

## **AEF GENERAL COMMENTS ON ADEQ'S JAN 2020 RULES 18, 19 and 26 STRAWMAN DRAFTS (GC)**

**1. Legal Review of Strawman Drafts for All Three Rules.** We appreciate the work and effort of ADEQ to revise Rules 18, 19 and 26 (the "Air Rules") at this time. There are some legal and other concerns on a few of the Rules revisions as further set out below which may be problematic. We also appreciate ADEQ confirming that the drafts have undergone a legal review of the Rules and with regard to the applicable General Comments below and Specific Comments attached.

**2. Chapter 2 Definitions: Rewording of Rules Definitions.** We understand that ADEQ is seeking to provide the same definitions where possible for the air rules which is commendable. The concern is whether the ADEQ changes/additions affect or correlate with the requirements in all state air rules and permitting requirements and/or with federal law and definitions and which changes may lead to unintended consequences. For Rules 19 and 26, it would be preferable to assure that the definitions are in keeping with federal law definitions as much as possible except when referring to specific state law definitions. Some other examples of potentially problematic changes to definitions are as follows:

**(a) Changes to certain definitions in all three Rules for the terms "Air Pollutant"-  
"Federally Regulated Air Pollutant,"- "Criteria pollutant", - and deletion of term  
"Regulated Air Pollutant."**

We appreciate ADEQ attempting to consolidate and use the same terms/definitions in all the Rules to the extent possible for consistency and clarity. Our understanding in these drafts is that ADEQ is proposing to change the term "air contaminant" to "air pollutant" in Rule 26, but not in the other Rules. The term "air pollutant" is used in Rule 19, but not defined, nor is "air contaminant" defined in Rule 19. However "federally regulated air pollutant" is defined in Rule 19 in the same manner as Rule 26. "Air contaminant" is defined in the Arkansas Water and Air Pollution Control Act (the "AWAPCA" or the "Act") at ACA 8-4-303(2) and also defined in Rule 18. This is a state term and not a federal term. It is defined a little differently in the state air regulations to include the limitation as shown in Rule 26 that it does not include "water vapor, nitrogen and oxygen." The term "criteria pollutant" is defined in Rule 19, but not Rule 26. All of which understandably is confusing to the general public and the regulated community.

The Clean Air Act (CAA) at 40 CFR 70.2 defines "regulated air pollutant" which has now been deleted in the strawman draft of Rule 26. ADEQ is now seeking to substitute the term "federally regulated air pollutant" instead with some tweaking from the definition of "regulated air pollutant." The CAA also defines "air pollutant" under section 302(g) of the Act which includes hazardous air pollutants. It seems that the terms "air pollutant," "federally regulated air pollutant," "criteria pollutant," and "air contaminant" should all be reviewed more closely to align with Rules 19 and 26 and used in the same way to the extent possible. We appreciate ADEQ's proposal to rectify this issue by considering use of the terms "air contaminant" and "federally regulated air pollutant" for all three Rules. We request that the term "air contaminant" not be changed at this time to "air pollutant." If ADEQ decides to change the term "regulated air pollutant" to "federally regulated air pollutant," it should be done so consistently throughout.

**(b) Changes to certain definitions in all three Rules for the terms -"Modification," -  
"Permit modification" – "Potential to emit."**

The term "modification" is in Rule 19 but not in Rules 18 and 26. "Minor permit modification" and "permit modification" terms are in Rule 26 but not in Rules 18 and 19. The term "potential to emit"(PTE) is provided in all the Rules, however PTE is defined in Rule 19 as pertaining to emissions of a "federally regulated air pollutant" then defined in Rule 26 as pertaining to

emissions of any “air pollutant,” and then defined in ADEQ’s Rule 8 Administrative Procedures as pertaining to emissions of any “air contaminant.” There are other differences in the air rules which could have major ramifications in how the terms are changed. We request that these terms in particular and all changed definitions be reviewed carefully in a legal context to see how they correlate with the changes proposed by ADEQ. Perhaps it is preferable not to change these definitions at this time, but subject to future EASE discussions with ADEQ and the public on the ramifications of such changes.

**(c) Chapter 2 – Definition of “Division.”** “Division” now includes “staff of the division acting at the direction of the Director.” Does this require a specific, written delegation of authority from the Director to a particular staff person? This has been a problem in the water area where informal written communications between EPA staff and state environmental staff have been construed to be a mandate from the EPA Regional Administrator, when in fact that was not the intent and was not even authorized by the Clean Water Act. We appreciate ADEQ clarifying how this delegation is intended with regard to Air Rules.

**3. Substituting term EPA “rules” rather than EPA “regulations.”** ADEQ is changing the term “Regulation” to “Rule” for the Arkansas state regulations per legislative mandate, but they have also changed the term to refer to EPA “Rules” rather than EPA “regulations” which is not necessarily correct. We request that ADEQ refer to all federal regulations and laws as such, and not use the term “rules” for federal reference.

**4. Substituting of terms “section,” “subsection,” “such.”** Instead of the current terms “section” or “subsection” to refer to requirements within each part of the Rules, those terms have been changed to refer to the particular numbered section such as “Rule \_\_.” It seems problematic in the event the section is numbered differently in the future. There is also a legal preference to use terms such as “such” and “section” to be more specific for that reason and in referencing certain terms that are in the section/paragraph. Sometimes deleting the term “such” changes the legal interpretation of the language. See for example, AEF Rule 19 SC 2(c).

**5. Changing terminology to improve readability or to simplify wording differently from the specific terminology and provisions set out in Rule 8 or the Act.** It is understandable that ADEQ is seeking to make the Air Rules easier to read and simpler, however it may not be advisable to change the wording of certain provisions of the Rules, especially if they are taken directly from other regulations, such as Rule 8. See for example Rule 19.406 Public Participation where Rule 8 has not been adopted as part of the SIP, but instead ADEQ is setting out the requirements on public participation per Rule 8. However it is also seeking to reorder the terminology of Rule 8 in this Rule 19 “to improve readability,” which may be problematic. See also Rule 19.407(B) Change In Ownership where ADEQ is seeking to do the same thing.

**6. All incorporation by reference (“IBR”) provisions in the Rules.** If ADEQ is going to automatically update all IBR provisions each time the Rules are revised, we request that the public notice for each Rule revision should list and explain what additional IBR provisions will become automatically updated, even if that is not the primary purpose of that particular Rule revision.

**7. Revisions to “General Permit” Sections.** The General Permits sections of the Rules are different in some manner. Further general permits are subject to the Arkansas Water and Air Pollution Control Act ( the “AWAPCA” or the “Act”) and Rule 8 as well. At this time, we request that ADEQ not change the wording of any of the General Permits sections in any of the Rules until ADEQ and EASE Workgroups and the public have had a chance to discuss the ramifications of these changes and how they conflict/differ from each other and the language of the Act at ACA 8-4-203(m)(1)(A)(i) on General Permits.

**8. Rule 18.102(C) and Rule 26 Chapter 2 Definition of “State” or “state.”** This comment is with regard to ADEQ’s use of the terms “State” and “state” throughout Rule 18 and 26. In Rule 18, ADEQ is capitalizing the word “State” ostensibly to refer to the State of Arkansas. The term “State” is not defined in Rule 18. The current Rule 26 uses the term “State” which is taken verbatim from federal Title V definitions and refers to all entities which are considered “States” for Title V and Acid Rain regulatory purposes. However, ADEQ is proposing to delete the term “State” in title V. We request that ADEQ retain the current definition of “State” in Rule 26. We appreciate ADEQ reviewing use of this term for all three Rules and provide consistency throughout.

**9. Rules 18.307(A)(2) and (C)(6) and 19.407(A)(2) and (C)(6) Administrative Permit Amendments and *De Minimis* Changes.** ADEQ is seeking to delete the term “as expeditiously as practicable” for an administrative change and for a *de minimis* change to the permit explained as it is “more efficient for ADEQ to combine another permit revision or renewal if there is one in the works already” rather than to “revise the permit as expeditiously as practicable.” It is true that is the way ADEQ works in the real world in actually revising the permit – it doesn’t do so until another major permit revision or renewal comes up. However it seems important to keep the term so that the public understands that while the permit may not have been technically revised immediately, a qualified administrative or *de minimis* change immediately becomes part of the permit. Retaining the term also provides a general timeframe that the change happens “as expeditiously as practicable” rather than providing no timeframe whatsoever and leaves the change approval in limbo. Maintaining the phrase also allows retains ADEQ’s discretion to revise the permit on a practicable basis rather than immediately. We request that this term remain in these sections.

**10. Rules 18.308 and 19.408 Exemptions from Permitting (A) Insignificant Activities.** Insignificant activities must be included in the permit for title V purposes but apparently ADEQ is now not requiring those activities in a non-title V permit. It is our understanding that it is the Division’s intent to do so. We appreciate clarification that if this change is adopted, ADEQ will allow a permittee to include those activities in a non-title V permit if it chooses to do so.

Appendix A language is also potentially affected by the change. Perhaps the intent is that Group A Insignificant Activities be listed in the permit, but only an administrative permit amendment (instead of a permit modification) is necessary to add a new insignificant activity? If so, this needs to be clarified in the Rule language. We appreciate ADEQ further explanation to the change it proposes to Rule 19.408(A).