

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

In the Matter of Regulation No. 18,  
Arkansas Air Pollution Control Code  
Third Party Rulemaking

DOCKET No. 08-005-R

And

In the Matter of Regulation No. 26,  
Regulation of the Arkansas Operating  
Air Permit Program Third Party Rulemaking

DOCKET No. 08-006-R

**COMMENTS ON THE PETITIONS FOR THIRD-PARTY RULEMAKING  
TO AMEND REGULATIONS 18 AND 26**

The Undersigned hereby respectfully submit the following comments to the Arkansas Pollution Control & Ecology Commission ("Commission") regarding the Petitions for Third-Party Rulemaking to Amend Regulation No. 18 (Docket No. 08-005-R) and Regulation 26 (Docket No. 08-006-R) ("Petitions") and urge this Commission to deny the Petitions.

I. The Petitions are Procedurally Defective

As an initial matter, the Petitions are procedurally defective for failing to include an analysis of the impact on small businesses, a review by the Director of Economic Development Commission, and an economic impact/environmental benefit analysis.

A. There is No Analysis of Impact on Small Businesses

Ark. Code Ann. § 25-15-302 requires analysis of impact on small businesses "before submitting a proposed rule for adoption[.]" The

Petitions contain no analysis of the impacts on small businesses. Instead the Petitions simply say the proposed changes will have no effect.<sup>1</sup> It is clear that there will be impacts on small businesses. For example, the proposed regulatory amendment would, for the first time, require any “building, structure, facility or installation” that emits 25 tons per year of carbon dioxide (“CO<sub>2</sub>”) to get a permit. Reg. 18, § 18.301(A). Any new permittees resulting from this change would be subject to annual permit fees (ranging from \$500 to \$64,000.00 or more), monitoring, recordkeeping, reporting and other compliance costs, and the Commission’s non-compliance determination requirements. Similarly, it seems probable that the proposed change could have other substantial effects on small businesses due to increased costs of electricity, increased cost of raw materials such as cement, increased costs of emission controls or required purchase of offsets, etc. Against this background, an analysis of impact on small businesses is clearly required.

B. There Has Been No Review By the Director of Economic Development Commission

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<sup>1</sup> Paragraph 15 of both 3<sup>rd</sup> party petitions states that:

"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."

When a proposed rule will affect small businesses, the agency must prepare an "economic impact statement" which analyzes the impacts on small businesses and submits the economic impact statement to the Director of the Arkansas Economic Development Commission ("EDC"). The Director of the EDC must then determine whether the agency has satisfactorily completed the economic impact statement and has taken sufficient measures to balance the interests of small businesses against the objectives of the regulation. Ark. Code Ann. §§ 25-15-303(c) & (d). There has been no EDC review requested by the Petitioners, and none has been conducted.

C. There is No Economic Impact/Environmental Benefit Analysis

In addition to the statutory provisions on small business impact discussed above, Arkansas law and the Commission's regulations require that an Economic Impact/Environmental Benefit analysis be prepared any time a rule is proposed which would be more stringent than federal requirements. Ark. Code Ann. § 8-1-203(b)(1)(B); Regulation No.8, § 3.5.2. This analysis must be prepared prior to submitting a proposed regulation for public notice, and, pursuant to the regulation, must be prepared by the proponent of the regulation.

Neither of the Petitions includes an Economic Impact/Environmental Benefit Analysis. Instead, the Petitions simply say that the proposed amendment would not be more stringent than federal requirements.<sup>2</sup>

The proposed amendments will be more stringent than federal requirements because they will require permits and permit conditions which are not currently required by state law and are not expressly required by federal law as a minimum element for state authorization.<sup>3</sup>

## II. The Petitions are Premature

In addition to procedural defects, the Petitions are premature given pending matters at both the State and Federal levels.

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<sup>2</sup> Paragraph 11 of both 3<sup>rd</sup> Party Petitions states in a conclusory fashion that the amendment requested by the petitions is not more stringent than federal requirements:

"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 No.8, Section 3.5.3."

Exhibit F of both 3<sup>rd</sup> Party Petitions elaborates on this point as follows:

"The proposal to delete the term 'carbon dioxide' from the definition of 'Air contaminant' will bring the Arkansas definition in line with the federal definition of 'air pollutant,' as articulated by the U.S. Supreme Court in *Massachusetts v. EPA*, 127 S.Ct. 1438,1460; 167 L.Ed2d 248 (2007).

"The proposed change would make the Arkansas definition conform to federal law, and would therefore be equivalent (neither more nor less stringent) than a federal requirement. Therefore, an economic impact/environmental benefit analysis is not required."

<sup>3</sup> Regulation No.8 defines "more stringent than federal requirements" as follows:

"A regulation that is "more stringent than federal requirements" is a regulatory standard, effluent limit, procedure, or other requirement which is more stringent than that which is expressly addressed by a federal regulation or presented as a minimum requirement for state program authorization." PCEC Regulation No. 8, § 3.5.3.

A. The Governor's Commission on Global Warming Is Conducting a Comprehensive Review that Will Be Reported on Nov. 1, 2008

Act 696 of 2007 established the Governor's Commission on Global Warming. Among other things, the Governor's Commission on Global Warming is directed to conduct an in-depth evaluation of the issues "related to global warming and the potential impacts of global warming on the state, its citizens, its natural resources, and its economy, including without limitation, agriculture, travel and tourism, recreation, insurance, and economic growth and development," to develop a "global warming pollutant reduction goal" based on that evaluation and to propose a comprehensive strategic plan to implement that goal for consideration by the next legislature. The Governor's Commission on Global Warming is required by statute to report to the Governor by November 1, 2008. The Director of ADEQ and four of the APC&EC Commissioners are also members of an advisory committee for the Governor's Commission on Global Warming.<sup>4</sup> Since the Governor's Commission on Global Warming is charged with these tasks, it would seem inappropriate for this Commission to start a rulemaking on global warming issues at this time.

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<sup>4</sup> Act 696 provides that the advisory body of the Commission on Global Warming shall include the directors of ADEQ, Arkansas Forestry Commission, Arkansas Natural Resources Commission, Arkansas Game & Fish Commission, and the Oil and Gas Commission.

B. U.S. EPA Has Not Resolved What it Will Do About CO<sub>2</sub> In the Wake of *Massachusetts v. EPA*

The U.S. Supreme Court in *Massachusetts v. EPA*, 127 S.Ct. 1438; 167 L.Ed.2d 248 (2007), decided that the U.S. Environmental Protection Agency ("EPA") had improperly failed to determine whether CO<sub>2</sub> emissions from automobiles "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare," and the EPA should as a consequence determine whether to regulate CO<sub>2</sub> emissions from automobiles under the Clean Air Act. The Supreme Court remanded the proceeding to EPA for such a determination or to provide a reasonable explanation as to why it cannot or will not make such a determination. Thus far, EPA has not made its determination on remand, and it is unlikely that the agency will do so before the end of the Bush administration.<sup>5</sup> The EPA has only recently (May 30, 2008) released a Draft of its Advanced Notice of Proposed Rulemaking (ANPR) with intent to collect more data before it can begin to make any regulatory determinations. The petitioners argue that their proposed amendments are necessary to make Regulations 18 and 26 "consistent with federal law." See Petitions at ¶ 4, ¶ 12, & Exhibit F. But it would seem inappropriate for the Commission to commence a rulemaking to make

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<sup>5</sup> See Testimony of EPA Administrator Steven Johnson before the U.S. House of Representatives Select Committee on Energy Independence and Global Warming on March 13, 2008, which can be found at: [http://www.epa.gov/ocir/hearings/testimony/110\\_2007\\_2008/2008\\_0313\\_slj.pdf](http://www.epa.gov/ocir/hearings/testimony/110_2007_2008/2008_0313_slj.pdf).

state regulation of CO<sub>2</sub> consistent with federal law, when there is so much uncertainty about whether and how federal law will regulate CO<sub>2</sub>.<sup>6</sup>

III. There Are Significant Questions on the Merits of the Proposed Rules

Finally, there are significant questions regarding the merits of the Petitions and the amendments they propose to Regulations 18 and 26.

A. The Petitions Say The Amendment Will Have No Effect; If That is True There is No Reason to Make the Change

Both of the Petitions repeatedly state that the changes proposed will have no regulatory effect:

"[1]t is important to note that this petition for third party rulemaking does *not* seek any additional new regulation of greenhouse gases." Petitions at ¶ 10 (emphasis in original text).

"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[.]" Petitions at ¶ 11 (emphasis in original text).

"[T]he 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." Petitions at ¶ 15 (emphasis in original text).

The petitioners' claim that their proposed amendment to Regulations 18 and 26 will have no regulatory effect seems highly questionable, but if

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<sup>6</sup> The litigation in *Massachusetts v. EPA* is ongoing. On April 2, 2008, a petition was filed in the D.C. Circuit Court to require EPA to act based on the U.S. Supreme Court's earlier ruling.

one accepts the claim at face value then there would seem to be no reason to adopt the change in the first place.

B. Massachusetts v. EPA Does Not Make the Proposed Change Necessary or Desirable:

The Petitioners point to the Supreme Court's decision in *Massachusetts v. EPA* as a reason why the Commission should initiate rulemakings to amend Regulations 18 and 26. This contention is without merit. The definition of "air pollutant" in the Clean Air Act which was at issue in *Massachusetts v. EPA*, is quite different from the definition of "air contaminant" in Regulations 18 and 26. More importantly, there are enormous differences between the regulatory structure governing automobile emissions, which was at issue in *Massachusetts v. EPA*, and the regulatory structures established in Regulations 18 and 26 for stationary sources. Because of all these differences, it is inappropriate to view the Supreme Court's discussion of the term "air pollutant" in the Clean Air Act as being somehow relevant or applicable to the definition of "air contaminant" in Regulations 18 and 26.

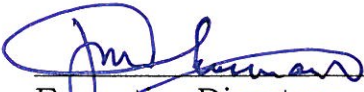
IV. Conclusion

The Undersigned asks this Commission to consider its comments set out above and for those above-discussed reasons, deny the Petitions.



Respectfully submitted,

Arkansas Environmental Federation  
Little Rock, Arkansas

By:   
Title: Executive Director


Arkansas State Chamber of Commerce  
Little Rock, Arkansas

By:   
Title: President and CEO

Associated Industries of Arkansas, Inc.  
Little Rock, Arkansas

By:   
Title: President and CEO

National Federation of Independent  
Businesses (Arkansas Chapter)  
Little Rock, Arkansas

By:   
Title: State Director

Arkansas Forest and Paper Council  
Little Rock, Arkansas

By:   
Title: Executive Director

And

Albermarle Corp.  
Magnolia, Arkansas

AmerCable, Inc.  
El Dorado, Arkansas

Arkansas Asphalt Pavement Association  
Little Rock, Arkansas

Arkansas Electric Cooperative Corporation  
Little Rock, Arkansas

Arkansas Forestry Association  
Little Rock, Arkansas

Arkansas Independent Producers &  
Royalty Owners Association  
Little Rock, Arkansas

Arkansas Petroleum Council  
North Little Rock, Arkansas

Arkansas Timber Producers Association  
Little Rock, Arkansas

Ashland, Inc.  
Lexington, Kentucky

Associated Electric Cooperative, Inc.  
Springfield, Missouri

Associated General Contractors of  
America, Inc. (Arkansas Chapter)  
Little Rock, Arkansas

Chesapeake Energy Corporation  
Little Rock, Arkansas

Cooper Tire and Rubber Co.  
Texarkana, Arkansas / Findlay, Ohio

Dassault Falcon Jet Corp.  
Little Rock, Arkansas

Deltic Timber Corporation  
El Dorado, Arkansas

GBMc and Associates  
Benton, Arkansas

Green Bay Packaging  
Morrilton, Arkansas

L and S Concrete  
Conway AR

L. R. Mourning Co.  
Little Rock, Arkansas

Macchiarolo Consulting  
El Dorado, Arkansas

Martin Marietta  
Hot Springs, Arkansas

McClinton-Anchor Companies  
Fayetteville, Arkansas

O.K. Industries, Inc.  
Fort Smith, Arkansas

Potlatch Forest Products Corp.  
McGehee, Arkansas/Spokane, Washington

The Poultry Federation  
Little Rock, Arkansas

Remington Arms Co., Inc.  
Lonoke, Arkansas

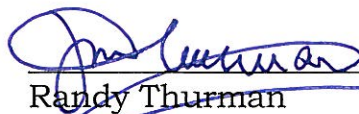
Sloan Valve Company  
Augusta, Arkansas

Superior Industries International, Inc.  
Fayetteville & Rogers, Arkansas

Weaver Bailey Contractors  
El Paso, Arkansas

Webco Mining  
El Paso, Arkansas

By:



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Randy Thurman  
Executive Director  
Arkansas Environmental Federation  
(Authorized to Sign On Behalf of the Above  
Named Entities)

And

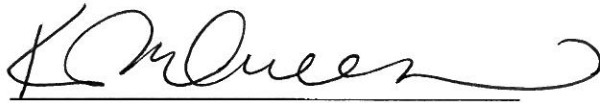
Southwestern Electric Power Company  
Gentry, Arkansas / Shreveport, Louisiana

WCA Waste Corporation  
El Dorado, Arkansas / Houston, Texas

Southwestern Energy Company  
Seeco, Inc.  
DeSoto Drilling, Inc.,  
DeSoto Sand, L.L.C., and  
DeSoto Gathering Company, L.L.C.  
Fayetteville, Arkansas / Houston, Texas

Building Owners and Managers  
Association of Greater Little Rock  
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And

LS Power Development, LLC  
St. Louis, Missouri

By:



Title: Executive Vice President

ARKANSAS POLLUTION CONTROL  
AND ECOLOGY COMMISSION

In the Matter of Regulation  
No. 18, Arkansas Air Pollution  
Control Code Third-party  
Rulemaking - Audubon, Sierra  
Club, and Environmental Integrity Project

Docket No. 08-005-R

MINUTE ORDER NO. 08-\_\_\_\_\_

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On May 16, 2008, the Sierra Club, Audubon Arkansas, and the Environmental Integrity Project (“Petitioners”), filed a Petition to Initiate Third-Party Rulemaking to Amend Regulation No. 18, the Arkansas Air Pollution Control Code, requesting that the Arkansas Pollution Control and Ecology Commission (“Commission”) delete the term “carbon dioxide” (CO<sub>2</sub>) from the definition of “air contaminant” in Regulation 18 as follows:

“**Air Contaminant**” means any solid, liquid, gas, or vapor or any combination thereof. The following shall not be considered air contaminants: water vapor, oxygen, ~~carbon dioxide~~, nitrogen, hydrogen, and inert gases.

Pursuant to Ark. Code Ann. § 8-4-202(c), the Commission has sixty (60) days in which to either institute rulemaking proceedings or to give written notice denying the petition for rulemaking. The Petition has been designated as Docket No. 08-005-R.

The Commission met on June 27, 2008, to review the Petition. Having reviewed the Petition and the oral and written comments submitted by members of the public, the Commission denies the Petition in Docket No. 08-005-R, effective June 27, 2008:

1. The Petition is procedurally defective for, at a minimum, failing to include an analysis of the impact of the proposed regulation on small businesses, a review by the Director of Economic Development Commission, and an economic impact statement as required by Ark. Code Ann. § 25-15-302 and -303.

2. The Petition also is procedurally defective because it does not contain an economic impact/environmental benefit analysis as required by Ark. Code Ann. §§ 8-1-203(b) and 8-4-311(b)(1) and Commission Regulation No. 8, § 8.3.5 for regulations that are more stringent than the federal requirements. The Commission finds that the proposed regulation would be more stringent than federal requirements as defined in Regulation No. 8, § 8.3.5.3, because the proposed regulation would require an air permit for any building, structure, facility or installation that emits more than 25 tons per year of CO<sub>2</sub>, pursuant to Section 18.301(A) of Regulation No. 18. The Petition does not set forth any federal regulation that contains such a requirement, nor does the Petition demonstrate that this is a minimum requirement for state program authorization by the United States Environmental Protection Agency (“USEPA”).

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Furthermore, it is apparent that the USEPA has not yet promulgated any final rules in response to the U.S. Supreme Court case, *Massachusetts v. EPA*, 127 S.Ct. 1438; 167 L.Ed.2d 248 (2007), nor which address CO<sub>2</sub> emissions from stationary sources.

3. The Petition is premature given ongoing activities at both the State and Federal levels, including, but not limited to, the Governor's Commission on Global Warming and the USEPA's response to *Massachusetts v. EPA*, which is expected to be forthcoming later this year or in 2009. Because of these ongoing matters, initiation of rulemaking would be untimely.

3. There are significant questions on the merits of the Petition and whether initiation of rulemaking on this matter is warranted at this time. For example, the Petitioners claim that their proposed amendment to Regulations 18 will have no regulatory effect. If one were to accept this claim at face value, there would seem to be no reason to adopt the change in the first place. However, making the changes suggested in the Petition could have significant impacts on stationary source permitting that have not been fully explained or evaluated. Petitioners further claim that the case of *Massachusetts v. EPA* makes the proposed regulatory change necessary. However, that claim seems doubtful given the significant differences between the subject matter of that case ("air pollutant" in the Clean Air Act and the regulatory structure governing automobile emissions) and the Petition (the definition of "air contaminant" in Regulation No. 18, which is primarily a stationary source permitting regulation.)

The Commission denies the Petition in Docket No. 08-005-R, effective June 27, 2008.

**COMMISSIONERS**

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**L. Bengal**  
**S. Henderson**  
**D. Hendrix**  
**C. McGrew**  
**D. Samples**  
**T. Schueck**  
**J. Shannon**

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**L. Sickel**  
**J. Simpson**  
**W. Thompson**  
**E. Valdez**  
**B. White**  
**R. Young**

\_\_\_\_\_ SUBMITTED BY: Randy Thurman PASSED: 6/27/08

ARKANSAS POLLUTION CONTROL  
AND ECOLOGY COMMISSION

In the Matter of Regulation  
No. 26, Regulation of the Arkansas  
Operating Air Permit Program Third-party  
Rulemaking - Audubon, Sierra Club, and  
Environmental Integrity Project

Docket No. 08-006-R

MINUTE ORDER NO. 08-\_\_\_\_\_

PAGE 1 OF 2

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On May 16, 2008, the Sierra Club, Audubon Arkansas, and the Environmental Integrity Project (“Petitioners”), filed a Petition to Initiate Third-Party Rulemaking to Amend Regulation No. 26, the Arkansas Operating Air Permit Program, requesting that the Arkansas Pollution Control and Ecology Commission (“Commission”) delete the term “carbon dioxide” (CO<sub>2</sub>) from the definition of “air contaminant” in Regulation 26 as follows:

**“Air Contaminant”** means any solid, liquid, gas, or vapor or any combination thereof. The following shall not be considered air contaminants: water vapor, oxygen, ~~carbon dioxide~~, nitrogen, hydrogen, and inert gases.

Pursuant to Ark. Code Ann. § 8-4-202(c), the Commission has sixty (60) days in which to either institute rulemaking proceedings or to give written notice denying the petition for rulemaking. The Petition has been designated as Docket No. 08-006-R.

The Commission met on June 27, 2008, to review the Petition. Having reviewed the Petition and the oral and written comments submitted by members of the public, the Commission denies the Petition in Docket No. 08-006-R, effective June 27, 2008:

1. The Petition is procedurally defective for, at a minimum, failing to include an analysis of the impact of the proposed regulation on small businesses, a review by the Director of Economic Development Commission, and an economic impact statement as required by Ark. Code Ann. § 25-15-302 and -303.

2. The Petition also is procedurally defective because it does not contain an economic impact/environmental benefit analysis as required by Ark. Code Ann. §§ 8-1-203(b) and 8-4-311(b)(1) and Commission Regulation No. 8, § 8.3.5 for regulations that are more stringent than the federal requirements. The Commission finds that the proposed regulation would be more stringent than federal requirements as defined in Regulation No. 8, § 8.3.5.3, because the proposed regulation would require sources subject to permitting under Regulation No. 26 (“Part 70 sources”) to include CO<sub>2</sub> emissions in their operating air permits pursuant to Regulation No. 26 § 26.305. The Petition does not set forth any federal regulation that contains such a requirement, nor does the Petition demonstrate that this is a minimum requirement for state program authorization by the United States Environmental Protection Agency (“USEPA”). Furthermore, it is apparent that the USEPA has not yet promulgated any



ARKANSAS POLLUTION CONTROL  
AND ECOLOGY COMMISSION

In the Matter of Regulation  
No. 26, Regulation of the Arkansas  
Operating Air Permit Program Third-party  
Rulemaking - Audubon, Sierra Club, and  
Environmental Integrity Project

Docket No. 08-006-R

MINUTE ORDER NO. 08-\_\_\_\_\_

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final rules in response to the U.S. Supreme Court case, *Massachusetts v. EPA*, 127 S.Ct. 1438; 167 L.Ed.2d 248 (2007), nor which address CO<sub>2</sub> emissions from Part 70 sources in their operating air permits.

3. The Petition is premature given ongoing activities at both the State and Federal levels, including, but not limited to, the Governor's Commission on Global Warming and the USEPA's response to *Massachusetts v. EPA*, which is expected to be forthcoming later this year or in 2009. Because of these ongoing matters, initiation of rulemaking would be untimely.

3. There are significant questions on the merits of the Petition and whether initiation of rulemaking on this matter is warranted at this time. For example, the Petitioners claim that their proposed amendment to Regulations 26 will have no regulatory effect. If one were to accept this claim at face value, there would seem to be no reason to adopt the change in the first place. However, making the changes suggested in the Petition could have significant impacts on stationary source permitting that have not been fully explained or evaluated. Petitioners further claim that the case of *Massachusetts v. EPA* makes the proposed regulatory change necessary. However, that claim seems doubtful given the significant differences between the subject matter of that case ("air pollutant" in the Clean Air Act and the regulatory structure governing automobile emissions) and the Petition (the definition of "air contaminant" in Regulations 26, which is a major stationary source permitting regulation intended to satisfy the requirements of Title V of the federal Clean Air Act.)

The Commission denies the Petition in Docket No. 08-006-R, effective June 27, 2008.

**COMMISSIONERS**

\_\_\_\_\_ **L. Bengal**  
\_\_\_\_\_ **S. Henderson**  
\_\_\_\_\_ **D. Hendrix**  
\_\_\_\_\_ **C. McGrew**  
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\_\_\_\_\_ **R. Young**

\_\_\_\_\_ **SUBMITTED BY: Randy Thurman PASSED: 6/27/08**