



TINSLEY & YOUNGDAHL, PLLC

February 17, 2015

Mr. Doug Szenher
Public Outreach and Assistance Division
Arkansas Department of Environmental Quality
5301 Northshore Drive
North Little Rock, AR 72118

Re: Arkansas Pollution Control and Ecology Commission, Docket No. 14-010-R;
Regulation No. 19—Regulations of the Arkansas Plan of Implementation for Air
Pollution Control

Dear Mr. Szenher:

On behalf of Arkansas Electric Energy Consumers, Inc. (hereinafter “AEEC”) and Arkansas Gas Consumers, Inc. (hereinafter “AGC”), two non-profit corporations which represent the interests of large consumers of electricity and natural gas in Arkansas, and pursuant to the procedural steps outlined in Minute Order No. 14-43, the following are public comments submitted in response to the public hearing held on January 12, 2015 regarding the proposed changes to Regulation No. 19, Regulations of the Arkansas Plan of Implementation for Air Pollution Control.

Background

Regulation No. 19 purports to provide a clear delineation of those regulations promulgated by the Arkansas Pollution Control and Ecology Commission (hereinafter “the Commission”) in satisfaction of certain requirements of the federal Clean Air Act, 42 U.S.C. § 7401 *et seq.*, as of July 1, 1997, and the federal regulations stemming therefrom. On November 21, 2014, the Arkansas Department of Environmental Quality (hereinafter “ADEQ”) filed with the Commission a Petition to initiate a rulemaking docket to amend Regulation No. 19. On December 5, 2014, the Commission initiated the above-referenced rulemaking docket to consider ADEQ’s proposed revisions to Regulation No. 19. The Commission conducted a public hearing regarding the proposed revisions to Regulation No. 19 on January 12, 2015, at which a representative of AEEC and AGC voiced certain concerns regarding the proposed revisions to Regulation No. 19. Subsequent to that hearing, the hearing officer granted a request to extend the deadline for submitting written public comments on the proposed changes to Regulation No. 19 until 4:30 p.m. on February 17, 2015. Therefore, AEEC and AGC hereby submit these written public comments in order to clarify the concerns their representative expressed at the public hearing on January 12, 2015.

Comments on the Proposed Rulemaking

- I. Sub-section (D) of the proposed Regulation No. 19.305 exceeds the authority granted to ADEQ by Arkansas Code Ann. § 8-4-318.

As part of its proposed revisions to Regulation No. 19, ADEQ proposes to add a new regulation enumerated as Regulation No. 19.305. ADEQ has titled Regulation No. 19.305 as “NAAQS Air Quality Analysis for Issuance of Permits.” Regulation No. 19.305 contains five sub-sections that are enumerated as sub-sections (A) through (E), respectively. Collectively, Regulation No. 19.305 purports to identify the type of air quality analysis ADEQ will conduct as it considers “potential ambient air quality impacts from a proposed increase in emissions for any pollutant for which a NAAQS is in effect prior to issuing a permit for the construction of a new stationary source or the modification of an existing stationary source subject to” Regulation No. 19. Since this regulation purports to define the type of air quality analysis ADEQ may require when making permitting decisions, it must comply with the requirements established in Ark. Code Ann. § 8-4-318, which states the following, in pertinent part:

Unless otherwise voluntarily proposed and agreed to by the owner or operator of a stationary source, the department shall not require or consider air dispersion modeling of an air contaminant for which a National Ambient Air Quality Standard has been established in air permitting decisions for stationary sources except:

(A) As required by Part C of Title I of the Clean Air Act, 42 U.S.C. § 7401 et seq., and the federal regulations promulgated thereto, for the permitting of major source construction;

(B) If necessary in the judgment of the department, with respect to permitting of a temporary source under 42 U.S.C. § 7661c(e); or

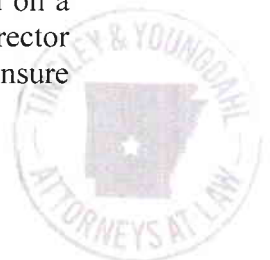
(C) Pollutant-specific or facility-specific air dispersion modeling explicitly required by an applicable NAAQS state implementation plan submitted to the United States Environmental Protection Agency.

Arkansas Code Ann. § 8-4-318(b)(3).

Most of the sub-sections of the proposed Regulation No. 19.305 comply with Ark. Code Ann. § 8-4-318. The proposed sub-section (D), however, contains ambiguous language that may exceed the authority granted to ADEQ in Ark. Code Ann. § 8-4-318. The proposed sub-section (D) states the following, in pertinent part:

For all other permits not described in 19.305(A) through 19.305(C) for the construction of a new stationary source or the modification of an existing stationary source, the air quality analysis may be qualitative in nature and may consider such factors as the nature, type, location, and emission parameters of the source, the existing attainment status of the area, the level of the proposed emissions increase relative to the area’s permitted emission rates, the existing ambient air levels of the pollutant based on the state monitoring network, and historical monitored trends in ambient air levels of the federally regulated air pollutant.

(1) Where the need has been demonstrated and specific criteria adopted on a pollutant-or facility-specific basis in the applicable NAAQS SIP, the Director may conduct air dispersion modeling for such an air quality analysis, to ensure



that the issuance of the proposed permit will not interfere with the attainment or maintenance of a NAAQS.

(2) The demonstration of need and the specific criteria adopted for when such modeling is conducted may be based on those factors listed in 19.305(D), together with other available and pertinent information such as the results of regional airshed modeling performed for NAAQS SIP development.

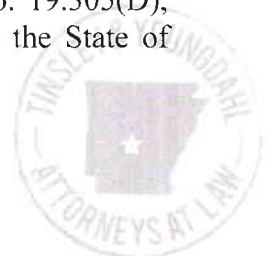
Since the proposed Regulation 19.305(D) contains ambiguous, permissive language such as the passive voice construction “[w]here the need has been demonstrated,” it is not consistent with the authority granted to ADEQ in Ark. Code Ann. § 8-4-318. One can readily contrast this ambiguous, permissive language with the clear language found in Regulation No. 19.305’s other sub-sections, e.g. “[n]o further air quality analysis shall be required” in sub-sections (B) and (C). Particularly, the use of the passive voice in the phrase “[w]here the need has been demonstrated” fails to clarify that ADEQ bears the burden of demonstrating a need for air dispersion modeling in addition to the qualitative air quality analysis permitted by sub-section (D).

In light of the ambiguity in this proposed sub-section of Regulation No. 19.305, which renders this regulation inconsistent with ADEQ’s regulatory authority pursuant to Arkansas law, AEEC and AGC respectfully propose certain revisions to sub-section (D) of Regulation No. 19.305. A document that identifies AEEC and AGC’s proposed revisions to sub-section (D) is attached to these public comments as Appendix A. AEEC and AGC respectfully submit that these proposed revisions to the proposed Regulation No. 19.305(D), or similar revisions, are necessary to bring this proposed regulation into compliance with Ark. Code Ann. § 8-4-318.

II. Sub-section (D) of the proposed Regulation No. 19.305(D) fails to adequately account for the industrial and economic development of the State of Arkansas, as required by Arkansas Code Ann. § 8-4-312.

The Act which contained the provision codified at Ark. Code Ann. § 8-4-318 also contained an emergency clause which demonstrates that the Arkansas General Assembly passed the law in order to curb ADEQ’s “stringent” air dispersion modeling policy that discouraged economic development in Arkansas. To the extent that the proposed Regulation No. 19.305(D) may allow ADEQ to resurrect this “stringent” air dispersion modeling policy, approval of the proposed Regulation No. 19.305(D) could have a significant impact upon the industrial and economic development of the State of Arkansas.

When industrial businesses, like those represented by AEEC and AGC, make decisions regarding where to locate facility sites, or whether or not to expand existing facilities, they analyze the procedures and policies surrounding the issuance of permits for said facilities. If a particular jurisdiction utilizes onerous and burdensome procedures for issuance of air quality permits, these industrial businesses will choose to locate their facilities in another jurisdiction, or they will choose to expand existing facilities in another jurisdiction. Therefore, the overly “stringent” air modeling procedures previously promulgated by ADEQ, which may be resurrected by the ambiguous and uncertain language proposed as Regulation No. 19.305(D), have a significant, deleterious effect on industrial and economic development in the State of Arkansas.



Moreover, Arkansas law requires ADEQ and the Commission to account for and consider this factor in the discharge of their respective responsibilities and duties. Ark. Code Ann. § 8-4-312(14) states the following, in pertinent part:

In exercising their powers and responsibilities under this chapter, the Arkansas Department of Environmental Quality and the Arkansas Pollution Control and Ecology Commission shall take into account and give consideration to the following factors:

(14) The economic and industrial development of the state and the social and economic value of the air contamination sources...

Ark. Code Ann. § 8-4-312(14).

Further, Arkansas law requires the Commission to consider the economic impact of the regulations it promulgates. Arkansas Code Ann. § 8-4-311(b)(1) states the following, in pertinent part:

(b) The Arkansas Pollution Control and Ecology Commission shall have the power to:

(1) (A) Promulgate rules and regulations for implementing the substantive statutes charged to the department for administration.

(B) In promulgation of such rules and regulations, prior to the submittal to public comment and review of any rule, regulation, or change to any rule or regulation that is more stringent than federal requirements, the commission shall duly consider the economic impact and the environmental benefit of such rule or regulation on the people of the State of Arkansas, including those entities that will be subject to the regulation.

(C) The commission shall promptly initiate rulemaking to further implement the analysis required under subdivision (b)(1)(B) of this section.

(D) The extent of the analysis required under subdivision (b)(1)(B) of this section shall be defined in the commission's rulemaking required under subdivision (b)(1)(C) of this section. It will include a written report that shall be available for public review along with the proposed rule in the public comment period.

(E) Upon completion of the public comment period, the commission shall compile a rulemaking record or response to comments demonstrating a reasoned evaluation of the relative impact and benefits of the more stringent regulation...

Ark. Code Ann. § 8-4-311(b)(1). Respectfully, AEEC and AGC submit that neither the Commission nor ADEQ have given adequate consideration to the economic impact of this proposed regulation, insofar as the economic analysis conducted by ADEQ and the Commission



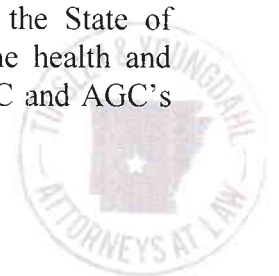
to date has failed to consider the economic impact that resurrection of an overly stringent air dispersion modeling requirement will have on the economic and industrial development of the State of Arkansas. Although ADEQ concedes in documents attached to its Petition that Regulation No. 19.305 is more stringent than federal requirements, the analysis of economic impact that ADEQ has conducted to date asserts, with no analysis whatsoever, that the revisions to this regulation will have no economic impact. The Economic Impact/Environmental Benefit Analysis prepared by ADEQ on November 21, 2014 states the following: "From a facility standpoint, there is no cost above what is required by the federal rule to implement the rule changes for which this statement is being prepared. There is no increase of permitting fees associated with this proposed change." ADEQ has not, however, supported this bare assertion with any analysis.

Insofar as the proposed Regulation No. 19.305(D) contains vague and ambiguous language through which ADEQ may resurrect an overly stringent air dispersion modeling requirement, this proposed regulation will have a significant impact on the costs that certain facilities must incur in order to obtain air permits. Although there may be no "increase of permitting fees associated with this proposed change," the requirement to conduct air dispersion modeling could significantly increase the costs that certain facilities must incur to obtain air permits and the results of those air dispersion models also may result in more stringent requirements and control technology being required by the ADEQ than is required by federal requirements alone. Therefore, neither ADEQ nor the Commission has adequately considered the ultimate economic impact associated with this proposed regulation.

Since the proposed Regulation No. 19.305(D) promulgated by ADEQ contains ambiguous, permissive language that exceeds ADEQ's authority pursuant to Ark. Code Ann. § 8-4-318, through which ADEQ may resurrect an overly stringent air dispersion modeling requirement that hampers industrial and economic development in Arkansas, the proposed revisions to Regulation No. 19 fail to adequately account for and consider one of the factors ADEQ and the Commission must consider as they discharge their powers and responsibilities pursuant to Arkansas law. Further, since the economic analysis conducted by ADEQ and the Commission to date does not consider the economic impact that resurrection of the air dispersion modeling requirement will have on the permitting process, and, therefore, Arkansas's industrial and economic development, both ADEQ and the Commission should undertake additional economic analysis, and allow engaged stakeholders a sufficient opportunity to review and comment on this additional analysis, before the Commission adopts ADEQ's proposed revisions to Regulation No. 19. If ADEQ and the Commission fail to conduct more rigorous, supplemental economic analysis that accounts for the economic impact of the vague and ambiguous language contained in Regulation No. 19.305(D), and provide an additional opportunity for engaged stakeholders to review and comment upon the supplemental analysis or make changes to 19.305(D), they will fail to discharge their statutory duties pursuant to Ark. Code Ann. §§ 8-4-311 and 8-4-312.

Conclusion

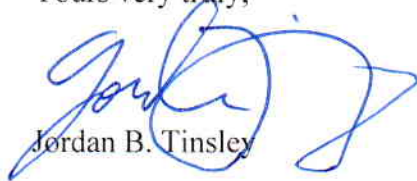
In order to encourage economic growth and industrial development in the State of Arkansas, while allowing ADEQ and the Commission to continue protecting the health and welfare of our citizenry and the environment, the Commission should adopt AEEC and AGC's



proposed amendments to the proposed sub-section (D) of Regulation 19.305, which are attached to these public comments as Appendix A.

Thank you for the opportunity to provide written public comments regarding the proposed changes to Regulation No. 19. Please contact me if you have any questions or concerns regarding these written public comments.

Yours very truly,



Jordan B. Tinsley

Attorney for AEEC and AGC

Enclosure

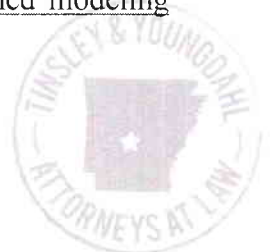


APPENDIX A

Reg. 19.305 NAAQS Air Quality Analysis for Issuance of Permits

The Department shall consider potential ambient air quality impacts from a proposed increase in emissions for any pollutant for which a NAAQS is in effect prior to issuing a permit for the construction of a new stationary source or the modification of an existing stationary source subject to this regulation, as those terms are defined in Regulation 19, Chapter 2. This consideration shall take the form of an air quality analysis which shall be conducted as follows:

- (A) For construction of a new stationary source or modification to an existing stationary source involving emissions increases, over permitted rates, of less than the pollutant-specific amounts established in 19.407(C), the resulting environmental impact is trivial and no further air quality analysis is required for each such pollutant for the modification.
- (B) Notwithstanding 19.305(A), for any permit application involving the construction of a new stationary source or the modification of an existing stationary source subject to permitting pursuant to Regulation 31, Nonattainment New Source Review Requirements (Regulation 31), compliance with the requirements of Regulation 31 shall constitute the necessary air quality analysis under this section. No further air quality analysis shall be required for any such pollutant subject to such review under Regulation 31.
- (C) Notwithstanding 19.305(A) and 19.305(B), for any permit involving the construction of a new major stationary source or the modification of an existing stationary source subject to Chapter 9 of this regulation, compliance with the requirements of 40 CFR § 52.21 as adopted by the Commission under 19.904 shall constitute the necessary air quality analysis under this section. No further air quality analysis shall be required for any such pollutant subject to such review under Chapter 9 of this regulation.
- (D) For all other permits not described in 19.305(A) through 19.305(C) for the construction of a new stationary source or the modification of an existing stationary source, the air quality analysis may be qualitative in nature and may consider such factors as the nature, type, location, and emission parameters of the source, the existing attainment status of the area, the level of the proposed emissions increase relative to the area's permitted emission rates, the existing ambient air levels of the pollutant based on the state monitoring network, and historical monitored trends in ambient air levels of the federally regulated air pollutant. Said air quality analysis shall not include air dispersion modeling unless the Department has complied with Ark. Code Ann. § 8-4-318(b)(3), and the Department demonstrates a need for air dispersion modeling based upon those factors listed in 19.305(D) above, together with other available and pertinent information such as the results of regional airshed modeling performed for NAAQS SIP development.



- (1) Notwithstanding the foregoing, where the need has been demonstrated and specific criteria adopted on a pollutant-or facility-specific basis in the applicable NAAQS SIP, the Director may conduct air dispersion modeling for such an air quality analysis, to ensure that the issuance of the proposed permit will not interfere with the attainment or maintenance of a NAAQS.
- (2) The demonstration of need and the specific criteria adopted for when such modeling is conducted may be based on those factors listed in 19.305(D), together with other available and pertinent information such as the results of regional airshed modeling performed for NAAQS SIP development. The Department shall not require air dispersion modeling when the qualitative air quality analysis described in 19.305(D) above provides the Department with adequate information.
- (E) Notwithstanding paragraphs 19.305(A) through 19.305(D), changes at existing stationary sources which qualify as *De Minimis* changes pursuant to 19.407(C) and changes to a source's insignificant activities list are not modifications, and are not subject to the requirements of this section.

