# Arkansas State Implementation Plan Revisions/Clean Air Act: U.S. Environmental Protection Agency Final Rule Addressing Startup, Shutdown, and Malfunction Provisions

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The United States Environmental Protection Agency ("EPA") published an October 23rd Federal Register Notice containing a final rule approving two revisions to the Clean Air Act Arkansas State Implementation Plan ("SIP"). See 88 Fed. Reg. 72686.

The revisions were submitted by Arkansas in response to a finding of substantial inadequacy and SIP call published by EPA in 2015 that included Arkansas (and a number of other states)SIP provisions related to excess emissions during startup, shutdown, and malfunction ("SSM") events.

Pursuant to Section 110 of the Clean Air Act the states are primarily responsible for ensuring attainment and maintenance of National Ambient Air Quality Standards ("NAAQS") once the EPA has established them. Each state is therefore required to formulate, subject to EPA approval, an implementation plan (i.e., SIP) designed to achieve each NAAQS.

States are given broad discretion in formulating a SIP. Nevertheless, the SIP must contain the measures and actions the state proposes to attain each NAAQS. These measures or actions must be enforceable through state regulations and typically include emission limits applicable to certain types of stationary sources.

The states are generally free to make their own choices as to how they will attain the NAAQS through their SIPs. However, the SIP (including revisions) must be reviewed and approved by EPA to determine whether the criteria set forth in Section 110 of the Clean Air Act are met. Such review includes revisions to the SIP.

The role of the SSM exemptions and their relationship with SIPs has been a focus for EPA, the regulated community, and environmental organizations for many years.

SSM refers to rules or provisions in SIPs that address the status of excess emissions during periods other than "normal" operation. The rationale for a potential exemption, or otherwise treating differently excess emissions during SSM, is a concern that in some instances the prescribed emission control strategies would not work. In other words, the pollutants emitted during SSM would be unrepresentative of the normal process. To invoke an SSM exemption or affirmative defense, the exceedance would generally have to be deemed unavoidable and certain procedural/substantive conditions fulfilled.

EPA began evaluating SSM provisions in various state SIPS a number of years ago for consistency with the agency's interpretation of the Clean Air Act. The evaluation began in response to a request by the Sierra Club.

EPA subsequently issued a finding that certain SSM SIP provisions in a number of states (including Arkansas) were substantially inadequate to meet Clean Air Act requirements. As a result, EPA issued a SIP call for these states. It established the due date for states subject to the SIP call to submit what it deemed corrective SIP revisions.

Arkansas submitted revisions in response to the SIP call on May 12 and November 1 of 2022. Such submittals requested removal of the provisions identified in the 2015 SIP call from the Arkansas SIP. On July 21st EPA proposed to determine that the removal of these provisions from the SIP would correct the deficiencies in the Arkansas SIP identified in the 2015 SIP call.

The Arkansas SIP provisions removed are referenced as:

- Reg. 19.1004(H)
- Reg. 19.602

EPA noted in the preamble to the proposed rule 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.

A copy of the Federal Register Notice can be downloaded here.