

Title 15. Natural Resources and Economic Development

Chapter XIII. Arkansas Pollution Control and Ecology Commission,

Department of Energy and Environment

Subchapter A. Generally

Part 234. Rules for the Implementation and Operation of the Arkansas State Set-Aside Program Under the Emergency Petroleum Set-Aside Act of 1983

(as amended)

Subpart 1. Generally

15 CAR § 234-101. Policy and purpose.

(a) The following rules of the Arkansas Energy Office, a division of the Division of Environmental Quality, are promulgated pursuant to Arkansas Code § 15-72-804 (a)(1) – (2) of the Arkansas Emergency Petroleum Set-Aside Act, Arkansas Code § 15-72-801 et seq., and the Arkansas Administrative Procedure Act, Arkansas Code § 25-15-201 et seq., as amended.

(b) It is the purpose of this part, and it is hereby declared to be the policy of the Arkansas Energy Office to:

- (1) Provide for the orderly operation of the state-authorized program;
- (2) Implement said set-aside program whenever the Governor, in his or her discretion, finds that such a program is necessary to manage a shortage of petroleum products which threatens the continuation of emergency services and essential industrial or agricultural activities;
- (3) Prevent duplication of state and federal regulatory requirements;
- (4) Implement only that portion of the set-aside program (with regard to the number of petroleum products covered) as is deemed necessary by the Governor to manage the existing shortage; and
- (5) Terminate the set-aside program as soon as the Governor finds that it is no longer necessary to manage a shortage.

Authority. Arkansas Code § 15-72-804.

15 CAR § 234-102. Definitions.

When used in this part:

(1) "Act" means the Emergency Petroleum Set-Aside Act, Arkansas Code § 15-72-801 et seq.;

(2) "Agricultural activities" means commercial farming, dairy, poultry, livestock, horticulture, forestry, and aquaculture activities and services directly related to the planting, cultivation, harvesting, milking, processing and distribution of:

(A) Fiber;

(B) Timber; and

(C) Food intended for human consumption and animal feed;

(3) "Assignment" means an action taken by the Arkansas Energy Office, designating that a prime supplier or broker of petroleum products supply them to an authorized consumer, dealer, wholesale purchaser-consumer, or wholesale purchaser-reseller to facilitate relief of emergency or hardship needs pursuant to Arkansas Code § 15-72-804;

(4)(A) "Blended fuels" are mixtures composed primarily of gasoline or diesel fuel that may have additional alternative fuels blended into the petroleum products in varying percentages.

(B) For diesel fuel, B2, B5, B20, or similar conventional/biodiesel blends shall be considered to be diesel fuel.

(C) For gasoline, E10 or similar gasoline/ethanol blends shall be considered to be gasoline;

(5) "Broker" means a marketer of petroleum products who performs none of the basic marketing functions but normally brings buyer and seller together and receives a fee or commission for his or her services;

(6) "Bulk user" means any firm that is an ultimate consumer which, as a part of its normal business practices, purchases or obtains a product subject to the state set-aside from a supplier and receives delivery of that product into a storage tank substantially under the control of that firm at a fixed location;

(7) "Consumer" or "end user" means any individual, trustee, agency, partnership association, corporation, company, municipality, political subdivision, or other legal entity which purchases petroleum products for ultimate consumption in Arkansas;

(8) "Dealer" or "retailer" means and includes any person or firm engaged in the business of selling petroleum products at retail;

(9) "Director" means the Director of the Arkansas Energy Office who serves under the consent of the Secretary of the Department of Energy and Environment;

(10) "Electronic transmission" means any process of communication that does not directly involve the physical transfer of paper and that is suitable for the retention, retrieval, and reproduction of information by the recipient;

(11) "Emergency" or "hardship" means any situation which, in the judgment of the Arkansas Energy Office, presents a threat to the economic, social, or personal welfare of the areas, regions, or individual users for which an assignment from the state set-aside is requested;

(12) "Emergency services" means vital services, including but not limited to:

- (A) Law enforcement;
- (B) Firefighting;
- (C) Medical care; and
- (D) Sanitation, etc.;

(13) "Firm" means any association, company, corporation, estate, individual, joint venture, partnership, sole proprietorship, or any entity however organized, including charitable or educational institutions and the federal government, including federal corporations, departments, and agencies, and state and local governments;

(14) "Industrial activities" means all industrial activities which create or change materials into another form as well as commercial activities involving the sale of goods and services;

(15) "Jobber of petroleum products" means any firm or any part or subsidiary of any firm, other than the United States Department of Defense, which supplies, sells, transfers, or otherwise furnishes any allocated product to wholesale purchasers or end

users;

(16) "Petroleum products" means:

- (A) Propane;
- (B) Motor gasoline;
- (C) Blended fuels;
- (D) Kerosene;
- (E) #2 fuel oil;
- (F) Diesel fuel;
- (G) Kerosene-base jet fuel;
- (H) Naphta-base jet fuel; and
- (I) Aviation gasoline;

(17) "Petroleum wholesaler" means any firm or any part or subsidiary of any firm, other than the United States Department of Defense, which supplies, sells, transfers, or otherwise furnishes any allocated product to wholesale purchasers or end users;

(18)(A) "Prime supplier" means the supplier which makes the first sale of any petroleum product subject to the state set-aside into the state distribution system for consumption within the state.

(B) Notwithstanding the above, "prime supplier" shall not include any firm, or any part or subsidiary of any firm, which supplies, sells, transfers, or otherwise furnishes any allocated product exclusively to utilities for generation of electric energy;

(19) "Purchaser" means a wholesale purchaser or consumer, or both;

(20) "Reference month" means the calendar month and year to which the reported information on actual sales volume relates;

(21) "Set-aside" means, with respect to a particular prime supplier, the amount of petroleum product which is made available from the total supply of a prime supplier, pursuant to the provisions of Arkansas Code § 15-72-804, for utilization by the Arkansas Energy Office to resolve emergencies and hardships due to shortages or other dislocations in petroleum distribution systems;

(22)(A) "Supplier" means any firm or any part or subsidiary of any firm other

than the United States Department of Defense, which supplies, sells, transfers, or otherwise furnishes any allocated product to wholesale purchasers or end users, including but not limited to refiners, importers, resellers, brokers, jobbers, and retailers.

(B) Notwithstanding the above, "supplier" shall not include any firm, or any part or subsidiary of any firm, which supplies, sells, transfers, or otherwise furnishes any allocated product exclusively to utilities for generation of electric energy;

(23)(A) "Undue economic burden" means, as used in Arkansas Code § 15-72-804(d)(2)(B), any assignment which, in the judgment of the Arkansas Energy Office, creates an extraordinary and financially prohibitive burden on a prime supplier or broker.

(B) Such judgments by Arkansas Energy Office personnel shall take into account written evidence of such a burden furnished by the prime supplier or broker involved;

(24) "Wholesale purchaser" means a wholesale purchaser-reseller or wholesale purchaser-consumer, or both;

(25) "Wholesale purchaser-consumer" means any firm that is an ultimate consumer which, as a part of its normal business practices, purchases or obtains a product subject to the state set-aside from a supplier and receives delivery of that product into a storage tank substantially under the control of that firm at a fixed location; and

(26) "Wholesale purchaser-reseller" means any firm, including dealers, which purchases, receives through transfers, or otherwise obtains, as by consignment, a product subject to the state set-aside and resells or otherwise transfers it to other purchasers without substantially changing its form.

Authority. Arkansas Code § 15-72-804.

Codification Notes. This section as promulgated prior to codification into the Code of Arkansas Rules contained a definition of "executive director" that provided as follows:

""Executive Director" means the Executive Director of the Arkansas Economic Development Commission."

Pursuant to Acts 2017, No. 271, and Acts 2019, No. 910, the duties of the Executive Director of the Arkansas Economic Commission as originally set out in this rule are now performed by personnel of the Department of Energy and Environment.

15 CAR § 234-103. Establishment of state set-aside system.

(a) **Percentage of products set aside.** The monthly set-aside percentages applicable to prime suppliers and brokers for petroleum products subject to the set-aside program shall be as follows:

- (1) Motor gasoline, five percent (5%);
- (2) Diesel fuel, four percent (4%);
- (3) Kerosene, four percent (4%);
- (4) #2 fuel oil, four percent (4%);
- (5) Aviation gas, five percent (5%);
- (6) Jet fuel (kerosene base), five percent (5%);
- (7) Jet fuel (naphtha base), five percent (5%); and
- (8) Propane, three percent (3%).

(b) **Volume in set-aside system.** The set-aside volume available to the Arkansas Energy Office for any particular month when the program is in effect shall be calculated as the product of the monthly set-aside percentage multiplied by each prime supplier's or broker's reported delivery for the most recent reference month.

(c) **Notification of prime suppliers and brokers by Arkansas Energy Office.** The Director of the Arkansas Energy Office shall notify each prime supplier or broker of the adoption of this part and of the set-aside percentage applicable to each product by mailing them a copy thereof.

(d) **Designation of representative by prime suppliers and brokers.**

(1) Each prime supplier or broker subject to the state set-aside program shall designate a representative to act for and in behalf of the prime supplier or broker with

respect to the set-aside program.

(2) Each prime supplier or broker shall notify the office in writing of that designation within ten (10) business days of the date of this notification, of such designation.

(3) Change of the designated company representative shall be transmitted to the office by the prime supplier or broker within ten (10) business days of the effective date of the change.

(4) This communication may be by United States Postal Service or electronic transmission.

Authority. Arkansas Code § 15-72-804.

15 CAR § 234-104. Applications for assignments.

(a) **Who may apply.** A wholesale purchaser-consumer, dealer, or end user seeking an assignment from the state set-aside system to meet a qualifying hardship or emergency requirement, and a wholesale purchaser-reseller seeking an assignment to enable him or her to supply dealers, wholesale purchaser-consumers, and end users to meet qualifying hardship or emergency requirements, may apply for an assignment from the state set-aside program when the program is in effect.

(b) **What to file.**

(1)(A) Each applicant for an assignment from the state set-aside program must submit a completed and signed Application to State for Petroleum Product Hardship or Emergency Relief.

(B) This application may be submitted by United States Postal Service or electronic transmission.

(2) Each application submitted may request only one (1) type of petroleum product and shall apply only for the month specified.

(c) **Where to file.** Applications must be:

(1) Filed with the:

Arkansas Energy Office
5301 Northshore Drive
North Little Rock, Arkansas 72118; or

(2) Filed by electronic transmission.

Authority. Arkansas Code § 15-72-804.

15 CAR § 234-105. Procedures for assignments.

(a) Order and timing for processing of applications.

(1) Each application shall be dated and assigned a case number indicating the order in which it has been received and will be processed.

(2) The Arkansas Energy Office reserves the right to depart from the procedure described in subsection (a)(1) of this section when required by extraordinary circumstances.

(3)(A) As a general rule, all applications will be processed, and orders will be issued, as quickly as possible.

(B) In no event shall a decision on an order be delayed more than ten (10) business days from the date assigned to it unless:

(i) Additional information is required for any reason;
(ii) No product is available from the state set-aside system; or
(iii) The applicant is a dealer with an allocation from his or her regular supplier, in which case such decision may take longer to ensure that needs of priority users can be met.

(b) **Records.** Records shall be maintained in which the numbered applications, names of suppliers, brokers, distributors, and applicants, as well as the type and amount of petroleum products requested, will be stored.

(c) Evaluation.

(1) No assignment shall be made to applicants who can obtain sufficient amounts of petroleum products through normal supply channels but are unwilling to

pay the selling price.

(2) No assignment shall be made unless the justification and product end-use stated indicate, in the judgment of the office, that an emergency or hardship exists relating to the continuation of:

- (A) Emergency services;
- (B) Essential agricultural activities; or
- (C) Essential industrial activities, as defined herein.

(3) If at any time during a given month applications are expected to exceed remaining product in the set-aside system, applicants may be granted relief based upon a pro-rata share of the remaining product and in consideration of the following priority uses, without regard to order listed below:

- (A) Agricultural production including perishable agricultural commodity transport and distribution;
- (B) Aviation ground support vehicles and equipment;
- (C) Cargo, freight, and mail hauling by truck;
- (D) Communications companies;
- (E) Emergency medical services;
- (F) Energy production and energy suppliers;
- (G) Firefighting units;
- (H) Government critical maintenance activities or mission-essential United States Department of Defense requirements;
- (I) Healthcare facilities;
- (J) Law enforcement;
- (K) Marine shipping (commercial shipping on navigable state waterways);
- (L) Public and community and school transportation; and
- (M) Public utility services, including water and sanitation.

(d) **Investigations.** In evaluating applications for assignments from the set-aside system, the office may:

- (1) Initiate an investigation of any statement or justification made therein; and
- (2) Take into account any relevant information obtained from such

investigation in its decision-making process.

(e) **Amount of product assigned.** In evaluating the amount of a particular petroleum product to be assigned, the office may consider, among other things, the following:

- (1) Amount of a particular product available in the total set-aside system for the month;
- (2) Number of applications received to date for that particular supplier or broker;
- (3) Amount requested;
- (4) Historical demand;
- (5) Growth factors;
- (6) Daily consumption; and
- (7) Storage capacity.

(f) **Assignment.**

(1) Upon consideration of an application and other relevant information, the office shall issue an assignment granting or denying the applicant's requests.

(2) The assignment shall include the following:

- (A) A brief statement summarizing the action taken, including comments;
- (B) A statement indicating that it is effective for ten (10) business days from date of issuance;
- (C) A statement indicating the process by which a person aggrieved by the order may appeal it; and
- (D) A statement directing the prime supplier or broker to furnish the product assigned through the distributor, if identified, or the applicant named therein.

(g) **Notification.**

(1) The office shall serve a copy of an assignment authorizing an application upon the:

- (A) Applicant;
- (B) Prime supplier or broker; and
- (C) Distributor, if identified.

(2) The office shall notify applicants of decisions denying an application.

(3) The office may follow up the notification process described in subdivisions (g)(1) and (2) of this section with additional communications in order to expedite the delivery of product and to ensure that such delivery is made within the required ten-business-day period.

(h) **Supply lines.**

(1) To the maximum extent possible, historic supply lines will be honored.

(2)(A) If it becomes necessary for supply lines to be crossed in order to assist an otherwise qualified applicant, the office may require any supplier or broker having product in the state set-aside system to supply said applicant, provided that said applicant can satisfy the existing credit, insurance, or other reasonable requirements of the prime supplier or broker involved.

(B) This provision shall apply in extraordinary cases only.

(i) **Suppliers' responsibilities.**

(1) Suppliers shall provide the assigned amount of a product subject to the set-aside program to an applicant upon receipt of a duly authorized assignment from the office, unless the assignment creates an undue economic burden as defined in Arkansas Code § 15-72-804(d)(2)(B).

(2) A duly authorized assignment shall entitle the applicant to receive product from any reasonably convenient local wholesale purchaser-reseller of the prime supplier or broker from which the set-aside assignment has been made.

(3)(A) Wholesale purchaser-resellers of prime suppliers or brokers shall, as nonprime suppliers, honor such duly authorized assignment upon presentation, and shall not, without good cause, delay deliveries required by said authorized assignment.

(B) Such deliveries should be confirmed with the prime supplier or broker.

(4) Any nonprime supplier which provides an allocated product pursuant to an authorized assignment from the office shall in turn receive from its supplier or broker an equivalent volume of the allocated product which shall not be considered part of its allocation entitlement.

Authority. Arkansas Code § 15-72-804.

15 CAR § 234-106. Appeal.

(a) Purpose and scope.

(1) This section establishes the procedure for the filing of an administrative appeal of state set-aside orders issued by the Arkansas Energy Office.

(2) A person has not exhausted the administrative remedies until an appeal has been filed and an order granting or denying the appeal has been issued.

(3) If the Director of the Arkansas Energy Office is unable to conduct an administrative appeal, the authority for conducting said administrative appeal shall revert to the Director of the Division of Environmental Quality or his or her designee.

(b) Who may file.

(1) A wholesale purchaser-consumer, dealer, or end user seeking an assignment from the state set-aside system to meet a qualifying hardship or emergency requirement, and a wholesale purchaser-reseller seeking an assignment to enable him or her to supply dealers, wholesale purchaser-consumers, and end users to meet qualifying hardship or emergency requirements who is wholly denied or partially denied an assignment of the requested amount may file an administrative appeal.

(2)(A) Any person, company, organization, or agent of said company or organization acting with authority of said company or organization who has been aggrieved by a decision from the office who is filing an appeal under this section shall submit a signed, written document entitled "Appeal of Order" which shall be clearly labeled as such.

(B) An appeal can be granted on the grounds that the assignment was wholly denied or partially denied.

(C)(i) If the appellant wishes to claim confidential treatment for any information contained in the appeal, the appellant shall file together with the appeal a second copy of the document from which has been deleted the information for which such appellant wishes to claim confidential treatment.

(ii) The appellant shall indicate in the original document that it is

confidential or contains confidential information and shall file a statement specifying the justification for nondisclosure of such information.

(c) **Where to file.** Appeals from state set-aside orders shall be filed with:

Director
Arkansas Energy Office
5301 Northshore Drive
North Little Rock, Arkansas 72118

(d) **Notice.**

(1)(A) The appellant shall send, in such manner that it shall be received within five (5) business days after the filing of an appeal, a copy of the appeal and any subsequent amendments or other documents relating to the appeal, or a copy from which confidential information has been deleted in accordance with this section and 10 C.F.R. § 205.9(f), to each person who is reasonably ascertained by the appellant as a person who will be aggrieved by the action sought, including those who participated in the prior proceedings.

(B) The copy of the appeal shall be accompanied by a statement that the person may submit comments regarding the appeal to the director within five (5) business days from the time of receipt.

(2) The appeal shall include:

(A) Certification that the appellant has complied with the requirements of this section; and

(B) The names and addresses of each person to whom a copy of the appeal was sent.

(3) Notwithstanding the provision of subdivisions (d)(1) and (2) of this section, if an appellant determines that compliance with subdivisions (d)(1) and (2) of this section would be impracticable:

(A) The appellant shall:

(i) Comply with subdivisions (d)(1) and (2) of this section with regard

to those persons whom it is reasonable and possible to notify; and

(ii) Include with the appeal a description of the persons or classes of persons to whom notice was not sent; and

(B) The appellant may be required to provide additional or alternative notice if it is determined that the notice required by subdivisions (d)(1) and (2) of this section is not practicable.

(e) **Contents.**

(1) The appeal shall contain a concise statement of the grounds upon which it is brought and a description of the relief sought.

(2) A copy of the order that is the subject of the appeal shall be submitted with the appeal.

(f) **Evaluation of appeal.**

(1)(A) Before the appeal is reviewed, the director shall give notice to the appealing party the issues upon review.

(B) These will be the only issues that the director will grant a decision on.

(C) The director may give this notice by United States Postal Service or electronic transmission.

(2) **Processing.**

(A)(i) The director may initiate an investigation of any statement in an appeal and utilize in its evaluation any relevant facts obtained by such investigation.

(ii) The director may solicit and accept submissions relevant to any appeal provided that the appellant is afforded an opportunity to respond to all submissions.

(iii) In evaluating an appeal, the director may consider any other source of information.

(B)(i) If the director determines that there is insufficient information upon which to base a decision, and if, upon request, the necessary additional information is not submitted, the director may dismiss the appeal with leave to amend within a specified time.

(ii) If the failure to supply additional information is repeated or willful,

the director may dismiss the appeal with prejudice.

(iii) If the appellant fails to provide the notice required under this section without showing it was for good cause, the director may dismiss the appeal with prejudice.

(C)(i) A hearing will take place within five (5) business days of granting the appeal if the appealing party so requests.

(ii) There, the appealing party can state their argument orally and produce additional evidence.

(iii) All other parties in interest will have a chance to be present and give an oral argument.

(iv) Notice shall be given by the director to all persons originally notified under subsection (d) of this section.

(v) The director may give notice by United States Postal Service or electronic transmission.

(3) Criteria.

(A) An appeal may be summarily denied if it is:

(i) Not filed within ten (10) business days from receiving notice of a judgment from the Arkansas Energy Office, unless good cause is shown; or

(ii) Defective on its face for failure to state, and to present facts and legal arguments in support thereof, that the office's action was erroneous in fact or in law, or that it was arbitrary or capricious.

(B) The director may deny an appeal if the applicant does not establish that the:

(i) Appeal was filed by a person aggrieved by the office's action;

(ii) Office's action was erroneous in fact or in law; or

(iii) Office's action was arbitrary or capricious.

(C) The denial of an appeal shall be a final order of the office of which judicial review may be sought by the appellant.

(g) Decision and order.

(1) The possible outcomes of an appeal are:

- (A) Reverse the prior office decision and grant requested fuel assignment;
- (B) Modify the prior office decision; or
- (C) Affirm the prior office decision.

(2) Upon consideration of the appeal and other relevant information received or obtained during the proceeding, the director shall enter an appropriate order, which may include the modification of the order that is the subject of the appeal.

(3)(A) The order shall include a written statement setting forth the relevant facts and the legal basis of the order.

(B) The order shall state that it is a final order of the office from which the appellant may seek judicial review.

(h) **Timeliness.** When the director has received all substantive information deemed necessary to process any appeal filed under this section, the director shall:

- (1) Serve notice of that fact upon the appellant; and
- (2) Take action on the appeal within five (5) business days of serving such notice.

Authority. Arkansas Code § 15-72-804.

Codification Notes. The Executive Director of the Arkansas Economic Development Commission referenced in this section is now the Director of the Arkansas Economic Development Commission pursuant to Acts 2019, No. 910.

15 CAR § 234-107. Release of state set-aside.

At any time during the month, the Director of the Arkansas Energy Office may order the release of part or all of the prime supplier's or broker's set-aside volume through the prime supplier's or broker's normal distribution system in accordance with Arkansas Code § 15-72-804(f)(1) – (3).

Authority. Arkansas Code § 15-72-804.

15 CAR § 234-108. Termination of set-aside program.

(a) The set-aside program shall remain in effect for a period of one hundred twenty (120) days from the date the Governor directs the Arkansas Energy Office to implement it, and shall automatically terminate thereafter, unless the Governor:

(1) Directs that the program should be extended for an additional thirty (30) days because it is still necessary to manage a shortage of petroleum products; or

(2) Finds that the program is no longer necessary to manage a shortage of petroleum products and directs that the program be terminated prior to the expiration of said one-hundred-twenty-day period.

(b) The office shall be responsible, in consultation with other state agencies, representatives of the petroleum industry, appropriate legislative committees, and other interested parties, for providing the Governor with timely data on the status of the supply and distribution of petroleum products in this state in order to assist in the decision-making process described in subsection (a) of this section.

Authority. Arkansas Code § 15-72-804.

15 CAR § 234-109. Reporting forms.

(a)(1) In the event the Governor declares an energy emergency, upon notification, each prime supplier or broker of petroleum products shall file with the Director of the Arkansas Energy Office, no later than twenty (20) calendar days after the close of each reference month, a report providing the actual sales (the total volume sold and delivered into the state for consumption) for the reference month.

(2) This report may be filed by electronic transmission.

(b)(1) The Arkansas Energy Office may require that said data shall be provided by each prime supplier and broker on an ongoing monthly basis regardless of whether or not the set-aside program has been implemented, using form EIA 782C or equivalent.

(2) This information will be required for the duration of the declared energy emergency and may be filed by electronic transmission.

(c) Information furnished pursuant to this section shall be treated as confidential in

accordance with Arkansas Code § 15-72-805.

Authority. Arkansas Code § 15-72-804.

15 CAR § 234-110. Penalties.

Persons violating any provisions of the Emergency Petroleum Set-Aside Act, Arkansas Code § 15-72-801 et seq., are subject to criminal and civil penalties as provided herein.

Authority. Arkansas Code § 15-72-804.