

**BEFORE THE ARKANSAS POLLUTION CONTROL AND ECOLOGY COMMISSION**

**In the Matter of Amendments to )  
Regulation No. 19, Regulations of Arkansas )  
Plan of Implementation for Pollution Control )**

**DOCKET NO. 16-001-R**

**COMMENTS OF THE ARKANSAS ENVIRONMENTAL FEDERATION ON  
PROPOSED REVISIONS TO ARKANSAS POLLUTION CONTROL AND ECOLOGY  
COMMISSION REGULATION NOS. 19.602 AND 19.1004**

The Arkansas Environmental Federation (“AEF”) appreciates consideration by the Arkansas Pollution Control & Ecology Commission (“APC&EC”) and the Arkansas Department of Environmental Quality (“ADEQ” or the “Department”) of the following public comments offered on the proposed revisions to APC&EC Regulation Nos. 19.602 and 19.1004. The AEF is a non-profit association with over 200 members, primarily Arkansas businesses and industries that manufacture products, provide services, and employ skilled workers in Arkansas while also insuring that their operations comply with all federal and State environmental, safety and health regulations. As such, the AEF and its members have an ongoing interest in the adoption and implementation of lawful, equitable and coherent regulations governing the treatment of excess emissions experienced during periods of emergency, upset and malfunction. For the reasons set forth below, the proposed amendments to the Regulation 19 provisions concerning emergency, upset and malfunction should not be adopted at this time. However, if APC&EC adopts the amendments to these provisions, the amendments should be revised as shown in the attached Exhibits A and B, and explained below.

**A. Comments on Overall Timing and Adoption of Amendments to Regulation 19**

The reason for ADEQ’s proposed revisions to Regulation Nos. 19.602 and 19.1004 is the requirement by EPA to comply with the provisions under its “SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction” (80 FR 33840) (“SSM SIP Call Rule”). The SSM SIP Call Rule was promulgated as a result of a settlement by EPA of a friendly “sue-and-settle” lawsuit with certain Petitioners seeking to amend certain provisions of various states’ State Implementation Plans (“SIPs”) — including Arkansas’s SIP as provided in Regulation Nos. 19.602 and 19.1004 — in which there were no truly adverse parties and in which no party sought to defend the lawfulness of the states’ approved SIPs under the Clean Air Act (“CAA”).

The existing provisions of Regulation Nos. 19.602 and 19.1004 are currently SIP-approved by EPA and are enforceable as a matter of both State and federal law. The State of Arkansas had no input into either the determination to excise these provisions from the existing SIP or EPA’s settlement of the matter. The SSM SIP Call Rule has the effect of a requirement on ADEQ and the other affected states in making certain changes to their EPA-approved state laws and regulations. In Arkansas’ case, the primary thrust of the requirement is to eliminate a “complete affirmative defense” for minor sources of air pollutants in the event of emergency conditions

which result in emissions exceeding the permittee's emission limits in its permit, among some other changes. However, the State of Arkansas through the Arkansas Attorney General is among a large group of petitioners, including 17 other states and state attorney generals, which have challenged and are appealing the SSM SIP Call Rule in the consolidated matter of *In the United States Court of Appeals for the District of Columbia Circuit, Cooke, Inc., et al, Petitioners v. USEPA, et al, Respondents, On Petition for Review of Final Agency Action of the USEPA*, 80 Fed. Reg. 33,840 (June 12, 2015), No. 15-1166 (and consolidated cases), August 11, 2015. The State of Arkansas and other petitioners challenge virtually every aspect of the SSM SIP Call Rule and contend, among other things, that EPA has exceeded its authority under the CAA. This matter is pending and unresolved, and ultimately may be resolved in a manner that it becomes unnecessary to amend Regulation 19 as currently proposed, if at all. Despite ADEQ's proposed inclusion of a rescission clause staying the effectiveness of the proposed amendments if the SSM SIP Call Rule is suspended, stayed or vacated by a federal court, or otherwise nullified by federal legislation; we remain concerned about the continuity and enforceability of the SIP in the interim as a matter of both State and federal law should the proposed amendments be adopted. Therefore, we strongly encourage ADEQ and APC&EC that no revisions should be made to the Regulation 19 provisions in question at this time and until all appeals of the SSM SIP Call Rule have been exhausted. *See also* Comment B.5., below.

To the extent that the SSM SIP Call Rule is affirmed by the courts and not otherwise nullified such that amendments to the current SIP are ultimately necessary; AEF generally supports ADEQ's proposed approach to "tailoring" the existing provisions to the requirements of the SSM SIP Call Rule (as opposed to excising the provisions entirely). If the SIP provisions in question are ultimately amended, any such amendments should be crafted as narrowly and precisely as necessary to conform to the final federal requirements. More importantly, any amendments to the State regulations and/or SIP should be made with the primary objective of encouraging safe and effective operation rather than penalizing emissions that cannot reasonably be avoided without risk of potential injury to people or control equipment.

## **B. Comments on Regulation 19.602, Emergency Conditions**

We continue to assert that no revisions should be made to Regulation 19 until all appeals have been exhausted and only when the SSM SIP Call Rule becomes the final rule of law. However, in the event that the proposed revisions to Regulation 19.602 are adopted as a result of the SSM SIP Call Rule, we strongly request your consideration and incorporation of the following specific comments regarding ADEQ's proposed revisions:

### **1. The effectiveness of the amendments should be conditional on EPA's approval of the corresponding SIP submission.**

As noted above, the proposed amendments to Regulation 19.602 are the end-result of a settlement concerning various states' SIPs in which there was no party defending the interests of affected states; and the Attorney General of the State of Arkansas, along with numerous other states' attorneys general, has since petitioned for review of EPA's decision. We fully support the State of Arkansas' challenge and objections to the SSM SIP Call Rule and incorporate the State's objections and positions in that matter as if set out word for word in these comments. Although

ADEQ wisely proposes to include a rescission clause which will roll-back the amendments to Regulation 19 contingent upon the outcome of that litigation; the proposed amendments would still become effective as a matter of State law in the interim and regardless of whether EPA will approve the amendments to the corresponding SIP under the CAA. Given that EPA is attempting to force these amendments on the State without the State's participation in the underlying settlement, equity demands that the proposed amendments not become effective as a matter of State law unless and until EPA approves the corresponding SIP causing the amendments to be federally enforceable. Therefore, the amendments to the regulations in question should be structured to delay the effective date of said amendments until EPA takes final action approving the SIP submission. This could be accomplished by retaining the existing Regulation 19.602(A) in its current form and inserting the proposed amendments into an entirely new subsection which will become effective upon EPA's approval of the SIP, as shown in Exhibit A hereto. This structure would provide the State and affected entities with a measure of protection from EPA's overreach in the SSM SIP Call Rule and should be incorporated if APC&EC elects to adopt the proposed amendments to Regulation 19.

**2. The phrase "with an operating permit" should be deleted from the definition of "emergency."**

ADEQ has proposed inserting a clause in the definition of "emergency" which may have the unintended result of limiting the applicability of an emergency condition only to a source "with an operating permit." While the term "operating permit," is not defined in Regulation 19, the term is generally used to apply to title V "operating permits" as provided in Regulation No. 26, Regulations of the Arkansas Operating Air Permit Program, which sources are "major sources" of federally regulated air pollutants. This interpretation would totally change the purpose and meaning of Regulation 19.602, which has always applied to any source governed by Regulation 19, whether a major source, minor source or synthetic minor source.

The inclusion of this phrase should be deleted. ADEQ may be incorrectly focusing on the characterization of the Petitioner's claim within the preamble to the SSM SIP Call Rule. The SSM SIP Call Rule at 33967 describes the Petitioner's position as an objection to the allowance of a "complete affirmative defense" for emergencies, which it claimed should be impermissible in Regulation 19 because its application is not clearly limited to operating permits. While we do not agree with this objection, nonetheless, the reasonable interpretation should be to remove the "complete affirmative defense" for non-title V operating permits, but not to remove the Department's authority to forego enforcement in the event an emergency has occurred for any permittee, whether a minor source, synthetic minor, major source or one with an "operating permit." We do not believe nor agree that the SSM SIP Call Rule mandates removal of the Department's discretion to forego enforcement in the event of a true emergency for minor sources. The "complete affirmative defense" provision is proposed to be removed and that should be sufficient to comply with the SSM SIP Call Rule.

Regulation 19.602 applies to all sources with regard to the Department's discretion to determine whether enforcement action is warranted in the event of an emergency. Regulation 26 applies only to title V operating permits which are major sources of federally regulated air pollutants. As a practical matter, Regulation 26.707 *Emergency Provisions* is substantially similar to the

current Regulation 19.602 and specifically allows an affirmative defense of emergency to such sources as long as certain conditions are met to show that an emergency condition exists. Adding the phrase “with an operating permit” could unwittingly relegate Regulation 19.602 to only sources with operating permits, which would be redundant, unnecessary and overreaching since it will then serve to essentially forever bar the Department from its discretion to forego enforcement action for non-title V sources in the event of an emergency. This would be an unreasonable, unfair, and unwise result. Therefore we request that the phrase “with an operating permit” not be included should the proposed amendments be adopted.

In the event the Department’s purpose in adding the phrase is something other than to limit the section to title V operating permits, we suggest that other language could be inserted such as addition of the word “stationary” in front of “source,” which term “stationary source” is defined in Regulation 19; or to change the word “source” to “permittee.”

**3. If finalized, the amendments to Reg. 19.602 should replace the undefined term “period of excess emissions” with clear and consistent terminology.**

The term “period of excess emissions” is not defined and is unclear. We request that the term be defined or made consistent with other terminology used throughout Regulation 19. We suggest that this could be accomplished by referring to an “an exceedance of an emission limit” as shown in Exhibit A hereto.

**4. If amended, Reg. 19.602 must include a sentence relating satisfaction of the emergency criteria to the Department’s discretionary action.**

As currently proposed, the amendments to Regulation 19.602 include criteria to be evaluated upon the occurrence of an emergency event, but do not state what actions may be appropriate if the criteria are satisfied. An additional sentence is needed to clarify that an exceedance of an emission limit may not warrant enforcement action by the Department in the event of an emergency and satisfaction of the criteria. That is the whole purpose of Regulation 19.602, and without such a sentence relating the criteria to the preferred action, Regulation 19.602 is rendered meaningless. We suggest inclusion of a statement that “an exceedance of an emission limit... may not warrant enforcement action by the Department when the above criteria have been met in whole or in part” and other grammatical revisions for clarity, as reflected in Exhibit A hereto. For all sources governed by Regulation 19 and delegated CAA programs, the Department can and should have enforcement discretion for excess emissions resulting from emergency conditions beyond the control of the permittee; notwithstanding deletion of the “complete affirmative defense” language required under the SSM SIP Call Rule, which has been sufficiently addressed elsewhere in the proposed amendments to Regulation 19.

**5. The rescission clauses at Reg. 19.602(C) proposed by ADEQ are proper and necessary.**

We wholeheartedly support the inclusion of proposed Regulation 19.602(C) by the Department. Currently, the State of Arkansas through the Arkansas Attorney General is among a large group of petitioners, including 17 other states and states’ attorneys general, which have challenged and are appealing the SSM SIP Call Rule in the consolidated matter of *In the United States Court of*

*Appeals for the District of Columbia Circuit, Cooke, Inc., et al, Petitioners v. USEPA, et al, Respondents, On Petition for Review of Final Agency Action of the USEPA, 80 Fed. Reg. 33,840 (June 12, 2015), No. 15-1166 (and consolidated cases), August 11, 2015.* This matter is pending and has not been resolved. In the event the SSM SIP Call Rule is suspended, stayed or vacated by a federal court, or otherwise nullified by federal legislation, the “complete affirmative defense” provisions of existing Regulation 19.602 should be reinstated and made effective for all sources governed by Regulation 19. An affirmative defense is already provided for title V sources in Regulation 26, which is not changed by the proposed revisions to Regulation 19. There is no justification for removing the longstanding SIP-approved “complete affirmative defense” provisions of Reg. 19.602 in the event the SSM SIP Call Rule is rescinded, suspended, stayed, withdrawn, vacated or otherwise nullified, particularly given that the State of Arkansas has raised valid objections to the SSM SIP Call Rule.

**C. Comments on Regulation 19.1004(H), Malfunctions, Breakdowns, Upsets**

**1. The internal reference to Regulation 19.602 is missing a decimal point.**

The proposed revisions to Regulation 19.1004(H)(1) include a typographical error in the internal reference to Regulation 19.602. The reference to “Reg. 19602” should include a decimal point as reflected in Exhibit B hereto.

**2. If amended, Regulation 19.1004(H)(1) must include a sentence relating the occurrence of the event to the Department’s discretionary action.**

If the proposed amendments to Regulation 19.1004(H)(1) are finalized, an additional sentence is needed clarifying the appropriate action by the Department in the event the criteria set forth therein are satisfied, as reflected in Exhibit B hereto. Please refer to the explanation provided at Comment No. B.4., above.

**3. The rescission clauses at Reg.19.1004(H)(3) proposed by ADEQ are proper and necessary.**

If the proposed amendments to Regulation 19.1004 are finalized, the rescission clauses proposed by ADEQ are proper and necessary. Please refer to the explanation provided at Comment No. B.5., above.