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**SENT VIA EMAIL: [AirPlanComments@adeq.state.ar.us](mailto:AirPlanComments@adeq.state.ar.us)**

Ms. Tricia Treece  
Office of Air Quality  
Arkansas Department of Environmental Quality  
5301 Northshore Drive  
North Little Rock, AR 72118

RE: Requested Feedback/Comments on ADEQ's Proposed Regulation 35

Dear Ms. Treece:

The Arkansas Environmental Federation (AEF) truly appreciates the Arkansas Department of Environmental Quality's (ADEQ's) efforts to reach out to stakeholders and the public to provide feedback on its proposed Regulation 35 Arkansas Air Quality Regulation, which we understand is an attempt to consolidate all air regulations into one air regulation. We understand that ADEQ's purpose to do so is to streamline the air program to make it easier for the regulated community and the public to understand air permitting and enforcement duties and responsibilities. This is not an easy task and we appreciate the time and effort ADEQ has put into this process.

Numerous members of the AEF have also expended considerable time and effort in reviewing the draft Regulation 35. As a result of this review, the AEF has serious concerns that, unfortunately, the consolidation does not seem to offer the clarity and ease with regard to air permitting and enforcement that ADEQ seeks. Instead, Regulation 35 appears confusing, burdensome, and complex. The AEF is concerned that the potential adverse ramifications of any consolidation at this time for all permittees and for the public are too difficult to be adequately determined due to the complexity of the consolidation.

The AEF believes that it is advisable to adjust the time frame and possibly reconsider the consolidation of the Air Regulations and the adoption of Reg 35. Here are some of the major reasons why:

The ADEQ's state air program is authorized by state statute under the environmental law sections of the Arkansas Code at Arkansas Code Annotated (ACA) 8-1-101 *et seq.*, and more specifically, under the Arkansas Water and Air Pollution Control Act, ACA 8-4-101 *et seq.* (the "AWAPCA") and Subchapter 3 on Air Pollution at ACA 8-4-301 *et seq.* The current Regulation 18 Arkansas Air Pollution Control Code is promulgated under the authority of Subchapter 2 of the AWAPCA. Regulation 18 is a unique state-only regulation and provides the simplest permitting mechanism for certain minor sources, registration of a facility etc. Regulation 18 exists to protect small sources and provide flexibility for the Regulation 18 community; and to make clear which provisions in all permits are state-only enforceable by reference to Regulation 18 in the applicable permit. Regulation 19 Regulations of the Arkansas Plan of Implementation for Air Pollution Control (SIP) and Regulation 26 Regulations of the Arkansas Operating

Air Permit Program primarily deal with federally enforceable provisions of the air program for major sources of federally regulated air pollutants.

1. One of the primary concerns of the AEF is that the blending of state-enforceable only provisions of Regulation 18 with the federally enforceable provisions of Regulations 19 and 26 blur the lines as to federal versus state enforceability provisions for all of the Arkansas regulated community. See, for example, Regulation 35.103(G-F). Certain provisions of Regulation 19 are in the EPA-approved SIP and thus, those provisions are federally enforceable. However, Regulation 18 is not included in any SIP, thus, it is not federally enforceable.

In the past, ADEQ had rightfully taken great pains, time and effort in working with the AEF and stakeholders to assure that standards mandated by federal requirements were kept separate and apart from those mandated by state requirements in a single permit system. An excellent resource to review as a reminder of those efforts is included in a law review article authored by Walter G. Wright, Jr. and Mary Ellen Henry, *The Arkansas Air Pollution Control Program: Past, Present and Future*, 51 Ark. L. Rev. 2 (1998). That was the primary reason for maintaining a separate Regulation 18 which is very clear on those provisions and registration/permitting requirements for state-only permits and state-only provisions in all permits, such as, for example, opacity requirements. Regulation 18.102(B) provides that:

It is the specific intent of Regulation 18 to preclude federal enforceability of Regulation 18 requirements. Regulation 18 permits or permit conditions issued under its authority, or enforcement issues arising from Regulation 18 shall not be deemed to be federally enforceable.

While Regulation 35 does refer to preclusion of federal enforceability of state law requirements and we believe ADEQ is seeking to maintain the distinction, it is unclear as to which provisions of Regulation 35 are state enforceable only and which are federally enforceable. For example, the definition section of Regulation 35 has commingled all definitions from Regulations 18, 19, and 26. It appears that all definitions will be included in the SIP, which would make them federally enforceable and not all of them are or should be. The definition of "air contaminant" is a state defined term and has been changed in Regulation 35 from the Regulation 18 definition. The new definition is now used throughout Regulation 35 which appears to subject state-regulated only air contaminants, such as ammonia, to the same federally enforceable standards as federally regulated air pollutants, such as nitrogen oxides. Not all air contaminants are federally regulated air pollutants. The proposed approach with regard to this definition is complex and could lead to unintended additional or more burdensome regulation of pollutants that are not federally regulated air pollutants. There are lots of potential problems in changing this definition and the application of this term throughout Regulation 35.

Further, the commingling of all definitions create problems for those definitions which may only be relegated to major sources and/or operating permits. For example, we believe that the part 70 definitions currently in Regulation 26 should be contained separately for those applicable provisions to minimize overlap and confusion with other definitions.

Another example is Regulation 35.601, which has changed Regulation 18.501 Opacity quite a bit, and has eliminated certain exclusions from percentage opacity requirements for equipment installed prior to January 30, 1972, for wood, coal or oil fired boilers, and for startup of a new fire in an incinerator used for disposal of wood waste or waste from cotton gins, as well as eliminating the petition option for less



stringent emission limits. It is unclear as to why these exemptions were eliminated and thus, Regulation 35 appears to be more stringent than Regulation 18 in this regard.

The above are just a few examples of the potentially difficult problems involved with segregating federally enforceable and state-only enforceable requirements in Regulation 35.

2. There are many provisions of Regulation 35 which are confusing or unclear with regard to potential changes for minor and major sources with regard to permit issuance, modification, administrative amendments, de minimis changes, upset and emergency conditions, etc. For example:

(a) In the Chapter 2 definitions, there are multiple examples of the definitions causing substantial and unintended regulatory changes due to terms being defined for specific regulatory programs. The term "construction" was modified to include "any physical change or change in the method of operation" from the nonattainment New Source Review (NSR) (Regulation 31) definition. One unintended impact is that any physical change, regardless of impact on actual or potential emissions, would be "construction" for part 70 sources and would require a significant modification per Regulation 35.1705.

(b) There is no provision in Regulation 35 (under Chapters 2 Definitions or Chapter 14) that clearly allows for minor NSR source permit modification (i.e., significant modification or major modification). The ability to make a minor NSR source permit modification within Regulations 18 and 19 is implied. However, Regulation 35 appears to intentionally change that ability with specific provisions for "significant modifications" to part 70 permits (see Regulation 35.1705 and 35.2309) and "major modification" for PSD permits. The AEF has several concerns with regard to this change.

(c) Under ADEQ's current regulatory structure, the majority of the minor NSR program for Regulation 26 sources is contained within Regulation 26. This is documented in the Federal Register (FR) notices and associated Technical Support Document (TSD) prepared by EPA Region 6 for the 2000 approval of the current Regulation 19/26 structure. Regulation 35 poses a significant risk of confusion regarding which minor NSR provisions are applicable to which types of sources.

(d) Regulation 35 has adopted the term "modification" from Regulation 19, however has changed the term "routine maintenance, repair and replacement" to "routine maintenance; routine repair; and routine replacement." This term is specifically defined in the Clean Air Act, and Regulations 19 and 26, and its interpretation has been the subject of litigation for decades. By changing the definition, ADEQ appears to be making the term more stringent than federal law without reasonable explanation or providing the proper standard of review to do so.

(e) There are many specified dates throughout where federal rules are incorporated by reference and some appear inaccurate and highly confusing. It is important that these dates are accurate for the awareness of the regulated community and the public.

(f) The permitting requirement exemptions for insignificant activities in Regulation 19.408 were not retained. The justification given for removal that "it is not true per Title V requirements" is confusing in that it appears that the title V provision exempting insignificant activities was retained at Regulation 35.1604. It is important that these exemptions be retained.

3. ADEQ is on a SIP track approval for changes to the relevant air regulations; and interjecting Regulation 35 into this process may likely unduly delay the status of SIP approval, review of applicable records, and negotiation of the current SIP track approval.

4. Regulation 8: Administrative Procedures is currently undergoing major revisions and is in the public comment review process. Regulation 8 affects administrative procedure for all permits, including air permits, such as public notice, comment, hearings, issuance, denial, transfer and modification of permits and general permits, all of which are provisions in Regulation 35. The final changes to Regulation 8 after its adoption will likely affect many of the provisions of Regulation 35. The Regulation 35 process, if it continues, should be held in abeyance until after Regulation 8 is promulgated.

The AEF feels that the above feedback is just the tip of the iceberg regarding the inherent major complications with the consolidated Regulation 35. As a result of our review, we recommend the following:

1. We believe that the current air regulations do not necessarily need to be consolidated at this time for the reasons set forth above.

2. In the event ADEQ decides to move forward with Regulation 35, we recommend that Regulation 18 not be included in any consolidation and kept separate and apart to maintain clarity of state-only and federally regulated requirements.

3. At the very least, we recommend that an interim study committee consisting of ADEQ staff, stakeholders and interested members of the public be formed after the revisions to Regulation 8 have been finalized, for a period of 12-18 months, to further review Regulation 35 and the consequences of the changes. Doing so would allow sufficient time and consideration of reviewing and revising existing air guidance or policies which could relieve the regulatory burden on ADEQ and the regulated community without perhaps the need for a Regulation 35, and to provide more specific and detailed comments on a consolidated Regulation 35. The AEF is ready and willing to assist ADEQ in this effort.

Thank you again for your consideration of this requested feedback on the process to consolidate air regulations under Regulation 35.

Sincerely,



Ava F. Roberts  
Executive Director