

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” (CO₂) 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 CO₂ 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

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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 CO₂ 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.

4. 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

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