State's citizens and that the objective of the economic impact/environmental benefit analysis is not to be easy, but to be complete, credible and meaningful. The analyses should be backed by accurate financial and verifiable sound scientific data, in order to make the correct and fair decision on a regulation change or a new regulation.

Reasonably available is not a high enough standard for these purposes. The commenters also request that the same language be inserted in Appendix A, Step 1, No. 2.

Response 19: ADEQ acknowledges the comment but, respectfully, disagrees. To avoid confusion in interpretation of a regulation, the drafters of regulations should choose words that have clear, consistent meanings. The phrase "reasonably available" is found throughout statutes and regulations. Courts have interpreted this phrase to determine if a certain set of data meet the requirement. Including this phrase in Regulation No. 8 offers certainty to the practitioners and the public that use the regulation that a court can readily interpret the requirements of the regulation and apply the plain meaning of the phrase to the facts at hand.

Comment 20: Several commenters requested that Reg.8.812, Economic Impact and Environmental Benefit Analysis Requirements, remain as written in the former sections 3.5.1 and 3.5.3. The former sections included the phrase, "more stringent than Federal law requires." Commenters state that this is necessary because this is the language specified by Act 1264 of 1993 and should be left in the regulation until the Legislature changes it.

Response 20: ADEQ acknowledges the comment but respectfully disagrees. As Mr. Steve Weaver stated, on behalf of the Arkansas Environmental Federation, after the passage of Act 1264, there were many disagreements between the Department and the Federation regarding the interpretation of the phrase, "more stringent than Federal law requires." (See Comment I above). To move forward with implementation of this Act, the Commission convened a subcommittee to look at the economic impact/environmental benefit analysis and the requirements of Executive Order 05-04. (See the Commission

website for detailed records of this subcommittee, http://www.adeq.state.ar.us/commission/economic_impact_env_benefit_analysis.htm).

Based on the recommendations of the subcommittee, to resolve this ongoing issue, the proposed amendments to Regulation No. 8 would remove this language. The inclusion of the phrase, "more stringent than Federal law requires," actually limits the number of proposed rules that would be subject to the economic impact/environmental benefit analysis. Thus, the removal of this phrase is intended to expand the scope of the regulation by requiring an economic impact/environmental benefit analysis for all rulemakings, unless specifically exempted under one of the five exemptions listed in Reg.8.812(A)(1)-(5).

Comment 21: Several commenters requested that language be added to Reg.8.812 and the corresponding section of Appendix A to clarify that only those Federal laws and regulations applying to Arkansas are applicable for the exemption from the economic impact/environmental benefit analysis requirement. Two separate options for the added language were offered by commenters, but the intent was the same:

1) Add "which the state of Arkansas is subject to," after the words "Federal statute" and "Federal regulation," or
2) Add "mandated" before the phrases, "federal statute or regulation" and "Arkansas state statute or regulation."

Commenters note that there are some Federal laws and regulations which only apply to certain States. This clarification will make it clear that only those Federal laws and regulations applying to Arkansas are applicable for this exemption.

Response 21: ADEQ acknowledges the comment but disagrees with the proposed change. Ark. Code Ann. §8-1-203 governs the authority of the Commission to promulgation administrative regulations. The Commission has the power to issue rules and regulations "implementing the substantive statutes charged to the Arkansas Department of Environmental Quality for administration." Ark. Code Ann. §8-1-203(b)(1)(A)). If state or federal law mandates that the Commission adopt certain regulations, those regulations must be adopted regardless of the economic impact or environmental benefit. The inclusion of this language was discussed at the August 25, 2005 meeting of the Commission's subcommittee on the economic impact/environmental benefit analysis and, after hearing from the public, the subcommittee recommended not including this language.

Comment 22: Rep. James Norton requested that Reg.8.812(D) be omitted, as this may not be adequate in some cases. Everything pertinent should be required, even if not included in Appendix A, and this requires an individual assessment on each proposed rule.

Response 22: The Economic Impact/Environmental Benefit Analysis is intended to balance the duty of the Commission and ADEQ to protect the environment of the State with the economic realities of environmental regulation. This analysis is not meant to look solely at economic or environmental factors but to provide an opportunity to address both interests.

A diverse subcommittee was convened by the Commission to look at this analysis. That subcommittee, after several meetings, came to a consensus on a procedure to implement this requirement. The subcommittee proposed that the procedure, and an

accompanying analysis form, be included in Regulation No. 8. This rulemaking includes the recommendations of the subcommittee, without revision.

Furthermore, the proposed rulemaking is consistent with the mandates of Act 1264. The General Assembly tasked the Commission with initiating rulemaking proceedings to implement the economic impact/environmental benefit analysis requirement. The Act stated that "the extent of the analysis required under [the Act] shall be defined by the Commission in that rulemaking proceeding." The Commission charged its subcommittee in 2005 with developing a revised procedure. That sub-committee has proposed the extent of the analysis that is included in this rulemaking.

The Act itself only requires that the analysis "include a written report which shall be available for public review along with the proposed rule in the public comment period." The analysis form found in Appendix A provides a basis for that written report. A complete analysis must answer each of the questions contained in Appendix A.

Comment 23: Several commenters requested that additional language be added in Reg.8.813, Evaluation of Economic Impact/Environmental Benefit, related to when a new economic impact/environmental benefit analysis would be required for revisions of the proposed rule based on public comments. Those comments stated that entities impacted by a proposed rulemaking, not ADEQ, be the ones to decide if a contemplated change to the proposed rulemaking is a "logical outgrowth" or if it is a substantive change which would require a new economic impact/environmental benefit analysis.

Response 23: ADEQ disagrees with this comment. Additionally, a basic canon of statutory, and regulatory, interpretation is that courts will give plain meaning to words and phrases found in the regulation. See, e.g., *Price v. Thomas Built Buses, Inc.*, 370

Ark. 405, 408, 260 S.W.3d 300, 303 (2007). To avoid confusion in interpretation of a regulation, the drafters of regulations should choose words that have clear, consistent meanings. The phrase "logical outgrowth" has been well defined by many courts. Ark. Code Ann. §8-4-202(d)(3)(A) gives the authority for making the determination of whether or not an amendment is a "logical outgrowth" of the noticed rulemaking to the Commission.

Comment 24: Mrs. Connie Burks requests that the Commission suspends the current in-agency revision of Regulation No. 8, until a proper procedure for this revision of this regulation (which differs from all other PCE Regulations) can be put in place. Mrs. Burks states that any revision or rearrangement of Regulation No. 8 should be conducted by one or more outside and/or public legal services who could compare notes, and provide check and balance to each other, as well as between the agency and the public. She notes that those outside reviewers should be unbiased professionals, trained in constitutional law, and whose task it would be to bring lawful balance and approval between the public and enforcement of environmental law as administered by ADEQ/PCE. The list of outside reviewers should be chosen or appointed by the legislative interim committee from a list of legal specialists supplied or approved by the counties.

Response 24: ADEQ disagrees with this comment because the Commission's rulemaking process follows Arkansas law. Ark. Code Ann. §8-1-203(b)(3) states, "The commission's power and duties shall be as follows...Promulgation of rules and regulations governing administrative procedures for challenging or contesting department actions...." Likewise, Ark. Code Ann. §8-4-202 sets out the basic procedures for

promulgating rules and regulations, as does Regulation No. 8. The Commission has initiated this rulemaking in conformity with state law and its own procedures.

Comment 25: Mrs. Burks also requests that ADEQ's legal budget be divided between staff attorneys that represent ADEQ and a fund to pay the fees of independent attorneys retained for the defense of the public when there arises litigation between the agency and the private sector as a result of alleged regulatory harm.

Response 25: ADEQ acknowledges this comment; however, this comment is outside the scope of the proposed amendments to Regulation No. 8 and does not require a response in this document.

Comment 26: Mrs. Burks also questions why the public is not allowed to write the rules in Regulation No. 2.

Response 26: ADEQ acknowledges the comment. While the comment is outside the scope of the proposed amendments to Regulation and does not require a response in this document, the Department notes that the Federal Water Pollution Control Act (Clean Water Act) charges the States with reviewing and updating water quality standards every three years. In addition, the Arkansas Water and Air Pollution Control Act and Regulation No. 8 provide an opportunity for any person to petition the Commission issue, amend or repeal any rule or regulation.

Comment 27: Mrs. Connie Burks requests that an education process be required for the Commission to be fully and individually educated as to their responsibilities in every matter presented by the Department, so that the Commission does not have to depend upon the Department's advice.

Response 27: ADEQ acknowledges the comment. This comment pertains to the operations of the Commission and the Department, not the proposed amendments to Regulation No. 8 and does not require a response in this document.

Comment 28: Mrs. Connie Burks states that the new proposed form for the economic impact/environmental benefit analysis [found in Appendix A] is a very simplified, condensed exercise that in no way would reveal the specific and significant individual impacts to people, counties, municipalities, homes, farms, roads, small businesses, etc. that potential rulemakings may cause in the future. Mrs. Burks states that the proposed form does not meet the original intent of Act 1264 of 1993 for a true exhaustive analysis as opposed to a generic form. The requirement for an analysis has the effect of protecting the public from oppressive regulatory harm.

Response 28: ADEQ acknowledges this comment but respectfully disagrees with the comment. The proposed changes to Regulation No. 8 pertaining to the economic impact/environmental benefit analysis include procedures and a form to be completed for every rulemaking initiated by the Commission unless the proposed rulemaking is specifically exempted from having to complete an analysis. The rulemakings exempt from having to complete the analysis are:

1) The proposed rule incorporates or adopts the language of a federal statute or regulation without substantive change;
2) The proposed rule incorporates or adopts the language of an Arkansas state statute or regulation without substantive change;
3) The proposed rule is limited to matters arising under Regulation No. 8 regarding the rules of practice or procedure before the Commission;
4) The proposed rule makes only de minimis changes to existing rules or regulations, such as the correction of typographical errors or the renumbering of paragraphs or sections; or
5) The proposed rule is an emergency rule that is temporary in duration.

The economic impact/environmental benefit analysis form requires proponents of the rulemaking to consider both the economic impact, which includes potential impacts to local governments, as well as the environmental benefits of the proposal. The economic impact/environmental benefit analysis procedure and form were developed by the Commission's economic impact/environmental benefit subcommittee. The subcommittee held meetings between June 2005 and August 2005. As with all Commission meetings, news releases notifying the public of these meetings were issues and the meetings were open to the public.

The subcommittee came to a consensus on a procedure to implement the requirement for an economic impact/environmental benefit analysis. The subcommittee proposed that the procedure and an accompanying analysis form be included in Regulation No. 8. This rulemaking includes the recommendations of the subcommittee, without revision.

The changes proposed by the subcommittee are consistent with the mandates of Act 1264 of 1993, which tasked the Commission with initiating rulemaking proceedings pertaining to the economic impact/environmental benefit analysis and stated that "the extent of the analysis required under [the Act] shall be defined by the Commission in that rulemaking proceeding." The Act also requires that the analysis "include a written report which shall be available for public review along with the proposed rule in the public comment period." The analysis form found in Appendix A provides a basis for that written report.

Comment 29: Mrs. Connie Burks notes the three minute time limit contained in the Minute Order adopted on July 25, 2008 is in conflict with the current Guide to

Commission Operations, as well as the proposed Reg.8.906(B). Mrs. Burks asks how can a Minute Order have the authority to override the provision of the Current Guide to Commission Operations?

Response 29: ADEQ acknowledges this comment. Currently, the "Guide to Commission Operations" that is included at the end of Regulation No. 8 states (in relation to public comments at monthly Commission meeting):

> The Chairman will usually allow any person to speak for five (5) minutes during the "Public Comments" portion of the meeting but shall have the discretion to extend or reduce the five (5)-minute period of time.

At present, this provision does not have the affect of law, but is a guideline to direct the activities of the Commission. This provision is proposed to be adopted verbatim into the body of Regulation No. 8. However, this provision does not guarantee anyone wishing to submit a public comment to the Commission during the public comment portion of a regularly scheduled Commission meeting to have five minutes for that comment. This provision clearly gives the Chairman the discretion to extend or reduce that amount of time. If there are many persons seeking to submit public comments or if the comments are repetitive, the Chairman may seek to reduce the amount of time allowed each speaker.

The Minute Order submitted by ADEQ in this rulemaking, and approved by the Chairman, does limit those persons wishing to submit public comments on the final version of the rule to a maximum of three minutes at the regularly scheduled Commission meeting where the proposed rule is presented for final adoption. Many persons, including the private bar, industry, and public citizens, are interested in this rulemaking and the Chairman of the Commission has the

discretion to extend or reduce the time limit for oral comments, as he deems necessary.

Finally, there were no time limits placed on any oral or written comments submitted during the public hearing on this proposed rulemaking.

Comment 30: Mrs. Connie Burks and Mrs. Edith Heath request that the Commission read every one of the original written comments submitted about the proposed rulemaking before making a final decision and before ADEQ prepares the responsive summary.

Response 30: ADEQ acknowledges the comment.

Comment 31: Mr. Allan Gates requests the proposed definition of "Adjudicatory Proceeding" in Reg.8.103(B) be deleted and the existing definition be retained. Mr. Gates states that the distinction between adjudicatory proceedings and rulemaking proceedings is an important principle in administrative law. Although the current definition of the term may seem awkward, it closely tracks the definition commonly found in the federal and state Administrative Procedures Acts. While these statutes are not directly applicable to ADEQ and the Commission, the proposed definition could cause confusion in some areas where the boundary between rulemaking proceedings and adjudicatory proceedings is uncertain.

Response 31: ADEQ acknowledges this comment but disagrees with retaining the existing definition. ADEQ agrees that the federal and state Administrative Procedures Acts are not directly applicable to ADEQ and the Commission. The Department does not find that the definitions found in those statutes closely track the existing definition.

Comment 32: Mr. Allan Gates requests the Commission consider adding language to the Disclosure Statement requirements in the revised version of Regulation No. 8 which would direct the Department to preserve the confidentiality of personal information which could be abused, such as social security numbers. Mr. Gates understands that the Department already provides such protection to the social security numbers and tax ID numbers as a matter of discretionary practice. Mr. Gates believes that applicants confronted with the requirement of submitting disclosure statements would take comfort if Regulation No. 8 explicitly required such protection.

Response 32: ADEQ acknowledges the comment and understands the concerns of applicants that must submit personal information on required disclosure forms. The Federal Privacy Act, 5 U.S.C. § 552(a) specifically forbids the release of social security numbers. The Arkansas Attorney General's office has consistently relied on the Federal Privacy Act when it has opined that public entities who release public records in response to a request under FOIA should delete or redact individuals' social security numbers prior to the release of the records. Ark. Op. Att'y Gen. No. 99-011, *See also*, Ops Att'y Gen. Nos. 95-262; 93-114.

However, as a general rule, administrative regulations and local ordinances cannot exempt records from FOIA. Ark. Op. Att'y Gen. No. 92-025. Thus, the Department has to balance privacy requirements with the public's right to access governmental records. In some situations, regulations may block disclosure if promulgated or passed pursuant to express legislative authority; for example, Ark. Code Ann §15-58-503(c) authorizes the Commission to regulate access to coal exploration and other information. However, a similar provision has not been enacted in regard to disclosure statements under Ark. Code

Ann. §8-1-106. The Commission cannot pass regulations exempting certain information from disclosure without a statute expressly authorizing such.

Comment 33: Mr. Allan Gates requests that the Commission delete the phrase "an aggrieved party" from Reg.8.702(A) and replace it with the phrase "an appellant" so that the language will more closely follow the statutory provisions of Ark. Code Ann. §8-4-223(a)(1). Mr. Gates believes that the use of the term "an aggrieved party" in the revision quoted above could give rise to confusion over who has standing to appeal a final decision of the Commission. Mr. Gates notes that the question of who has standing to appeal a Commission decision has arisen more than once in the past and that following the statutory language more closely would avoid any suggestion that the Commission intends to alter the current legal status quo regarding who has standing to appeal to circuit court.

Response 33: ADEQ agrees that "an appellant" more closely follows the statutory language and the change will be made. ADEQ disagrees with Mr. Gates' comments regarding who has standing to appeal in circuit court, as no court of last resort has considered this question.

Comment 34: Beaver Water District states that the newly added definition of "Administrative Permit Amendment" at Reg.8.103(F) may be appropriate for some kinds of permits, but it overlaps and conflicts with the definition of "minor modification" for NPDES permits at 40 C.F.R. §122.63 as incorporated by reference in APCEC Reg. 6.104(A)(3). This definition should be revised to state that it does not apply to NPDES permits.

Response 34: ADEQ acknowledges the comment but disagrees with the proposed change. The distinction between "administrative permit amendment" and "minor modification" found in Regulation No. 8 is consistent with the definitions found in Regs. 9, 18, 19, and 26. Essentially, instead of conflict, some minor modifications may also qualify as administrative permit amendments. In regards to Regulation No. 9, Permit Fees, if minor modifications are determined to be administrative permit amendments, currently, no permit modification fee is charged.

Comment 35: Beaver Water District states that the definition of "Minor modification" in Reg.8.103(W) should be revised to include the following bolded language: "Minor modification" means a revision of a permit as defined by any other **applicable** regulation or, **in the absence of a such a regulation**, as determined by the Department...." The District notes that the proposed definition could conflict with federal regulations regarding NPDES permits.

Response 35: ADEQ acknowledges the comment but disagrees with the proposed change. See Response 32 above.

Comment 36: Beaver Water District states that the wording of Reg.8.204(A), Non-compliance Determination, is unclear. The District asks, "To whom does the phrase 'which he or she deems appropriate' refer? Is it the Director?" The District notes that this provision also seems to overlap and potentially conflict with Reg.8.204(D).

Response 36: ADEQ acknowledges the comment and disagrees that this provision overlaps and conflicts with Reg.8.204(D). In Reg.8.204(A), the phrase "which he or she deems appropriate" does refer to the Director. Reg.8.204(A) is a broad statement of

purpose for the section that works in conjunction, not conflict, with the more specific procedures of Reg.8.204(D).

Comment 37: Beaver Water District states that Reg.8.204(C)(5), regarding abbreviated disclosure requirements, should apply to persons or entities seeking a permit modification as well as to those seeking a renewal of an expiring permit, license, certification or operational authorization.

Response 37: ADEQ acknowledges this comment but notes that the statutory authority for this section, Ark. Code Ann. §8-1-106(b), does not apply the disclosure statement requirements to permit modifications. The Department does not find that the intent of the statute includes permit modifications. The intent of the statute is to prevent applicants with a history of non-compliance or a pattern of disregard for state and federal laws from being able to obtain a new permit or having a permit transferred to them. As a general rule, denial of a permit modification addresses the requirements of an already issued permit.

Comment 38: Beaver Water District questions the advisability of exempting eleven categories of permits, licenses, certifications and operational authorizations from the requirement to submit a disclosure statement. All of the listed activities or entities have the potential to adversely impact the environment, and it seems reasonable and appropriate that both ADEQ and the public continue to have the opportunity to review the disclosure information mandated by A.C.A. §8-1-106. For the six categories that involve permit modifications and license renewals, however, Beaver Water District believes that the application of Reg.8.204(C)(5) to those categories would be sufficient to protect the public interest.

Response 38: ADEQ acknowledges the comment but will retain the exemptions in the regulation. The Director retains the discretion to require a disclosure statement from anyone included in an exempted category through Reg.8.204(C)(7)(b) which states, "The exemption from the requirement to submit a disclosure statement shall not be construed as a limitation upon the authority of the Director to request any information he or she deems appropriate that may relate to the competency, reliability, or responsibility of the applicant and affiliated persons."

Comment 39: Beaver Water District states that ADEQ may want to consider revising Reg.8.204(D) to cover permit modifications by adding the following words shown in bold: "The Director may deny the issuance or transfer **or modification** of any permit, license, certification or operational authority if the Director finds:...." Although permit modifications aren't explicitly covered in A.C.A. §8-1-106, it seems consistent with the statute that they be included. On the other hand, ADEQ may want to consider whether 8.204(D) unnecessarily goes beyond the statute in specifying the criteria that the Director shall and shall not consider when making a discretionary decision to deny the issuance or transfer of any permit, license, certification or operational authority.

Response 39: ADEQ acknowledges the comment but will not make any changes at this time. See Response 35 above.

Comment 40: Beaver Water District requests Reg.8.205(B) and 8.207 be revised to require that the public notice of a permit application contain the address of the proposed facility, in addition to containing the business address of the applicant and the city, town or community nearest to the proposed facility. The notice also should include the surface water body nearest to the proposed facility or, where applicable, the receiving stream for

the proposed facility. Additionally, the public notice should contain the specific day, month, and year that any comments or requests for a public hearing are due (sometimes it is difficult to ascertain the date a notice was published, particularly when accessing the notices on ADEQ's website). This information is not burdensome for the applicant to provide and it will enable the public to identify applications of interest.

Response 40: ADEQ acknowledges this comment and strives to inform the public on permitting decisions and about public hearings; however, ADEQ will not make any changes at this time.

Comment 41: Beaver Water District requests that Reg.8.206 be revised to provide for the submission of comments on a permit application (the proposed regulation only provides that an interested party may make a request for a public hearing on the permit application). An interested person may have comments to submit irrespective of whether a public hearing is desired or warranted. If this requested revision is made, Reg.8.205 will need to be revised accordingly. Also, any comments submitted would need to be addressed by the process for comments received on draft permits.

Response 41: ADEQ disagrees with this comment. Reg.8.206 closely tracks the statutory language of Ark. Code Ann. §8-4-203(c). The intent of the statute is to give public notice of a permit application so that interested persons may request a public hearing on the application. In addition, interested persons are given an opportunity to submit written comments on draft permitting decisions. One of the purposes of submitting written comments on the draft permitting decision is to bring to the attention of the decision-maker any issues not considered. Under Regulation No. 8, submitting written comments on the draft permitting decision also preserves a party's right to appeal

the final permitting decision. Adopting a procedure that includes two formal comment periods (that require written responses from the Department) could create confusion among practitioners and the public as to whether or not an interested party had submitted a comment to preserve their right to appeal.

Submitted by:

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