

ADEQ

ARKANSAS
Department of Environmental Quality

Via U.S. Mail and e-mail transmission

May 9, 2012

Ms. Patricia Goff
Arkansas Pollution Control and Ecology Commission
101 E. Capitol Ave., Suite 205
Little Rock, AR 72201

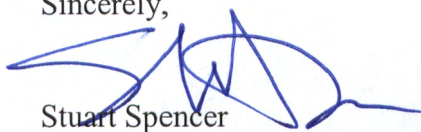
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| IN THE MATTER OF AMENDMENTS TO |) | |
| REGULATION NO. 18, ARKANSAS |) | DOCKET NO. 11-001-R |
| AIR POLLUTION CONTROL CODE |) | |

Dear Ms. Goff:

Please find enclosed an original and one (1) copy of the Petition to Withdraw Rulemaking to Amend Regulation No. 18 and Close Rulemaking Docket. Pursuant to the directives of the ADEQ Director's office, this matter needs to be placed upon this month's agenda of the Arkansas Pollution Control and Ecology Commission's meeting. Thus, I am hereby requesting that the enclosed Petition be filed by May 10th, at the latest.

Thank you, as always, for your assistance. If you need to reach me, my direct line is (501) 682-0743.

Sincerely,



Stuart Spencer
Attorney for ADEQ

cc: Judge Charles Moulton, Arkansas Pollution Control and Ecology Hearing Officer (w/Enc.)
Ms. Teresa Marks, ADEQ Director (w/Enc.)
Ms. Karen Bassett, ADEQ Chief Deputy Director (w/Enc.)
Ms. Ellen Carpenter, ADEQ Legal Policy Advisor (w/Enc.)
Ms. Tamara Harrelson, ADEQ Legal Division Chief (w/Enc.)
Mr. Mike Bates, ADEQ Air Division Chief (w/Enc.)

Enclosure: Petition to Withdraw Rulemaking to Amend Regulation No. 18 and Close Rulemaking Docket (w/ Exhibits A, B, and C)

BEFORE THE ARKANSAS POLLUTION CONTROL AND ECOLOGY COMMISSION

| | | |
|--------------------------------|---|---------------------|
| IN THE MATTER OF AMENDMENTS TO |) | |
| REGULATION NO. 18, ARKANSAS |) | DOCKET NO. 11-001-R |
| AIR POLLUTION CONTROL CODE |) | |

PETITION TO WITHDRAW RULEMAKING TO AMEND REGULATION NO. 18
AND CLOSE RULEMAKING DOCKET

The Arkansas Department of Environmental Quality (hereinafter "ADEQ") for its
Petition to Withdraw Rulemaking to Amend Regulation No. 18 and to Close the Rulemaking
Docket states:

1. On January 28, 2011, the Arkansas Pollution Control and Ecology Commission
(hereinafter "APC&EC" or "Commission") initiated rulemaking for proposed changes to
Regulation No. 18. *See* Minute Order 11-02, attached hereto as Exhibit "A".
2. This proposed rulemaking was initiated in response to the United States Environmental
Protection Agency's (hereinafter "EPA's") June 3, 2010, "Prevention of Significant
Deterioration and Title V Greenhouse Gas Tailoring Rule" (hereinafter "Tailoring
Rule").
3. The Commission initiated rulemaking in order for state regulations to be consistent with
EPA's Tailoring Rule, and to remove the exclusion of carbon dioxide from the definition
of air contaminant.
4. The public hearing for Regulation No. 18 was held on March 8, 2011, and the public
comment period was extended through April 11, 2011. In addition to the initial public
hearing and comment periods, public stakeholder meetings also occurred on December
14, 2010, March 11, 2011, and February 29, 2012, and additional meetings with
stakeholders occurred on March 1, 2012, and March 9, 2012.
5. Comments were received from thirteen (13) commenters during the comment period.

6. Based on the comments received, ADEQ prepared a Responsive Summary for Regulation No. 18, Arkansas Air Pollution Control Code, which is attached hereto as Exhibit "B".
7. Based on comments received, ADEQ determined that implementing EPA's Tailoring Rule may be achieved through revisions to APC&EC Regulation Nos. 19 and 26, and that inconsistencies in definitions between APC&EC Regulation No. 18 and Regulation Nos. 19 and 26 will not create permitting inconsistencies at this time.
8. Accordingly, ADEQ respectfully requests that APC&EC adopt the attached proposed Minute Order ("Exhibit C"), which will withdraw the proposed rule change and close the rulemaking docket.

WHEREFORE, ADEQ requests that APC&EC grant this request to withdraw the proposed rule change and adopt the proposed Minute Order, which will close Docket No. 11-001-R.

Respectfully Requested,

By: 

Stuart Spencer, Attorney Specialist, ABA #99151
Arkansas Department of Environmental Quality
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North Little Rock, AR 72118
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Fax: (501) 682-0891
E-mail: spencer@adeq.state.ar.us

**ARKANSAS POLLUTION CONTROL
AND ECOLOGY COMMISSION**

**SUBJECT: Petition to
Initiate Rulemaking –
Regulation No. 18
DOCKET NO. 11-001-R**

MINUTE ORDER NO. 11-02

PAGE 1 OF 3

On January 14, 2011, the Arkansas Department of Environmental Quality ("Department" or "ADEQ") filed a Petition to Amend Regulation No. 18, Arkansas Air Pollution Control Code, ("Petition"). The Petition has been designated as Docket No. 11-001-R.

The Commission's Regulations Committee met on January 28, 2011, to review the Petition. Having considered the Petition, the Regulations Committee recommends the Commission institute a rulemaking proceeding to consider adopting the proposed revisions to Regulation No. 18.

1. The Department shall file an original and two (2) copies and a computer disk in Word of all materials required under this Minute Order.
2. Persons submitting written public comments shall submit their written comments to the Department. Within ten (10) business days following the adoption or denial of the proposed rule, the Department shall deliver the originals of all comments to the Commission Secretary.
3. A public hearing shall be conducted on March 8, 2011, beginning at 1:00 p.m. in the ADEQ Commission Room, 5301 Northshore Drive, North Little Rock, AR 72118-5317.
4. The period for receiving all written comments shall conclude ten (10) business days after the date of the public hearing pursuant to Reg. 8.806 of Regulation No. 8, unless an extension of time is granted.
5. The Department shall file, not later than 14 days before the Commission meets to consider adoption of the proposed rule, a Statement of Basis and Purpose as required by Reg. 8.808 and 8.815 of Regulation No. 8.
6. The Department shall file, not later than 14 days before the Commission meets to consider adoption of the proposed rule, a proposed Minute Order deciding this matter.
7. The Department shall seek review of the proposed rule from the Joint Interim Committee on Public Health and Welfare and/or from the Joint Interim Committee on Administrative Rules and Regulations.
8. The Regulations Committee may consider this matter at its June 2011 meeting. In the event that the appropriate legislative committees do not complete review of the proposed rule by the above date, the Regulations Committee and the Commission will consider the proposed amendments to the regulation after review by the appropriate legislative committee. Members of the Regulations Committee may ask questions of the Department and any person that made oral or written comments. The Regulations Committee will make a recommendation to the Commission.
9. At its regularly scheduled June 2011 meeting, the presentation of oral statements and legal arguments shall be regulated as follows:

EXHIBIT

A

**ARKANSAS POLLUTION CONTROL
AND ECOLOGY COMMISSION**

**SUBJECT: Petition to
Initiate Rulemaking –
Regulation No. 18
DOCKET NO. 11-001-R**

MINUTE ORDER NO. 11-

PAGE 1 OF 3


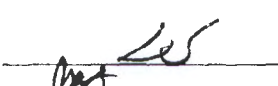
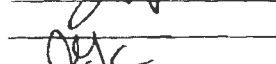
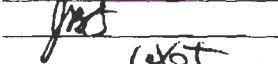

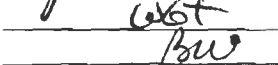
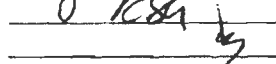
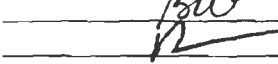

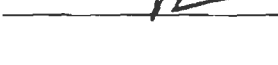

- a. The Chair of the Commission will permit members of the public to make a statement to the Commission. No more than three (3) minutes will be allowed for each statement. The period for statements will close at the end of one (1) hour, or sooner if all interested persons have completed their statements. The Chair, in his discretion, may extend the one (1) hour public comment period.
- b. At the discretion of the Chair, an attorney representing one or more individuals, a corporation or other legal entity may be permitted five (5) minutes in which to address the Commission.
- c. Department legal counsel or other designated Department employee will be permitted ten (10) minutes in which to address the Commission.
- d. At the conclusion of all comments, the Chairman will call on each Commissioner for the purpose of asking the attorneys or persons sponsoring comments who are present, any questions they may have. Attorneys will not be permitted to respond or ask follow-up questions of any person questioned by a Commissioner.


After each Commissioner has had an opportunity to ask questions, the Chair will entertain a motion on the matter, allow discussion, and call for a vote of the Commission members.

10. The Commission concurs with the Arkansas Economic Development Commission that the Department has taken sufficient steps to protect the interests of impacted small businesses as required in Act 143 of 2007.

The Commission accepts the recommendation of the Regulations Committee and initiates the rulemaking proceeding in this docket. The Commission adopts, without modification, the procedural schedule set forth above.

COMMISSIONERS

| | | | |
|---|---------------|--|-------------|
|  | J. Bates |  | L. Sickel |
|  | L. Bengal |  | J. Simpson |
|  | J. Chamberlin |  | W. Thompson |
|  | S. Henderson |  | B. White |
|  | D. Samples |  | R. Young |
|  | J. Shannon | | |


Chair, D. Hendrix

Submitted by: Mike Bates

Date Passed: 01/28/11

BEFORE THE ARKANSAS POLLUTION CONTROL AND ECOLOGY COMMISSION

IN THE MATTER OF AMENDMENTS TO)
REGULATION NO. 18, ARKANSAS) DOCKET NO. 11-001-R
AIR POLLUTION CONTROL CODE)

RESPONSIVE SUMMARY FOR
REGULATION NO. 18, ARKANSAS AIR POLLUTION CONTROL CODE

Pursuant to Ark. Code Ann. § 8-4-202(d)(4)(C) and Regulation No. 8.815, a responsive summary groups public comments into similar categories and explains why the Arkansas Pollution Control and Ecology Commission (“Commission”) accepts or rejects the rationale for each category.

On January 14, 2011, the Arkansas Department of Environmental Quality (“ADEQ”) filed a Petition to Initiate Rulemaking to Amend Regulation No. 18, Arkansas Air Pollution Control Code. The Commission’s Acting Administrative Hearing Officer, Charles Moulton, conducted a public hearing on March 8, 2011 and the public comment period ended April 11, 2011. The following is a summary of the comments regarding the proposed amendments to Regulation No. 18 along with the Commission’s response.

Comment 1: Until there is a finding that greenhouse gases (“GHGs”) are “Air Pollution” in Arkansas, the Commission lacks authority to amend Regulation 18 as proposed by ADEQ. The Commission lacks the requisite authority at this time under Arkansas law to adopt the proposed revisions to Regulation 18. Therefore, the Commission may adopt state regulations for the control of GHGs, but only after there has been a finding that - in Arkansas - GHGs are or will be materially injurious or will unreasonably interfere with enjoyment of life or property. ADEQ has not demonstrated that emissions of CO₂ or GHGs (individually or collected as CO₂e) have resulted in any episode of “air pollution” in Arkansas. To adopt a version of Regulation 18 that addresses GHGs is to essentially create a state program for the control of GHG emissions. However, without the requisite finding, any state GHG program (both the Commission regulation and the ADEQ’s implementation thereof) would not be legally enforceable.

Response: ADEQ disagrees that an Arkansas-specific finding must be made before GHGs can be regulated in the state. EPA has made Endangerment and Cause or Contribute Findings for GHGs under Section 202(a) of the Clean Air Act. 74 FR 66496. Further, state law gives the Commission broad authority to adopt regulations implementing the substantive statutes ADEQ administers and requires permits before any equipment causing the issuance of air contaminants may be built or operated. Ark. Code Ann. § 8-4-311(b). Nonetheless, in consideration of comments received, it has been determined that it is not necessary to amend Regulation Number

18 and require permitting of GHG sources under this regulation. Therefore, Regulation Number 18 will not be amended and the proposed revisions will be withdrawn.

Comment 2: ADEQ's rationale for proposed revisions does not justify amending Regulation 18. In the first instance, there is no basis for the assertion that taking no action on these revisions will cause the Commission's regulation to be misaligned with the Tailoring Rule.

Response: ADEQ's proposed changes to Regulation Number 18 were made for consistency among the state's air regulations. However, upon consideration of comments received, it has been determined that implementing the federal GHG Tailoring Rule may be achieved through revisions to Regulation Numbers 19 and 26. Therefore, the proposed revisions in Regulation Number 18 will be withdrawn. See also Response to Comment 1.

Comment 3: ADEQ's assertion that taking no action on the proposed revisions to Regulation 18 will present conflicts between state-only and federally enforceable regulations which will cause confusion among the regulated community is equally flawed and unsupported.

Response: While the ADEQ believes that amending the definition of "air contaminant" to remove the exclusion of carbon dioxide would be prudent to avoid ambiguity or conflict with Regulation Numbers 19 or 26, ADEQ will not seek to finalize the proposed changes. See also Response to Comment 2.

Comment 4: ADEQ also attempts to justify the proposed revisions to Regulation 18 by making the unsupported allegation that not adopting the proposed revisions would cause ADEQ to lose permitting authority or federal funding, cause permitting authority to default to the EPA, or cause significant delays for businesses applying for operating permits.

Response: See Responses to Comments 2 and 3.

Comment 5: ADEQ's claim that failure to adopt the proposed revisions to Regulation 18 will cause delays for businesses applying for operating permits is equally confusing. Issuance of Operating permits is governed exclusively by Regulation 26, which is federally enforceable. Because Regulation 18 is a state-only rule, the failure to adopt any revisions to it should not delay the issuance of Operating permits under Regulation 26.

Response: Although it is our opinion that differing permitting requirements among the various state air pollution control regulations may cause some confusion, upon consideration of comments received, it has been determined that the proposed revisions to Regulation Number 18 will be withdrawn. See also Response to Comment 2.

Comment 6: No revisions are mandated to Regulation 18 by the Tailoring Rule or any other federal law. A change should not be made unless the change is required by law in order for ADEQ to obtain approval to administer the Tailoring Rule, and any changes made in order to obtain EPA approval should be the absolute minimum necessary to obtain approval. Since Regulation 18 is a state-enforceable only regulation, it is not necessary to make modifications to Regulation 18 for the purpose of implementing the Tailoring Rule. Regulation 18 does not contain any PSD or Title V requirements and therefore it is not necessary to modify Regulation 18. As such, any revision which imposes additional requirements on regulated sources is in excess of that which is mandated by federal law. Moreover, because the proposed revisions to Regulation 18 include a trigger for regulation of CO₂e which is lower than the corresponding trigger under federal law, and do not include a rescission clause or transition clause as provided by federal law, the specific amendments to Regulation 18 are more stringent than what is required by federal law.

Response: We do not agree with the suggestion made by the commenter that a change to state regulations should only be made if required by federal law in order to obtain approval for a federal program. As previously noted, however, upon consideration of comments received, it has been determined the revisions to Regulations Numbers 19 and 26 will adequately serve to implement the federal GHG Tailoring Rule and the proposed revisions to Regulation 18 will be withdrawn. See also Responses to Comments 2 and 3.

Comment 7: Arkansas law requires that in the event proposed regulations are not identical to those promulgated by the EPA, then the Commission must provide a written explanation of the necessity of the regulation and make a demonstration in the Statement of Basis and Purpose upon adopting the proposed regulations that “any technical regulation or standard is based upon generally accepted scientific knowledge or engineering practices,” with appropriate references to technical literature or written studies conducted by ADEQ. Further, Regulation 8.812 requires a cost vs. benefit analysis for all changes to regulations with certain exceptions, one of which is if the proposed rule incorporates or adopts the language of a federal statute or regulation without substantive change. ADEQ should cite to the appropriate provision of the Tailoring Rule upon which it is relying for authorization of the modification, and for each modification to the Regulations for which ADEQ cannot cite to the appropriate provision of the Tailoring Rule which authorizes the change and which would be considered “non-exempt” under Regulation 8.812(C), in order to adopt the modification, ADEQ should provide its scientific and technical demonstration as described by Regulation 8.815(A)(ii) and an evaluation of the economic impact and environmental benefit of such modification as required by Arkansas law. However, to facilitate promulgation of this amendment, and Economic Impact/Environmental Benefit Analysis is included in this regulation rulemaking packet.

Response: See Responses to Comments 2, 6, 8 and 10. In consideration of comments received, the proposed revisions to Regulation Number 18 will be withdrawn.

Comment 8: ADEQ and the Commission have not properly exercised their authority under Ark. Code Ann. § 8-4-312. In exercising their powers under the state Air Pollution code, ADEQ and the Commission are required to take into account and consider, among other things, the quantity and characteristics of air contaminants and the duration of their presence in the atmosphere that may cause air pollution, the extent of danger to property in the area reasonably to be expected from any particular air contaminant, the interference with enjoyment of life by persons in the area and conduct of established enterprises that can reasonably be expected from air contaminants. The Commission's action in adopting the proposed revisions to Regulation 18 without consideration of the applicable factors enumerated in §8-4-312 is inappropriate and contravenes Arkansas law.

Response: See Response to Comment 2. Also, we do not agree with the commenter's claim that, if the Commission were to adopt the revisions to Regulation Number 18 as proposed, it would contravene state law. The proposed deletion of the carbon dioxide exclusion from the definition of "air contaminant" would, in fact, bring the regulatory definition more in line with the statutory definition, which does not contain any exclusion. See Ark. Code Ann. § 8-4-303(2). Further, the United States Supreme Court ruled in *Massachusetts v. EPA*, 549 U.S. 497 (2007), that greenhouse gases are air pollutants under the Clean Air Act, and the EPA has made an Endangerment and Cause or Contribute Finding for greenhouse gases under Section 202(a) of the Clean Air Act, 74 FR 66946. Greenhouse gases include, among others, carbon dioxide. Regulation Number 18 currently excludes carbon dioxide from being an "air contaminant." The exclusion of carbon dioxide from being an air contaminant is contrary to federal law. The changes to Regulation 18 originally proposed relied on federal actions, including EPA's Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act¹, the GHG Tailoring Rule², and the SIP call³ to determine whether GHGs must be regulated. GHGs are air contaminants under the federal law and regulations. However, in consideration of other comments received, the proposed changes to Regulation 18 will be withdrawn.

Comment 9: By promulgating Regulation 18 without the necessary supporting documentation and findings, there will be widespread uncertainty among the regulated community and the general population about whether a person may be in violation of the law for undertaking even

¹ 74 FR 66946

² 75 FR 31514

³ 75 FR 77698

everyday activities which result in the release of CO₂ without a permit.

Response: We disagree with the assertion that the proposed regulation would create widespread uncertainty within the regulated community and the general population in regard to the scope of permitting requirements for carbon dioxide emissions. It is our opinion that the proposed revisions were clear and unambiguous as to the proposed permitting scope. However, this issue is moot due to the fact that it has been determined that the revisions to Regulation Numbers 19 and 26 will adequately serve to implement the federal GHG Tailoring Rule in Arkansas and the proposed revisions to Regulation Number 18 will be withdrawn in consideration of comments received, as previously noted.

Comment 10: Deletion of the words “carbon dioxide” (“CO₂”) from the definition of “air contaminant” is inappropriate, unnecessary, will lead to unintended regulatory consequences, cause confusion among the regulated community and the general public, harm economic growth in Arkansas, and cause an undue burden on the regulated community and the permitting authority. If “carbon dioxide” is deleted from the definition of air contaminant in Regulation 18, then under Regulation 18.801, it will immediately become unlawful for any person to cause or permit the emission of CO₂ if the emission constitutes air pollution.

Response: The Department does not agree with the commenter’s assertion. As addressed in previous responses, the definition of “air contaminant” set out in state law does not contain any of the exclusions found in the regulatory definition. Deleting the exclusion for carbon dioxide from the regulatory definition would actually be more in line with state law. See Ark. Code Ann. § 8-4-303(2). The commenter does not provide any information to support the claim that removing the carbon dioxide exclusion creates unintended consequences, confusion among the regulated community and the general public, or harm to economic growth in Arkansas. Also, it is noted that under federal regulation, carbon dioxide, as well as the other GHGs, will be regulated without regard to any change in state regulations. The United States Supreme Court ruled in *Massachusetts v. EPA*, 549 U.S. 497 (2007), that greenhouse gases are air pollutants under the Clean Air Act, and the EPA has made an Endangerment and Cause or Contribute Finding for greenhouse gases under Section 202(a) of the Clean Air Act, 74 FR 66946. Regulation Number 18 currently excludes carbon dioxide from being an “air contaminant,” yet carbon dioxide is one of the gases listed as a greenhouse gas in EPA’s GHG Tailoring Rule. Removing the carbon dioxide exclusion would have clarified that carbon dioxide is considered an air contaminant in Arkansas, consistent with the federal findings. Although, the revisions proposed to Regulation Number 18 will be withdrawn, regulation and permitting of GHG emissions will be addressed through revisions to Regulation Numbers 19 and 26.

See also Responses to Comments 2, 3, 6 and 8.

Comment 11: Because deletion of the words “carbon dioxide” will result in a stricter requirement in Arkansas than is required by federal law and will cause unnecessary and undue burden on the regulated community and the general public, the Commission must undertake a benefit analysis to consider the economic impact and environmental benefit of the amendment. Furthermore, because the proposed deletion is not required by or consistent with federal law, the Commission also must provide a written scientific and technical rationale explaining the necessity of the amended regulation.

Response: Deleting the words “carbon dioxide” would not make the Arkansas regulation more stringent than federal law. Carbon dioxide is one of six gases that make up the federally regulated air pollutant “greenhouse gas” or GHG. See also Response to Comment 10. *Massachusetts v. EPA*, 549 U.S. 497, (2007) and EPA’s Endangerment or Cause or Contribute Findings for Greenhouse Gases, cited by EPA in the GHG Tailoring Rule, provide the legal, scientific and technical rationale for the removal of carbon dioxide from the definition of air contaminant. However, in consideration of other comments made, ADEQ is withdrawing the proposed revisions to Regulation Number 18, even though they are consistent with state and federal law; thus there is no reason to modify the determination of the need for an analysis submitted with the petition to initiate rulemaking.

Comment 12: Additional explanation is needed regarding the impact of the proposed revisions on sources subject to permitting. It appears, based upon the proposed revisions to Regulation 18, that under some circumstances a source may be required to obtain a Regulation 18 permit for GHGs/CO₂e even though it may not be required to obtain a Regulation 19 or 26 permit (e.g. a source which is not major for any non-GHG federally regulated air pollutant but which has emissions of greater than 75,000 tons per year (“tpy”) CO₂e).

Response: See Response to Comment 2.

Comment 13: It is unclear that should a facility be required to obtain a permit for GHG/CO₂e, what the permit conditions or provisions related to the emission of GHGs would include. Commenters request an explanation from ADEQ about these matters as well as what evidence or other information, including calculations, sources subject to permitting would be required to provide to show applicability or inapplicability of the requirements in the proposed regulation.

Response: See Response to Comment 2.

Comment 14: The proposed revisions to Regulation 18 should include a rescission clause. As ADEQ has proposed to include a rescission clause for this purpose in the proposed revisions to Regulations 19 and 26 a rescission clause should also be included therein to maintain consistency across the three regulations and to ensure that Arkansas does not regulate GHGs in the absence

of federal regulation. In addition, Section 18.305, entitled “Action on Application,” is not an appropriate place for an escape clause in Regulation 18. The Regulation 18 escape clause should be placed in some other section of the Regulation, such as in Chapter 1, or in Section 18.301.

Response: The proposed changes to Regulation Number 18 are being withdrawn, thus alleviating the need for a rescission clause. See Response to Comment 2.

Comment 15: The purpose and effect of the change to Section 18.305(B) is unclear. ADEQ has suggested that the purpose of Section 18.305(B)(2) is to incorporate the so-called “escape clauses” in Regulations 19 and 26 into Regulation 18 by automatic operation. However, the language of Section 18.305(B)(2) is ambiguous on that point, and could – in fact - be interpreted to incorporate the Regulation 19 and 26 requirements to regulate CO₂e into Regulation 18, even if those requirements are later rescinded or vacated. For a source that is not otherwise required to obtain a permit under Regulations 19 and 26, this provision appears to add requirements that are stricter than what is required by current state or federal law. Indeed, because the proposed revisions to Regulation 18.301 cause the regulation to be applicable to a source which emits 75,000 tpy CO₂e, and if the requirements of Section 18.304(a) are met, then ADEQ must issue a draft permit that addresses all air pollutant emissions, including, under Section 18.305(B)(2), the GHG requirements in Regulations 19 and 26, and a source could be required, because of the proposed revision to Regulation 18.305(B)(2), to comply with Regulations 19 and 26 when it otherwise would not.

Response: As stated in previous responses to comments, the proposed revisions to Regulation 18 will be withdrawn. See also Response to Comment 2.

Comment 16: Commenters made the statement that the “escape clause” should read as follows: The provisions of this Regulation and any terms or conditions of permits issued pursuant thereto regarding Greenhouse Gases, as herein defined, shall cease to be effective if any of the following occurs:

- 1) Enactment of federal legislation depriving the United States Environmental Protection Agency (“EPA”) Administrator of authority, limiting the EPA Administrator’s authority, or requiring the EPA Administrator to delay the exercise of authority, to regulate Greenhouse Gases under the Clean Air Act; or
- 2) The issuance of any opinion, ruling, judgment, order or decree by a federal court depriving the EPA Administrator of authority, limiting the EPA Administrator’s authority, or requiring the EPA Administrator to delay the exercise of authority, to regulate Greenhouse Gases under the Clean Air Act, or finding any such action, in whole or in part, to be arbitrary, capricious, or otherwise not in accordance with law; or

- 3) Action by the President of the United States or the President's authorized agent, including the EPA Administrator, to repeal, withdraw, suspend, postpone, or stay the amendment to 40 CFR Section 51.166 promulgated on June 3, 2010, as set forth at 75 Fed. Reg. 31606, or to otherwise limit or delay the EPA Administrator's exercise of authority to require permitting of sources of Greenhouse Gas emissions.
- 4) EPA final regulation resulting in Greenhouse Gases not being subject to regulation.

Response: See Response to Comment 15.

Comment 17: ADEQ must address the effect that permitting GHGs as "air contaminants" will have on the permit fees required by permit holders. The Commission should refuse to adopt ADEQ's proposed revisions to Regulation 18; and failing that, should require ADEQ to either exclude GHG emissions from permit fees (as is done with carbon monoxide) or directly address this issue in the revisions to Regulations 18, 19 and 26 or separately in a rulemaking for Regulation 9.

Response: ADEQ appreciates the concerns raised by commenters regarding the impact to permit fees as an ancillary consequence to the proposed revisions to Regulation Number 18. However, revisions to permit fees were not part of this rulemaking. The issues associated with GHG permitting fees will be addressed in a separate rulemaking proposal for revisions to APC&EC Regulation Number 9. Additionally, due to consideration of other comments received, the proposed revisions to Regulation 18 will be withdrawn. (See Response to Comment 2.)

Comment 18: Chapter 2 definition for "Air Contaminant" should not be changed and should not add the phrase "or air pollutant." The definition of "air contaminant" in Regulation 18 should not be changed since this is a state-enforceable only regulation, and it is not necessary to change the definition in Regulation 18. Moreover, the Commission and ADEQ authority to regulate air pollution is defined in terms of "air contaminants," not "air pollutants," the latter of which is not defined in either the Arkansas Water and Air Pollution Control Act (see A.C.A. § 8-4-303) or Regulation 18. Therefore, this proposed change is unwarranted and should not be adopted.

Compliance with the Tailoring Rule arguably requires that the words "carbon dioxide (CO₂)" be removed from the definition of air contaminant in Regulations 18 and 26, which ADEQ has proposed, and nothing more.

Response: The addition of the words "or air pollutant" to the definition of "air contaminant" was proposed to add clarity to the regulation by reducing the ambiguity arising from the Regulation's synonymous use of these two terms. It would not have added any new regulatory requirement

under Regulation 18. However, due to comments received, all of the proposed changes to Regulation 18 will be withdrawn.

Comment 19: There is no mandate in the federal regulations requiring ADEQ to define “air pollutant” in its state-only permit regulations, and there is no evidence presented that ADEQ requires this change to Regulation 18 in order to administer the program efficiently and effectively.

Response: See Response to Comment 18.

Comment 20: The proposed addition of the definition of the term “CO₂ equivalent emissions” is unnecessary and confusing, and should not be adopted. The proposed addition of the definition of the term “CO₂ equivalent emissions” in Chapter 2 of Regulation 18 is unnecessary to comply with the Tailoring Rule or any other federal law and should not be adopted.

Response: Upon consideration of other comments received, the proposed changes to Regulation Number 18 will be withdrawn. See Response to Comment 2.

Comment 21: The proposed definition of “CO₂e,” specifically the language “for each of the six greenhouse gases in the pollutant [greenhouse gases]” is ambiguous. If the definition is kept in the proposed revisions, then the definition of “CO₂e” should be revised to convey clarity and avoid confusion among the regulated community. The definition is not consistent with the proposed revision to Regulation 19.904, which includes a “CO₂e” definition that corresponds to that in the Tailoring Rule. If incorporated, the definitions in Regulation Number 18 should correspond exactly to the proposed additions in Regulations 19 and 26.

Response: See Response to Comment 2.

Comment 22: The proposed addition of the definition of the term “Greenhouse gases” is unnecessary and should not be adopted. Defining the term “Greenhouse gases” in the state-only air regulation is not necessary to comply with the Tailoring Rule or any other federal law, and thus should not be adopted.

Response: The proposed changes to Regulation Number 18 will be withdrawn. See Response to Comment 2.

Comment 23: The proposed revision to Regulation 18.301 is unnecessary, and should not be adopted. The effect of this proposed revision is to require every source which emits 75,000 tpy or more of CO₂e to obtain a permit, even though the corresponding trigger under federal law is 100,000 tpy. This proposed revision is therefore more stringent than federal law. In the event

section 301 is amended, commenters urge the Commission to adopt a permitting threshold of 100,000 tpy so as to be consistent with federal law.

Response: The proposed changes to Regulation Number 18 will be withdrawn. See Response to Comment 2.

Comment 24: Because there is no transition period included in Regulation 18 for phased-in implementation of the proposed GHG requirements as there is with the Tailoring Rule, upon adoption, any and all sources which emit 75,000 tpy CO₂e or more will be required to obtain a permit under Regulation 18 despite the fact that there appears to be no corresponding substantive permit standard or condition applicable to the newly-regulated emissions.

Response: The proposed changes to Regulation Number 18 will be withdrawn. See Response to Comment 2.

Comment 25: The word “recognized” should not be deleted from Regulation 18.305(B)(2). ADEQ proposes to delete the word “recognized” before the words “air pollutant emissions” in Regulation 18.305(B)(2). This deletion is not necessary, may lead to unintended regulatory consequences, and will cause confusion among the regulated community. The more appropriate revision, should there be any, would be to substitute the word “contaminant” for “pollutant” in Regulation 18.305(B)(2). Inclusion of the words “recognized air contaminant emissions” is appropriate because that term is specifically defined in the regulations of the operating air permit program and provides the criteria for which air contaminants must be included in such a permit. “Air Pollutant” is not defined in Regulation 18 and could be interpreted very broadly to require a source to include all air pollutants in its permit instead of only those air contaminant emissions which may be reasonably assumed to be present or which cause or present a threat of harm to human health or the environment.

Response: The proposed changes to Regulation Number 18 will be withdrawn. See Response to Comment 2.

Comment 26: Because deleting the word “recognized” is not required by the Tailoring Rule, and doing so will result in regulation which is stricter than that required by federal law, the Commission must undertake a benefit analysis to consider the economic impact and environmental benefit of the amendment. Because the proposed deletion is not required by or consistent with federal law, the Commission also must provide a written scientific and technical rationale explaining the necessity of the amended regulation.

Response: See Response to Comment 7.

Comment 27: Because revisions to Regulation 18.305(B)(2) will cause a source to incorporate Regulations 19 and 26 requirements (and in essence permitting) for a lesser tonnage than is required by the Tailoring Rule, the proposed revision to Regulation 18.305(B)(2) will result in a much stricter requirement for emissions subject to permitting in Arkansas than is required by federal law, and will cause unnecessary and undue burden on the regulated community and ADEQ as the permitting authority. Because the revision is not required by the Tailoring Rule, and because doing so will result in regulation which is stricter than that required by federal law, the Commission must undertake a benefit analysis to consider the economic impact and environmental benefit of the amendment. Furthermore, because the proposed deletion is not required by or consistent with federal law, the Commission also must provide a written scientific and technical rationale explaining the necessity of the amended regulation.

Response: See Response to Comment 7

Comment 28: In Reg 18.305(B)(2), the language of these paragraphs should be clarified to note that air pollutant emissions emitted in greater than de minimis amounts should be addressed in permits. Otherwise, it could be mistakenly assumed that even trivial amounts of air pollutants must be permitted, which is not current ADEQ practice.

Response: Since GHG permitting will not be required under Regulation Number 18, this comment is moot. The proposed changes to Regulation Number 18 will be withdrawn. See Response to Comment 2.

Comment 29: The proposed revision to Regulation 18.307(C)(2)(vi) is unnecessary and should not be adopted. Revising the criteria for determining the conditions of a modification that will be regarded as de minimis under the state-only air regulation is not necessary to comply with the Tailoring Rule or any other federal law. Because addition of the words “seventy-five thousand (75,000) tons per year CO₂e” to the list of criteria for determining the conditions of a modification to a facility that will be considered de minimis will result in a regulation that is more stringent than federal law, the Commission must undertake a benefit analysis to consider the economic impact and environmental benefit of the amendment. Furthermore, because the proposed deletion is not required by or consistent with federal law, the Commission also must provide a written scientific and technical rationale explaining the necessity of the amended regulation. Moreover, such a revision is unnecessary in view of the fact that there is no corresponding substantive permit standard or condition for a facility that undergoes a modification that meets the proposed criteria. In other words, it is not clear how the permit would address or control the newly-regulated emissions.

Response: In consideration of other comments received, the proposed revisions to Regulation Number 18 will be withdrawn. Since the permitting requirements for GHGs will be removed,

the proposed language at 18.307(C)(2)(vi) will also be removed, this comment is moot. See also Response to Comment 7.

Comment 30: Appendix A insignificant activities should refer to “CO₂e” emissions rather than to “CO₂” emissions: The changes at Group A (1) and (13) added increases in carbon dioxide emissions for insignificant activities, but the reference to carbon dioxide should be changed to “CO₂e” emissions. Greenhouse gases are a combination of gases including carbon dioxide and it is that combination of gases which are being regulated under the Tailoring Rule and as calculated for CO₂e emissions, which definitions are adopted by ADEQ in the Regulations. ADEQ should explain its rationale for referencing carbon dioxide emissions rather than CO₂e emissions in Appendix A.

Response: Since the proposed changes the Regulation Number 18 will be withdrawn, there will be no changes to Appendix A in Group A (1) and (13). See Response to Comment 2.

Comment 31: Currently, the ADEQ lists all pollutants (emitted in above de minimis amounts) from each individual source, regardless of whether facility-wide thresholds have been exceeded. (Example: Permitting SO₂ emissions from natural-gas combustion sources as an “also emitted” pollutant.) Will this practice continue with GHGs, or will GHGs not be listed as pollutants at all in the permits until after the facility-wide GHG permitting thresholds are reached?

Response: In consideration of other comments received, the proposed revisions to Regulation Number 18 will be withdrawn and carbon dioxide emissions will not be permitted under Regulation Number 18. See Response to Comment 2.

Comment 32: The general transition clauses in Regulations #18 and #19 may (or may not) indicate that permittees have 180 days after the effective date of the regulation to submit permit applications addressing GHGs. This language seems in need of updating since it refers to “facilities which are now subject to this regulation which were not previously.” It should also refer to facilities that are subject to new provisions of this regulation. If these existing generic transition clauses are not intended for the GHG permitting implementation then the regulation should clarify such.

Response: In consideration of other comments received, the proposed revisions to Regulation Number 18 will be withdrawn. See Response to Comment 2. Since the proposed revisions will be withdrawn, this comment is moot.

Comment 33: If and when the Commission determines that it is prudent and necessary to develop a state GHG program, commenters would suggest that the Commission develop market-based flexible mechanisms for GHG control, possibly as a development of new source

performance standards required by § 111 of the Clean Air Act. Until then, revision of Regulation 18 to address GHGs is not required to comply with the Tailoring Rule and should not be adopted at this time.

Response: See Response to Comment 2. In consideration of other comments received, the proposed revisions to Regulation Number 18 will be withdrawn.

Comment 34: If ADEQ makes changes to language in any of the three regulations, Regulation 18, 19, or 26, ADEQ should consider whether the equivalent changes should be made to Regulations 18, 19, or 26 for consistency.

Response: In consideration of other comments received, the proposed revisions to Regulation Number 18 will be withdrawn.

Prepared by:
Arkansas Department of
Environmental Quality

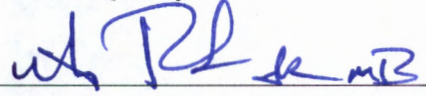
By: 
Mike Bates, Chief, Air Division

EXHIBIT C

ARKANSAS POLLUTION CONTROL AND ECOLOGY COMMISSION

**SUBJECT: Petition to
Initiate Rulemaking
Regulation No. 18**

Docket No. 11-001-R

MINUTE ORDER NO. 12-

PAGE 1 OF 1

On January 28, 2011, the Arkansas Pollution Control and Ecology Commission (hereinafter "APC&EC" or "the Commission") adopted Minute Order 11-02, which initiated rulemaking to amend APC&EC Regulation No. 18 in response to the United States Environmental Protection Agency's ("EPA") June 3, 2010, "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule" ("Tailoring Rule").

After a review of the written and oral comments received, ADEQ has determined that implementing the EPA Tailoring Rule may be achieved through revisions to APC&EC Regulation Nos. 19 and 26. Therefore, ADEQ has proposed to withdraw the changes proposed in APC&EC Regulation No. 18 to address greenhouse gas requirements.

At this time, the Commission finds that implementation of the Tailoring Rule may be achieved through revisions to APC&EC Regulation Nos. 19 and 26.

Therefore:

The Commission approves the withdrawal of the proposed amendments to Regulation No. 18 and closes Docket No. 11-001-R.

COMMISSIONERS:

**J. Bates
L. Bengal
D. Hendrix
S. Jorgenson
D. Samples
L. Nance**

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

John Chamberlin, Chair

Submitted by: Stuart Spencer DATE PASSED: _____