BEFORE THE ARKANSAS POLLUTION CONTROL AND ECOLOGY COMMISSION

IN THE MATTER OF AMENDMENTS TO REGULATION NO. 19, REGULATIONS OF THE ARKANSAS PLAN OF IMPLEMENTATION FOR AIR POLLUTION CONTROL	**)** **)** **)** **)**	**DOCKET NO. 11-002-R**

RESPONSIVE SUMMARY FOR REGULATION NO. 19, REGULATIONS OF THE ARKANSAS PLAN OF IMPLEMENTATION FOR AIR POLLUTION CONTROL

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" or "Department") filed a Petition to Initiate Rulemaking to Amend Regulation No. 19, Regulations of the Arkansas Plan of Implementation for Air Pollution Control. 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. 19 along with the Commission's response.

The revisions to Regulation No. 19 addressed in this rulemaking are made with the intention of implementing EPA's "Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule: Final Rule" ("enabling federal law") Federal Tailoring Rule ("federal rule"). Minor adjustments to provisions of Regulation No. 19 not specifically addressed in the enabling federal law are included in this rulemaking. These minor adjustments are necessary in order to either integrate the enabling federal law's provisions into the affected Arkansas regulations as seamlessly as possible or to clarify the implementation of the greenhouse gas ("GHG") provisions within the existing regulatory framework. Every effort has been made to keep these ancillary revisions to a minimum without making wholesale revisions to the existing permitting infrastructure contained within the present regulations. Additionally, the intent of this rulemaking is to amend the Arkansas regulations to be consistent with and no more stringent in application and effect with regard to the regulation and permitting of GHGs in

Arkansas (within the overall structure of the existing permitting program) and to reach the same goal as would be accomplished by EPA through the Federal Implementation Plan (FIP) that is presently in place. Further, the intent of these revisions is to attain EPA's approval of the Arkansas State Implementation Plan for GHGs and the withdrawal of the FIP.

Regulation No. 19 also contains a rescission clause, stating that if a federal court of competent jurisdiction issues any opinion, ruling, judgment, order, or decree which stays, invalidates, or otherwise renders unenforceable, in whole or in part, any provision of enabling federal law regarding the prevention of significant deterioration and Title V greenhouse gas tailoring rule (75 FR 31514, June 3, 2010), then any provision based on such enabling federal law adopted in the Regulation will be void and of no effect. If the enabling federal law is successfully challenged, either in part or in whole, then the Department will seek to initiate rulemaking in order to modify the GHG provisions in Regulation No. 19 in accordance with program requirements set out by EPA in response to the court decision which renders federal law invalid or unenforceable. In this case, there are a number of measures available to either the Department or the Commission to address the state GHG regulatory provisions which are based on any invalid or unenforceable provisions of the enabling federal law, until such time as the rulemaking process is completed. Specifically, the Commission may, pursuant to Arkansas statute, declare a moratorium on a type or category of permit (Ark. Code Ann. §§ 8-4-202 and 8-4-304), or grant a variance from any particular requirements of the regulation to specific air contamination sources (Ark. Code Ann. § 8-4-313). One option available to the Director of the Department (hereinafter "Director") is the authority to exercise enforcement discretion over those portions of the Regulations based on the enabling federal law found to be invalid or unenforceable. It is important to note that if the enabling federal law is successfully challenged, the Department will rely on EPA guidance for implementing interim measures (pending rulemaking and a subsequent State Implementation Plan ("SIP") and Title V program approval) to conform to federal requirements and to ensure that ADEQ is not enforcing the GHG provisions in a manner more stringent than federal law (see also Reg. 19.102(D)).

Comment 1: One commenter stated that they are not opposed to the Commission's efforts to incorporate the Tailoring Rule into Arkansas's air regulation.

Response: ADEQ acknowledges and appreciates this comment.

No changes to the final rule are necessary due to this comment.

Comment 2: Commenters stated they are generally unopposed to streamlining the federally enforceable state regulations and support the State's continued administration of the federal air permitting programs in Arkansas. However, commenters believe revisions to Regulation 19 should not be made unless the change is required by law in order for ADEQ to obtain approval to administer the Tailoring Rule, and changes made in order to obtain such approval should be the absolute minimum necessary to obtain approval.

Response: ADEQ believes that each of the proposed regulation revisions are required by law and include the minimum changes necessary to incorporate EPA's Greenhouse Gas ("GHG") Tailoring Rule and obtain the necessary state regulatory authority for GHG source permitting in Arkansas.

No changes to the final rule are necessary due to this comment.

Comment 3: To the extent ADEQ believes that each of the proposed revisions to Regulation 19 are required by the Tailoring Rule, ADEQ should justify each revision by reference to the specific corresponding federal requirement (*see* Regulation 8.815(A)(1)(i) and (ii)); and to the extent the revision may be more stringent than or is not identical to federal requirements, then ADEQ must provide the necessary justification and supporting documentation mandated by Ark. Code Ann. § 8-4-311(b)(1)(B), § 8-4-201(b)(1)(B), and Regulations 8.815 and 8.812.

Response: The regulation revisions meet the Economic Impact and Environmental Benefit Analysis exemption provisions of Regulation 8.812 by incorporating the GHG Tailoring Rule without substantive change. The proposed changes to the definitions and Chapter 9 of Regulation Number 19 are excerpted from the Code of Federal Regulations ("CFR") without change. The proposed change in Chapter 4 and changes in Appendix A, although not identical to EPA's GHG Tailoring Rule, are consistent with and necessary to implement the GHG Tailoring Rule in the existing Regulation 19. The amendments to Regulation Number 19 are the minimum necessary to modify ADEQ's PSD permitting program to match EPA's GHG Tailoring Rule. Making the proposed revisions will maintain consistency between federal air pollution control programs and the Commission's regulations. The demonstration that these revisions are scientifically sound can be satisfied by incorporating by reference the justification contained in the federal GHG Tailoring Rule published June 3, 2010, in the Federal Register at 75 FR 31514, the finding of substantial inadequacy and SIP call to ensure authority to issue permits under the PSD program to GHG sources published in the Federal Register on December 13, 2010, at 75 FR 77698 and the Endangerment Finding published in the Federal Register on December 15, 2009, at 74 FR 66496.

Ark. Code Ann. § 8-4-311(b)(1)(B) and § 8-4-201(b)(1)(B) require that any proposed rule or change to any existing rule that is *more stringent* than federal requirements be accompanied by an analysis of the economic impact and environmental benefit of the proposed rule. By strict application of the statutory requirement, an economic impact and environmental benefit analysis is not required; however, the Commission adopted implementing regulations pursuant to Ark. Code Ann. § 8-4-311(b)(1)(C) and § 8-4-201(b)(1)(C) at Regulation 8.812. Adhering to the requirements of Regulation 8.812, the proposed rule revisions are deemed to be exempt since the revisions are incorporating or adopting federal regulation without substantive change (Regulation 8.812(A)(1)).

No changes to the final rule are necessary due to this comment.

Comment 4: To the extent that the proposed revisions to Regulation 19 result in regulations that go beyond the Tailoring Rule and thus, are more stringent than federal requirements, the Commission has not undertaken a proper benefit analysis, in contravention of Arkansas law.

Response: The commenters do not identify any specific proposed change to Regulation Number 19 that they consider to be more stringent than federal requirements. Arkansas law requires that an economic impact and environmental benefit analysis be conducted for any regulations or change in regulation that is *more stringent* that federal requirements. The proposed revisions are not more stringent than federal requirements and, in most instances, adopt or incorporate identical requirements as set forth in the federal rule. Certain minor changes to the state rules were necessary either to clarify the requirements proposed or as logically necessary to enact the federal requirements in the existing state rules. All revisions are designed to incorporate only the minimum changes necessary to maintain consistency between EPA's GHG Tailoring Rule and the Commission's regulations so that ADEQ will have the authority necessary to permit regulated GHG sources in Arkansas. ADEQ believes that the proposed revisions are not more stringent than the requirements of the GHG Tailoring Rule and that the proposed revisions are exempt from the requirement to prepare an Economic Impact and Environmental Impact Analysis under Regulation 8.812(A)(1) because "the proposed rule incorporates or adopts the language of a federal statute or regulation without substantive change."

No changes to the final rule are necessary due to this comment.

Comment 5: ADEQ should include its scientific and technical rationale for each change to the regulation. Arkansas law also 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 Commission's 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 the ADEQ."

Thus, ADEQ should provide its explanation of the need for each and every revision with reference to the requirement in the Tailoring Rule as well as the necessary scientific or engineering basis for such revision to the extent the revisions are not identical to the Tailoring Rule.

Response: The commenter failed to quote the remainder of the statutory section which provides:

> For any standard or regulation that is identical to a regulation promulgated by the United States Environmental Protection Agency, this portion of the record may be satisfied by reference to the Code of Federal Regulations.
> In all other cases, [ADEQ] must provide its own justification with appropriate reference to the scientific and engineering literature or written studies conducted by the department. (Ark. Code Ann. § 8-4-202(d)(4)(A)(ii)).

Further, the commenter failed to identify the proposed changes which were not identical to the Tailoring Rule. The proposed changes in the definitions and Chapter 9 are excerpted word-for-word from EPA's GHG Tailoring Rule without change. The proposed change in Chapter 4 and changes in Appendix A, although not identical to EPA's GHG Tailoring Rule, are consistent with and are the minimum revisions necessary to modify ADEQ's PSD permitting program to match EPA's GHG Tailoring Rule. The justification for these revisions to Regulation 19 include reference to the federal GHG Tailoring Rule, published in the Federal Register on June 3, 2010, at 75 FR 31514, incorporating by reference the justification for the GHG Tailoring Rule contained therein, the finding of substantial inadequacy and SIP call to ensure authority to issue permits under the PSD program to GHG sources, published in the Federal Register on December 13, 2010, at 75 FR 77698, and the Endangerment Finding, published in the Federal Register on December 15, 2009, at 74 FR 66496. Without these revisions, facilities currently subject to the PSD permitting program will not be able to receive permits from ADEQ for GHG emissions. Without these revisions, PSD, and eventually title V GHG permits, would be issued by EPA instead of by the ADEQ. However, at this point, it is unclear whether EPA has the authority to issue a title V permit in an approved state such as Arkansas.

No changes to the final rule are necessary due to this comment.

Comment 6: Explanation is needed regarding the effect of the amendments on existing Part 70 sources. Based upon the proposed revisions to Regulation 19, it is not clear that should a facility's permit include GHG emissions, what the associated permit condition or provision will be if the source is required to address GHG emissions in its permit as well as a description of

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: Applicants for permits or permit modifications under Regulation Number 19 are required to submit certain information to ADEQ as part of the existing application process (see Regulation 19.404). These requirements are unaffected by the proposed revisions in all regards except that the proposed revisions add GHGs as a new pollutant that must be addressed. Permit application forms (as addressed in the currently effective Regulation 19.404) will be revised to include the additional information that will be necessary after enactment of the regulatory revisions; those forms will be made available to the regulated community and the public.

As a point of reference and information in response to the questions raised in this comment, interested parties are directed to the document PSD AND TITLE V PERMITTING GUIDANCE FOR GREENHOUSE GASES, Environmental Protection Agency, United States Office of Air and Radiation, dated March 2011, which outlines these requirements. Specifically, on page 53:

> Under both Steps 1 and 2 of the Tailoring Rule, sources will need to include in their title V permit applications, among other things: citation and descriptions of any applicable requirements for GHGs (e.g., GHG BACT requirements resulting from a PSD review process), information pertaining to any associated monitoring and other compliance activities, and any other information considered necessary to determine the applicability of, and impose, any applicable requirements for GHGs. This is the same application information required under title V for applicable requirements pertaining to conventional pollutants.
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> As a general matter, all title V permits issued by permitting authorities must contain, among other things, emissions limitations and standards necessary to assure compliance with all applicable requirements for GHGs, all monitoring and testing required by applicable requirements for GHGs, and additional compliance certification, testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with GHG-related terms and conditions of the permit. Permitting authorities will also need to request from sources any information deemed necessary to determine or impose GHG applicable requirements.
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> It is possible that some sources will need to address GHG-related information in their applications even if they will ultimately not have any GHG-specific applicable requirements (such as a PSD-related BACT requirement for GHGs) included in their permit. This is because, as noted above, permitting authorities would need to request

information related to identifying GHG emission sources and other information if they determine such information is necessary to determine applicable requirements.

No changes to the final rule are necessary based on this comment.

Comment 7: Commenters request ADEQ to provide further explanation regarding the effect of the Tailoring Rule on its pre-construction review program and its operating permit program in the event the revisions to Regulation 19 are not adopted by July 1, 2011.

Response: Unless and until the proposed revisions are adopted and approved by EPA in a State Implementation Plan, ADEQ will not have the requisite authority to issue permits regarding GHGs. Facilities that emit such pollutants at levels addressed in the federal GHG Tailoring Rule will be required to comply and obtain the necessary federally required permits before commencing construction or operation. Until Arkansas adopts GHG Tailoring Rule requirements, any PSD/NSR permits involving significant GHG emission increases will require EPA issuance of the GHG portions. This will require application submittal, EPA review of the application, and EPA's drafting of permits. While ADEQ will seek to expedite any such permit and possibly enter into an agreement with EPA on permit issuance, it is not certain that EPA will issue any such permits or how quickly.

The effect on the operating permit program of not adopting the rules will leave ADEQ and facilities without title V permits that meet federal requirements. What action EPA will pursue in such an instance is unknown. ADEQ is continuing to work with EPA at the Regional and Headquarter levels to minimize any disruption of the Operating Permit (title V) program during the pendency of the rulemaking for Regulation Numbers 19 and Number 26.

No changes to the final rule are necessary due to this comment.

Comment 8: Commenters stated that only the following revisions are necessary to comply with the Tailoring Rule.

1. Addition of an adequately comprehensive rescission clause;
2. The definitions for "CO_2 equivalent emissions (CO_2e)" and "Greenhouse Gases (GHGs)" in Regulation 19, Chapter 9;
3. Incorporation of the Tailoring Rule at Regulation 19.904.

Response: ADEQ appreciates the commenters' suggested list of revisions to incorporate EPA's GHG Tailoring Rule into Regulation Number 19; however, the Department believes that the most cohesive and complete implementation of the Tailoring Rule in existing regulations is through the revisions that have been proposed (allowing for any revisions in response to comments). Commenters did not address the need for the newly proposed definitions to be

placed in the Definitions chapter of Regulation Number 19 (Chapter 2, Definitions), the *De Minimis* threshold value of 75,000 tpy that is necessary for CO_2e to reduce the number of sources that would require major permit modifications for CO_2e, or the revisions to Appendix A, Insignificant Activities List, Group A, which are necessary to avoid specified emissions of CO_2 from triggering the need for permits.

ADEQ responds to each item on the list as follows:
1. ADEQ believes the "rescission clause" is adequate. See Response to Comment 22.
2. The definitions for "CO_2 equivalent emissions (CO_2e)" and "Greenhouse Gases (GHGs)" are already proposed in Regulation Number 19, Chapter 9, at Regulation 19.904(G)(1) and Regulation 19.904(G)(2), as well as in Chapter 2 of Regulation Number 19.
3. The majority of the GHG Tailoring Rule's requirements are proposed as revisions to Regulation 19.904.

No changes to the final rule are necessary due to this comment.

Comment 9: ADEQ must address the effect that permitting GHGs as "air contaminants" will have on the permit fees required by permit holders. Permitting fees for GHGs should be exempt. The Commission 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: Revisions to permit fees were not part of this rulemaking. Permitting GHGs will result in additional costs for the permitting program. However, the issues associated with GHG permitting will be addressed in a separate rulemaking proposal for revisions to APC&EC Regulation Number 9, which proposes to exclude CO_2 and methane from being chargeable emissions within air permit fees.

No changes to the final rule are necessary due to this comment.

Comment 10: The proposed definition of the term "CO_2 equivalent emissions" in Chapter 2 of Regulation 19 is unnecessarily confusing. Specifically, the language used to identify "each of the six greenhouse gases in the pollutant [greenhouse gases]" lacks clarity. If the definition is not omitted entirely, the definition of "CO_2 equivalent emissions" in Chapter 2 of Regulation 19 should be revised to match that appearing at Regulation 19.904(G)(2).

Response: See Response to Comment 12 and 13.

Comment 11: Insofar as implementation of the Tailoring Rule necessitates defining "CO_2 equivalent emissions," the definition at proposed Regulation 19.904(G)(2), with modification to include the "escape clause" found in Regulation 19.904(G)(6), is sufficient for that purpose.

Response: ADEQ disagrees with the comment. ADEQ does not believe the addition of the "escape clause" is needed in the "CO_2 equivalent emissions" definition found in Regulation 19.904(G)(2). The "escape clause" is found in Section 19.904(G)(6) of Regulation Number 19.

No changes to the final rule are necessary due to this comment.

Comment 12: The definitions for "CO_2 equivalent emissions" and "Greenhouse gases" should be the same as those in Regulation 19.904. The definitions of "CO_2 equivalent emissions (CO_2e)" and "Greenhouse gases" in all three proposed Regulations should be made identical to the definitions provided in Regulation 19.904 for purposes of consistency and clarity. ADEQ should be required to explain why these two definitions in the drafts of the Regulation are not identical to the definitions of these terms provided in Regulation 19.904.

Response: The definitions of "CO_2 equivalent emissions" and "Greenhouse gases" proposed in Chapter 2 and Chapter 9 of Regulation Number 19 are nearly identical to each other as well as to the GHG Tailoring Rule's definitions of the terms. For additional clarity, the definitions of "CO_2 equivalent emissions" and "Greenhouse gases" proposed in Chapter 2 of Regulation Number 19 will be modified to match the GHG Tailoring Rule's definitions of the terms, with the exception of the internal citations to 40 CFR § 86.1818-12-(a) being deleted and an incorporation by reference date of October 30, 2009, to Table A-1 to subpart A of 40 CFR Part 98 being added.

No change to the language of Regulation 19.904(G) is necessary as a result of this comment.

Comment 13: The addition of "Greenhouse Gases (GHGs)" definition in Chapter 2 is unnecessary and should not be adopted. The proposed addition of the definition of the term "Greenhouse Gases" in Chapter 2 of Regulation 19 is unnecessary, may lead to unintended regulatory consequences, will cause confusion among the regulated community, and should be omitted.

Response: The definition is placed in Chapter 2 of Regulation Number 19 to increase readability and will be changed to match the GHG Tailoring Rule's definition as described in the Responses to Comments 10 and 12. ADEQ believes that matching the definition found in Chapter 2 to the GHG Tailoring Rule's definition will eliminate any potential confusion among the regulated community, as well as the potential for unintended regulatory consequences.

Comment 14: The definition of "greenhouse gases" at Regulation 19, Chapter 2, must be revised to remove the reference to measuring in CO_2e because CO_2e is one of two steps used in conjunction with major source mass thresholds to determine whether a source is subject to regulation for its GHG emissions. The commenter suggests the following revision to this definition:

> "Greenhouse gases" (GHGs) is the air pollutant defined as the aggregate group of six greenhouse gases: carbon dioxide, nitrous oxide, methane, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride… ~~and shall be measured as CO_2e.~~

Response: The definitions of "Greenhouse gases" proposed in Regulation Number 19 will be modified to match the GHG Tailoring Rule's definitions of the terms with the exception of the internal citations to 40 CFR Part 86.1818-12-(a) being deleted. This change will delete the language, "and shall be measured as CO_2e."

Comment 15: The *De Minimis* changes section should refer to the definition of CO_2e in Regulation 19.904. Provided that the definition of "CO_2 equivalent emissions" in Chapter 2 of Regulation 19 is omitted, the proposed addition under *De Minimis* Changes in Regulation 19.407(C)(2)(a)(vi) should be revised to state "Seventy-five thousand (75,000) tons per year of CO_2e, as defined in Regulation 19.904(G)(2)." The combination of these changes will avoid ambiguity.

Response: The existing regulation formatting provides the definition of a term prior to the term's use in the text of the Regulation. Therefore, ADEQ believes that the definition of "CO_2 equivalent emissions" should remain in Chapter 2 of Regulation Number 19. See also Response to Comments 12 and 25.

Comment 16: The proposed addition at Regulation 19.904(G) is incomplete. The language found at Regulation 19.904(G) should be revised by substituting the words "Greenhouse Gases (GHGs), as defined below," after the words "[f]or the purpose of the regulation of" and before the word "only."

Response: ADEQ believes that the regulation revision found at Regulation 19.904(G) could only be construed as incomplete if the correlated comment that aims to remove the definition of GHGs from Chapter 2 of Regulation Number 19 were to be accepted. ADEQ intends to keep the definition of GHGs in Chapter 2 of Regulation Number 19 because the existing regulation formatting provides the definition of a term prior to the term's use in the text of the Regulation. By previously defining GHG in Chapter 2 of Regulation Number 19, the regulation revision found at Regulation 19.904(G) is not incomplete.

No changes to the final rule are necessary due to this comment.

Comment 17: Internal references in Regulation 19.904 should be revised to include the rescission clause. The proposed definition of "Greenhouse Gases" in Regulation 19.904(G)(1) is inadequate and fails to incorporate the proposed rescission clause at 904(G)(6), which may have unintended regulatory consequences. Specifically, the exception clause should be revised to incorporate the rescission clause by substituting the words "Reg. 19.904(G)(6)" for the words "Reg. 19.904(G)(5)."

Response: ADEQ agrees with this comment and will make the suggested revision.

Comment 18: A Reference to Regulation 19.407(c) should be added to proposed Regulation 19.904(G)(2). Provided that the definition of "CO_2 equivalent emissions" in Chapter 2 of Regulation 19 is omitted, the proposed definition of "CO_2 equivalent emissions" in Regulation 19.904(G)(2) is incomplete. It should also reference the *De Minimis* Change provision at Regulation 19.407(c).

Response: ADEQ does not support the addition of the reference to Regulation 19.407(C) within the regulation revisions found at Regulation 19.904(G), because such a reference is not necessary if the related comments concerning the placement of definitions and citations are not accepted. Because ADEQ does not intend to make changes based on the previous comments that are the foundation for this comment, action on this comment is not needed. Commenters' request differs significantly from the language found in Regulation 19.904(G)(2), which matches the GHG Tailoring Rule language verbatim, with the exception of citations within the definition which had to be changed to the corresponding Regulation Number 19 citations for consistency purposes.

No changes to the final rule are necessary due to this comment.

Comment 19: The following language should be substituted before the words "the term tons per year": "For purposes of Reg. 19.407(C) and Reg. 19.904(G)(3) through Reg. 19.904(G)(6), . . .".

Response: ADEQ does not support the revision described in this comment. This revision is not necessary if the related comments concerning the placement of definitions and citations are not accepted. Because ADEQ does not intend to make changes based on the previous associated comments, action on this comment is not needed.

No changes to the final rule are necessary due to this comment.

Comment 20: Proposed Regulations 19.904(G)(3) and (4) and in Regulation 19.904 and (G)(4)(a) and (b) should not reference "Regulated NSR Pollutant," which is an undefined term in

Regulation 19. While GHGs are a pollutant "subject to regulation" under the Clean Air Act and, thus, are a "regulated NSR pollutant" after January 2, 2011, the term "regulated NSR pollutant" is not defined in Regulation 19 and is not otherwise a term used in the Regulation. Instead of using the term "regulated NSR pollutant," ADEQ should consider replacing it with the term "GHGs subject to regulation to the extent provided in this Regulation." The proposed revisions to Regulation 19.904(G)(3), include a provision that an emissions increase for GHGs shall be calculated "assuming the pollutant GHGs is a regulated NSR pollutant." This assumption is potentially confusing and unnecessary.

Response: The proposed revisions to Regulations 19.904(G)(3) and (4) have been inserted verbatim from the GHG Tailoring Rule, which relies on the term "Regulated NSR Pollutant" as defined in relation to federal PSD. The federal definition of "Regulated NSR Pollutant," as promulgated at 40 CFR 52.21(b)(50), has been adopted by reference at Regulation 19.904, making it a currently defined term within Regulation Number 19. This proposed revision also includes the verbatim language found in Regulation 19.904(G)(3), stating GHGs shall be calculated "assuming the pollutant GHGs is a regulated NSR pollutant." This phrase is not used to indicate a "guess" or "conjecture," but states the intention that GHGs are to be calculated as a regulated NSR pollutant. It is also noted that the referenced language is a verbatim adoption of the federal regulation.

No changes to the final rule are necessary due to this comment.

Comment 21: The Department should be required to include language in the regulations that makes it clear that GHGs are not subject to regulation or regulated air pollutants under Regulation 18, 19 or 26 except as specifically provided therein. The regulations should also state that nothing therein is intended to be or shall be interpreted to be an " emission limitation" or "emission standard" within the meaning of section 302(k) of the Clean Air Act, or a "control requirement" within the meaning of section 193 of the Clean Air Act. ADEQ should consider the following provision:

> "GHGs shall not be deemed to be subject to regulation or regulated air pollutants under this regulation, except as provided herein. Nothing herein is intended to be or shall be interpreted to be an "emission limitation" or "emission standard" within the meaning of section 302(k) of the Clean Air Act, or a "control requirement" within the meaning of section 193 of the Clean Air Act."

Response: The proposed and existing regulatory language adequately addresses the commenters' concerns since it neither limits emissions nor creates an emission standard for GHGs. Specifically, section 302(k) is not relevant because nowhere is the term "emission limitation" or "emission standard" used in the ADEQ regulation in relation to GHGs. Section 193 only pertains to nonattainment rules and required controls in place before November 15, 1990.

Implementation of the GHG Tailoring Rule does not require inclusion of the language or such a statement as that suggested by the commenters.

Section 193 of the CAA reads in part:

> No control requirement in effect, or required to be adopted by an order, settlement agreement, or plan in effect before the date of the enactment of the Clean Air Act Amendments of 1990 in any area which is a nonattainment area for any air pollutant may be modified after such enactment in any manner unless the modification insures equivalent or greater emission reductions of such air pollutant.

Since any control requirements resulting from this proposed revision will occur after the date of enactment of the CAA and since there are no nonattainment areas for GHGs, any disclaimer with respect to §193 is unnecessary.

Regarding section 302(k), it reads:

> The terms 'emission limitation' and 'emission standard' mean a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operation standard promulgated under this Act.

The rule as proposed does not establish any limits on "the quantity, rate, or concentration of" GHGs nor does it promulgate "any design, equipment, work practice or operation standard." However, one of the stated reasons for this rulemaking is to allow the Department to issue PSD permits to GHG sources. One of the requirements of the PSD program is for the source to use BACT on the pollutants subject to PSD. BACT for GHG, as for other pollutants, will be determined on a facility by facility basis and may include "emission limitations … a design, equipment, work practice, operation standard, or combination thereof …."

The language suggested by the commenter would unnecessarily state that the rule does not intend to or should be interpreted to be an "emission limitation" or "emission standard" for GHG emissions and it could potentially mislead the reader into thinking it somehow restricts the Department's ability to establish BACT limits.

However, it should be noted as the result of other comments, language has been added to Regulation 19.405(B)(1)(b) and (c) which states that permitted emission rates, emission limitations or other enforceable conditions for GHG emissions will not be included in permits

unless a BACT determination is required under Regulation Number 19, Chapter 9 or is requested by a facility. See Response to Comment 25.

Comment 22: Commenters stated that the proposed rescission clause is too narrow and should be broadened to accommodate all the possible mechanisms through which the Tailoring Rule is no longer binding in whole or in part. A rescission clause that limits the scope and burdensomeness of GHG permitting in Arkansas, including the termination of the effectiveness of these regulations simultaneously with any federal legislative, judicial, or executive suspension, postponement, or nullification of the federal GHG permitting requirements are needed and appropriate to protect Arkansas citizens and businesses from more adverse federal regulatory consequences. Changes to the scope, thresholds, and authority to implement the permitting requirements are possible based on a wide variety of potential actions including successful court challenge of the federal regulations, action by Congress deferring or eliminating EPA authority to regulate Greenhouse Gases, alternate legislation that replaces the current Tailoring Rule, or alternate regulation by EPA that results in Greenhouse Gases not being subject to federal permitting requirements. As such, the following rescission clause should be substituted for proposed Regulation 19.904(G)(6): The provisions of this Regulation and any terms or conditions of preconstruction permits regarding Greenhouse Gases, as herein defined, shall cease to be effective if any of the following occurs:

1) Enactment of federal legislation depriving the Administrator of authority, limiting the Administrator's authority, or requiring the Administrator to delay the exercise of authority, to regulate Greenhouse Gases under the New Source Review Prevention of Significant Deterioration provisions of the Clean Air Act; or
2) The issuance of any opinion, ruling, judgment, order or decree by a federal court depriving the Administrator of authority, limiting the Administrator's authority, or requiring the Administrator to delay the exercise of authority, to regulate Greenhouse Gases under the New Source Review Prevention of Significant Deterioration provisions of 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 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 FR 31606, or to otherwise limit or delay the Administrator's exercise of authority to require preconstruction permits for sources of Greenhouse Gas emissions.
4) U.S. EPA final regulation resulting in Greenhouse Gases not being subject to regulation under the New Source Review Prevention of Significant Deterioration provisions of the Clean Air Act.

Response: In 1995, the Arkansas Attorney General issued an opinion which specifically addresses adopting future legislation, rules, regulations or amendments by reference. The opinion states that doing so would run afoul of the constitutional separation of powers doctrine. Ark. Const. art. 4, §§ 1 and 2. The Attorney General opined:

> It is generally stated, pursuant to this doctrine, that the legislature may confer discretion in the administration of the law. It may not, however, delegate the exercise of its discretion as to what the law shall be. 16 C.J.S. Constitutional Law § 137 (1984). The latter form of delegation constitutes an unlawful delegation of legislative authority, and has been held to preclude legislative attempts to adopt by reference future legislation, rules, regulations or amendments to existing regulations.[1] See generally *Cheney v. St. Louis Southwestern Railway Co.*, 239 Ark. 870, 394 S.W.2d 731 (1965) (rejecting as unconstitutional that part of the Income Tax Law of 1929 under which certain corporate tax liability was to be based upon a formula subject to prospective federal legislation or administrative rules); *City of Warren v. State Construction Code Commission*, 66 Mich. App. 493, 239 N.W.2d 640 (1976) (stating that while the legislature clearly may incorporate by reference existing statutes, it cannot adopt by reference future legislation, rules, or regulations which are subsequently enacted or promulgated by another sovereign authority).

The Attorney General's opinion clearly prohibits incorporating by reference future legislation, rules, regulations, or amendments. However, the prohibition against prospective rulemaking articulated in the Attorney General's opinion does not specifically address judicial review and there are currently numerous judicial challenges pending. If the basis for this rulemaking is overturned as a result of any pending challenges, further revisions will be initiated as necessary to address the court's decision.

The rescission clause has been revised so it is more closely aligned with the Commenter's proposal contained in paragraph 2 regarding judicial review.

Comment 23: Appendix A insignificant activities list should reference CO_2e, not CO_2. The reference to "carbon dioxide" in the Insignificant Activities List at Appendix A, Group A, paragraphs 1 and 13 should be changed to "CO_2e." Regulation 9, Chapter 9, Appendix A,

[1] The desire for uniformity of federal-state regulation has led to states' adoption in some instances of existing federal legislative policies and prospective administrative determinations thereunder. See *State v. Hotel Bar Foods, Inc.*, 18 N.J. 115, 112 A.2d 726, 732 (1955) (stating that "there are reasoned decisions which tend to support the view ... that a state legislature, in dealing with [a matter that is] properly subject to extensive federal regulation, may constitutionally provide that its administrator's regulations shall be brought into conformity with pertinent federal regulations as they are duly promulgated and amended from time to time.")

Insignificant Activities List, Group A, Sections 1 and 13 states that certain activities less than 75,000 tpy CO_2 are considered insignificant. Commenters note that CO_2 is only one of six pollutants analyzed in the aggregate to determine GHG emissions. Additionally, the insignificant activity list exclusions need to be based both on the same major source 100/250 tpy thresholds and the CO_2e thresholds used to determine whether a source is subject to regulation for PSD permitting.

Response: GHG pollutants other than CO_2 are still regulated as air contaminants and cannot be considered exempt at such levels. The statement about having the same major source 100/250 tpy thresholds in the Appendix A insignificant activities list would only be applicable if the intention was to reference CO_2e, not CO_2. This is not the case.

Additionally, the introductory paragraph to Appendix A includes a statement that "Any activity for which a state or federal applicable requirement applies (such as NSPS, National Emission Standards for Hazardous Air Pollutants [NESHAP], or Maximum Achievable Control Technology [MACT]) is not insignificant, even if this activity meets the criteria below." This statement means that if any federal applicable requirement, including PSD for GHG, is triggered as a result of a particular activity at a source, the emissions are subject to permitting and are not considered to be insignificant.

No changes to the final rule are necessary due to this comment.

Comment 24: Appendix A Insignificant Activities List Group A, paragraph 13 should be slightly revised. The proposed additional language in the Insignificant Activities List at Appendix A, Group A, paragraph 13 should be revised by inserting the word "other" after the words "or 5 tpy of any" and before "air pollutant regulated under this regulation" so as to be consistent with the rest of Appendix A and the Insignificant Activities Lists in Regulation 18.

Response: ADEQ agrees with the comment and will make the described change.

Comment 25: The language or provisions used in these rules to obtain approval to administer the Tailoring Rule should not result in unintended consequences, should not impose or permit the imposition of unduly burdensome, costly, or needless regulatory requirements, and should not lead to absurd results (such as a requirement to apply for and obtain a permit with no regulatory conditions).

Response: ADEQ has made every effort to incorporate the necessary provisions of the GHG Tailoring Rule in order to maintain consistency with the federal program and obtain the necessary federal approvals for the state program while maintaining maximum state authority over its permitting programs. ADEQ expects that EPA will grant approval for ADEQ to

administer the GHG provisions of the programs, which will be implemented in a fashion to maximize program efficiency and minimize the burden to the regulated community to the extent possible.

A revision has been incorporated, based on this Comment, to Regulation 19.405(B)(1)(b) and (c) to clarify that the intent of the GHG provisions added to the state regulations shall not expand the permitting scope in Regulation 19 beyond that addressed in the Federal GHG Tailoring Rule and to alleviate concerns regarding unintended consequences.

Comment 26: Revisions to Regulation 19.904(G)(5) should not include the term "potential to emit' in these provisions because it is a defined term which refers to a stationary source's emissions of a "federally regulated air pollutant." The term "stationary source" is also defined in terms of a source that emits a "federally regulated air pollutant."

Response: The revisions to Regulation 19.904(G) incorporate the necessary provisions of the GHG Tailoring Rule largely verbatim, including the term "potential to emit." Inclusion of the terms "potential to emit" and "stationary source" are necessary to avoid confusion or problems with federal approval of the state programs which may result if these terms were to be redefined within the provisions incorporating the GHG Tailoring Rule into Regulation Number 19.

No changes to the final rule are necessary due to this comment.

Comment 27: Adoption of ADEQ's proposed revisions at section 19.904(G)(5)(a) and (b) regarding "potential to emit" is not necessary to comply with the Tailoring Rule and to do so could render Regulation 19 more stringent than federal law. In addition, commenters suggest the following alternative language:

> (a) At a new source that will emit or has the maximum capacity under its physical and operation design to emit 100,000 tons per year of CO_2e, or
> (b) At an existing source that emits or has the maximum capacity under its physical and operation design to emit 100,000 tons per year of CO_2e, including any physical or operational limitation on the source's capacity to emit CO_2e if such limitation is enforceable by the by the Administrator, when such source undertakes a physical change or change in the method of operation that will result in an emission increase of 75,000 tpy CO_2e or more.

Response: The revisions to Regulation 19.904(G)(5)(a) and (b) incorporate the provisions of the GHG Tailoring Rule verbatim. Inclusion of the GHG Tailoring Rule's term "potential to emit" is necessary to avoid confusion or problems with federal approval of the state programs which may result if these terms were to be redefined within the provisions incorporating the GHG Tailoring Rule into Regulation Number 19. ADEQ thanks the commenter for the suggested definition of

the term, but does not believe this change is warranted and believes it may have unintended regulatory consequences.

No changes to the final rule are necessary due to this comment.

Comment 28: EPA does not support the proposed revisions to Regulation 19, section 19.407(C)(2)(a)(vi). While an emission source with a potential to emit (PTE) less than the 75,000 tpy CO_2e will in practical effect be excluded from regulatory consideration in a way that may equate to the treatment of *De Minimis* emission levels, the significance levels established in the Tailoring Rule are not by nature considered *De Minimis* by EPA. See 75 FR at 31560. EPA approaches GHG applicability in two steps. First, EPA uses the phased-in GHG permitting thresholds to determine if the source's GHG emissions are subject to regulation. Then, EPA determines whether the source has a PTE that is at or above the Clean Air Act major source thresholds for GHGs.

Response: The purpose and intent of the proposed revisions at Regulation 19.407(C)(2) is to ensure that increases of GHG emissions below the level that requires a permitting action under the federal Tailoring Rule can be accomplished within the framework of the Arkansas regulations and with the least burden to Arkansas industry and the Department. The GHG levels addressed at proposed revisions in Regulation 19.407(C)(2)(a)(vi) are below that regulated by EPA at the current time. There are no regulatory requirements for such changes at a facility at the federal level. However, in the Arkansas regulations, any increase in permitted emission rates are subject to permit modification procedures. Therefore, it has been determined that a permit modification process at the state level is required (by the existing regulations / approved SIP) and that it is reasonable and appropriate to address such permit modifications with the least administrative process requirements. It is not the Department's intent to establish a (PSD) significance level for GHG – rather, the proposed revision is meant to establish a *De Minimis* permit modification procedure for emission increases that are below federal permitting action levels.

It should be noted that if a GHG emission increase triggers PSD review, then the provisions of (existing) Regulation 19.407(C)(3) disqualify the project as a *De Minimis* permit modification. In consideration of comments received and to prevent the assumption that the state regulation establishes a significance level for GHG; the *De Minimis* modification trigger language has been moved to Regulation 19.407(C)(3) and the existing 19.407(C)(3)-(6) renumbered accordingly. Regulation 19.407(C)(3) will read as follows: "A proposed change will be considered *De Minimis* if the increases are less than 75,000 tpy of CO_2e and other pollutant emission increases otherwise qualify as *De Minimis* under this section." If the federal Tailoring Rule is modified with respect to permitting thresholds, Regulation Number 19 will need to be changed and ADEQ

will take the appropriate action to reflect EPA's change.

Comment 29: Regulation 19, Section 19.904(G)(3) also includes the following typo: "a significant emissions increase (as calculated using the procedures in 40 CFR 52.21 (a)(2)(iv), as of November 29, 2005), and a significant net emissions increase (as defined in 40 CFR 52.21 (b)(3), as of November 29, 2005, and 40 CFR 52.21 (b)(**23**), as of November 29, 2005), occur."

Response: ADEQ agrees with the comment and will make the described change.

Comment 30: Commenters note that the definition of "CO_2 Equivalent Emissions" at Regulation 19, Chapter 2 and that the definition of "CO_2e Equivalent Emissions" at Regulation 19, Section 19.904(G)(2), includes the incorporation date of October 30, 2009, and that it will be ADEQ's responsibility to monitor Table A-I to subpart A of 40 CFR Part 98 for updates and to initiate rulemaking accordingly pursuant to all applicable state implementation plan (SIP) revision requirements. Additionally, Regulation 19.904(G) also includes the incorporation dates of November 29, 2005, and June 3, 2010. Commenters note that it will be ADEQ's responsibility to monitor the referenced provisions of 40 CFR 52.21 for updates and initiate rulemaking accordingly pursuant to all applicable SIP revision requirements.

Response: ADEQ acknowledges the comment.

No changes to the final rule are necessary due to this comment.

Comment 31: Regulation 19.904(G) refers to the permitting of CO_2e emissions. The commenter notes that the PSD program does not permit CO_2e emissions, but instead permits GHG emissions that are subject to regulation. CO_2e is not in itself a pollutant subject to regulation under PSD; CO_2e is one of two steps used to determine if a source's GHG emissions are subject to PSD permitting.

Response: The commenter stated this comment was in error and requested the comment be rescinded.

No changes to the final rule are necessary due to this comment.

Comment 32: In Reg.19.405(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: The proposed changes to Regulation Number 19 did not include revisions to

Regulation 19.405(B)(2); however Regulation 19.405(B)(1)(b) and (c) have been modified to state that permitted emission rates, emission limitations or other enforceable conditions for GHG emissions will not be included in permits unless a BACT determination is required under Regulation Number 19, Chapter 9, or is requested by a facility. ADEQ does not intend to alter its present practice in regard to the manner in which trivial amounts of air pollutants are addressed during the permitting process. The *De Minimis* change levels do not relate to any threshold for addressing GHG in permits. See Response to Comments 21 and 25.

Comment 33: The Department should consider simply incorporating the pertinent provisions of the federal Tailoring Rule in Regulations 19 and 26. ADEQ has the authority to do so pursuant to Regulation 8.817. This would prevent argument as to whether the Department's proposed modifications of Regulations 18, 19, and 26 are unnecessary, inconsistent, and more stringent than the equivalent federal rule.

Response: ADEQ considered incorporating the GHG Tailoring Rule by reference into Regulation Number 19, but ADEQ believes doing so might violate the prohibition on prospective rulemaking due to the manner in which EPA crafted the federal rule. ADEQ believes the proposed revisions will allow regulation of Arkansas sources in a responsible manner which is desirable for all state entities and preserves the public right for notice and commenting on changes to state regulations.

No changes to the final rule are necessary due to this comment.

Comment 34: The general transition clause in Regulation #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: It is ADEQ's interpretation of Regulation 19.409 that any facility that is subject to the current (pre-GHG revisions) permitting requirements of Regulation Number 19 and will be required to modify the existing permit to add GHG requirements due to these revisions must do so and be in full compliance (including requisite permit modification) within 180 days of the effective date of the GHG revisions. Facilities that are not now subject to the permitting requirements of Regulation Number 19 (pre-GHG revisions) but will become subject to permitting under Regulation Number 19 due to these revisions must submit the appropriate permit application within 180 days of the effective date of the GHG revisions. It is also noted that the Director may grant extensions (up to one year total compliance time) to these time frames on a case-by-case basis.

No changes to the final rule are necessary due to this comment.

Comment 35: If the Department's proposed rules impose additional costs on a utility, those costs will automatically be passed through to the utility's residential, small business, and other customers. However, the Department's Economic Impact Statement says nothing about such impact and instead indicates that the changes will have no impact on small businesses. These changes would appear to impose a Best Available Control Technology ("BACT") Standard. These facts are not addressed in the Department's Economic Impact Statement, and they should be, because, implementation of BACT standard GHG controls is likely to be very expensive.

Response: The rules are implementing a Federal requirement. Permitting thresholds in the GHG Tailoring Rule and related provisions proposed by ADEQ are set so that only the largest emitters of GHG will be required to address GHG emissions. Without these rules, even more sources would be subject to GHG rules and permitting. Likewise, BACT determinations and implementations will be imposed on the largest emitters of GHG. BACT determinations and implementations could vary depending on conditions at the sources. The entities that ADEQ believes to be directly affected by the proposed rule are large businesses, not small businesses as indicated on the Economic Impact Statement.

While it is possible that additional costs utilities spend complying with this rule will be passed on to their customers, these costs, whatever they may be, will exist regardless of the outcome of this rulemaking. The purpose of this rulemaking is to codify into state law changes to air regulations which have already been made at the federal level. If the APC&E Commission declines to adopt these changes, the underlying requirements, and any costs associated with meeting these requirements, will still exist.

To date, BACT has not required controls which would impact ratepayers.

No changes to the final rule are necessary due to this comment.

Comment 36: 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: ADEQ has made efforts to ensure consistency across all of the regulations as changes are made due to comments received.

Prepared by:
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