ARKANSAS STATE IMPLEMENTATION PLAN REVISION

Removal of Rule 19.602 from the Arkansas State Implementation Plan

Division of Environmental Quality

Office of Air Quality

Final

November 1, 2022

Table of Contents

I. Introduction

A. Arkansas State Implementation Plan

The Arkansas state implementation plan (SIP) is the air quality protection strategy implemented by the Department of Energy and Environment's Division of Environmental Quality (DEQ) pursuant to the Clean Air Act (CAA). The SIP consists of laws and rules, nonregulatory and quasi-regulatory measures, and other state enforceable requirements codified at 40 CFR § 52 Subpart E. The Arkansas SIP is federally enforceable, and it was first approved by the United States Environmental Protection Agency (EPA) in 1972 (37 CFR 10841). All subsequent revisions to the SIP require EPA approval.

B. Background for Requested SIP Revision

On June 12, 2015, EPA finalized an action ("SSM SIP Call") clarifying its policy on treatment of excess emissions during periods of startup, shutdown or malfunction (SSM).[1] The SSM SIP Call was promulgated by EPA in response to a lawsuit filed by Sierra Club and WildEarth Guardians in the United States District Court for the Northern District of California. *Sierra Club et al. v. Jackson*, No. 3:10-cv-04060-CRB (N.D. Cal.). The lawsuit claimed that the policy in place at that time provided an affirmative defense from monetary penalties for excess emissions during periods of SSM, automatic exemptions from applicable emission levels during SSM events, and enforcement discretion, which appeared to bar enforcement by EPA or citizens for excess emissions during periods of SSM. EPA evaluated existing SIPs and determined that certain SIP provisions for thirty-six states (including Arkansas) were substantially inadequate to meet CAA requirements and thus issued a SIP Call for each of those states. SIP revisions to address provisions identified in the SSM SIP Call were due November 22, 2016.

The SSM SIP Call was the subject of litigation (US. District Court of Appeals for the DC Circuit, Consolidated Case No.15-1239)[2] and reconsideration by EPA during the Trump administration. As a result, many states (including Arkansas) did not submit a responsive SIP revision, and EPA only acted on three responsive SIP submittals from Texas, Iowa, and North Carolina. On October 9, 2020, EPA Administrator Andrew Wheeler issued guidance for the agency's SSM policy that altered the EPA policy laid out in the 2015 SSM SIP Call in the form of a Guidance Memorandum addressed to EPA Regional Administrators.[3]

Under the Biden Administration, EPA has reverted back to the 2015 SSM Policy as described in the 2015 SSM SIP Call preamble. On September 30, 2021, EPA Deputy Administrator Janet

[1] https://www.govinfo.gov/content/pkg/FR-2015-06-12/pdf/2015-12905.pdf
[2] This case has been held in abeyance since 2017.
[3] https://www.epa.gov/system/files/documents/2021-09/2020-ssm-in-sips-guidance-memo.pdf

McCabe issued a Guidance Memorandum[4] that withdrew the 2020 EPA guidance and reinstated the 2015 policy. In the Memorandum, EPA expressed its intention to revisit its SSM SIP Call withdrawals for North Carolina, Texas, and Iowa. EPA is also subject to a lawsuit for failing to issue findings of failure to submit for states subject to the SSM SIP Call that did not submit responsive SIPs (including Arkansas) and for failure to act on a number of responsive SIP submittals.[5]

C. Applicability of SSM SIP Call to Arkansas

In the 2015 SSM SIP Call, EPA identified two regulatory portions of Arkansas's SIP as substantially inadequate to meet CAA requirements. Arkansas Pollution Control and Ecology Commission (APC&EC) Rule 19.602 contains an affirmative defense for non-compliance with a technology-based emission limitation during emergency conditions if certain criteria are met. Rule 19.1004(H) provides for an automatic exemption from temporary emissions in excess of Rule 19, Chapter 10 requirements if they arise from a sudden and unavoidable breakdown, malfunction, or upset of process or emission control equipment or a sudden and unavoidable upset of operation.

In 2016, DEQ worked with stakeholders on a rulemaking to address the SSM SIP Call by revising the language in Rule 19.602 and Rule 19.1004(H) to remove the affirmative defense and automatic exemption, respectively, and allow DEQ to consider the factors laid out in Rule 19.602 and Rule 19.1004(H) in making a determination as to whether to exercise enforcement discretion. APC&EC initiated the rulemaking on April 29, 2016. The rulemaking received adverse comments from EPA and industrial stakeholders. The rulemaking was subsequently withdrawn without adoption on September 28, 2018, at the request of DEQ.

On July 23, 2021, APC&EC initiated rulemaking to repeal a number of provisions from Rule 19, including Rule 19.1004(H), based on a petition from DEQ. On July 31, 2021, DEQ proposed revisions to the Arkansas SIP based on the APC&EC rulemaking. With APC&EC adoption of the changes to Rule 19 and EPA-approval of the related SIP revision, submittal deficiencies identified by EPA in Reg. 19.1004(H) will be addressed.

In this SIP revision, DEQ proposes to remove Rule 19.602 from the federally-enforceable SIP. DEQ has not requested repeal of Rule 19.602 by APC&EC. Therefore, the effect of this proposed SIP revision would be that EPA and citizen suits would not be governed by Rule 19.602; however, DEQ would continue to implement Rule 19.602 as a matter of state law. This change would address the deficiency claimed by EPA while maintaining existing DEQ policy with respect to emergency conditions.

[4] https://www.epa.gov/system/files/documents/2021-09/oar-21-000-6324.pdf
[5] *Sierra Club v Regan*, No. 4:21-cv-06956 (N.D. Cal.)

II. Requested Revisions to Arkansas SIP Components

DEQ requests that EPA remove the language of Rule 19.602 from the Arkansas SIP (outlined at 40 CFR § 52 Subpart E), which is shown below in current form:

Rule 19.602 Emergency Conditions

An "emergency" means any situation arising from the sudden and reasonably unforeseeable events beyond the control of the source, including natural disasters, which situation requires immediate corrective action to restore normal operation, and that causes the source to exceed a technology-based emission limitation under the permit, due to unavoidable increases in emissions attributable to the upset condition. An emergency shall not include non-compliance to the extent caused by improperly designed equipment, lack of preventive maintenance, careless or improper operation, or operator error.

(A) An emergency constitutes a complete affirmative defense to an action brought for non-compliance with such technology-based limitations if the following conditions are met. The affirmative defense of emergency shall demonstrate through properly signed contemporaneous operating logs, or such other relevant evidence that:

(1) An emergency occurred and that the permittee can identify the cause(s) of the emergency;

(2) The permitted facility was at the time being properly operated;

(3) During the period of the emergency, the permittee took all reasonable steps to minimize levels of emissions that exceeded the emission standards, or other requirements in the permit; and

(4) The permittee submitted notice of the upset to the Division by the end of the next business day after the emergency. This notice must contain a description of the emergency, any steps taken to mitigate emissions, and corrective actions taken.

(B) [RESERVED]

III. Consideration of Ark. Code Ann. § 8-4-312 factors

Pursuant to Ark. Code Ann. § 8-4-312, the APC&EC and DEQ must consider the factors listed in Ark. Code Ann. § 8-4-312, when exercising their powers and responsibilities. Table 1 provides DEQ's assessment of the statutory factors as applied to this SIP.

Table 1: Consideration of Ark. Code Ann. § 8-4-312 factors

Ark. Code Ann. § 8-4-312 Factors	Consideration of the Factors
(1) The quantity and characteristics of air contaminants and the duration of their presence in the atmosphere that may cause air pollution in a particular area of the state	Rule 19.602 applies only to exceedances of technology-based emission limitations during periods of emergency conditions. An emergency is defined as a situation that is sudden, unplanned, and beyond the control of the source. Furthermore, Rule 19.602 requires that the permittee takes all steps necessary to minimize emissions in excess of emission standards or other permit requirements. Therefore, removal of this provision from the SIP while continuing to follow Rule 19.602 as a matter of state policy will not affect the quantity and characteristics of air contaminants and the duration of their presence in the atmosphere. Continuing to implement Rule 19.602 at the state level will not interfere with DEQ's ability to ensure attainment and maintenance of the NAAQS. The affirmative defense provision at Rule 19.602 provides persons responsible for a source with a means to minimize damages associated with an event beyond their control, a method to responsibly report and mitigate excess emissions from that event, and a motivation for self-reporting. Further, all permitted sources are subject to Rule 19.303(C), which requires the regulated source to "repair malfunctioning equipment and pollution control equipment as quickly as possible. If the malfunctioning equipment is causing, or contributing to, a violation of the NAAQS, as determined by computer modeling, the source is responsible for ceasing operations of the affected equipment until such time that it is repaired." Rule 19.303(C) provides for relief if the emergency event

	under Reg. 19.602 would cause or contribute to a violation of the NAAQS, and requires immediate cessation of operations if computer modeling shows the excess emissions cause or contribute to a violation of the NAAQS.
(2) Existing physical conditions and topography	This factor is not relevant to this SIP revision.
(3) Prevailing wind directions and velocities	This factor is not relevant to this SIP revision.
(4) Temperatures and temperature-inversion periods, humidity, and other atmospheric conditions	This factor is not relevant to this SIP revision.
(5) Possible chemical reactions between air contaminants or between such air contaminants and air gases, moisture, or sunlight	This factor is not relevant to this SIP revision.
(6) The predominant character of development of the area of the state such as residential, highly developed industrial, commercial, or other characteristics	This factor is not relevant to this SIP revision.
(7) Availability of air-cleaning devices	This factor is not relevant to this SIP revision.
(8) Economic feasibility of air-cleaning devices	This factor is not relevant to this SIP revision.
(9) Effect on normal human health of particular air contaminants	This factor is not relevant to this SIP revision.
(10) Effect on efficiency of industrial operation resulting from use of air-cleaning devices	This SIP revision will not have an effect on the efficiency of industrial operation resulting from the use of air-cleaning devices.
(11) The extent of danger to property in the area reasonably to be expected from any particular air contaminant	This factor is not relevant to this SIP revision.
(12) Interference with reasonable enjoyment of life by persons in the area and conduct of established enterprises that can reasonably be expected from air contaminants	This factor is not relevant to this SIP revision.
(13) The volume of air contaminants emitted from a particular class of air contamination sources	Rule 19.602 is broadly applicable to all permitted sources in the state. Removal of Rule 19.602 from the SIP will not have an effect on the volume of air contaminants emitted. See Response to Factor (1).

(14) The economic and industrial development of the state and the social and economic value of the air contamination sources	Removal of Rule 19.602 from the SIP is not expected to have a practical effect on the economic and industrial development of the state. The scope of circumstances that could trigger the applicability of Rule 19.602 is narrow and DEQ will continue to implement Rule 19.602 as a matter of state policy. To date, DEQ has not been a party to any compliance or legal action at the state level in which Rule 19.602 was invoked as an affirmative defense, and DEQ is unaware of any historical cases brought before a federal court in which Rule 19.602 was cited as an affirmative defense by a permitted source in Arkansas.
(15) The maintenance of public enjoyment of the state's natural resources	This factor is not relevant to this SIP revision.
(16) Other factors that the Division or the commission may find applicable	This SIP revision avoids potential negative consequences associated with the issuance of a federal plan by EPA and potential sanctions against the state of Arkansas. Should DEQ fail to submit a SIP revision responsive to the 2015 SSM SIP Call, EPA is obligated to impose a federal plan that may put alternative emission limits in place during emergency conditions and Arkansas could be subject to sanctions, including emissions offsets and highway fund sanctions should any area of Arkansas fail to attain a NAAQS.

IV. Consideration of CAA 110(l): "Anti-backsliding"

Due to the limited scope of the SSM SIP Call and this subsequent SIP revision, DEQ finds that the requirements of 40 CFR, Appendix V to Part 51 – *Criteria for Determining the Completeness of Plan Submissions, 2.2 Technical Support*, may be satisfied without the formal, detailed analysis that customarily supports a request for a SIP revision. This approach is consistent with EPA's determination as detailed in Example 1 of Section X. Implementation Aspects of EPA's SSM SIP Policy, B. Recommendations for Compliance with Section 110(l), and Section 193 for SIP Revisions of the Federal Register:

> "Example 1: A state elects to revise an existing SIP provision by removing an existing automatic exemption provision, director's discretion provision, enforcement discretion provision or affirmative defense provision, without altering any other aspects of the SIP provision at issue (e.g., elects to retain the emission limitation for the source category but eliminate the exemption for emissions during SSM events). Although the EPA must review each SIP submission for compliance with section 110(l) and section 193 on the facts and circumstances of the revision, the Agency believes in general that this type of SIP revision should not entail a complicated analysis to meet these statutory requirements. **Presumably, removal of the impermissible components of preexisting SIP provisions would not constitute backsliding, but would in fact strengthen the SIP and would be consistent with the overarching requirement that the SIP revision be consistent with the requirements of the CAA.** Accordingly, the EPA believes that this type of SIP revision should not entail a complicated analysis for purposes of section 110(l). If the SIP revision is also governed by section 193, then elimination of the deficiency will likewise presumably result in equal or greater emission reductions and thus comply with section 193 without the need for a more complicated analysis. The EPA has recently evaluated a SIP revision to remove specific SSM deficiencies in this manner."[6] [emphasis added]

Due to the limited scope of the proposed SSM SIP Call and this subsequent SIP revision, the requested changes to the Arkansas SIP to address EPA's updated policy related to SSM does not result in any increase in plan allowable emissions from affected sources.

V. Legal Authority to Implement the Plan

The State's legal authority to adopt and implement state plans can be found in Ark. Code Ann. § 8-1-203(b)(1), § 8-4-311(a), and § 8-4-317.

[6] 80 FR 33840, as published June 12, 2015, at 33957.