



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

Startup, Shutdown, and Malfunction/Clean Air Act: U.S. Environmental Protection Agency Federal Register Notice Addressing Arkansas State Implementation Plan

01/18/2022

The United States Environmental Protection Agency (“EPA”) undertook final action published in the January 12th Federal Register finding that 12 states and local air pollution control agencies failed to submit Clean Air Act State Implementation Plan (“SIP”) revisions in a timely manner. See 87 Fed. Reg. 1680.

The revisions allegedly not addressed relate to EPA’s 2015 findings of substantial adequacy and “SIP Calls” for provisions applying to excess emissions during periods of startup, shutdown, and malfunction (“SSM”).

Arkansas is referenced along with the following other 11 states and local agencies:

- Alabama
- North Carolina – Forsyth County
- California – San Joaquin Valley APCD
- District of Columbia
- Illinois
- Ohio
- Rhode Island
- South Dakota
- Tennessee – Shelby County
- Washington – EFSEC
- Washington – SWCAA

The final action taken by EPA triggers Clean Air Act deadlines for the federal agency to impose certain sanctions if a state does not submit the requested SIP revision.

The Clean Air Act provides EPA the authority to promulgate a federal implementation plan if the federal agency does not approve a state’s submission as a SIP revision.

Section 110 of the Clean Air Act requires states to submit SIPs to ensure that each state attains and maintains compliance with each of the National Ambient Air Quality Standards promulgated by EPA. The SIPs must include “enforceable emission limitations” sufficient to meet the Clean Air Act’s requirements. The plans also must prohibit the emission of air pollution that contributes to nonattainment or

interference with the maintenance of the National Ambient Air Quality Standards in other states. In addition, states must have adequate authority to carry out their SIPs.

SSM might generally be described as follows:

- Startup constitutes setting in operation an affected source or portion of an affected source
- Shutdown generally connotes the cessation of operation of an affected source or portion of an affected source
- Malfunction is generally described as any sudden, infrequent, and not reasonably preventable failure of air pollution control and monitoring equipment, process equipment, or process to operate in a normal or usual manner which causes or has the potential to cause the emission limitations in an applicable standard to be exceeded (i.e., it does not constitute scheduled maintenance)

The role of SSM exemptions and their relationship with SIPs has been a focus of EPA, states, the regulated community, and environmental organizations for many years. Various existing state air rules had historically allowed some excess emissions during SSM events if certain procedural requirements were met.

The O’Bama Administration had issued a “SIP Call” in 2015 in response to a Sierra Club petition pertaining to certain SSM provisions in a number of states’ SIPs. See 80 Fed. Reg. 33840. The Sierra Club had argued that certain provisions in these SIPs were inconsistent with EPA’s interpretation of the Clean Air Act requirement for excess emissions during periods of SSM. As a result, various states (including Arkansas) were required to remove relevant SSM provisions from their SIPs and delete related affirmative defenses.

The Arkansas Department of Energy & Environment – Division of Environmental Quality (“DEQ”) initiated a rulemaking in 2016 to address the EPA SIP Call. However, this rulemaking was withdrawn in 2018 as the EPA policy shifted under the Trump Administration.

EPA under the Biden Administration has once again adopted the previously referenced 2015 SSM policy. The federal agency specifically withdrew a guidance memo issued by former Administrator Wheeler that had reversed the 2015 SSM SIP Call. As a result, the previously referenced 12 states are required to revise their SIPs as referenced in the final action EPA specified in the January 12th Federal Register Notice.

I understand that DEQ is preparing a possible revision to the Arkansas SIP that would address the action requested by EPA.

A copy of the Federal Register Notice can be downloaded [here](#).