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August 14, 2017

Kelly Robinson  
Arkansas Department of Environmental Quality  
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AUG 14 2017  
Kn 11-34

Re: Proposed Revisions to Arkansas Pollution  
Control and Ecology Commission  
(APC&EC) Regulation 16

Dear Ms. Robinson:

Thank you for the opportunity to comment on the proposed Revision to Regulation 16.

Comment 1.

- a. As a preliminary matter, please note that Arkansas Code Section 26-51-506 was originally adopted in 1991 and is the primary Code section granting tax credits for the purchase of waste reduction, reuse or recycling equipment (“Recycling tax credits”) A.C.A. §26-51-506(c), (e).
- b. Acts 2015, No. 692 added new Arkansas Code Section 26-51-1215 that provides “qualified manufacturers of steel” with additional flexibility insofar as qualifying for Recycling tax credits; the types of expenditures that will qualify for Recycling tax credits; and the manner in which the tax credits can be carried forward and utilized. The Act and Arkansas Code Section 26-51-1215(b) apparently refer to the variations between Section 26-51-506 and Section 26-51-1215 as “the income tax credit allowed under this section.” Id.
- c. The additional flexibility granted to qualified manufacturers of steel includes:
  - (i) Clarifying that production, processing and testing equipment used to manufacture products containing recovered materials are within the definition of “waste reduction reuse, or recycling equipment” for tax credit purposes (A.C.A. §26-51-1215(a));

- (ii) Extending the carryforward period for tax credit from three (3) to fourteen (14) years following the year in which the income tax credit originated (A.C.A. §26-51-1215(c)(1));
  - (iii) Allowing a qualified manufacturer of steel an option to qualify for tax credit based on a lower percentage of recovered materials and higher percentage of postconsumer waste than required in Ark. Code §26-51-506(d), while eliminating the specific target percentage of Arkansas post-consumer waste that should be utilized (A.C.A. §26-51-1215(d)(2)(C), (D)); and
  - (iv) Narrowing the circumstances that might trigger a “clawback” of tax recycling credits (A.C.A. §26-51-1215(e)(2)(B)).
- d. The “Notice of Proposed Regulation Changes, Public Hearing and Public Comment Period” published June 27 and 28, 2017 refers to Acts 692 and 862 of 2015 as the primary reasons for issuing the proposed changes to Regulation 16.
- e. Act 692 of 2015 and Arkansas Code Section 26-51-1215 include the following provision:
- “(b) To be eligible for the income tax credit allowed under this section, a taxpayer shall:
- (1) Be a qualified manufacturer of steel as defined in §26-51-1211, §26-52-901, §26-52-911, Acts 2013, No. 1084, or Acts 2013, No. 1476;
  - (2) Have made the minimum investment required under §26-51-1212, §26-52-902, §26-52-912, Acts 2013, No. 1084, or Acts 2013, No. 1476; and
  - (3) Either:
    - (A) Have obtained a certification under §26-51-1212, §26-52-902, §26-52-912, Acts 2013, No. 1084, or Acts 2013, No. 1476; or
    - (B) Be located on the same or an adjacent manufacturing site as a qualified manufacturer of steel that has obtained such a certification.”

- f. Notwithstanding the more extensive qualification requirements quoted in the previous paragraph, Arkansas Code Subsections 26-51-1215(c)-(f), only use the phrase “qualified manufacturer of steel.” We take this to be the reason the proposed changes to Regulation 16 as written appear to apply to all qualified manufacturers of steel (under the generic definition in Subsection (b)(1) and proposed Reg. 16.102 Definitions), rather than only to those “qualified manufacturers of steel” that also meet the investment and certification requirements of subsections (b)(2) and (b)(3).
- g. It has been our understanding that Act 692 of 2015 only applies to qualified manufacturers of steel that also meet the investment and certification requirements set out in the Act. This is not reflected in the proposed changes to Regulation 16 as presently written. We have no objection to an interpretation that the additional flexibility provided in Act 692 of 2015 is available to all qualified manufacturers of steel. However, we recommend that the APC&EC first confirm that this is consistent with the Arkansas Department of Finance and Administration’s interpretation of the Act. If not, a more extensive rewrite of the proposed changes and a new round of public comments may be required.

In such event, either the definition of “qualified manufacturer of steel” as used in the revised Regulation would need to be changed to include the investment and certification requirements set out in the Act; or the additional investment and certification requirements would need to be added as additional qualifiers whenever the term “qualified manufacturer of steel” is used in the Regulation.

Comment 2. Reg. 16.102 Definitions.

See Comment (1) concerning the definition of “Qualified manufacturer of steel.”

Comment 3. Reg. 16.103 Eligible Costs.

Consider rewording subsection (B)(2) as follows:

- “(2) Waste reduction, reuse or recycling equipment used by a qualified manufacturer of steel, including production, processing and testing equipment, must either meet the requirements of Reg. 16.103(B)(1), or be used in the collection, separation, processing, modification, conversion, treatment, or manufacturing of products containing at least twenty-five percent (25%) post-consumer waste.”



Comment 4. Reg. 16.103 Eligible Costs.

Consider rewording subsection (C) as follows:

“(C) The cost of replacing existing waste reduction, reuse, or recycling equipment shall be eligible for certification only if the replacement provides greater capacity for recycling or provides the capability to collect, separate, process, modify, convert or treat a different type of solid waste or manufacture additional products containing recovered materials.”

This subsection of the existing Regulation tracks Arkansas Code Section 26-15-506(e)(3)(D) as written, and the proposed changes to Regulation 16 do not alter the existing regulatory language. However, there is a grammatical error in the sentence structure of the statute so that the words “or manufacture additional” are misplaced and do not track the placement of similar language used in the definition of “waste reduction, reuse or recycling equipment” earlier in the subsection, or in Arkansas Code Subsection 26-51-506(b)(16)(A)(i). The suggested change to the Regulation would be consistent with ADEQ’s historical interpretation of this subsection concerning the replacement of existing waste reduction, reuse and recycling equipment with more robust equipment, and would serve an appropriate regulatory purpose by clarifying the accepted interpretation of a statute by regulation.

Comment 5. Reg. 16.108 Credit Determination, Maximum and Carryforward.

See Comment (1) concerning the extended carryforward period addressed in Subsection (D).

Comment 6. Reg. 16.201 Application Process.

Please note that under Arkansas Code Section 26-51-1215(d) a qualified manufacturer of steel must either meet the requirements of §26-51-506(d) or meet the requirements of §26-51-1215(d)(2); not both. The proposed Revision would require that applications include both the acknowledgement required in §26-51-506(d)(4) as well as the statement referred to in §26-51-1215(d)(2)(D), if applicable. Both concern the use of post-consumer waste generated in Arkansas, but are slightly different. If §26-51-1215(d)(2)(D) is applicable, §26-51-506(d)(4) does not apply. Consider reorganizing subsections (C)(5) and (6), into subsection (C)(5)(A) and (B) as follows:

“(5) (A) An acknowledgment that, to the best of taxpayer’s knowledge, a good faith effort is being made to utilize post-consumer waste generated in Arkansas as at least ten

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percent (10%) of the post-consumer waste being used in the equipment, to the extent available at a competitive price; or

(B) For qualified manufacturers of steel, a statement acknowledging that the taxpayer will make a good faith effort to utilize Arkansas post-consumer waste as part of the materials used.”

Comment 7:

In addition to the comments above, we are generally concerned that there are other possible issues of consistency with Acts 692 and 862 of 2015, Arkansas Code Section 26-51-506, and Section 26-51-1215, related to qualified manufacturers of steel.

Thank you for this opportunity to comment on the proposed changes to Regulation 16. If there are any questions concerning these comments, please let us know.

Very truly yours,

DOVER DIXON HORNE PLLC

  
Michael O. Parker

MOP:dkc