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June 20, 2016

Becky Keogh, Director
c/o Kelly Robinson
Arkansas Dept. of Environmental Quality
5301 Northshore Drive
North Little Rock, AR 72118

via electronic submission

**Re: Comments of the Energy and Environmental Alliance of Arkansas;
In the Matter of Amendments to Regulation No. 19, *Regulations of the
Arkansas Plan of Implementation for Air Pollution Control*;
Arkansas Pollution Control & Ecology Commission Docket No. 16-001-R**

Dear Director Keogh:

The following comments are provided pursuant to Arkansas Pollution Control and Ecology Commission (“APC&EC”) Regulation No. 8 by the Energy and Environmental Alliance of Arkansas (“EEAA”) regarding the proposed amendments by the Arkansas Department of Environmental Quality (the “Department”) to APC&EC Regulation No. 19, *Regulations of the Arkansas Plan of Implementation for Air Pollution Control*, in response to EPA’s Final Rule¹ determining that certain provisions of Arkansas’ State Implementation Plan (“SIP”)--as well as those of 35 other states--are substantially inadequate to meet requirements of the Clean Air Act (“CAA”) and calling on the affected states to amend their respective SIP provisions which apply to the treatment of excess emissions during various periods of operation such as startup, shutdown, upset and emergency (collectively, “SSM”) conditions; otherwise known as and referred to throughout as the “SSM SIP Call” rule or, simply, the “Rule.”

EEAA is an ad-hoc collaboration of Arkansas’ investor-owned, co-operative, municipal, and independent electric utilities and other companies formed to advocate, communicate and encourage energy and environmental policies that promote sound and predictable regulation of Arkansas’ utility industry and support an economically viable and environmentally secure future for all Arkansans, including access to reliable and affordable energy resources. EEAA’s members² are owners and/or operators of sources subject to the requirements of the Arkansas SIP

¹ *Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction*, 80 Fed. Reg. 33840 (June 12, 2015), a/k/a the “SSM SIP Call” rule.

² The members of EEAA include: AEP/Southwestern Electric Power Company, Arkansas Electric Cooperative Corporation, Arkansas Municipal Power Association, Conway Corporation, Empire District Electric Company,

and APC&EC Regulation No. 19; and, as such, have a strong and persistent interest in the lawful promulgation of thoughtful, fair, consistent and *safe* regulations governing the requirements and obligations of sources during all periods of operation--including SSM conditions. The Department is proposing various amendments to the provisions of Regulation 19 for the stated separate purposes of: (1) complying with the purported requirements of the SSM SIP Call rule; (2) repeal of general provisions governing the Ozone Season Trading Program under the now-defunct Clean Air Interstate Rule³; (3) consistency with EPA's Clean Air Fine Particle Implementation Rule; revising the regulatory definition of Volatile Organic Compounds; and, correcting various typographic errors. However, EEAA's comments are only directed at the proposed revisions to Chapters 6 and 10 of Regulation 19 governing treatment of excess emissions during periods of SSM. As explained below, the Department and APC&EC should postpone finalizing the amendments to Regulation 19 proposed in response to the SSM SIP Call rule until the final disposition of the State's challenges to that Rule are known; and should then do so only in a manner that promotes safe and effective operation of sources as well as protection of overall air quality from excess emissions; and that preserves the State's role in the SIP process according to the principles of cooperative federalism envisioned under the CAA.

A. General Comments on Proposed Amendments to Regulation 19 SSM Provisions

1. The Proposed Amendments to Regulation 19 SSM Provisions should not be Finalized Prematurely.

The State of Arkansas, through the Office of the Arkansas Attorney General--along with numerous other states and affected sources--is actively challenging the SSM SIP Call rule before the District of Columbia Circuit Court of Appeals,⁴ arguing that EPA has exceeded its authority under the CAA and that its final determinations are otherwise unreasonable, arbitrary and capricious. The issues being appealed by the State relate directly to the foundation and justification for the Department's proposed amendments to the SSM provisions in Regulation 19. Premature revisions to Regulation 19 pending the outcome of the appeals leaves open the possibility that the State will unnecessarily repeal its longstanding common-sense regulations governing treatment of excess emissions during SSM events in favor of provisions which are inconsistent with the court's final decision and which may encourage unsafe operation of pollution control equipment. While EEAA understands the desire to address all of the discreet amendments enumerated above through a single rulemaking process and SIP submission, nothing prohibits severing the proposed amendments to the SSM provisions from the other proposed amendments to Regulation 19. Due to the uncertainty regarding the outcome of the appeals of the SSM SIP Call rule and the potential unforeseen consequences of prematurely adopting the proposed amendments to Chapters 6 and 10 of Regulation 19 as a matter of State law, APC&EC should postpone finalizing the amendments to the provisions in question until the final disposition of the State's challenges to the SSM SIP Call rule are known.

Entergy Arkansas, Inc., Jonesboro City Water & Light, North Little Rock Electric, Oklahoma Gas & Electric Company, Plum Point Services Company, LLC, and West Memphis Utility Commission.

³ *Interstate Transport of Fine Particulate Matter and Ozone, Final Rule*, 76 Fed. Reg. 48208 (Aug. 8, 2011).

⁴ *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.

2. Amendments to Regulation 19 should Encourage Safe and Effective Operation of Sources.

If amendments to the Regulation 19 SSM provisions are ultimately finalized in response to the SSM SIP Call rule, the amended regulations should be narrowly crafted to the requirements of the SSM SIP Call rule, and their primary focus should be to encourage safe and effective operation instead of penalizing sources for emissions that could not reasonably be avoided without risk of injury to people or control equipment. It is often impossible or impractical for sources to meet emissions limits based on steady-state operation during SSM events, and EPA has recognized that attempting to do so could jeopardize process or pollution control equipment as well as the safety of employees or the public.⁵ Likewise, emergencies or unexpected events resulting in excess emissions can occur despite proper maintenance and operation of the source, and such events may exceed the capacity of pollution control equipment or make it unsafe to use the control equipment or to immediately cease source operation. Indeed, these practical considerations informed EPA's previous inclusion and approval of affirmative defenses against monetary penalties for excess emissions during SSM events; including the emergency defense provisions in Regulation 19, which have been well-established in Arkansas and approved by EPA for many decades.⁶

Emissions standards in permits have historically been based on results of steady-state operation of the best technology. However, no technology works all the time and, in emergency situations, certain exceedances cannot be predicted. Penalizing a source for emissions resulting from emergency conditions that could not be reasonably or safely avoided is not only unfair, but also does little in terms of improvements to air quality, because the emissions will occur anyways. As such, if the Regulation 19 SSM provisions are ultimately revised in response to the SSM SIP Call rule, the provisions should not be revised in such a way as to detract from the Department's discretion to forego enforcement in such situations for a source whose emissions could not be reasonably avoided through proper design, operation, and maintenance of available technology. In the event of a true emergency which involves a detailed showing under the terms of the Regulation, and as long as the people of the State are protected, it is sensible and reasonable to maintain an affirmative defense for a source and for the Department to maintain discretion to forego enforcement action.

B. Specific Comments on Proposed Revisions to Regulations 19.602 and 19.1004

Should APC&EC elect to finalize the proposed amendments to Regulations 19.602 and 19.1004 substantially in the form proposed by the Department, it must incorporate certain specific revisions to the terms of the proposed regulations to provide essential clarity and meaning, as depicted and explained in the Comments of the Arkansas Environmental Federation and the exhibits thereto, which Comments EEAA hereby adopts and incorporates in their entirety as if set out word-for-word herein. Such revisions to the form of the proposed amendments include but are not limited to: (1) deletion of the phrase "with an operating permit" from the definition of "emergency" in Regulation 19.602; and (2) addition of a statement relating the

⁵ *National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters, Proposed Rule*, 80 Fed. Reg. 3090 (Jan. 21, 2015).

⁶ *See* 45 Fed. Reg. 67397 (Oct. 10, 1980) (Proposed rule approving revisions to Arkansas regulations pertaining to malfunctions/upsets and continuous emissions monitoring).

criteria for consideration to the actions by the Department in both Regulations 19.602 and 19.1004.

Finally, EEAA fully supports the Department's inclusion of the automatic rescission clauses as currently proposed in Regulations 19.602(C) and 19.1004(H), and inclusion of the clauses in the corresponding SIP submission to EPA. The proposed automatic rescission clauses fully comport with EPA's criteria that (1) any future change to the approved SIP that occurs as a result of the automatic rescission provision would be consistent with the EPA's interpretation of the triggering action (*i.e.*, EPA's interpretation of a future court order); and (2) the public will be given reasonable notice of any change to the SIP as a result of the automatic rescission provision.⁷ EPA has asserted that, with respect to the SSM SIP Call rule, it is not possible to craft an automatic rescission provision ensuring that any resulting SIP change would be consistent with EPA's interpretation of the effect of a court decision, due to the array of possible outcomes in litigation over the SSM SIP Call rule and even greater number of ways that EPA could interpret the impact of the possible litigation outcomes with respect to the Arkansas SIP provisions. However, the vast possible array of outcomes of litigation over the SSM SIP Call rule is primarily owed to EPA's decision to unlawfully consolidate 36 distinct SIP calls--each with a limited number of possible litigation outcomes--into a single nationwide action wherein each state's underlying SIP provisions are so disparate and unique as to allow the outcome of litigation on any one state's SIP provisions to be interpreted and applied with completely different effect on each of the other states' SIP provisions. EPA duplicitously adopts the self-serving position that the SIP provisions of 36 separate states are so similar that they should be addressed in a single nationwide action; but simultaneously asserts that the same SIP provisions are so different and uniquely impacted by any possible litigation outcome as to preclude any individual state's adoption of a lawful mechanism to rescind EPA's prior unlawful action.

EPA's inconsistent actions and comments related to this issue illustrate the importance of the comments by EEAA and others that APC&EC should not adopt the proposed amendments to the Regulation 19 SSM provisions pending final resolution of the State's challenges to the SSM SIP Call rule, and that, if the proposed amendments are finalized, such amendments should include an appropriate rescission clause.

We sincerely appreciate your careful and thoughtful consideration of these comments. Should you have any questions or need for clarification, please do not hesitate to contact me at the number shown above.

Sincerely,



Chad L. Wood

Counsel for the Energy and Environmental Alliance of Arkansas

⁷ *Approval of Revisions to the Jefferson County Portion of the Kentucky SIP; New Source Review; Prevention of Significant Deterioration, Final Rule*, 77 Fed. Reg. 62150 (Oct. 12, 2012).