Arkansas Children's Hospital
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December 14, 2012

Mr. Doug Szenher
POA Division - ADEQ
5301 Northshore Drive
North Little Rock, AR 72118-5317

RE: **Comments Draft Regulations 18 and 19 "NAAQS Sweep Package"**
Arkansas Hospital Association,
Arkansas Association for Healthcare Engineering, and all its members
Little Rock, Arkansas

Dear Mr. Szenher:

The Arkansas Hospital Association, the Arkansas Association for Healthcare Engineering and all its members are pleased to present you with our comments on the ADEQ Proposed "NAAQS Sweep" rules. ADEQ has proposed to modify sections of APC&E Commission Regulations 18, 19, and 26, The Arkansas healthcare industry is concerned with how NAAQS are used during the review of individual air permit actions.

We understand that the rules and regulations are created to protect human health and the environment; being in healthcare we share the similar goals, however, the ADEQ proposals penalize industries such as healthcare that utilize emergency (backup) electrical power systems. All hospitals are required to have backup-electrical-power-supply systems.

In general, our comments are not as much related to the rules as much as they are the implementation of the rules. NAAQS should be implemented through attainment designation as determined on an area-wide basis. Your proposal to implement NAAQS at a permit level is far more stringent than federal law. Arkansas Air Permittee's could be faced with significant added costs with little or no added benefit to human health or the environment.

We greatly appreciate your consideration of these comments. If you have any questions or require additional information, please do not hesitate to contact Joe Knight at (501) 364-3800.

Sincerely,
Arkansas Hospital Association

Joe Knight, REM
Arkansas Children's Hospital
Environmental Management Coord.

Enclosures

General Comments Concerning NAAQS Sweep and NAAQS Implementation

Background:

ADEQ has proposed to modify sections of APC&E Commission Regulations 18, 19, and 26, to incorporate the latest National Ambient Air Quality Standards (NAAQS), specifically for $PM_{2.5}$, SO_2, and NO_2. ADEQ's practice, since the mid 1990s is to perform computer-based dispersion modeling of facility's air emissions to predict fenceline pollutant concentrations and compare these predictions to the NAAQS during the Title V (Regulation 26) permit issuances/modification for most all permittees. Even facilities that have operated for decades with no measured air quality problems are subjected to this predictive modeling exercise. Because modeling is performed using worst case hourly emissions as though they occur every hour of the year, the model can often generate 'artificial' near-field problems that have no real environmental impact. ADEQ implementation of the federal rules goes beyond the requirements and has considerable financial impact due to the way ADEQ is choosing to implement these rules.

ADEQ typically does not issue the final permit until a satisfactory model prediction is produced. The problem lies in the unrealistic way that ADEQ requires the model to be run. ADEQ policy is to require modeling of intermittent sources as though they operate continuously or to accept permit limits on what hours they can operate, which is impossible to predict for emergency equipment. They also require modeling of all sources existing and new, and then require background concentrations from ADEQ monitors to be added before being compared to the standards. This arguably double counts the impact of existing sources, since background concentrations are actual measurements of naturally occurring pollutants and pollutants from existing stationary and mobiles sources. ADEQ has argued that is not double counting, since the monitors may not be near the site being modeled. However, monitors must be located in areas likely to predict "the highest concentrations expected to occur in the area covered by the network" (40 CFR Part 58 Subpart G 1.1.1 (a), Attachment 3). Based upon this, the background concentrations from monitors should be conservative representation of worst case concentrations of naturally occurring pollutants and existing mobile and stationary sources. For every time that a permittee is required to complete a refined analysis, the cost of a modeling study can exceed $10,000 and can cost weeks of permitting delay while a solution is devised. Further, if the overly conservative approach required by ADEQ produces results that predict an exceedance of a NAAQS, the permittees are required to agree to measures which would lower the modeling result, which might include add-on pollution control devices, increased stack heights, or other measures which require significant expenditures.

The new NAAQS are a 24-hour standard for fine particulate matter ($PM_{2.5}$), a 1-hour standard for NO_2 and a 1-hour standard for SO_2. These standards will add another layer of technical complexity and challenge with respect to satisfactory modeling demonstration. We believe if ADEQ's current permitting/modeling policies continue, very few permittees will be able to produce model results that do not exceed these new standards.

Recommendations:

1. **Existing sources should not be duplicated in modeling**

   Current ADEQ policy requires modeling of all initial Title V facilities and many renewal applications. ADEQ is proposing to require both existing and new sources to be modeled with monitored background concentrations added on top of the modeled concentrations with the results compared to NAAQS standards. ADEQ maintains multiple ambient air monitors through the state. The locations of the monitoring stations must be approved by the EPA Regional Administrator and at least one (1) monitor must be located in an area representing the worst case. Therefore:

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   All hospitals are required by regulation to have emergency backup power because patient safety is critical. Electrical power supply systems may fail, leaving the hospital unable to deliver safe care, treatment, and services to patients if not for emergency generators supplying backup power. Testing these backup systems for sufficient lengths of time at regular frequencies increases the likelihood of detecting reliability problems and reduces the risk of losing this critical resource when it is most needed. Testing and maintenance activities last only minutes per month; it is possible the emergency generators will not be used any other time during the year. Current ADEQ policy requires modeling as if these intermittent sources are operated 100% of the time. This approach leads to flawed conclusions.

ROBERT "BO" RYALL
President and CEO

December 12, 2012

Mr. Doug Szenher
POA Division - ADEQ
5301 Northshore Drive
North Little Rock, AR 72118-5317

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We greatly appreciate your consideration of these comments. If you have any questions or require additional information, please do not hesitate to contact me at *boryall@arkhospitals.org* or (501) 224-7878.

Sincerely,

Bo Ryall
President and CEO

BR/ae

Enclosures

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Background:

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UAMS
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FOR MEDICAL SCIENCES

December 17, 2012

Mr. Doug Szenher
POA Division - ADEQ
5301 Northshore Drive
North Little Rock, AR 72118-5317

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We greatly appreciate your consideration of these comments. If you have any questions or require additional information, please do not hesitate to contact Nelson Watson at (501) 551-9993.

Sincerely,
Arkansas Hospital Association

Nelson Watson
Commissioning and Training

Enclosures
pc:

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BEFORE THE ARKANSAS POLLUTION CONTROL AND ECOLOGY COMMISSION

In the Matter of Amendments to Regulation No. 18, 19 & 26, Regulations of the Arkansas Plan of Implementation for Air Pollution Control	))))	DOCKET NO. 12-010-R

COMMENTS OF AMERICAN SOCIETY FOR HEALTHCARE ENGINEERING ON PROPOSED REVISIONS TO REGULATION 18, 19 & 26 REGULATIONS OF THE ARKANSAS PLAN OF IMPLEMENTATION FOR AIR POLLUTION CONTROL

Introduction

The following comments are submitted pursuant to Ark. Code Ann. § 8-4-202 and Arkansas Pollution Control and Ecology Commission ("APC&EC" or the "Commission") Regulation No. 8.806 on behalf of the American Society for Healthcare Engineering, (ASHE). ASHE is the largest association devoted to optimizing the planning, design, construction, and operations of a health care organization"s physical facilities. As a trusted industry resource, ASHE is committed to advancing the knowledge and leadership of our members as they build and maintain health care facilities, support project teams and facility management staff, and serve patients.

On September 28, 2012, the Commission initiated three separate rulemaking proceedings to revise Commission Regulations 18, 19 and 26. The proposed regulatory amendments include substantive changes to Regulations 18, 19 and 26 to implement revisions to the Environmental Protection Agency"s ("EPA") National Ambient Air Quality Standards ("NAAQS") for particulate matter less than 2.5 micrometers in size ("$PM_{2.5}$"), sulfur dioxide ("SO_2"), and nitrogen dioxide ("NO_2"), and other substantive revisions to the regulations. While ASHE recognizeS that the Commission has an obligation to adopt the revised NAAQS as promulgated by EPA in order to maintain delegation of the air permit program under the Clean Air Act ("CAA"), ASHE is concerned with how the NAAQS are utilized by the Arkansas Department of Environmental Quality ("ADEQ") during the review of individual air permit actions. The Commission cannot satisfy its obligations under the CAA and the Arkansas Water and Air Pollution Control Act by merely adding the revised NAAQS to the regulations without considering how the NAAQS are implemented by ADEQ through the air permitting program. Accordingly, while ASHE is providing specific comments on the regulations revisions proposed by ADEQ, many of the comments are also directed at ADEQ"s implementation of the NAAQS, which cannot be separated or considered apart from the NAAQS themselves. Although ASHE is formally submitting the following comments in each of the rulemaking dockets for Regulations 18, 19 and 26 (docket numbers 12-009-R, 12-010-R and 12-011-R, respectively), the general comments that follow are substantively the same and equally applicable to all three regulations. In addition to general comments applicable to all three regulations, ASHE is

providing comments specifically applicable to certain proposed revisions to Regulations 18 and 19, as indicated herein.

I. General Comments on Proposed Revisions to Regulations 18, 19 and 26

A. The Commission Must Consider ADEQ"s Implementation of the Revised NAAQS

ADEQ has stated that the purpose of the proposed revisions to Regulations 18, 19 and 26 is to merely undertake a periodic update to the regulations to incorporate EPA"s recently revised NAAQS for the pollutants in question, and that the Commission should not consider ADEQ"s implementation of the NAAQS in conjunction with these proceedings. However, as explained below, the proposed revisions to Regulations 18, 19 and 26, when implemented through ADEQ"s existing policies not made subject to public comment or consideration by the Commission, will have unacknowledged implications for permittees throughout the State, including healthcare facilities. ADEQ"s own memoranda provided to the Commission in conjunction with ADEQ"s Petition to initiate the rulemaking proceedings in question state that "ADEQ is proposing revisions to [the regulations] in order to implement the [current NAAQS]."[1] Further, Arkansas statute explicitly provides that the Commission has exclusive authority to promulgate rules and regulations for implementing the substantive statutes charged to ADEQ for administration.[2] Maintenance of the NAAQS under the CAA is a substantive statute charged to ADEQ for administration, and the Commission has the authority and obligation to promulgate rules and regulations for implementation of the same. Accordingly, incorporation of the revised NAAQS into Regulations 18, 19 and 26 cannot be separated from implementation of the NAAQS, and ADEQ and the Commission should consider the total effect of ADEQ"s planned implementation of the NAAQS on all Arkansans, including the regulated community. When promulgating regulations for implementation of the substantive statutes charged to ADEQ for administration, the Commission is obligated to take into account and consider a variety of factors, including the social and economic value of the air contamination sources.[3] As discussed in detail below, ADEQ"s planned implementation of the NAAQS through its existing policies, particularly the Air Dispersion Modeling Protocol, will have an immediate and negative effect on the ability of healthcare facilities with high social and economic value to obtain the requisite air permits.

B. ADEQ"s Planned Implementation of the NAAQS has Unacknowledged Implications

1. Implementation of NAAQS at the Permit Level causes Unnecessary Burdens on Permit Applicants

[1] Memorandum to Charles Moulton, Interim Hearing Officer, from Mike Bates, Air Division Chief, dated September 14, 2012.
[2] Ark. Code Ann. § 8-4-311(b)(1)(A).
[3] Ark. Code Ann. § 8-4-312.

ADEQ"s current practice is to perform computer-based dispersion modeling of a source"s air emissions to predict often unrealistic fenceline pollutant concentrations, and to compare these predictions to the NAAQS during the permit issuance process for almost all Title V permit applicants, including Title V permit renewals with no emissions changes and permit modifications that will result in a decrease in air emissions. Even facilities that have operated for decades with no measured air quality problems are routinely subjected to this predictive modeling exercise. Because modeling is performed using worst case hourly emissions as though they occur every hour of the year, the model can often generate artificial near-field problems that do not exist and have no actual environmental impact.

ADEQ typically will not take a final action on a permit application until such time as a satisfactory model prediction is produced. These modeling exercises, which are not required under federal regulations, create an unnecessary burden on the regulated community. For example, ADEQ"s policy also requires modeling of all new and existing sources, and then further requires background concentrations from area monitors to be added to the total emissions concentrations prior to comparison to the NAAQS. Since background concentrations are actual measurements of naturally occurring pollutants and pollutants from existing stationary and mobiles sources, addition of existing sources" emissions to the monitored background concentrations amounts to double-counting of some air emissions and results in overly conservative, unrealistic modeling predictions. Because monitors must be located in areas likely to predict "the highest concentrations expected to occur in the area covered by the network"[4], the background concentrations from monitors are a conservative representation of worst-case concentrations of naturally occurring pollutants and existing mobile and stationary sources. Each time that ADEQ requires a permit applicant to complete a refined analysis to eliminate these unrealistic modeling predictions, the cost of a modeling study can exceed $10,000 and cause weeks or months of permitting delays. Further, if the overly conservative approach produces results that predict an exceedance of a NAAQS for even a short duration in a limited area, the permit applicant is often required to agree to measures which would lower the modeling result, include unnecessary addition of costly pollution control devices, increased stack heights, or other measures requiring significant capital expenditures.

The proposed NAAQS revisions include a 24-hour averaging time for $PM_{2.5}$, and 1-hour averaging times for NO_2, and SO_2. These shorter averaging times will add another layer of technical complexity and challenge with respect to satisfactory modeling demonstrations. ASHE believes that, if ADEQ continues its current policy of implementing the NAAQS at the individual facility permit level, very few permit applicants, including healthcare facilities, will be able to produce model results that do not exceed these new standards. Permit applicants that are unable to produce model results below the new standards will be required to conduct costly refined modeling with no

[4] 40 C.F.R. Part 58, Subpart G1.1.1(a).

measurable environmental benefit, make expensive and unnecessary capital investments in the design of the facilities, and/or curtail operation of the facilities. As explained herein, ADEQ's implementation of the NAAQS in this fashion goes far beyond what is required under federal regulations.

2. Planned Implementation of NAAQS Revisions Creates Even Greater Permitting Burdens for Facilities with Emergency Generating Equipment

ASHE is dedicated to optimizing the health care physical environment which includes assuring that facilities are safe for patients, visitors and staff. Hospitals, long-term care facilities and other health care facilities participating in Medicare and Medicaid programs are required by law to maintain emergency backup power.[5] Essential electrical systems may fail during a power disruption, leaving the hospital unable to deliver safe care, treatment, and services to patients. Testing these systems for sufficient lengths of time at regular frequencies increases the likelihood of detecting reliability problems and reduces the risk of losing this critical resource when it is most needed. ASHE's members manage the operation of generators with this in mind. Testing and maintenance activities last minutes per month, and it is quite possible that the essential electrical ssystem will not be used any other time during the year. Nonetheless, ADEQ policy requires modeling of intermittent sources such as emergency generators as though they operate continuously for 365 days per year, or otherwise requires facilities to accept permit limits on the hours such equipment is allowed to be operated, which is impossible to predict for emergency equipment.

Following its promulgation of the revised 1-hour NO_2 NAAQS in 2010, EPA provided guidance concerning the implementation of the new standard as it relates to modeling certain NO_2 emissions during the process of evaluating applications for Prevention of Significant Deterioration ("PSD") permits.[6] However, that guidance does not provide any practical relief to permit applicants in Arkansas with respect to ADEQ's policy of modeling emissions from emergency generators and comparing those emissions to the NAAQS, in part due to ADEQ's interpretation and application of the guidance itself. In the first instance, EPA's guidance on modeling emissions from emergency generators is only applicable to PSD permit application evaluations, thus it provides no relief for air permit applicants undergoing a non-PSD permit modification or renewal, which is the majority of permit applicants. Importantly, EPA's guidance on this subject only addresses modeling emissions from emergency generators as it relates to evaluation of PSD applications because EPA regulations do not require dispersion modeling on non-PSD permit applications. Moreover, EPA's guidance on this subject fails to provide relief to non-PSD permit applicants in Arkansas because although EPA's guidance states that in calculating the potential to emit for emergency generators the permitting

[5] *See* 42 CFR §482.41(a)(1); 42 CFR § 483.70(b)(1); *see also* Sections 76(G)-(H) of the Arkansas Department of Health's Rules and Regulations of Hospitals and Related Institutions.

[6] Memorandum dated June 29, 2010, from Stephen D. Page, Director, EPA Office of Air Quality Planning and

authority should allow a default value of 500 hours for estimating the number of hours that an emergency generator could be expected to operate under worst-case conditions, ADEQ continues to model emissions of other criteria pollutants from emergency generators assuming operation 365 days per year. Because ADEQ does not apply the EPA guidance to emissions of SO_2 or PM, sweeping the revised NAAQS into the Commission"s regulations will exacerbate the challenges faced by permit applicants with emergency generating equipment when applying for a permit with respect to making a satisfactory modeling demonstration. ADEQ"s policy of implementing the NAAQS at the individual facility permit level through the existing Modeling Protocol will lead to this result even for permittees seeking a legally required permit renewal with no changes to their facility or emissions, and in some cases for permittees seeking a permit modification for installation of pollution controls that would actually result in a decrease in overall emissions. ADEQ"s interpretation and application of EPA"s guidance creates an additional unnecessary burden on permit applicants and renders Arkansas" regulations more stringent than federal law. Under Arkansas statute, where a proposed rule or regulation will cause Arkansas law to be more stringent than federal regulation, the Commission has an obligation to undertake an analysis to consider the economic impact and the environmental benefit of such rule or regulation on the people of the State, including regulated entities such as healthcare facilities.[7]

3. The Commission Must Consider the Impacts from Implementation of NAAQS at the Permit Level through the Modeling Protocol in this Rulemaking

To address these and other unacknowledged consequences of ADEQ"s planned implementation of the NAAQS, ASHE recommends that ADEQ and the Commission discontinue the practice of implementing the NAAQS at the individual permit level and instead develop a policy for proper implementation of the NAAQS through the State Implementation Plan ("SIP") process in accordance with the CAA, as explained in Comment I.C., below. Alternatively, if ADEQ continues to implement the NAAQS at the individual permit level through the Modeling Protocol, the Modeling Protocol should be promulgated in accordance with the statutory requirements found at Ark. Code Ann. §§ 8-4-202 and 8-4-311(b). This is because the Modeling Protocol itself, attached hereto as Exhibit A[8], is a *de facto* regulation that has a legal and binding effect on facilities, prescribes the policy and practice of ADEQ, is treated by ADEQ as if controlling, is the basis for ADEQ"s interpretations and decisions, and leads private parties to believe permits will not be issued if the Modeling Protocol is not adhered to. However, the Modeling Protocol has never been subjected to public notice and comment or consideration by the Commission, and ADEQ lacks the statutory authority to promulgate such a rule or regulation.[9] ADEQ has only been delegated the

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Standards, available at http://www.epa.gov/region07/air/nsr/nsrmemos/appwno2.pdf.

[7] Ark. Code Ann. §§ 8-4-201(b)(1); 8-4-311(b)(1).

[8] Available at www.adeq.state.ar.us/air/branch.../pdfs/screening_**modeling_protocol**.pdf.

[9] *See* Ark. Code Ann. §§ 8-4-202; 8-4-311.

authority to administer and enforce all laws and regulations related to pollution of the air.[10] Where the legislature has delegated authority to adopt or modify rules or regulations with respect to the CAA, such authority has been delegated exclusively to the Commission. To the extent the Modeling Protocol constitutes a *de facto* regulation, it has not been adopted by the Commission pursuant to the statutory procedures mandated under Ark. Code Ann. § 8-4-202. Given the Modeling Protocol is not a regulation properly promulgated by the Commission, ADEQ"s application and enforcement of the Modeling Protocol as a regulatory requirement is *ultra vires*.

Further, because implementation of the NAAQS proposed in this rulemaking through the Modeling Protocol at the individual permit level renders Arkansas" regulations more stringent than federal regulations, the Commission must undertake an analysis to consider the economic impact and the environmental benefit of these proposed regulation revisions on the people of the State, including regulated entities such as healthcare facilities, as required under Arkansas statute (*see* Comment I.B.2.).

C. NAAQS are Properly Implemented through a State Implementation Plan

To remedy the unnecessary burdens that implementation of the proposed revised NAAQS at the individual facility permit level through the Modeling Protocol will place on permitted facilities, and to avoid rendering Arkansas" regulations more stringent than federal regulations, ASHE recommends that ADEQ and the Commission adopt a policy of implementing the NAAQS through a SIP development and promulgation process, as is envisioned by Arkansas law and the CAA. Neither the CAA nor EPA regulations make NAAQS applicable directly to individual stationary sources as emissions standards or limitations or applicable requirements. EPA has clearly stated that NAAQS should not be confused with emission standards. Emission standards apply to individual sources of air pollution or categories of industrial sources. The NAAQS, on the other hand, serve as benchmarks from which each state derives the total emission reductions necessary to be accomplished in a given area.[11] Accordingly, NAAQS attainment and maintenance is a State obligation intended to be addressed through the development of a SIP and ADEQ and the Commission have authority under existing State and federal law to do so. This topic is explained in greater detail in the industry paper "*Proper Implementation of the National Ambient Air Quality Standards Through the State Implementation Plan Process*," which is provided separately with comments submitted by the Energy and Environmental Alliance of Arkansas.

II. Comments on Proposed Revisions to Regulation No. 18

A. The Proposed Revisions to Regulation 18 are Not Required by Federal Law

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[10] *Id.*

[11] Clean Air Act Compliance/Enforcement Guidance Manual (U.S. EPA, 1986), *available at* http://envinfo.com/caain/enforcement/caad131.html.

Regulation 18 is Arkansas' "state-only" air pollution regulation; none of its provisions are federally enforceable as part of an EPA-approved Arkansas SIP.[12] As such, the proposed revisions to Regulation 18 are not required to comply with federal requirements. As ADEQ explained in its Petition to Initiate Rulemaking, the proposed rule "revises the state air code (non-federally enforceable regulations) to be consistent with federal rule changes made after EPA's periodic reevaluation and revisions of the [NAAQS] and other federal air pollution control regulations."[13] While they may be desirable for the sake of consistency, the proposed changes to Regulation 18 are discretionary and therefore are not necessary for Arkansas to retain delegation of the federal air program. Because the proposed changes to Regulation 18 are not federally required, and therefore more stringent than federal requirements, the Commission has a mandate under Arkansas statute to undertake a proper environmental and economic benefit analysis to consider the economic impact and the environmental benefit of the proposed regulation on the people of the State, including regulated entities such as healthcare facilities (*see* Comment I.B.2.).

B. Regulation 18.302 Does Not Require Implementation of the NAAQS at the Permit Level

ADEQ should confirm that if Regulation 18 is amended to incorporate revisions to the NAAQS, it will not construe Regulation 18.302 as imposing obligations to assess a facility's emissions against the NAAQS as a part of non-PSD permitting. Regulation 18.302 does not obligate ADEQ to assess a stationary source's emissions against the NAAQS during routine permitting, and none of the provisions of Regulation 18 purport to impose modeling requirements on permittees. Regulation 18.302 currently provides:

> No permit shall be granted or modified under this chapter unless the owner/operator demonstrates to the reasonable satisfaction of the Department that the stationary source will be constructed or modified to operate without resulting in a violation of applicable portions of this regulation and without causing air pollution.

ADEQ has previously stated that under Regulation 18, "air pollution" is determined by reference to the NAAQS, such that pollution levels that exceed the NAAQS are deemed to be "air pollution" for the purpose of permit decisions under Regulation 18.302. However, this interpretation ignores the fact that Regulation 18 separately defines "conditions of air pollution" and "air contamination." The definition of "air pollution" in Regulation 18 is identical to the statutory definition in the Arkansas Water & Air Pollution Control Act.[14] Thus, the purpose of that definition is to implement the State statute, not the federal Clean Air Act. Under Regulation 18, the term "air contamination"—not "air

12 40 C.F.R. § 52.170 (identifying EPA-approved Arkansas SIP provisions).
13 ADEQ, Petition to Initiate Rulemaking to Amend Regulation No. 18, Arkansas Air Pollution Control Code.
[14] Ark. Code Ann. § 8-4-303(5).

pollution"—is linked to an exceedance of a NAAQS. The only instance of the term "air contamination" in Regulation 18 is in Chapter 13. Chapter 13 concerns ADEQ's authority to address areas "affected by levels of air contamination" (i.e. areas where the NAAQS are exceeded), and is limited to those areas that "constitute a significant departure from the [NAAQS]."[15] As such, ADEQ should not interpret Regulation 18.302 as requiring permittees to model emissions against the NAAQS as a part of non-PSD permitting.

C. The Definitions for $PM_{2.5}$ and PM_{10} Should be Revised

ADEQ's proposed revisions to Regulation 19 include a definition of "$PM_{2.5}$" which defines $PM_{2.5}$ "as measured by a reference method based on Appendix L of 40 C.F.R Part 50 as of July 27, 2012, or by an approved regional method designated in accordance with Appendix C of 40 C.F.R. Part 53." This proposed definition defines PM2.5 by how it is measured. However, the methods referenced in the proposed definition are for determining $PM_{2.5}$ concentrations in the ambient air, not in emissions. There is no separate definition for "$PM_{2.5}$ Emissions" in Regulation 18 (as there is in Regulation 19, Chapter 2), yet there are several provisions within Regulation 18 where $PM_{2.5}$ is intended to refer to emissions.[16] This discrepancy will lead to confusion among the regulated community and the permitting authority. ASHE proposes that the potential for confusion could be eliminated by adopting a definition for "$PM_{2.5}$" in lieu of the proposed definitions in Regulations 18 and 19 as follows:

> "„$PM_{2.5}$" means particulate matter with an aerodynamic diameter less than or equal to a nominal two and one-half (2.5) micrometers as measured:
>
> (A) in the ambient air by a reference method based on Appendix L of 40 C.F.R Part 50 as of July 27, 2012, or by an approved regional method designated in accordance with Appendix C of 40 C.F.R. Part 53; or
>
> (B) in emissions by an applicable reference method, or an equivalent or alternate method, specified in 40 C.F.R. Part 51, Appendix M as of July 27, 2012, or by a test method specified in these regulations or any supplement thereto."

This issue is equally applicable to the definition of "PM_{10}" in Regulations 18 and 19. As such, ASHE also proposes a similar change to the definitions for PM10 in Regulations 18 and 19.

III. Comments on Proposed Revisions to Regulation No. 19

[15] APC&EC Reg. 18.1301 (emphasis added).
16 *See, e.g.*, APC&EC Reg. 18.301(A), 18.307(C)(2).

A. ADEQ Should Not Interpret Regulation 19 as Requiring Implementation of NAAQS at the Individual Facility Permit Level in the Absence of a Duly Promulgated SIP

ADEQ should clarify that it will not interpret Regulation 19.302 as requiring non-PSD permit applicants to measure the facility's emissions against the NAAQS. As discussed above, existing State and federal statutes and regulations envision that NAAQS are properly implemented through a SIP process (*see* Comment I.C.). In response to previous requests by permit applicants for ADEQ's justification for implementing the NAAQS at the individual permit level through the Modeling Protocol, ADEQ has stated that Regulation 19.302 obligates ADEQ to ensure that NAAQS are not exceeded at compliance points established under EPA-approved models. However, this interpretation cannot be correct. Regulation 19.302 does not task ADEQ with ensuring that the NAAQS are not exceeded. The only provisions in Regulation 19.302 concerning "computer modeling" obligate ADEQ to perform modeling for areas that can reasonably be expected to be in excess of the NAAQS.[17]

ADEQ has also stated that non-PSD Title V permit applicants are required to model source emissions against the NAAQS because NAAQS are "applicable requirements" under Regulation 19. However, Regulation 19 does not establish NAAQS as "applicable requirements." Under Regulation 19, NAAQS compliance is not a source-specific obligation for any type of source. EPA has consistently stated that NAAQS themselves are not applicable requirements, and that applicable requirements are merely the methods employed by the state to comply with the NAAQS.[18] As such, ADEQ should clarify that it will not require non-PSD Title V permit applicants to model source emissions against the revised NAAQS.

B. Regulation 19.904 Should Not Exclude Federal Definition of "Subject to Regulation"

ADEQ's formal rejection of the federal definition of "regulated NSR pollutant" and "subject to regulation" in the proposed revisions to Regulation 19.904(A) circumvents EPA's interpretation of "subject to regulation" as set-forth in the Johnson Memorandum[19] (and subsequently codified in the federal regulations[20]). By using the term "subject to regulation" in the proposed definition of "regulated NSR pollutant" and failing to incorporate the federal definition of "subject to regulation," ADEQ's definition of "regulated NSR pollutant" is broader than the federal definition and, consequently, encompasses pollutants that are subject to monitoring and reporting requirements under the Act, not just pollutants subject to control under the Act. The proposed exclusion of the federal definition of "subject to regulation", and resulting discrepancy between the

[17] APC&EC Regulation No. 19.903(B).
[18] *See* Order Responding to Petitioner's Request the the Administrator Object to Issuance of State Operating Permit, In the Matter of East Kentucky Power Cooperative, Inc. William C. Dale Power Station, Permit V-08-009.
[19] *See* Memorandum from Stephen L. Johnson, EPA Administrator, dated December 18, 2008.
[20] 40 C.F.R. § 52.21(b)(49).

federal and state regulations, will also cause unnecessary confusion among the regulated community as well as the permitting authority. Excluding the definition of "subject to regulation" will also cause Arkansas regulations to be more stringent than federal regulations, thus requiring the Commission to undertake a proper environmental and economic benefit analysis to consider the economic impact and the environmental benefit of the proposed regulation on the people of the State under Arkansas law (*see* Comment I.B.2.). Additionally, the proposed exclusion of the federal definition of "subject to regulation", and resulting discrepancy between the federal and state regulations, will also cause unnecessary confusion among the regulated community as well as the permitting authority. Excluding the federal definition and interpretation of "subject to regulation"—a term recognized by EPA as being inherently ambiguous—will render Regulation 19 impermissibly vague in that it will not provide the regulated community notice of what pollutants are being regulated. Further, the proposed exclusion of 52.21(b)(49) is especially confusing in light of the effective date tied to the federal regulation (November 29, 2005). As of November 29, 2005, 52.21(b)(49) was "reserved." This leads to confusion among the regulated community as it is paradoxical to specifically exclude from State regulation a nonexistent federal regulation and definition.

To remedy this discrepancy, ASHE proposes that the incorporation-by-reference dates in Regulations 19.903 and 19.904 be updated to incorporate EPA's definition of "subject to regulation," and that the proposed revisions to Regulation 19.904(A) to specifically exclude the federal definitions of "subject to regulation" and "regulated NSR pollutant" not be adopted. Adoption of the federal definitions of "subject to regulation" and "regulated NSR pollutant" as of a date certain will cause Arkansas regulations to be consistent with federal regulations in this respect, and, as discussed below, will also obviate the need for ADEQ's proposed addition of the definition of "regulated NSR pollutant" in Regulation 19.903.

C. Regulation 19 Should Not Exclude Federal Definition of "Regulated NSR Pollutant"

The proposed exclusion of 40 CFR 52.21(b)(50) from Regulation 19, together with proposed definition of "regulated NSR pollutant" in Regulation 19.903(B) creates a discrepancy between the federal regulations and Regulation 19, renders Regulation 19 more stringent than federal law and will cause confusion among the regulated community. ADEQ's proposed definition of "regulated NSR pollutant" (and exclusion of the federal definition) will include any pollutant regulated under the CAA, including pollutants under Title I and Title III. State and federal law require a PSD analysis to be conducted on a pollutant-by-pollutant level and compared against the significance levels in 40 CFR 52.21, which significance levels include any increase in any other pollutant for which no threshold is provided.[21] Therefore, a single molecule of a monitor and report pollutant under Title III will cause such pollutant to be a Regulated NSR pollutant under Regulation 19 and,

[21] *See* 40 C.F.R. § 52.21(b)(23)(ii).

thus require a PSD analysis for that pollutant under Arkansas regulation. By causing Arkansas PSD program to be applicable to individual pollutants based solely on monitoring and reporting requirements, the proposed revisions to Regulations 19.903 and 19.904 will create an excessive burden on the regulated community not envisioned under the CAA or the regulations promulgated thereunder.

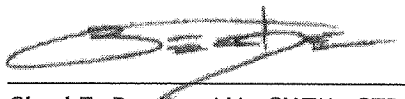
Additionally, ADEQ"s proposed definition of "regulated NSR pollutant" in Regulation 19.903 forecloses the narrower federal definition specifically endorsed and adopted by EPA, rendering the proposed revisions to Regulation 19 more stringent than federal regulations. As discussed above, where rule or regulation is more stringent than federal law, Arkansas statute requires that the Commission undertake a proper environmental and economic benefit analysis to consider the economic impact and the environmental benefit of the proposed regulation on the people of the State, including regulated entities such as healthcare facilities (*see* Comment I.B.2.).

Conclusion

ASHE sincerely appreciates the opportunity to provide comments on these important regulatory revisions and ADEQ"s and the Commission"s consideration of the same.

Respectfully Submitted,

American Society for Healthcare Engineering



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