BEFORE THE ARKANSAS POLLUTION CONTROL AND ECOLOGY COMMISSION

IN THE MATTER OF AMENDMENTS TO REGULATION NO. 26, REGULATIONS OF THE ARKANSAS OPERATING AIR PERMIT PROGRAM	**)** **)** **)**	**DOCKET NO. 11-003-R**

RESPONSIVE SUMMARY FOR REGULATION NO. 26, REGULATIONS OF THE ARKANSAS OPERATING AIR PERMIT PROGRAM

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. 26, Regulations of the Arkansas Operating Air Permit Program. 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. 26 along with the Commission's response.

The revisions to Regulation No. 26 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"). Minor adjustments to provisions of Regulation No. 26 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 changes 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 than federal law in application and effect with regard to the regulation and permitting of GHGs in Arkansas (within the overall structure of the existing permitting program). Further, the intent of these revisions is to attain EPA's approval of amendments to the Arkansas Operating Permit Program (Title V Permit Program).

Regulation No. 26 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 ("PSD") and Title V greenhouse gas tailoring rule (75 FR 31514, June 3, 2010), then any provision based on such enabling 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. 26 in accordance with program requirements set out by EPA in response to the court decision which renders federal law invalid or unenforceable. In the interim, 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.

Comment 1: Regulation 26 should only be revised as required to comply with the Greenhouse Gas ("GHG") Tailoring Rule, and no change should be made unless the change is required by law in order for ADEQ to obtain approval to administer the Tailoring Rule. Changes made in order to obtain such approval should be the absolute minimum necessary to obtain approval. ADEQ should assure the public that its modifications are identical to the Tailoring Rule and are not inconsistent with or more stringent than the Tailoring Rule. As to the extent that the proposed revisions to Regulation 26 exceed those that are necessary for ADEQ to implement the operating air permit program in accordance with applicable federal regulations or are more stringent than federal requirements, such revisions are unnecessary and potentially an unlawful expansion of the Commission's authority. Moreover, going beyond what is strictly required for compliance with the Tailoring Rule may lead to unnecessary compliance costs, unintended regulatory consequences, and confusion in the regulated community.

Response: ADEQ believes that each of the proposed regulation revisions are required by law and are the minimum changes necessary to incorporate EPA's GHG Tailoring Rule and to obtain the necessary state regulatory authority for GHG source permitting in Arkansas. While some regulation revisions are not identical to the GHG Tailoring Rule, all revisions are necessary to implement the GHG Tailoring Rule and are not inconsistent with or more stringent than the GHG Tailoring Rule.

Moreover, ADEQ does not agree with the commenters' assertion that any revisions or regulatory provisions that go beyond federal requirements would be an unlawful expansion of the Commission's authority. Arkansas law provides broad authority to the Commission to

promulgate environmental protection regulations. While state law prescribes certain procedures that must be followed if regulatory provisions are proposed that are more stringent than federal requirements, the law does not prohibit or restrict the Commission's authority in the manner suggested by the commenter.

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

Comment 2: To the extent ADEQ believes that each of the proposed revisions to Regulation 26 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)). 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 demonstration that these proposed regulation revisions are scientifically sound is satisfied by incorporating by reference the justification contained in the federal GHG Tailoring Rule published in the Federal Register, on June 3, 2010, 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.

The proposed revisions are the minimum changes necessary to modify ADEQ's title V permitting program to match EPA's GHG Tailoring Rule. The proposed removal of carbon dioxide from the definition of "Air contaminant" is consistent with and necessary to implement the GHG Tailoring Rule. The proposed changes to the definition of "Applicable requirement" and "Major source" are withdrawn. The proposed changes to the definition of "Regulated air pollutant" will be revised as follows: "…(F) GHGs (1) emitted in, or having a potential to emit, amounts that equal or exceed 100 tpy calculated as the sum of the six (6) well-mixed GHGs on a mass basis; and (2) emitted in, or having a potential to emit, amounts of 100,000 tpy or more of GHGs measured as CO_2e." ADEQ believes these changes are consistent with and required to allow permitting consistent with the GHG Tailoring Rule. The proposed definitions of "CO_2 equivalent emissions" and "Greenhouse gases" are required to implement the GHG Tailoring Rule; the proposed changes to the definition of "Existing part 70 source" are required to ensure that sources that currently exist, but that may not be regulated under part 70 are not treated as new due to the new permitting requirements under the Tailoring Rule. The proposed change to add Regulation 26.302(G) and the deletion of "recognized" from Regulation 26.305 will not be finalized in this rulemaking. (See Responses to Comments 10, 24, and 25.) Proposed changes at Regulation 26.401 are required to implement the GHG Tailoring Rule and make the section applicable to GHG sources and emissions. Proposed changes to Regulation 26.403 are required

to implement the GHG Tailoring Rule because the changes clarify that permit applications are required from existing part 70 sources, rather than from sources existing on the effective date of the regulation. Finally, proposed changes at Regulation 26.1002(A)(8) are consistent with the GHG Tailoring Rule because the Rule does not require permitting of emissions less than 75,000 tpy CO_2e; however, Regulation No. 26 currently provides that any increases in permitted emission rates are "modifications" and as such are required to be permitted prior to implementation of the changes (physical or operational) that would cause such increases. The revision at Regulation 26.1002(A)(8) allows permit modifications of this nature to be made under expedited procedures as minor modifications. Making the proposed revisions will maintain consistency between federal air pollution control programs and the Commission's regulations. This will ensure that facilities currently subject to the PSD/title V permitting requirements will be able to receive permits from ADEQ for greenhouse gas emissions, as is explained in the Statement of Basis. (See also Response to Comment 6.)

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 that requires a broader application of the requirement for an economic impact and environmental benefit analysis. Although the revisions proposed do not all involve incorporating or adopting federal regulation without substantial change, they are necessary in order to implement the federal rule changes with minimal burden to the regulated community and the Department within the existing regulatory and permitting structure or Regulation No. 26 and are not inconsistent with the federal GHG Tailoring Rule. Based on comments received, an Economic Impact/Environmental Benefit Analysis pursuant to Regulation 8.812 has been prepared.

Changes to the final rule have been made in the proposed definitions of "Applicable requirement," "Major source," and "Regulated air pollutant" as described above.

Comment 3: Explanation is needed regarding the effect of the amendments on existing Part 70 sources. Based upon the proposed revisions to Regulation 26, it is not clear when and if an existing Part 70 source, which is not undertaking a modification of the source, will be required to address GHG emissions in its permit. It is also unclear what the associated permit condition or provision will be if the source is required to address GHG emissions in its permit.

Response: Regulation 26.403 and the revisions to "Existing Part 70 Source" definition govern when an application will be required from an existing source without a current title V permit, i.e. 12 months after becoming subject to regulation under Regulation No. 26 or sooner if the ADEQ

notifies the source.

ADEQ's administration of GHG provisions for current Part 70 permit holders would be governed by Regulation 26.1011(A)(1), which provides that an application will be required not later than 18 months of a new requirement being promulgated for permits with a remaining term of three (3) years or greater, or upon renewal. The Department would need to reopen the permits in accordance with Regulation 26.1011(C). The document PSD AND TITLE V PERMITTING GUIDANCE FOR GREENHOUSE GASES, Environmental Protection Agency, United States Office of Air and Radiation dated March of 2011, outlines possible 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 due to this comment.

Comment 4: Commenter states that it is unclear that should a facility's permit include GHG emissions, what the permit condition or provision would be or what legal basis justifies any substantive permit provision.

Response: Any GHG requirements derived from a PSD/New Source Review ("NSR") permit will have specific emission limits and standards in the title V permit, based on the (Best Available Control Technology ("BACT") determination.

Other title V facilities without GHG requirements derived from a PSD/NSR permit will have the minimum conditions or requirements to quantify GHG emissions, including source descriptions and emission types, but not necessarily mass emission rates and limits, unless necessary for other reasons, i.e. possible limits requested by a facility to avoid NSR review, etc.

See also Response to Comment 3 for additional information.

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

Comment 5: Commenters request an explanation from ADEQ about permit conditions and provisions as well as what supporting documentation and evidence, or other information, including calculations, that sources subject to permitting will be required to provide to demonstrate whether the requirements in the proposed regulation apply.

Response: Applicants for permits or permit modifications under Regulation No. 26 are required to submit certain information to ADEQ as part of the existing application process (see Regulation 26.402). 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 in the permit application. Permit application forms (as addressed in the currently effective Regulation 26.402) will be revised to include the additional information that will be necessary after enactment of the proposed regulatory revisions and made available to the regulated community and the public. ADEQ would require sufficient information to determine applicability and monitoring as necessary. It is not the ADEQ's intent to establish any GHG limits unless there are underlying requirements for such a limit, such as PSD/NSR.

See Response to Comment 3 for additional information.

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

Comment 6: Commenters request that ADEQ provide further explanation regarding the effect of the Tailoring Rule on its operating permit program, if any, 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 and Operating Permit (title V) Program, ADEQ will not have the requisite authority to issue permits regarding GHGs that are recognized as federal permits. 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 approval for the GHG portions. This will require application submittal to EPA, EPA review of the application, and drafting of permits by EPA. 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 Regulations No. 19 and No. 26.

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

Comment 7: Commenters stated that only the following revisions are necessary to comply with the Tailoring Rule. Making revisions beyond those listed below (such as revising definitions that do not need revising) is unnecessary and will have unintended regulatory consequences when an unnecessary change in one part of the regulation then implicates the application of other parts. The only revisions necessary are as follows:

1. Addition of an adequately comprehensive rescission clause;

2. Addition of definitions for "CO_2 equivalent emissions (CO_2e)" and "Greenhouse Gases (GHGs)";

3. Addition of the following to Regulation 26.302 Sources Subject to Permitting: "(G) any building, structure, facility, or installation 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 Administrator.";

4. Revision of Regulation 26.305 Emissions Subject to Permitting so it reads as follows:

   All regulated air pollutant emissions, GHG emissions and recognized air contaminant emissions from a part 70 source shall be included in a part 70 permit

except that GHG emissions less than 100,000 tpy CO_2e shall not be included in a part 70 permit unless permitting is triggered by a permit modification allowing an increase in emissions of CO_2e of greater than 75,000 tpy CO_2e, in which event the part 70 permit shall not include GHG emissions less than 75,000 tpy CO_2e. Only regulated air pollutants and GHG emissions subject to regulation may trigger the need for a part 70 permit or a part 70 permit modification process. However, no Title V permit shall be required due to GHG emissions from any stationary source under this regulation, and 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. A permit modification involving . . . [continue with remainder of existing regulation].

5. Regulation 26.403 should be revised to clarify that no existing part 70 source not seeking a modification that would increase emissions by at least 75,000 tpy CO_2e is required to submit a new Title V application for GHG emissions until such time as its existing Title V is modified or renewed. See 75 Fed. Reg. 31523 (June 3, 2010) ("Sources with Title V permits must address GHG requirements when they apply for, renew, or revise their permits.")

Response: ADEQ appreciates the Commenters' proposed list of revisions to incorporate EPA's GHG Tailoring Rule into Regulation No. 26, but ADEQ believes that the most cohesive and complete implementation of the GHG Tailoring Rule in the existing regulation is through the revisions that have been proposed (allowing for any revisions specified in this document). ADEQ has, however, modified the proposed language and placement of the rescission clause as a result of comments received. Regarding the "rescission clause," please see Responses to Comments 11, 31, and 32. Commenters did not address the need for the newly proposed definitions to be placed in the Definitions chapter of Regulation No. 26 (Chapter 2), the changes needed for Regulation 26.401 Duty to Apply, or Regulation 26.403 Initial applications from existing part 70 sources, which specifies the GHG Tailoring Rule's permit timing requirements.

ADEQ responds to each item on the list as follows:

1. ADEQ believes the "rescission clause" should be revised. Based on other comments, the proposed revisions to the definitions of "applicable requirement" and "major source" are withdrawn and the rescission clause is moved to the Severability section found at 26.103. See Response to Comments 11, 31 and 32.

2. The definitions for "CO_2 equivalent emissions (CO_2e)" and "Greenhouse Gases

(GHGs)" are proposed in Regulation No. 26, Chapter 2.

3. The proposed addition of Regulation 26.302(G) is withdrawn. See Response to Comment 10.

4. The proposed and existing regulatory language adequately addresses the Commenters' concerns since it neither limits emissions nor creates any specific emission standard for GHG other than that required by federal rules.

5. Proposed changes to the definition of "Existing part 70 source," when combined with permit timing requirements found in Regulation 26.401 and Regulation 26.403 already state that no existing part 70 source that is not seeking a modification which increases GHG emissions by at least 75,000 tpy CO_2e is required to submit a new title V application for GHG emissions until such time as its existing title V is modified or renewed.

Comment 8: ADEQ must address the effect that permitting GHGs as "air contaminants" will have on the permit fees required to be paid by permit holders. Permitting fees for GHGs should be exempt, and 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 are not part of this rulemaking. Permitting GHGs will result in additional costs for the permitting program. However, the issues associated with GHG permitting have been addressed in a separate rulemaking proposal for revisions to Regulation No. 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 9: Addition of "or air pollutant" should not be adopted. Addition of the words "or 'air pollutant'" to the definition of "air contaminant" is unnecessary. Compliance with the Tailoring Rule arguably requires that the words "carbon dioxide (CO_2)" be removed from the definition of air contaminant, which ADEQ has proposed, and nothing more. There is no mandate in the federal regulations requiring ADEQ to define "air pollutant," and there is no indication that ADEQ requires this change in order to administer the air operating permit program efficiently and effectively.

Response: ADEQ agrees that even though there is no federal mandate to modify the definition of "air contaminant," removal of the exclusion for CO_2 is necessary to implement the GHG

Tailoring Rule. While making this change, the addition of the words "or air pollutant" to the definition of "air contaminant" will reduce the ambiguity arising from the Regulation's synonymous use of these two terms.

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

Comment 10: It is not necessary or appropriate to revise the definition of "Applicable Requirement." The addition of the language at (M) under the definition of "Applicable Requirement" should be removed as it is not necessary and may lead to unintended regulatory consequences and cause confusion among the regulated community. The language proposed to be inserted at (M) would have the effect of making requirements found in the Tailoring Rule an "Applicable Requirement" for all part 70 sources, be they new, modified, or existing. At this time, there are no "Applicable Requirements" for existing part 70 sources not seeking a modification.

In Chapter 2 of Regulation 26, ADEQ has modified the definition of "air contaminant" and added definitions for CO_2e equivalent emissions and GHGs which provide for regulation of GHGs. ADEQ also modified Regulation 26.302 to include stationary sources emitting or having the potential to emit 100,000 tpy CO_2e and other sections for permit modification to be in compliance with the Tailoring Rule. These modifications to Regulation 26 should be sufficient without modifying the definition of "applicable requirement."

EPA believes the addition of new subsection M under the definition of "applicable requirement" at Regulation 26, Chapter 2, would be better situated under the new subsection of GHGs under the definition of "regulated air pollutant." The definition of "applicable requirement" already appears to cover GHG permitting under subsections A and B as Title I requirements.

Response: The intent of the proposed changes to Regulation No. 26 was to prevent the wholesale inclusion of all recent revisions to EPA's PSD/NSR and title V rules, while still incorporating the necessary elements of the GHG Tailoring Rule. ADEQ disagrees that the proposed revisions to the definition of "applicable requirement" at Regulation No. 26, Chapter 2, would have the effect of making requirements found in the Tailoring Rule an "Applicable Requirement" for all part 70 sources. ADEQ also disagrees that this change modifies the intent of the GHG Tailoring Rule or the permitting requirements under Regulation No. 26. However, the proposed change to the definition of "applicable requirement" is withdrawn and the rescission clause has been moved to the Severability section found at 26.103.

See also Response to Comment 11.

ADEQ agrees that proposed changes to Regulation 26.302 to include stationary sources emitting or having the potential to emit 100,000 tpy CO_2e and other sections for permit modification to be in compliance with the GHG Tailoring Rule are redundant. ADEQ will remove the language proposed at Regulation 26.302(G) from the final rule.

ADEQ disagrees that the proposed subsection M, under the definition of "applicable requirement" at Regulation No. 26, Chapter 2, would be better situated under the definition of "Regulated air pollutant" as a new subsection under the proposed addition of GHG. However, based on comments received, proposed changes to the definition of "applicable requirement" have been withdrawn and the rescission clause has been moved to the Severability section found at Regulation 26.103.

See also Response to Comment 11.

Comment 11: This definition of "Applicable Requirement" also includes ADEQ's proposed Regulation 26 "escape clause." However, the clause should be more properly placed in a separate part of the Regulation, such as the Severability provision (Regulation 26.103), and should include more encompassing language for any provision "affected" by an overturn of the federal enabling law by the legislature in addition to a court order for the modifications to be deemed void and of no effect.

Response: ADEQ agrees that the rescission clause, proposed as subsection M, under the definition of "applicable requirement" at Regulation No. 26, Chapter 2, would be better situated under a separate part of the Regulation, such as the Severability section. However, ADEQ disagrees that its rescission clause should include more encompassing language, due to the restrictions imposed by the prohibition against prospective rulemaking.

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. 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.

Changes were made as a result of comments received, in that the rescission clause was added to the Severability section of Regulation No. 26 at Regulation 26.103. Additionally, the language has been revised to more clearly articulate the effect of any judicial review. See also Responses to Comments 31 and 32.

Comment 12: Chapter 2 definitions for "CO_2 equivalent emissions" and "greenhouse gases" are unnecessarily confusing and should be the same as those in Regulation 19.904. The definition of "greenhouse gases" at Regulation 26, Chapter 2, should be revised to mirror the definition of "greenhouse gases" in Regulation 19.904 for purposes of consistency and clarity. We suggest the following revisions to this definition: "Greenhouse gases" (GHGs) is the air pollutant defined as the aggregate group of six greenhouse gases: carbon dioxide, nitrous oxide, methane, hydro-fluorocarbons, perfluorocarbons, and sulfur hexafluoride.

Response: The definitions of "CO_2 equivalent emissions" and "Greenhouse gases" proposed in Chapter 2 of Regulation Nos. 19 and 26 are nearly identical to each other as well as 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 Nos. 19 and 26 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 and an incorporation by reference date of October 30, 2009, to Table A-1 to subpart A of 40 CFR Part 98 being added.

Comment 13: Comments were received stating that the proposed addition of subpart (B) to the "existing part 70 source" definition is superfluous, unnecessary and may lead to unintended regulatory consequences and cause confusion among the regulated community. Additionally, the proposed revision to the first half of Regulation 26's definition of "Existing part 70 source"

states that it means "a part 70 source that was in operation as of September 13, 1993 . . . " A "part 70 source" currently is defined in Regulation 26 as "any source subject to the permitting requirements of this regulation." Therefore, there is no need to add the additional language proposed as subsection (b) of the definition of "Existing part 70 source."

Response: Absent these revisions, the current regulation could be read to mean that a facility that is not currently subject to title V (part 70) permit requirements but becomes a major source solely due to the amount of GHG emissions and new regulations would be out of compliance immediately as of the effective date of the GHG revisions to Regulation No. 26 since it would not have an appropriate title V permit. This outcome was not the intent of the GHG Tailoring Rule or this rulemaking.

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

Comment 14: It is not clear that EPA required that the definition of "existing part 70 source" be modified for Title V programs as part of the Tailoring Rule. It is unnecessary to revise this Definition with any reference to GHGs, as sources subject to permitting due to their GHG emissions would be considered existing part 70 sources by way of the current definition of that term and the proposed revisions to Regulation 26.302.

Response: While the proposed revisions to the definition of "Existing part 70 source" are not identical to the implementing provisions found in the GHG Tailoring Rule, the proposed revisions are necessary to enact the GHG Tailoring Rule in the existing Regulation No. 26. These revisions are designed to incorporate only the essential elements of EPA's GHG Tailoring Rule. The proposed revision to add 26.302(G) is withdrawn as addressed above. See also Responses to Comments 3, 10, and 13.

Comment 15: The definition of "Greenhouse Gases" differs from that proposed for Regulation 19. For clarity and consistency, the definition of "Greenhouse Gases" in Regulation 26 should correspond exactly to the definition of "Greenhouse Gases" in proposed Regulation 19.904(G)(1).

Response: The manner in which the terms "Greenhouse gases" and "CO_2 equivalent emissions" are used in Regulation 19.904(G) requires additional qualifying language that is not contained in the GHG Tailoring Rule's definitions of the terms in order to implement the GHG Tailoring Rule in the existing Regulation No. 19. The language added to the definition of the terms found in Regulation 19.904(G) is taken directly from the GHG Tailoring Rule's definition of "Subject to Regulation," and has been placed at Regulation 19.904(G) for implementation of the GHG Tailoring Rule in Regulation No. 19 and is necessary for implementation of the GHG Tailoring Rule in Regulation No. 26.

See Response to Comment 12 for additional information.

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

Comment 16: No revision to the definition of "Major Source" should be adopted. The addition of the language at (B) under the definition of "major source" is unnecessary. It is not clear that EPA has required that this definition under title V be modified for purposes of the Tailoring Rule.

Response: The EPA's GHG Tailoring Rule revised the federal definition of "major source" by codifying its interpretation that applicability for a major stationary source was triggered by sources of pollutants "subject to regulation" (and adding "subject to regulation" to the definition of major source) and added a definition of "subject to regulation." Consideration was given to adopting the federal rule by reference; however, it was believed that doing so may violate the prohibition against prospective rulemaking, due to the manner in which EPA crafted the federal rule. However, based on other comments received, the proposed revision to the definition of "major source" is withdrawn.

See also Response to Comment 18.

Comment 17: If "GHGs" are added to the definition of "regulated air pollutant" then, according to the proposed additions to the definition of "major source," any major stationary source that directly emits or has the potential to emit 100 tpy or more of GHG will be a major source as defined by Regulation 26. This outcome would controvert the stated purpose of the Tailoring Rule, which is to tailor the applicability criteria for sources subject to greenhouse gas permitting requirements under Title V so as to avoid imposing undue costs.

Response: ADEQ will revise the proposed definition of subsection (F) of "Regulated air pollutant" in Chapter 2 as follows: "…GHGs (1) emitted in, or having a potential to emit, amounts that equal or exceed 100 tpy calculated as the sum of the six (6) well-mixed GHGs on a mass basis; and (2) emitted in, or having a potential to emit, amounts of 100,000 tpy or more of GHGs measured as CO_2e."

See also Response to Comment 19.

Comment 18: The revised definition of "major source" at Regulation 26, Chapter 2 appears to limit major source applicability under title V to a source that has both 100,000 tpy CO_2e and 100 tpy of any regulated pollutant; essentially this means a source is only major for title V if it can be considered major for GHG emissions. Commenters believe that the clearest option for resolving

this concern is to revise the definition of "major source" pursuant to the revisions at 40 CFR 70.2 to include the phrase "any regulated air pollutant *subject to regulation*," then the definition of "subject to regulation" could be added to the Regulation 26 definitions.

Response: ADEQ disagrees that the Commission's Regulations should adopt the phrase "subject to regulation" since doing so may result in prospective rulemaking, in violation of Arkansas law. Additionally, the proposed revisions to the definition of "major source" will be withdrawn.

See also Responses to Comments 2 and 11.

The federal GHG Tailoring Rule establishes a "dual threshold" applicability test in regard to GHG emissions – the traditional 100 tpy of a pollutant *plus* the "tailored" threshold by applying the global warming potential to each of the component gases that make up the pollutant GHG. Our initial proposal was an attempt to address the dual threshold within the major source definition; however, after consideration of comments received, we have determined that a slightly different approach is more appropriate. Therefore, the proposed revision to the definition of "Major source" is withdrawn. This will retain the "mass" threshold (100 tpy) to remain applicable to GHGs, in keeping with the federal Tailoring Rule and the second threshold test (mass multiplied by the global warming potential) for the purpose of defining the permitting threshold will be addressed by applying the changes proposed to the definition of "Regulated air pollutant."

See also Response to Comment 19.

Comment 19: GHGs should not be added to the definition of "Regulated Air Pollutant." The addition of the word "GHGs" at (F) under the definition of "Regulated Air Pollutant" is not required by the Tailoring Rule and could have unintended regulatory consequences. While GHGs is a regulated NSR pollutant at the federal level, that term is independently defined in state Regulation 26 with a meaning that is separate and distinct from that in the federal program. The Tailoring Rule does not appear to directly modify the definition of "regulated air pollutant," as currently defined in Regulation 26, nor does it require the State to do so to implement the Tailoring Rule. Adding GHGs to the definition of "Regulated Air Pollutant" will subject GHG sources to additional requirements not envisioned by the Tailoring Rule and make Regulation 26 stricter than federal law.

Response: While the proposed regulation revisions to the definition of "Regulated air pollutant" are not found in the Tailoring Rule, these proposed regulation revisions are necessary to implement the Tailoring Rule in the existing Regulation No. 26. Because ADEQ is not proposing that Regulation No. 26 adopt the federal definition of "subject to regulation," it becomes necessary to include GHG in the Regulation No. 26 definition of "Regulated air

pollutant." ADEQ believes such use does not change the meaning or intent of the federal Tailoring Rule nor does this revision broaden the scope of the requirements for GHGs or make Regulation No. 26 more stringent than the federal regulation. Revisions have been made in response to comments received to clarify the intent and application of inclusion of GHGs to the definition of "Regulated air pollutant." The definition of "Regulated air pollutant" will be revised as follows: "…GHGs (1) emitted in, or having a potential to emit, amounts that equal or exceed 100 tpy calculated as the sum of the six (6) well-mixed GHGs on a mass basis; and (2) emitted in, or having a potential to emit, amounts of 100,000 tpy or more of GHGs measured as CO_2e." This revision, combined with other revisions within this rulemaking, incorporates the essential elements established in the federal Tailoring Rule without the attendant problems of incorporating the federal definitions as promulgated by EPA.

Comment 20: Commenters urge the Commission to adopt a provision in Regulation 26 that clarifies that nothing in Regulation 26 is intended or should be interpreted to deem GHGs a Regulated Air Pollutant for the purposes of Regulation 26.

Response: See Response to Comment 19 for an explanation of why ADEQ has proposed to add GHG to the definition of "Regulated air pollutant."

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

Comment 21: The revision to Regulation 26.302 should not reference "Stationary Sources" or "Potential To Emit." ADEQ proposes to add to Regulation 26.302 a new subpart (G) relating to GHG sources. So as to deem those sources "subject to permitting," ADEQ should delete the word "stationary" before "source" and not reference "potential to emit." The terms "stationary sources" or "potential to emit" are defined terms in Regulation 26 that reference a source's emissions of regulated air pollutants. ADEQ's use of "stationary source" and "potential to emit" in Regulation 26.302(G) is unnecessary for implementation of the Tailoring Rule and, given ADEQ's other proposed revisions in Regulation 26, could render Regulation 26 to be more stringent than federal law. In the event ADEQ decides to include the terms "stationary source" and "potential to emit" in this section, it should explain its rationale for doing so, cite to the provisions of the Tailoring Rule which refer to a source of GHGs as a stationary source emitting regulated air pollutants and explain the reasons why it believes the inclusion of that term is required to adopt the Tailoring Rule.

Response: ADEQ believes that the term "major source" in Regulation No. 26 is defined to include GHG sources. Additionally, with the incorporation of the changes discussed above in relation to "regulated air pollutant," subsection (G) of Reg. 26.302 is unnecessary and will be deleted.

See also Responses to Comments 18 and 19.

Comment 22: Commenters suggest the following language as a proposed revision to section 26.302 instead: "(G) any building, structure, facility, or installation that (1) emits 100,000 tons per year or more of CO2e; or (2) has the maximum capacity under its physical and operational design to emit 100,000 tons per year or more of CO2e, including any physical or operational limitation on the source's capacity to emit CO2e if such limitation is enforceable by the Administrator."

Response: See Responses to Comments 10 and 21.

Comment 23: The revisions to Regulation 26, Section 26.302, do not adequately address the two step approach used to determine whether a source is subject to title V permitting. In addition to emitting at or above the 100,000 tpy CO_2e threshold, a source must also be a major title V source with 100 tpy of GHG emissions. Commenters noted that if the ADEQ chooses to correct the definition of "major source" as discussed above by adding the phrase "subject to regulation" it is likely that Section 26.302 will not need to be revised.

Response: ADEQ acknowledges the two step approach used to determine whether a source is subject to title V permitting and will rely on the proposed regulation revisions incorporated from the GHG Tailoring Rule to address title V permitting. ADEQ also acknowledges the possibility that a GHG emitting source can theoretically emit over 100,000 tpy CO_2e without emitting over 100 tpy of regulated air pollutants, an issue EPA addressed in the preamble to the GHG Tailoring Rule. If such a permitting issue arises in Arkansas, ADEQ will likewise follow EPA's intentions described in the preamble to the GHG Tailoring Rule by applying the two step approach to determine whether a source is subject to title V permitting. For the purpose of determining whether a GHG emission source, resulting from either new construction or a physical or operational change at an existing source, is considered a major source under PSD, ADEQ will require the following conditions to be met:

(1) 100 tpy calculated as the sum-of-six well-mixed GHGs on a mass basis (no Global Warming Potential values applied); and
(2) An existing or newly constructed source emits or has the potential to emit GHG in amounts that equal or exceed 100,000 tpy CO_2e basis.

See also Responses to Comments 10, 11, 18, and 19.

Comment 24: "Recognized" before "Air Contaminant Emissions" in Regulation 26.305 should not be deleted. ADEQ should not delete the word "recognized" before "air contaminant emissions" and should provide that GHG emissions are subject to be included in a part 70 permit pursuant to the provisions of Regulation 26, and change the threshold for not including GHG

emissions in a title V permit as 100,000 tpy CO2e rather than 75,000 tpy CO2e unless triggered by a minor permit modification. However, this word should not be deleted since the term "recognized air contaminant" is specifically defined in Regulation 26 and sets out the criteria for air contaminants to be included in a Title V air permit, including those which present a harm to the public health and the environment. By deleting this word, a source is subject to including all air contaminant emissions in its title V permit, which is a much stricter application than federal law and more burdensome for the permittee and for ADEQ. It is not necessary to change this term for purposes of the Tailoring Rule. It is important that the word "recognized" not be deleted; or ADEQ should provide its scientific and technical rationale for deleting "recognized," and conduct an evaluation including consideration of the economic impact and environmental benefit of such modification to the regulation.

Response: The deletion of the word "recognized" will not be finalized as part of this regulation revision.

Comment 25: Deletion of the word "recognized" will require a source to include all air contaminant emissions in its title V permit instead of only those air contaminant emissions which may be "reasonably assumed to be present according to mass balance calculations or applicable published literature," or which may "cause or present a threat of harm to human health or the environment" (*see* Regulation 26 definition of Recognized air contaminant emissions).

Response: A facility's obligation to include emissions in its permit application is not limited by "mass balance" or "published information." "Recognized air contaminant emissions" is defined in the Regulation, but it is not the only criteria for including emissions which are to be included in a title V air permit. It is noted that Regulation 26.305 requires that "all regulated air pollutant emissions" as well as "recognized air contaminant emissions" be included in a part 70 source's permit.

The deletion of the word "recognized" will not be finalized as part of this regulation revision.

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, should the Commission adopt such a revision then 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 Responses to Comments 24 and 25.

Comment 27: The proposed language referencing the thresholds for emissions subject to permitting in Regulation 26.305 should be adjusted. ADEQ proposes to add language to the "emissions subject to permitting" section stating "that GHG emissions less than 75,000 tpy CO_2e shall not be included in a part 70 permit." However, after July 1, 2011, only facilities that emit at least 100,000 tpy CO_2e will be subject to title V permitting requirements under the Tailoring Rule unless there is a modification that involves emissions increases of greater than 75,000 tpy CO_2e. Because only those facilities which emit at least 100,000 tpy CO_2e, without a triggering modification, are subject to title V permitting requirements, the proposed language should be revised to reflect that GHG emissions less than 100,000 tpy shall not be included in a part 70 permit, except in the case of a triggering modification, as defined. Commenters are concerned about the revisions to Regulation 26, Section 26.305. Commenters interpret the purpose of this revision to exclude from inclusion in the title V permit emissions of GHG that are not major for PSD. If that is the case, the revision needs to reference both the CO_2e threshold to determine a source is subject to regulation and the *100/250* tpy major source threshold for determining whether the source is major for PSD permitting. Additionally, we have concerns that this provision will preclude a source from taking synthetic minor limits to avoid major source applicability.

Response: ADEQ agrees with this comment. The proposed language referencing the thresholds for emissions subject to permitting in Regulation 26.305 will be adjusted in the following way "…GHG emissions less than 100,000 tpy CO_2e shall not be included in a part 70 permit unless such emissions result from an increase in GHG emissions at a stationary source due to a modification of 75,000 tpy CO_2e or more…"

Comment 28: Should ADEQ adjust its proposed revision Reg. 26.305 upward to the 100,000 tpy CO_2e threshold, then the provision should also address those sources subject to permitting due to a permit modification of greater than 75,000 tpy CO_2e pursuant to the proposed revision to section 26.1002(A). ADEQ should clarify the threshold to 100,000 tpy CO_2e rather than 75,000 tpy CO_2e since that is the threshold for a minor permit modification. Commenters suggest the following replacement language: "All regulated air pollutant emissions, recognized air contaminant emissions, and GHGs emissions subject to regulation shall be included in a part 70 permit, except that GHG emissions less than 100,000 tpy CO_2e shall not be included in a part 70 permit unless triggered by a minor permit modification regarding an emission increase of CO_2e as required by this regulation; and only regulated air pollutants and GHGs emissions subject to regulation may trigger the need for a part 70 permit or a part 70 modification process . . ." ADEQ should explain why the threshold for non-application of GHGs in a Title V permit is 75,000 tpy CO_2e rather than 100,000 CO_2e as set out in the Tailoring Rule, and conduct an evaluation including consideration of the economic impact and environmental benefit of such modification to the regulation, and provide a written scientific and technical rationale explaining the necessity of the amended regulation.

Response: It is agreed that the 75,000 tpy is in error and Regulation 26.305 will be corrected in the final rule as follows: "All regulated air pollutants and recognized air contaminant emissions from a part 70 source shall be included in a part 70 permit, except that GHG emissions less than 100,000 tpy CO_2e shall not be included in a part 70 permit…" See also Response to Comment 27.

Comment 29: It should be clarified that GHG emissions in addition to regulated air pollutants can trigger permitting in Regulation 26.305. The second sentence of Regulation 26.305 should also be revised to add a reference to GHG emissions after the language "only regulated air pollutants." Additionally, 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 definition of "Regulated air pollutant" in Regulation No. 26 as revised will include GHGs. ADEQ has, in practice, developed procedures to not include some lesser emissions; however, there is no definition of De Minimis amounts in the GHG Tailoring Rule; therefore, it cannot be referenced in Regulation No. 26. The revisions to this rule do include a threshold for minor permit modifications (Regulation 26.1002(A)(8)) in regards to GHG emission changes of less than 75,000 tpy.

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

Comment 30: Regulation 26.403 should be clarified. The proposed change to Regulation 26.403 requires that existing part 70 sources submit an application to ADEQ for its GHG emissions within 1 year from July 1, 2011, which is the date that a source becomes subject to title V for purposes of the Tailoring Rule.

Response: The purpose for the proposed revisions to Regulation 26.403 (and the revision to the definition of "existing part 70 source" in Chapter 2) was to clarify when a facility must submit an application if it becomes subject to the part 70 permit requirements due to the GHG regulations. The wording of Regulation 26.403, as requested in comments, is revised for clarity as follows: "A timely application for an initial part 70 permit for an existing part 70 source is one that is submitted within 12 months after the source becomes subject to the permit program, or on or before such earlier date as the Department may establish. The earliest that the Department may require an initial application from such an existing part 70 source is 6 months after the Department notifies the source in writing of its duty to apply for an initial part 70 permit."

Comment 31: Each regulation should contain its own provision that clearly, comprehensively and effectively rescinds changes made during these rule-makings, a so-called "escape clause," in

the event that the Tailoring Rule or EPA's authority to regulate carbon dioxide or other GHG emissions as a climate change mitigation strategy is reversed, terminated, effectively limited through judicial, regulatory, legislative action, or any of the other 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. These provisions should operate both prospectively and retroactively and should be broad enough to apply to related GHG provisions in permits issued pursuant to these regulatory changes. The proposed clause is unduly narrow and, in the event all or part of the Tailoring Rule is invalidated by anything other than a court decision, could lead to a requirement for an Arkansas operating permit for GHG emissions when none exists in federal law.

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. 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 language has been revised to more clearly articulate the effect of any judicial review.

See also Responses to Comments 11 and 32.

Comment 32: The definition of "Applicable Requirement" is not the appropriate location for a rescission clause. To better convey that the rescission clause is applicable to all GHG requirements in Regulation 26, the rescission clause should be included under the "severability" section of Chapter 1. To address these concerns, commenters propose the following rescission clause be included in Regulation 26.103:

> The provisions of this Regulation and any terms or conditions of operating air 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 Title V 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 Title V 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 Fed. Reg. 31606, or to otherwise limit or delay the Administrator's exercise of authority to require operating air permits for sources of Greenhouse Gas emissions.
> 4) U.S. EPA final regulation resulting in Greenhouse Gases not being subject to regulation under Title V of the Clean Air Act.

Response: The rescission clause has been revised so that it is more closely aligned with the Commenter's suggested change in paragraph 2 regarding judicial review and has been moved to the Severability section at Regulation 26.103.

See also Responses to Comments 11 and 31.

Comment 33: 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.

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

Comment 34: ADEQ should separately list that GHG emissions as required by Regulation 26 shall be included in a part 70 permit rather than referring to GHG emissions as "regulated air pollutant emissions."

Response: It appears that this is a preference by the commenter; no reason is given why it is inappropriate as proposed by ADEQ. We disagree that the suggested approach is better or more appropriate and retain the opinion that the revised rule revision to the definition of "regulated air pollutant" is the most comprehensive and efficient manner to address this matter.

See also Response to Comment 19.

Comment 35: In Regulation 26.403 (initial applications from existing part 70 sources), ADEQ should provide that existing title V sources are not required to submit a new Title V application for purposes of the Tailoring Rule until such time as its title V permit is modified or renewed. ADEQ's proposed change to this section can be interpreted to mean that any existing title V source must submit a new Title V application for purposes of the Tailoring Rule by July 1, 2012 (one year from July 1, 2011, the date a source becomes subject to title V for purposes of the Tailoring Rule). However, EPA has not made such a requirement for existing title V sources in the Tailoring Rule. ADEQ should modify this section to clarify the requirements of existing title V permittees with regard to compliance with permitting under the Tailoring Rule.

Response: Through modifications made to Regulation 26.403 (initial applications from existing part 70 sources), and the definition of "existing part 70 sources," ADEQ has made it clear that existing title V sources not previously subject to the permitting requirements of Regulation No. 26 would be required to submit an application within 12 months of becoming classified as a major source due to their GHG emissions. Regulation 26.403 addresses **Initial** application submittal time frames. The deadline for submission of an initial application for sources already subject to Regulation No. 26 permitting (major sources without GHG emissions) has long since

passed and those facilities should already have a part 70 (title V) permit. Such facilities are not required to submit a new title V application to address their GHG emissions until such time as their title V permit is modified or renewed.

It should be noted that facilities not previously subject to permitting as a major source but that will become a major source solely due to its GHG emissions will have an obligation under federal regulations to submit a title V permit application within 12 months of becoming subject to such requirements imposed by federal law, regardless of the status of the revisions of Regulation 26.

See also Response to Comment 30.

Comment 36: Commenters believe that the inclusion of the "subject to regulation" language at 40 CFR 70.2 would greatly improve clarity of the Arkansas regulations. Commenters think that ADEQ could either add this as a separate Regulation 26 definition or include this under the new subsection for GHGs under the definition of "regulated air pollutant."

Response: ADEQ considered incorporating the federal definition of "subject to regulation" into Regulation No. 26, but believed doing so could be considered prospective rulemaking due to the manner in which EPA crafted the federal GHG Tailoring Rule. ADEQ believes the proposed revisions limit EPA's role in the 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.

See also Response to Comment 19.

Comment 37: Commenters interpret the revisions to the minor permit modification procedures at Regulation 26, Section 26.1002 to apply to sources that are minor for PSD permitting requirements. If that is the correct interpretation, this provision must be revised to reflect the usage of CO2e to determine if the source is subject to regulation and then the *100/250* tpy major source thresholds to determine if the source is major for PSD.

Response: The only test needed is if the emissions changes are below the PSD significance level. It is irrelevant whether or not the facility is a current major PSD source. In any event, modifications that are subject to PSD review are prohibited under 26.1002(G) to be processed as minor permit modification.

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

Comment 38: The definition of "CO2 Equivalent Emissions" at Regulation 26, Chapter 2

includes the incorporation date of October 30, 2009. We note 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 title V revision requirements.

Response: ADEQ acknowledges this comment.

Comment 39: The Department should consider simply incorporating the pertinent provisions of the federal Tailoring Rule in Regulations 19 and 26. The Department should be required to consider simply incorporating the Tailoring Rule by reference in Regulations 18, 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 No. 26, but believed doing so could run afoul of the prohibition on prospective rulemaking due to the manner in which EPA crafted the federal rule. ADEQ believes the proposed regulation revisions limit EPA's role in the regulation of affected 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.

See also Response to Comment 19.

Comment 40: Currently, 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: Normally permits will not contain GHG emissions until the permitting thresholds are reached. A facility may wish to assume a GHG limit for certain purposes, such as restriction to a minor source when there are no other methods to limit GHG (such as a fuel use limit).

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

Comment 41: Regulation 26 does not appear to currently have any general transition clauses such as those found in Regulations #18 and #19 which 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.
Also, Regulation 26 does not appear to currently have any such transition clauses. Such may need to be inserted for clarity.

Response: The general transition clauses are found in Regulation 26.403 and Regulation 26.404. The definition of an "Existing part 70 source" was modified to account for existing GHG sources. See also Response to Comment 35.

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

Comment 42: The definition of "Major source" found in Chapter 2 of Regulation 26 should include the following changes:
The phrase "or more" should be added to the first line of the definition of "major source" paragraph (B) so that the marked-up language reads as such, 100,000 tpy CO_2e or more…

Response: The proposed change to the definition of "Major source" is withdrawn.
See Response to Comment 18.

Comment 43: 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.

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

Prepared by:
Arkansas Department of
Environmental Quality

By: _____
Mike Bates, Chief, Air Division