



ARKANSAS

ENERGY & ENVIRONMENT

February 13, 2023

The Honorable Michael Regan
Administrator, U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460
ATTN: Docket ID No. EPA-HQ-OAR-2021-0317

Submitted via the Federal eRulemaking Portal at <https://www.regulations.gov>

Re: Arkansas Department of Energy and Environment Comments

Docket ID No. EPA-HQ-OAR-2021-0317

Dear Administrator Regan:

On November 15, 2021, the United States Environmental Protection Agency (EPA) proposed rules, “Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review” (Docket ID EPA-HQ-OAR-2021-0317), to reduce emissions from the oil and gas sector, and on December 6, 2022, EPA issued a supplemental proposal with some revisions to initially proposed requirements. Hereinafter, the proposals are collectively referred to as the “Proposed Rule.”

The Arkansas Department of Energy and Environment (E&E) disagrees with the Proposed Rule and requests that EPA withdraw it. Notwithstanding this request, E&E has reviewed the Proposed Rule and examined the supporting documentation. E&E submits the enclosed comments in response to the Proposed Rule.

Regards,

A handwritten signature in blue ink, appearing to read 'Shane Khoury'.

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Enclosures: Comments on EPA's New Source Performance Standards and Emission Guidelines for the Oil and Gas Sector

PRELIMINARY COMMENTS ON THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY’S NEW SOURCE PERFORMANCE STANDARDS AND EMISSION GUIDELINES FOR THE OIL AND GAS SECTOR

Docket ID No. EPA-HQ-OAR-2021-0317

I. Introduction

On November 15, 2021, the United States Environmental Protection Agency (EPA) proposed “Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review” (Docket ID No. EPA-HQ-OAR-2021-0317) to reduce emissions from the oil and gas sector. On December 6, 2022, EPA issued a supplemental proposal with revisions to the initially proposed requirements. Hereinafter, these proposals are collectively referred to as the “Proposed Rule.”

The Proposed Rule includes requirements for new, reconstructed, and modified oil and gas wells; centralized production facilities; and compressor stations under the new source performance standards (NSPS) section of the Clean Air Act and emission guidelines (EG) that would establish requirements for state plans regulating emissions from existing oil and gas wells, centralized production facilities, and compressor stations. Arkansas law charges the Arkansas Department of Energy and Environment’s Division of Environmental Quality (DEQ) with the responsibility to develop and effectuate the state’s program for the prevention and control of all sources of air pollution in the state. DEQ is the delegated authority by EPA to implement Clean Air Act NSPS, and it is responsible for developing and implementing state plans for existing sources. The Proposed Rule, if finalized, represents a substantial expansion in the scope of sources regulated under DEQ’s air pollution control program; is anticipated to have major economic impacts for the state, particularly for small business operators and property owners who currently have a financial interest in oil and gas operations; and creates a regulatory framework that conflicts with the current regulatory authorization enacted by the Clean Air Act and corresponding Arkansas law. Therefore, DEQ requests that EPA withdraw the Proposed Rule. Notwithstanding this request, DEQ submits the following preliminary comments.

II. Extension of the public comment period is warranted.

DEQ requests an extension of the public comment period for the Proposed Rule by 90 days to enable it and others to provide more robust comments on this expansive and complex rulemaking. EPA did not release the proposal, proposed regulatory language, and complete set of supporting documentation at the same time, and the piecemeal approach caused delay in the public’s analysis of the Proposed Rule in its entirety. During the comment period for the Proposed Rule, EPA published the non-regulatory Inflation Reduction Act Request for Information, which included six separate dockets, with a response deadline of January 18, 2023. States are currently overwhelmed

with comment deadlines on several multifaceted proposals and information solicitations on top of their typical responsibilities. More time is needed for complete analysis of the Proposed Rule and its impacts.

A. The Proposed Rule is complex.

EPA posted the supplemental proposal to the docket on December 5, 2022; the same date, EPA posted over 100 new supporting documents to the docket. Many serve only as documentation of EPA's outreach and discussions with stakeholders. However, several of these documents are technically dense and involve lengthy reports that require significant time to review.¹ Other documents posted to the docket that would help the public digest EPA's rationale are only partially informative. For instance, report and study references that are newly included in EPA's regulatory impacts analysis supplement are copyrighted or otherwise restricted from public view,² making it necessary for states to take extra steps (and time) to acquire the documents before review can even commence.

Additionally, EPA has continued to post new, supporting documentation after the supplemental proposal was released, and EPA's "Analysis of Cost Impacts of Revising Control Device Efficiency Standards to 98 Percent" supplemental technical support documentation was not posted until January 10, 2023, a full five weeks after the public comment period began. More time is required to digest technical support documentation so states can provide meaningful input. EPA has attempted to include states in early engagement in this rulemaking, but in doing so, it also provided an incomplete docket for public review. EPA should allow more time for states to review and comment on a complete docket, including all relevant supporting documentation EPA used in its analysis and decision-making processes.

EPA additionally, and specifically, requests feedback on over 140 topics in the supplemental proposal, posing several questions per topic that are technically dense in nature. Unlike other rulemakings, this proposal's timeline is not one that is governed by consent decree, and EPA has flexibility in this instance to allow extra time for proposal analysis and comment, planning and outreach following a final rule, and subsequent state plan development. EPA should do so to ensure that the magnitude of effects that ripple outward—affecting state regulators and air programs, small producers, and reduced domestic energy production—does not outweigh the benefits of the

¹ Select items posted to the docket on December 5, 2022:

Zero Emission Technologies for Pneumatic Controllers in the USA. Updated Applicability and Cost Effectiveness. November 2021. Prepared by Carbon Limits AS;

EO 12866 OMB Interagency Review: August 2022. *Email Correspondence between EPA and OMB and Transmitted Files* (Documents submitted to OMB) in August 2022. Ten Attachments (Transmitted Documents-e.g., Briefings, ICR Documents, Comment Solicitation Memo/Attachments).

² *Additional Supporting References (Not Included with 2021 November Proposal RIA) - Support for Regulatory Impacts Analysis of the Supplemental Proposal for the Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review.* October 2022. EPA-452/R-22-006. Fifteen Attachments <https://www.regulations.gov/document/EPA-HQ-OAR-2021-0317-1580> Six of the fifteen attachments are "restricted."

proposal and that the proposal in its final form effectively addresses the issue at hand.

B. The scope of affected sources is vast.

EPA's Proposed Rule contains requirements for entities spanning the entire range of production volume, from the largest producing well-pads to single well-heads that are purely domestic in nature and used for home heating. DEQ currently permits approximately 200 facilities in the oil and natural gas sector through its Office of Air Quality. The Arkansas Department of Energy and Environment's Oil and Gas Commission (OGC) currently permits approximately 19,000 oil and gas wells, 1700 tank batteries, and 5000 miles of natural gas pipeline and other potentially affected sites. Under the Proposed Rule, DEQ will become responsible for the implementation, development of compliance strategy and determination, and enforcement for over 60,000 sources. The number of sources will likely increase as development continues to meet the energy needs of Arkansas and surrounding states that gain energy stability from marketable Arkansas products. The state simply cannot expand capacity under current constraints to adequately permit and enforce both the delegated NSPS and a state plan for existing sources under the Proposed Rule.

C. The impact on small businesses and families is unclear.

EPA did not give adequate consideration to the impacts on small businesses and marginal well owners and operators, particularly regarding the supplemental proposal, which includes new requirements even for the smallest of sources. EPA's expanded set of affected sources in the supplemental proposal (e.g., removing the 3-ton per year threshold triggering required monitoring and reporting) creates an unmanageable universe of sources for regulatory authorities to inspect and permit. Removing the threshold also disproportionately causes negative economic effects for individuals and families in rural areas (i.e., underserved communities) who receive minimal financial benefits from small sources located on their private property. In many states, this proposed change would create a set of regulated sources that is larger by a degree of magnitude than the original proposal.

In 2022 approximately 16,000 oil and gas wells were producing in Arkansas by approximately 300 operators.³ Eighty-five percent of the 7000 producing oil wells in southern Arkansas and fifty percent of the 9000 producing natural gas wells in northern Arkansas are "stripper" or marginal producing wells. These wells cannot provide sufficient financial benefit to the well operators to fund the additional measures required for compliance with the Proposed Rule. According to 2020 Census data, 58 oil and gas producers in Arkansas reported having fewer than 5 employees. Most of these marginal production wells are located in rural areas of the state, where annual income is typically on the lower end of the scale, and the Proposed Rule will negate the income currently generated for the landowners and tax revenues for those small communities.

³ Arkansas Oil and Gas Commission

In Arkansas the average household income in 2019 was \$47,600; compared to national percentiles using EPA’s EJ screening tool, a majority of the state falls within the 60-90th percentile for “low-income,” with a good portion falling into the 90-100th percentile.⁴ The oil and gas industry is a significant contributor to local economies and individual financial stability in rural areas in the state where employment opportunities are often limited. Census data from 2017 established that over 3700 employees reported as working in the oil and gas industry in Arkansas. The average annual salary in the state for oil and gas industry jobs in 2017 was just over \$52,000, 10% higher than the average salary statewide. This is a substantial portion of revenue that makes its way back into the coffers of rural communities that lack the combined resources of more populated communities. The Proposed Rule burdens small producers and individual owners in a way that threatens to cause closures and shutdowns at otherwise productive and economically beneficial well sites, and the impact to rural communities (where a majority of these wells are located) has not been properly considered or explored by EPA. DEQ disagrees with EPA’s decision to promulgate the Proposed Rule. However, if EPA moves forward with the proposal, it should include exemptions for very small sources as initially proposed, and it should thoroughly evaluate the effect that the requirements will have on small businesses and individual families who have domestic wells on their property.

States rich in energy production and energy resources used for nationwide benefit historically have populations of lower socioeconomic status; these citizens welcome oil and natural gas activities and the resulting energy production in their communities because it provides stable tax revenue and well-paying jobs in areas where economic development (and employment) is scarce. EPA should also understand that these already economically burdened states and populations inherently bear more of the weight for any requirements imposed on the oil, gas, and energy industries.

III. The Proposed Rule, if finalized, represents a major expansion in the scope of sources regulated under DEQ’s air pollution control program.

With the addition of thousands of new qualifying sources performing quarterly Optical Gas Imaging (OGS), and without consideration of additional testing required for larger sources, DEQ staff anticipates a considerable increase in emission testing observations per year under the Proposed Rule. Increases in testing would stretch agency staff and resources thin. This would likewise be compounded by the fact that the rural nature of these locations will create substantial travel times between sites. Significantly increasing the number of additional sources to permit and inspect creates the need for additional permitting staff to process the onboarding of so many new sources and for additional enforcement staff when noncompliance with requirements is noted. Though many sources could likely qualify for a general permit, there would still be a need for additional permit engineers and supporting administrative staff dedicated to oil and gas permit

⁴ <https://ejscreen.epa.gov/mapper/> Arkansas map, low income filter, shown by county

processing as well as customer service, due to the sheer volume of new sources.

A regulation, rule, or requirement is only as effective as the compliance strategies and enforcement actions that actually govern it. Without a viable method for checking to ensure that all requirements are being met by all sources subject to the Proposed Rule, there is a potential to create an uneven economic advantage for those who choose to ignore the regulatory requirements. For some, it could be viewed as less burdensome to pay a penalty on the rare chance noncompliance is discovered than it is to comply.

IV. The Proposed Rule, if finalized, is anticipated to have a major impact on small business operators and rural populations.

DEQ is particularly concerned with the subset of existing well sites owned by individuals, farmers, small business operators, and family limited partnerships. Many rural households use natural gas production from wells located on their property, either through ownership or lease. These entities should not be subject to the Proposed Rule, and DEQ urges EPA to reconsider including such small sources in the scope of the Proposed Rule's requirements. EPA has not fully analyzed the financial burden on homeowners, small business operators, and farmers that would result from the Proposed Rule, and the RIA does not address the costs resulting from new requirements for this subset of sources.

Additionally, EPA has not adequately considered "low-hanging fruit," before proposing costly new requirements. Many best management practices (BMPs) could be implemented as emission reduction strategies that would make the best use of resources currently in place (or could be put in place with a nominal investment). Solutions of this nature equate to pennies on the dollar compared to EPA's projected costs and still deliver meaningful emission reductions. Prior to imposing the economic and regulatory burdens of the Proposed Rule on small businesses and individual families, EPA should give more consideration to the effectiveness of BMPs, particularly at larger sources where resulting emission reductions would be expected to be significant.⁵

V. The Proposed Rule, if finalized, does not provide adequate time for plan development and state administrative processes for adopting a plan to regulate existing sources.

Both the Clean Air Act § 111(d)(1) and EPA's implementing regulations under 40 CFR 60.24a(e) require that states be allowed the opportunity to propose a method other than EPA's Best System of Emission Reductions (BSER) to achieve the required emission reductions (or to propose a

⁵ <https://www.controlglobal.com/manage/asset-management/article/11301041/use-wireless-to-monitor-thief-hatches> and https://cms.oilresearch.nd.gov/image/cache/G-55-01_Applicant_Presentation.pdf Description of technologies that can reduce emissions from thief hatches by as much as 80% with minimal installation of additional equipment.

standard of performance less stringent than the presumptive standard of performance under a given EG, depending on the affected source's remaining useful life and other factors). The Proposed Rule does not provide clear guidance on this issue. In considering how to achieve the required emission reductions under the EG, states must have time to assess all affected sources in light of their remaining useful lives, and other factors, in order to formulate a strategy to achieve the required emissions reductions. Given the daunting complexity of this type of analysis, states must be given additional time to begin the analyses and develop comments reflective of their individual situations.

States need a minimum of three years to develop and adopt standards of performance and submit a plan to EPA. The more complex the standard-setting process, the more time states will need to gather information from designated facilities and perform analyses to set appropriate standards consistent with emission guidelines. In addition, states will require significant resources to develop and implement a successful state plan. DEQ has a small air planning team with limited capacity to take on new planning initiatives in response to state and federal air-related rulemakings. In addition to state plan development, members of this team are responsible for grant administration, metrics reporting, and development of Office of Air Quality outreach materials, emission inventory, and prevention of significant deterioration modeling review. DEQ is aware from its coordination with other states that some have even fewer resources and staff available for state plan development than DEQ. Preparing rulemaking and finalizing a state plan to address EPA's final rule on this matter is just one of the numerous projects and state plan submissions that state's air planning teams will be tackling over the next few years. Once again, DEQ disagrees with EPA's decision to promulgate the Proposed Rule. However, if EPA moves forward with the proposal, DEQ stresses the need for EPA to commit to providing additional financial and technical resources for state plan development and implementation

The preparation of an Arkansas plan to address EPA's Proposed Rule would require a significantly greater amount of time and effort to develop than eighteen months. In Arkansas the average timeline to develop and submit to EPA a state plan that addresses a straightforward requirement is eighteen months, because of the numerous federal and state administrative procedures required for such an action. Plans including controversial or complex regulation, such as the Proposed Rule, can reasonably be expected to take longer. Considering the multiple extra steps necessary to develop this particular state plan, and the time required for affected sources to meet their obligations under the state plan, DEQ foresees the need for three years, at a minimum, for development of state plans.

VI. The Proposed Rule's "super-emitter program," if finalized, violates provisions of the Clean Air Act and authority provided by Congress to the states.

EPA's Proposed Rule creates a super-emitter response program. EPA proposes that EPA-approved third-party entities, using innovative methane detection technologies, would be allowed to monitor

for super-emitting methane sources. These entities would then notify the owner operators of the super-emitting sources, and owner operators would then be responsible for correcting the conditions responsible for the excess emissions.

Under the Clean Air Act, Congress granted authority to the states to implement standards of performance, developed by EPA at existing sources of air pollution.⁶ Under Arkansas Code Annotated § 8-4-311, DEQ is the entity authorized to:

- develop and effectuate a program for the prevention and control of sources of air pollution in the state (including responding to emissions violation concerns from third-party entities that would implement the Proposed Rule’s super-emitter program),
- advise, consult, and cooperate with other agencies and with affected groups (including, presumably, third-party entities), to conduct studies, investigations, and research relating to air pollution and its causes, prevention, control, and abatement (including super-emitter events addressed in the Proposed Rule), and
- develop and implement state implementation plans addressing air pollution control (including inspection and compliance requirements, which are essentially bypassed by the Proposed Rule’s super-emitter program).

EPA must recognize that the super-emitter program, if finalized as proposed, will conflict with the authority granted to the states by Congress and will conflict with the Clean Air Act, Arkansas law, and the rules promulgated by the Arkansas Pollution Control and Ecology Commission governing DEQ operations and authority. EPA is required to allow monitoring and compliance authority to be implemented by the states, as has been the case with previous emission guidelines and performance standards. If applied to the current regulatory landscape, EPA’s super-emitter response program would cause authoritative confusion, conflict of laws, and litigation necessary to adjudicate this conflict. State air control agencies—those with the legal authority to permit emissions activities, inspect facilities, and enforce compliance—would be further burdened by the untangling of this “program within a program.”

VII. The Proposed Rule, if finalized, creates a difficult obstacle for states to meet “meaningful engagement” requirements.

EPA has proposed additional requirements for state plans to address meaningful engagement with stakeholders. However, EPA states that it “believes [the Proposed Rule] does not have proportionately high and adverse human health or environmental effects on minority populations, low-income populations, and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994)” [86 Fed. Reg. 63262]. It is not clear why state plans would need to demonstrate additional “meaningful engagement” outreach efforts, when EPA has deemed the

⁶ 40 CFR Part 60, subpart B; and 40 CFR Part 60, subpart Ba

Proposed Rule to have inconsequential effects on communities that are the focus of the executive order.

The supplemental proposal removes the 3-ton per year threshold triggering requirements for “wellhead only sites,” and many more communities and stakeholders would need to be included in state outreach than the original proposal, which already included a vast number of stakeholders. The varying degrees of interest level, knowledge, and economic dependence on regulated sources that spans this diverse group of stakeholders will require state regulators to engage in intense targeted framing and explication of highly technical information. It will not be a one-size outreach effort, and to produce fact sheets, presentations, and hold meetings on this scale will require months for states to prepare. Several more months will be necessary to roll out to the public in “meaningful engagement.” The process is not intended to be a one-way street when engaging with stakeholders, and collaboration requires a public information *and* education period, a period of time to allow for presentation of stakeholder concerns, a period of time for regulator consideration *and* response to those concerns, and in many cases, further explanation and rationale developed and presented to support regulator decisions where stakeholders are not satisfied with initial responses. A state could expect this process to stretch out from eight to twelve months prior to beginning administrative procedures for rulemaking and SIP proposal, which themselves take an additional twelve to eighteen months to complete.

The rushed timeline EPA proposed leaves DEQ with the following choices:

- a) forego submitting a plan and decide whether to take delegation of a federal plan;
- b) submit a plan based on EPA’s BSER without the ability to consider remaining useful life and other factors as allowed under the Clean Air Act or provide adequate meaningful engagement; or
- c) miss the deadline for submittal by performing its due diligence in engagement and technical analysis prior to adopting a plan.

The first and second options create an illusionary collaborative environment, in which interested parties who present their concerns to state regulators will feel disenfranchised, as there will be little room for change once outreach begins. This has a real possibility of degrading the community-regulator relationship. EPA’s efforts to include all relevant stakeholders in information sharing and decision-making may actually cause more harm than good in this instance. The third option results in wasted effort as missing the deadline would trigger a requirement for EPA to develop and implement a federal plan.

VIII. Conclusion

EPA’s NSPS oil and gas supplemental proposal presents more than 100 technical matters for consideration and comment, and it makes several major changes to the original proposal. One of these is a newly conceived “super-emitter response program” that EPA intends to develop to

address large emission events and includes third-party monitoring and reporting of events, which presents unique issues for states to consider on top of the technical aspects of the proposal. EPA also proposes to remove the 3-ton per year “trigger” threshold that was included in the original proposal, which would make even small sources subject to costly monitoring and reporting requirements. This change alone would result in an increase in regulated sources by an order of magnitude, in a universe of sources that is already vast.

Due to the complexity of this proposal, the unintended consequences for small businesses and families, the conflict of laws created by this proposal, and the significant changes to the original proposal presented by EPA in the supplemental proposal, DEQ urges EPA to withdraw the Proposed Rule. If EPA moves forward, DEQ requests that EPA reconsider the problematic and onerous requirements for states and oil and gas operators included in the Proposed Rule, and DEQ further requests a 90-day extension to the current public comment period to give states ample time to evaluate the evidence at hand and provide meaningful feedback to EPA.