UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS TX 75202-2733

JUN 14 2016

Kelly Robinson
Arkansas Department of Environmental Quality
5301 Northshore Drive
North Little Rock, AR 72118-5317

Re: Proposed Revisions to Regulations 19.602 & 19.1004(H) - State Docket 16-001-R

Dear Ms. Robinson:

The United States Environmental Protection Agency (EPA), Region 6 appreciates the opportunity to submit comments on proposed revisions to Regulation No. 19, Regulations of the Arkansas Plan of Implementation for Air Pollution Control. More specifically, we are commenting on the proposed revisions to Regulation 19.602 and Regulation 19.1004(H) being undertaken as part of Arkansas's response to the EPA's State Implementation Plan (SIP) Call to amend provisions applying to excess emissions during periods of startup, shutdown, and malfunction (SSM SIP Call) (80 FR 33840, June 12, 2015).

It is our understanding that Regulation 19.602 and Regulation 19.1004(H) will be revised to replace the deficient affirmative defense language in the current regulations with language establishing certain factors that Arkansas Department of Environmental Quality (ADEQ) intends its Director to consider when determining whether a state administrative enforcement action is warranted for excess emission events resulting from startup, shutdown, and malfunction (SSM) activities. However, to address potential outcomes associated with the legal challenge to the EPA's SSM SIP Call pending in the United States District Court for the District of Columbia, the proposed revisions to Regulation 19.602 and Regulation 19.1004(H) also include automatic rescission provisions that would reinstate an affirmative defense should the EPA's SSM SIP Call be stayed, vacated, or withdrawn.

As an initial matter, we would like to remind you that "state-only" enforcement discretion related rules do not have to be submitted to the EPA for review and inclusion into the SIP. We believe that it is preferable for state-only enforcement discretion provisions to be outside the EPA approved SIP in order to minimize any potential for confusion about the applicability of such provisions. If they are included within the SIP, it is more important that the provisions are clearly enforcement discretion provisions, applicable only with respect to the state's decision whether or not to initiate enforcement.

Our specific comments on the proposed revisions are as follows:

1. For clarification purposes, Regulation 19.602 defines emergency as "any situation arising from the sudden and reasonably unforeseeable events beyond the control of the source *with an operating*

permit, including ..." This definition could be interpreted as limiting in its application only to sources with an ADEQ-issued air permit. We recommend the proposed definition be revised to read "any situation arising from the sudden and reasonably unforeseeable events beyond the control of the source *required to obtain a permit to operate*, including ..." in order to encompass a scenario where a source experiencing an emergency, while operating unlawfully without an ADEQ-issued air permit, also would be subject to Regulation 19.602.

2. With respect to the enforcement discretion provisions in proposed Regulation 19.602(A), we believe that the wording should be revised to make clearer that it applies to the State's exercise of its own enforcement discretion and not the enforcement actions taken by the EPA or any other party. Wording changes to further clarify this could include, for example, modifying the clause, ". . . whether enforcement action is warranted *by the state* . . ." and an explicit statement in the regulation text that the State's exercise of enforcement discretion would not affect the exercise of enforcement authority of any other party. In addition, the State rulemaking record, as a part of your potential submittal to the EPA, should clearly reflect and document that the revised rules shall only apply to the exercise of enforcement discretion in State enforcement proceedings and the rules shall not be construed to preclude the EPA or federal court jurisdiction under Section 113 of the Act, or to interfere with the rights of citizens under Section 304 of the Act.

   We note the same concerns with respect to the proposed language in Regulation 19.1004(H)(1) which states, "In determining whether enforcement action is warranted for emissions . . ."

3. With respect to the enforcement discretion criteria established in proposed Regulation 19.602 and Regulation 19.1004(H), please see the enclosure to this letter, or 80 FR 33980-81 (June 12, 2015), which contains a list of the recommended criteria that the EPA believes should be considered in determining whether an enforcement action is appropriate in the case of excess emissions during a malfunction. Our initial assessment is that the criteria in Regulation 19.602 and Regulation 19.1004(H)(1)(a)-(e) are not as robust as they need to be. Moreover, the criteria appear more relevant to an affirmative defense provision, rather than an enforcement discretion provision.

4. The rules should be clear that excess emissions are violations and the State has the authority to assess or sue to recover civil penalties, notwithstanding a demonstration by an owner/operator that the listed criteria have been met. Clarification language in the State rulemaking record for the proposed revisions should address this comment to ensure that the State retains appropriate authority to enforce the SIP and meets the Title V program enforcement authority requirements. The rules should not be worded in a way that appear to remove the State's authority to enforce against violations of the Clean Air Act (CAA) requirements. This could be problematic for the approvability of the Infrastructure SIPs for Arkansas. See CAA section 110(a)(2)(C). The EPA believes Arkansas must retain this authority to meet the CAA Title I enforcement requirements for SIPs as well as the CAA Title V enforcement requirements. See 40 CFR 70.11(a).

5. As stated in the EPA's SSM SIP Call, the EPA interprets the CAA to preclude the EPA's approval of affirmative defense provisions into SIPs. See 80 FR 33840 (June 12, 2015). The EPA acknowledges the ADEQ's desire to revise Regulation 19.602 and Regulation 19.1004(H) in a manner that is not only responsive to the EPA's SSM SIP Call, but also anticipates the various potential outcomes of the current judicial challenges to that SIP Call. However, we believe the

wording of the automatic rescission provisions, as currently proposed in Regulation 19.602(C) and Regulation 19.1004(H)(3), is inconsistent with the SIP revision procedures set forth at the CAA section 110(l) and in the EPA's regulations at 40 CFR 51.105, and thus would not constitute approvable revisions to the Arkansas SIP.

In assessing the potential approvability of an automatic rescission provision, the EPA considers two key factors: (1) whether 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 (e.g., a court order); and (2) whether the public will be given reasonable notice of any change to the SIP as a result of the automatic rescission provision. These criteria are derived from the SIP revision procedures set forth in the CAA and federal regulations.

The EPA's consideration of whether any SIP change resulting from the automatic rescission provision would be consistent with the EPA's interpretation of the effect of the triggering action on federal requirements is based on 40 CFR 51.105 ("Revisions of a plan, or any portion thereof, will not be considered part of an applicable plan until such revisions have been approved by the Administrator in accordance with this part."). It does not appear that Arkansas's automatic rescission provisions, as currently proposed in Regulation 19.602(C) and Regulation 19.1004(H), provide an adequate assurance that any SIP change resulting from operation of the automatic rescission provision would be consistent with the EPA's interpretation of the triggering event (such as issuance of a court order that limits or renders ineffective the referenced action).

Specifically, while the proposed rules provide that any future SIP change brought about by the automatic rescission provision would only occur as of the date specified by the EPA in a Federal Register notice, the provisions appear to allow the SIP change to take effect upon the EPA's publication of a notice of a stay or suspension of *any provision* of the referenced action, without regard to the EPA's interpretation as to whether the particular provision that is stayed or suspended relates to the EPA's decision to include Arkansas in the SSM SIP Call. The EPA notes that given the array of possible outcomes in litigation over the SSM SIP Call and the way such outcomes could impact the Arkansas SIP provisions, it may not be possible to craft an automatic rescission provision that ensures that any resulting SIP change would be consistent with the EPA's interpretation of a court decision's effect. In other words, if a court stayed the portion of the EPA's SSM SIP Call pertaining to the SSM exemptions for example, one might interpret the automatic rescission provisions in the proposed Arkansas regulations to revert back to the prior SIP language providing for a complete SSM affirmative defense, even though such a stay would not in fact relate to the portion of the SSM SIP Call pertaining to the unlawfulness of affirmative defense provisions in SIPs.

Likewise, ambiguity regarding precisely what triggering action would result in a SIP change appears to conflict with the public notice requirements of the CAA section 110(l). Specifically, it is unclear what would happen to the SIP if only part of the SSM SIP Call were stayed or vacated. Not only does this ambiguity make it difficult for the public to know in advance how a triggering action would change Arkansas' SIP, it also means that a Federal Register notice of vacatur would not necessarily communicate how the vacatur impacts the Arkansas SIP to the regulated entities and the public.

For the reasons explained above, we strongly recommend that the proposed automatic rescission provisions found at Regulation 19.602(C) and Regulation 19.1004(H)(3), as currently written, not be included in a SIP submission.

6. In addition to Comment 5 above, and as an example of the uncertainties associated with the outcome of the current challenge to EPA's SSM SIP Call, the proposed automatic rescission provisions in Regulation 19.602(C) provide for a *complete* affirmative defense for emergency conditions if the criteria in 19.602(A)(1)-(4) have been met. The EPA has a fundamental responsibility under the CAA to ensure that SIPs provide for attainment and maintenance of the National Ambient Air Quality Standards (NAAQS) and protection of Prevention of Significant Deterioration (PSD) increments. NAAQS are health-based (as opposed to technology-based) standards, and because SIPs must provide for attainment and maintenance of the NAAQS and achievement of PSD increments, all periods of excess emissions must be considered violations.

   In addition to the foregoing concerns with the proposed automatic rescission provision, we also have a substantive concern within it. The EPA cannot approve a SIP revision providing for a complete affirmative defense provision (which includes injunctive relief) that would undermine the fundamental requirement of attainment and maintenance of the NAAQS or any other requirement of the CAA. See CAA sections 110(a) and 110(1), 42 U.S.C. § 7410(a) and (l), respectively. See also 80 FR 33862 (June 12, 2015). Proposed revisions to the Arkansas SIP must adhere to the requirements of CAA sections 110(a) and 110(l), independent of the pending SSM SIP Call litigation. We note that EPA's June 14, 2016 (81 FR 38645) publication also calls for removal of the affirmative defense provisions for "emergencies" found in the regulations for state and federal operating permit programs. Therefore, we strongly recommend the ADEQ refrain from adopting any rule with a complete affirmative defense provision, where health-based standards are concerned. Consistent with the CAA section 110(l), the EPA cannot approve a SIP revision that would interfere with the attainment and maintenance of the NAAQS and protection of PSD increments.

7. In addition to Comment 5 above, and as an example of the uncertainties associated with the outcome of the current challenge to the EPA's SSM SIP Call, the proposed automatic rescission provisions in Regulation 19.1004(H) provide for a *complete* affirmative defense for malfunctions, breakdowns, and upsets once the criteria in Regulation 19.1004(H)(1)(a)-(e), and those referenced in Regulation 19.601 and Regulation 19.602 have been met. As stated above, the EPA has a fundamental responsibility under the Act to ensure that SIPs provide for attainment and maintenance of the NAAQS and protection of the PSD increments. The NAAQS are health-based (as opposed to technology-based) standards, and since the SIPs must provide for attainment and maintenance of the NAAQS and achievement of the PSD increments, all periods of excess emissions must be considered violations.

   In addition to the foregoing concerns with the proposed automatic rescission provision, we also have a substantive concern within it. The EPA cannot approve a SIP revision providing for a complete affirmative defense provision (which includes injunctive relief) that would undermine the fundamental requirement of attainment and maintenance of the NAAQS, or any other requirement of the CAA. See CAA sections 110(a) and 110(1), 42 U.S.C.S 7410(a) and (l), respectively. See also 80 FR 33862 (June 12, 2015). Proposed revisions to the Arkansas SIP must adhere to the requirements of the CAA sections 110(a) and 110(l), independent of the pending SSM SIP Call

litigation. We note that EPA's June 14, 2016 (81 FR 38645) publication also calls for removal of the affirmative defense provisions for "emergencies" found in the regulations for state and federal operating permit programs. Therefore, we strongly recommend the ADEQ refrain from adopting any rule with a complete affirmative defense provision, where health-based standards are concerned. Consistent with the CAA section 110(l), the EPA cannot approve a SIP revision that would interfere with the attainment and maintenance of the NAAQS and protection of the PSD increments.

We appreciate the ADEQ's efforts to address excess emissions and the SSM SIP Call. We would be happy to discuss the comments further, if you would like. Feel free to contact me at 214-665-7242, or Alan Shar, of my staff, at 214-665-6691. I also encourage your legal staff to contact Rick Bartley at 214-665-8046, with any legal questions.

Sincerely yours,

for Guy Donaldson
Chief
Air Planning Section

Enclosure

ENCLOSURE

Enforcement Discretion Criteria from 80 FR 33981 (June 12, 2015)

When using enforcement discretion in determining whether an enforcement action is appropriate in the case of excess emissions during a malfunction, satisfaction of the following criteria should be considered:

(1) To the maximum extent practicable the air pollution control equipment, process equipment or processes were maintained and operated in a manner consistent with good practice for minimizing emissions;

(2) Repairs were made in an expeditious fashion when the operator knew or should have known that applicable emission limitations were being exceeded. Off-shift labor and overtime were utilized, to the extent practicable, to ensure that such repairs were made as expeditiously as practicable;

(3) The amount and duration of the excess emissions (including any bypass) were minimized to the maximum extent practicable during periods of such emissions;

(4) All possible steps were taken to minimize the impact of the excess emissions on ambient air quality; and

(5) The excess emissions are not part of a recurring pattern indicative of inadequate design, operation or maintenance.