



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R06-OAR-2022-0605; FRL-11128-01-R6]

Air Approval Plan; Arkansas; Excess Emissions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Pursuant to the Federal Clean Air Act (CAA or Act), the Environmental Protection Agency (EPA) is proposing to approve two revisions to the Arkansas State Implementation Plan (SIP) submitted by the Governor of the State of Arkansas on May 12, 2022, and November 1, 2022. The revisions were submitted in response to a finding of substantial inadequacy and SIP call published by EPA on June 12, 2015, which included certain provisions in the Arkansas SIP related to excess emissions during startup, shutdown, and malfunction (SSM) events. The submittals request the removal of the provisions identified in the 2015 SIP call from the Arkansas SIP. EPA is proposing to determine that the removal of these substantially inadequate provisions from the SIP will correct the deficiencies in the Arkansas SIP identified in the June 12, 2015 SIP call.

DATES: Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: Submit your comments, identified by Docket No. EPA-R06-OAR-2022-0605 at <https://www.regulations.gov> or via email to Shar.Alan@epa.gov. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied

by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system). For additional submission methods, please contact Mr. Alan Shar, (214) 665-6691, *Shar.Alan@epa.gov*. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit

<https://www.epa.gov/dockets/commenting-epa-dockets>.

Docket: The index to the docket for this action is available electronically at *www.regulations.gov* and in hard copy at the EPA Region 6 Office, 1201 Elm Street, Suite 500, Dallas, Texas 75270. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available at either location (e.g., CBI).

FOR FURTHER INFORMATION CONTACT: Mr. Alan Shar, Regional Haze and SO₂ Section, EPA Region 6 Office, 1201 Elm Street, Suite 500, Dallas, Texas 75270, (214) 665-6691, *Shar.Alan@epa.gov*. We encourage the public to submit comments via *<https://www.regulations.gov>*. Please call or email the contact listed above if you need alternative access to material indexed but not provided in the docket.

SUPPLEMENTARY INFORMATION: Throughout this document “we,” “us,” and “our” means the EPA.

Table of Contents

- I. Background
 - A. EPA’s 2015 SSM SIP Action
 - B. Arkansas Regulation 19.1004(H) Malfunctions, Breakdowns, Upsets and Regulation 19.602 Emergency Conditions

- II. Analysis of SIP Submission
- III. Proposed Action
- IV. Environmental Justice Considerations
- V. Incorporation by Reference
- VI. Statutory and Executive Order Reviews

I. Background

A. EPA's 2015 SSM SIP Action

On February 22, 2013, EPA issued a *Federal Register* proposed rulemaking action outlining EPA's policy at the time with respect to SIP provisions related to periods of SSM. EPA analyzed specific SSM SIP provisions and explained how each one either did or did not comply with the CAA with regard to excess emission events.¹ For each SIP provision that EPA determined to be inconsistent with the CAA, EPA proposed to find that the existing SIP provision was substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call under CAA section 110(k)(5). On September 17, 2014, EPA issued a document supplementing and revising what the Agency had previously proposed on February 22, 2013, in light of a D.C. Circuit decision that determined the CAA precludes authority of EPA to create affirmative defense provisions applicable to private civil suits. EPA outlined its updated policy that affirmative defense SIP provisions are not consistent with CAA requirements. EPA proposed in the supplemental proposal document to apply its revised interpretation of the CAA to specific affirmative defense SIP provisions and proposed SIP calls for those provisions where appropriate (79 FR 55920, September 17, 2014).

¹ State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction, 78 FR 12460 (Feb. 22, 2013).

On June 12, 2015, pursuant to CAA section 110(k)(5), EPA finalized “State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA’s SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction,” (80 FR 33839, June 12, 2015), hereafter referred to as the “2015 SSM SIP Action.” The 2015 SSM SIP Action clarified, restated, and updated EPA’s interpretation that SSM exemption and affirmative defense SIP provisions are inconsistent with CAA requirements. The 2015 SSM SIP Action found that certain SIP provisions in 36 states, including Arkansas, were substantially inadequate to meet CAA requirements and issued a SIP call to those states to submit SIP revisions to address the inadequacies. EPA established an 18-month deadline by which the affected states had to submit such SIP revisions. States were required to submit corrective revisions to their SIPs in response to the SIP calls by November 22, 2016. The detailed rationale for issuing the SIP call to Arkansas can be found in the 2015 SSM SIP Action and preceding proposed actions.

EPA issued a Memorandum in October 2020 (2020 Memorandum), which stated that certain provisions governing SSM periods in SIPs could be viewed as consistent with CAA requirements.² Importantly, the 2020 Memorandum stated that it “did not alter in any way the determinations made in the 2015 SSM SIP Action that identified specific state SIP provisions that were substantially inadequate to meet the requirements of the Act.” Accordingly, the 2020 Memorandum had no direct impact on the SIP call issued to Arkansas in 2015. The 2020 Memorandum did, however, indicate EPA’s intent at the time to review SIP calls that were issued in the 2015 SSM SIP Action to determine

² October 9, 2020, memorandum “Inclusion of Provisions Governing Periods of Startup, Shutdown, and Malfunctions in State Implementation Plans,” from Andrew R. Wheeler, Administrator.

whether EPA should maintain, modify, or withdraw particular SIP calls through future agency actions.

On September 30, 2021, EPA's Deputy Administrator withdrew the 2020 Memorandum and announced EPA's return to the policy articulated in the 2015 SSM SIP Action (2021 Memorandum).³ As articulated in the 2021 Memorandum, SIP provisions that contain exemptions or affirmative defense provisions are not consistent with CAA requirements and, therefore, generally are not approvable if contained in a SIP submission. This policy approach is intended to ensure that all populations, including overburdened communities, impacted by air pollution receive the full health and environmental protections provided by the CAA.⁴ The 2021 Memorandum also retracted the prior statement from the 2020 Memorandum of EPA's plans to review and potentially modify or withdraw particular SIP calls. That statement no longer reflects EPA's intent. EPA intends to implement the principles laid out in the 2015 SSM SIP Action as the agency takes action on SIP submissions, including the two Arkansas SIP submittals provided by the State in response to the 2015 SIP call.

B. Arkansas Regulation 19.1004(H) Malfunctions, Breakdowns, Upsets and Regulation 19.602 Emergency Conditions

Rules of the Arkansas Plan of Implementation for Air Pollution Control (Rule 19), Regulation 19.1004(H) Malfunctions, Breakdowns, Upsets (Reg. 19.1004(H)) and Regulation 19.602 Emergency Conditions (Reg. 19.602) were originally approved by EPA on October 16, 2000 (65 FR 61103), and became federally effective on November 15, 2000. The EPA found that Reg. 19.1004(H) provided an automatic exemption for excess emissions of Volatile Organic Compounds (VOC) for sources located in Pulaski

³ September 30, 2021, memorandum "Withdrawal of the October 9, 2020, Memorandum Addressing Startup, Shutdown, and Malfunctions in State Implementation Plans and Implementation of the Prior Policy," from Janet McCabe, Deputy Administrator.

⁴ Section J, June 12, 2015 (80 FR 33985).

County that occur due to malfunctions and that Reg. 19.602 provided an affirmative defense for excess emissions that occur during emergency conditions. As a part of EPA's 2015 SSM SIP Action, EPA made a finding that these provisions (Regs. 19.1004(H) and 19.602) in the Arkansas SIP are substantially inadequate as they provide for an automatic exemption and an affirmative defense, respectively, from otherwise applicable SIP emissions limits, and thus issued a SIP call with respect to these two provisions. On January 12, 2022, EPA issued Findings of Failure to Submit (FFS) to 12 air agencies, including the State of Arkansas, that had not submitted SIPs responding to the 2015 SSM SIP call by the November 22, 2016, deadline per the requirements of section 110(k)(5) of the Act.⁵

II. Analysis of SIP Submission

Subsequent to EPA's January 12, 2022 FFS, Arkansas submitted two SIP revisions on May 12, 2022, and November 1, 2022, requesting the removal of both SIP-called provisions - Reg. 19.1004(H) and Reg. 19.602 of Rule 19, respectively - from the EPA-approved Arkansas SIP.^{6,7} We note that Arkansas has repealed and removed Reg. 19.1004(H) under State law; however, Reg. 19.602 remains as a state-only provision applicable only under the Arkansas law. The Reg. 19.602 provisions do not apply to actions brought by EPA or citizens to enforce excess emission violations.⁸

Removal of Reg. 19.1004(H) from the EPA-approved Arkansas SIP will eliminate the impermissible automatic exemption from applicable SIP emissions limits for VOC

⁵ Findings of Failure To Submit State Implementation Plan Revisions in Response to the 2015 Findings of Substantial Inadequacy and SIP Calls To Amend Provisions Applying To Excess Emissions During Periods of Startup, Shutdown, and Malfunction, 87 FR 1680 (Jan. 12, 2022), available at www.regulations.gov, Docket ID No. EPA-HQ-OAR-2021-0863.

⁶ The May 12, 2022 submittal included other revisions to Rule 19 which will be handled in a separate SIP rulemaking action(s); the only aspect of the May 12, 2022 submittal that is being addressed by this proposed rulemaking now is the removal of Reg. 1004(H) from the Arkansas SIP. The November 1, 2022 submittal requests EPA approval of the removal of Reg. 19.602 from the Arkansas SIP, and this proposed rulemaking is taking action on that request.

⁷ These SIP submittals were found to be administratively complete on May 1, 2023. See "AR SSM Completeness Letter" available in the docket for this rulemaking.

⁸ CAA sections 113 and 304; see 80 FR 33958 (June 12, 2015).

sources located in Pulaski County. Also, removal of Reg. 19.602 from the EPA-approved Arkansas SIP will eliminate an owner or operator's ability to assert an affirmative defense to violations of applicable SIP emissions limits resulting from excess emissions during SSM events.

These revisions (removal of Reg. 19.1004(H) and Reg. 19.602) will not otherwise affect the adequacy of the remaining portions of the Arkansas SIP. EPA concurs with this State action and is proposing to approve removing these substantially inadequate SIP-called provisions (Reg. 19.1004(H) and Reg. 19.602) from the EPA-approved Arkansas SIP.

The Arkansas submittal includes an analysis to demonstrate compliance with Section 110(l) of the Act.⁹ Removal of Reg. 19.602 from the Arkansas SIP is not expected to lead to any emissions increase and, therefore, would not interfere with the State's ability to attain or maintain state or federal standards or reasonable further progress. This approach is consistent with the analogy presented in EPA's Example 1 at 80 FR 33975 of the 2015 SSM SIP Action. Likewise, removal of Reg. 19.1004(H) from the Arkansas SIP is not expected to lead to any emissions increase and, therefore, would not interfere with the State's ability to attain or maintain state or federal standards or reasonable further progress. Consequently, EPA is proposing to approve the removal of Reg. 19.602 and Reg. 19.1004(H) from the EPA-approved Arkansas SIP.

III. Proposed Action

EPA is proposing to approve revisions to the Arkansas SIP submitted by the State of Arkansas on May 12, 2022, and November 1, 2022, following EPA's FFS concerning excess emissions during periods of SSM. Specifically, we are proposing to approve the removal of Reg. 19.1004(H) Malfunctions, Breakdowns, Upsets and Reg. 19.602 Emergency Conditions of Rule 19 of the Arkansas SIP. We are proposing to approve

⁹ See pdf pages 36-37 of the November 1, 2022 submittal.

these revisions in accordance with section 110 of the Act. EPA is further proposing to determine that such SIP revisions correct the substantial inadequacies in the Arkansas SIP as identified in the 2015 SSM SIP Action and in response to EPA's 2022 FFS Action. EPA is not reopening the 2015 SSM SIP Action and is only taking comment on whether this proposed SIP revision is consistent with CAA requirements and whether it addresses the substantial inadequacy in the provisions of the Arkansas SIP identified in the 2015 SSM SIP Action.

IV. Environmental Justice Considerations

Although not a basis for this proposed action, EPA is providing additional information, for informational purposes only, regarding this proposed action and potentially impacted populations. EPA reviewed demographic data, which provides an assessment of individual demographic groups of the populations living within the affected Pulaski County area, as well as the State of Arkansas as a whole.¹⁰ EPA then compared this data to the national average for each of the demographic groups. The results of the demographic analysis indicate that, for populations within Arkansas, the percent people of color (persons who reported their race as a category other than white alone (not Hispanic or Latino)) is above the national average for Pulaski County; and below the national average for the State of Arkansas as a whole (49.3 and 29.7 percent, respectively versus 41.7 percent). The percent of the population that is Black or African American alone is significantly above the national average for Pulaski County and above the national average for the State as a whole (38.3 and 15.7 percent, respectively versus 13.6 percent), and the percent of the population that is American Indian/Alaska Native is below the national average for both Pulaski County and the State as a whole (0.5 and 1.1 percent, respectively versus 1.3 percent). The percent of people living below the poverty

¹⁰ <https://www.census.gov/quickfacts/fact/table/pulaskicountyarkansas,AR,US/PST045222>.

level in Pulaski County and the State as a whole is higher than the national average (17.6 and 16.3 percent, respectively versus 11.6 percent). The percent of people over 25 with a high school diploma is above the national average for Pulaski County; and is similar to the national average for the State of Arkansas as a whole (91.5 percent and 87.7 percent, respectively versus 88.9 percent), while the percent with a Bachelor's degree or higher is above the national average for Pulaski County; and is lower than the national average for the State of Arkansas as a whole (36.3 percent and 24.3 percent, respectively versus 33.7 percent).

Communities in close proximity to and/or downwind of industrial sources may be subject to disproportionate environmental impacts of excess emissions. Short- and/or long-term exposure to air pollution has been associated with a wide range of human health effects including increased respiratory symptoms, hospitalization for heart or lung diseases, and even premature death. Excess emissions during SSM activities exceed applicable emission limitations and can be considerably higher than emissions under normal steady-state operations. As to all population groups within the State of Arkansas, as explained below, we believe that this proposed action will be beneficial and may reduce impacts. As discussed earlier in this document, this rulemaking, if finalized as proposed, would result in the removal of identified provisions in the Arkansas SIP that provide sources emitting pollutants in excess of otherwise allowable amounts to be automatically exempt or be allowed to assert an affirmative defense for violations involving excess emissions during SSM activities. Federal removal of such impermissible automatic exemptions or impermissible affirmative defense provisions from the SIP is necessary to preserve the enforcement structure of the CAA, to preserve the jurisdiction of courts to adjudicate questions of liability and remedies in judicial enforcement actions and to preserve the potential for enforcement by the EPA and other parties under the citizen suit provision as an effective deterrent to violations. If finalized as proposed, this

action is intended to ensure that overburdened communities and affected populations across the State and downwind areas receive the full human health and environmental protection provided by the CAA. There is nothing in the record which indicates that this proposed action, if finalized, would have disproportionately high or adverse human health or environmental effects on communities with environmental justice concerns.

V. Incorporation by Reference

In this action, we are proposing to include in a final rule regulatory text that includes incorporation by reference. In accordance with the requirements of 1 CFR 51.5, the EPA is proposing to remove the incorporation by reference of Reg. 19.1004(H) Malfunctions, Breakdowns, Upsets and Reg. 19.602 Emergency Conditions of Rule 19 of the Arkansas SIP, as described in the Proposed Action section above. The EPA has made, and will continue to make, these documents generally available electronically through www.regulations.gov and in hard copy at the EPA Region 6 office.

VI. Statutory and Executive Order Reviews

Under the Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Act. Accordingly, this action merely proposes to approve state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993), 13563 (76 FR 3821, January 21, 2011), and 14094 (88 FR 21879, April 11, 2023);

- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Act; and
- Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, Feb. 16, 1994) directs Federal agencies to identify and address “disproportionately high and adverse human health or environmental effects” of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. EPA defines environmental justice (EJ) as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.” EPA further defines the term fair treatment to mean that “no group of people should bear a disproportionate burden of environmental harms and risks, including those

resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies.” The air agency did not evaluate environmental justice considerations as part of its SIP submittal; the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. The EPA performed an environmental justice analysis, as is described above in the section titled, “Environmental Justice Considerations.” The analysis was done for the purpose of providing additional context and information about this rulemaking to the public, not as a basis of the action. Due to the nature of the action being taken here, this action is expected to have a neutral to positive impact on the air quality of the affected area by removal of an automatic exemption provision and an affirmative defense provision from the Arkansas SIP. In addition, there is no information in the record upon which this decision is based inconsistent with the stated goal of Executive Order (E.O.) 12898 of achieving environmental justice for people of color, low-income populations, and Indigenous peoples.

This proposed approval of a revision to the Arkansas SIP removing provisions providing an exemption and an affirmative defense to excess emission violations has no tribal implications as specified in E.O. 13175 (65 FR 67249, November 9, 2000). This action will neither impose substantial direct compliance costs on federally recognized tribal governments, nor preempt tribal law. This action will not impose substantial direct compliance costs on federally recognized tribal governments because no actions will be required of tribal governments. This action will also not preempt tribal law as it does not have applicable or related tribal laws.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Particulate matter, Sulfur dioxide, Reporting and recordkeeping requirements, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: July 13, 2023.

Earthea Nance,

Regional Administrator, Region 6.

[FR Doc. 2023-15344 Filed: 7/20/2023 8:45 am; Publication Date: 7/21/2023]