

## OAC 252:100-9 Excess Emission Reporting Requirements

### Background and Support Document for Oklahoma's 2016 Subchapter 9 SSM-related SIP revisions, including Section 110(I) analysis

#### SIP Action – Withdrawal

The State of Oklahoma is withdrawing the portion of the Oklahoma Air Quality Control Implementation Plan contained in OKLA. ADMIN. CODE (OAC), Title 252, Chapter 100, Subchapter 9 (OAC 252:100-9 Excess Emission and Malfunction Reporting Requirements) of the Department of Environmental Quality's (DEQ's) permanent rules, as it existed when approved by the U.S. Environmental Protection Agency (EPA) effective January 3, 2000 ([64 Fed.Reg. 59629](#) (November 3, 1999)), and as listed in 40 CFR §52.1920(c). This action is in response to EPA's finding that certain provisions<sup>1</sup> of Oklahoma's State Implementation Plan (SIP) are substantially inadequate to meet Clean Air Act (CAA) requirements, and its corresponding issuance of a "SIP Call," i.e., requiring submittal of a SIP revision by November 22, 2016 as necessary to correct the identified deficient provisions. [80 Fed.Reg. 33840](#) (June 12, 2015). The withdrawal is also considered to include predecessor rules previously included in Oklahoma's SIP as referenced in 40 CFR § 52.1960(c)(30) & (c)(37)(i)(A) (*see* Attachment A).

#### Background/History

The current Subchapter 9, Excess Emission Reporting Requirements, derives from the original Oklahoma Air Pollution Control Regulation 11<sup>2</sup> Malfunction of Equipment, Reports Required – first effective February 14, 1972. The Subchapter 9 requirements have been updated several times to mirror EPA's Startup, Shutdown and Malfunction (SSM) policy and guidance in effect at the time. The most recent changes prior to this year became effective in 2009 following a significant, multi-year review process. DEQ submitted the 2009 version of the rule to EPA as a SIP Revision in July 2010, and at the same time withdrew a 2001 revision that had not been acted on<sup>3</sup>.

On September 6, 2013, EPA Region 6 proposed<sup>4</sup> three actions: approval of the applicability, definitions, and reporting requirements sections (Sections 9-1.1, 9-2, and 9-7, respectively); limited approval and limited disapproval of the purpose and affirmative defenses sections –

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<sup>1</sup> OAC 252:100-9-3(a) and OAC 252:100-9-3(b). Subsection 100-9-3(a) and (b) were amended and moved to 100-9-3.1 and 100-9-3.3, respectively, effective June 2001, and were then amended and renumbered to 100-9-7 and 100-9-8, respectively, effective July 2009.

<sup>2</sup> Issued under the Air Quality Service, Oklahoma State Department of Health (OSDH). Recodified in 1981 as Regulation 1.5 Reports Required: Excess Emissions during Startup, Shutdown, and Malfunction of Equipment; in 1991 OAC 310:200-9 Excess Emission and Malfunction Reporting Requirements; and in 1994 under DEQ as OAC 252:100-9 Excess Emission and Malfunction Reporting Requirements.

<sup>3</sup> Substantive changes were made effective June 1, 2001, and submitted to EPA as part of the "Big SIP" in February 2002. EPA did not take action on Subchapter 9 in their December 29, 2008, approval of the Big SIP. DEQ began a formal process in December 2006 to bring the excess emissions reporting requirements up to date with EPA's SSM policy in effect at the time. The process brought discussions and proposals before numerous Council Meetings and informal task force meetings. These changes were approved, and became effective on July 1, 2009. DEQ submitted the 2009 version of Subchapter 9 for EPA review as a SIP Revision in its present (pre-FY2017) form in July 2010, and withdrew the 2001 version that was included in Oklahoma's February 2002 SIP submittal.

<sup>4</sup> [78 Fed.Reg. 54816](#)

Sections 9-1 and 9-8; and a SIP Call to correct disapproved portions. One of EPA's primary objections was that the subchapter provides an affirmative defense – in their view, an automatic shield for startup and shutdown incidents that are planned events. Region 6's intent was that the proposed action, if finalized, would make Oklahoma's inclusion in the February 2013 proposed National SIP Call unnecessary. However, EPA's reading of an April 2014 D.C. Circuit Court of Appeals<sup>5</sup> decision broadened the objections and changed their view, and to avoid a separate, accelerated timeline, DEQ agreed to Region 6's request that Oklahoma withdraw its July 2010 Subchapter 9 SIP submittal.

### **2015/2016 Subchapter 9 Revision**

Following issuance of the June 12, 2015 SIP Call, and in consultation with EPA Region 6 staff, DEQ proposed and passed further changes to Subchapter 9 to address EPA's remaining concerns. These concerns have been addressed primarily as follows:

1. The revision retains the explicit statement in 252:100-9-8(a) that all periods of excess emissions are violations of the Act, rules, or applicable ODEQ-issued air permits, regardless of cause.
2. The revision replaces the existing term "affirmative defense" with "mitigating factors" for startup, shutdown, and malfunctions in 252:100-9-1 and 100-9-8, to express more explicitly that these mitigating factors could be taken into account if DEQ is considering administrative penalties for an instance of excess emissions, but would not preclude other appropriate actions.
3. The revision includes language in 252:100-9-8(c) acknowledging that, although facilities will not be exempted from emission limitations<sup>6</sup> during periods of startup and shutdown, properly justified alternative emission limitations for different operating scenarios are permissible. Thus, emissions in compliance with such alternative limitations would not be considered excess emissions. The revision emphasizes and clarifies that Subchapter 9 does not govern these alternative limits – that they originate under the permitting provisions, and must also comply with the limits of any applicable SIP requirements.
4. The revision retains the prohibition on use of any relief for excess emissions under conditions identified in OAC 252:100-9-8(d).
5. The revision makes it clear that consideration of the mitigating factors will only be given to DEQ (i.e., "State-only") administrative enforcement proceedings/penalty actions. Under 252:100-9-8(e), the revised rule states more clearly that it does not preclude EPA or federal court jurisdiction under Section 113, and does not interfere with the rights of citizens under section 304 of the Act.

Notices of proposed rule changes were published in the Oklahoma Register on September 1, 2015 (32 OK Reg 1511, Vol. 24) and December 15, 2015 (33 OK Reg 167, Vol. 7). The proposed changes were presented at both the October 2015 and January 2016 meetings of the Air Quality Advisory Council, which served as public hearings on the proposal. Comments on the proposed revisions were received from the stakeholders, public, and EPA, and a response to comments was prepared and made available. The Council recommended adoption of the proposed changes to the Environmental Quality Board, which adopted the changes at its

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<sup>5</sup> *NRDC v. EPA*, 74 F.3d 1055 (D.C. Cir. 2014).

<sup>6</sup> Under Section 302(k) of the Federal CAA, emissions limitations must be continuous.

February 19, 2016 meeting. The proposed changes were approved by the Governor, completed the Legislative review period without action, and became effective September 15, 2016.

The revision of Subchapter 9 addresses all remaining issues identified by EPA as its basis for finding that OAC 252:100-9-3(a) and OAC 252:100-9-3(b) as they once existed were substantially inadequate. See 80 Fed.Reg. 33968 published on June 12, 2015. These changes, along with entirely removing from the Oklahoma SIP the Excess Emission and Malfunction Reporting Requirements rule (Subchapter 9 and its predecessor rules), most recently approved by EPA at 40 CFR §52.1920 (64 Fed.Reg. 59629 (November 3, 1999)), will result in a "State-only" excess emission reporting rule that remains outside the SIP for Oklahoma. This is a permissible approach per the SIP Call. See 80 Fed.Reg. at 33855-56.

Note that at this time, the State has not determined whether it would be appropriate to submit the current version of Subchapter 9, including the most recent changes, at a later date for inclusion in the SIP.

In addition to public hearings and comment periods on the agency rule change, DEQ provided an opportunity for the public to comment on and request a hearing on the proposal to withdraw the subject provisions from the Oklahoma SIP. The public participation process, documented in Attachment B, followed the procedures for SIP submittals that Oklahoma submitted to EPA for review under 40 CFR § 51.102. In a letter dated August 23, 2012, EPA concurred that the procedures are consistent with the requirements of 40 CFR § 51.102 and associated guidance.

### **Section 110(l) analysis for the Oklahoma SSM-related SIP revisions**

Section 110(l) of the federal CAA indicates that EPA cannot approve a SIP revision if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (RFP), or any other applicable requirement of the CAA. Therefore, the EPA will approve a SIP revision that removes or modifies control measure(s) in the SIP only after the State has demonstrated that such removal or modification will not interfere ("noninterference") with attainment of the National Ambient air Quality Standards (NAAQS), Rate of Progress (ROP), RFP or any other applicable requirement of the CAA.

Specifically, section 110(l) states:

*"Each revision to an implementation plan submitted by a State under this Act shall be adopted by such State after reasonable notice and public hearing. The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 171), or any other applicable requirement of this Act."*

DEQ's approach in this 110(l) analysis is consistent with EPA's *Example 1* at 80 Fed.Reg. 33975. DEQ does not anticipate an increase in the amount of emissions or any increase in number of sources of such emissions as a result of revising Subchapter 9, Excess Emission Reporting Requirements, or removing old Subchapter 9 references from the Oklahoma SIP. In fact, DEQ believes that this action will strengthen the Oklahoma SIP by removing the obsolete provisions that have been deemed substantially inadequate.

## Conclusion

Based on examination of available records, we believe that the proposed SIP revisions meet the reasonable notice and public hearing requirements.

The 110(l) analysis approach, as explained above, is consistent with the EPA's *Example 1* at 80 Fed.Reg. 33975. Based on the above analogy, we also believe that removal of substantially inadequate provisions from the SIP would not interfere with attainment and reasonable further progress (as defined in section 171), or any other applicable requirement of the CAA. The overall intended effect of the proposed revisions will be strengthening of the Oklahoma SIP by removing, in its entirety, the Excess Emission and Malfunction Reporting Requirements rule as approved by EPA on November 3, 1999 (64 Fed.Reg. 59629).

Therefore, the proposed revisions to Subchapter 9 provisions in the Oklahoma SIP meet the 110(l) requirement of the Act.

**Attachment A**

**Historic Treatment of Excess Emissions Reporting Requirements  
In Oklahoma's SIP as Referenced in 40 CFR Part 52, Subpart LL**

EPA's actions on Oklahoma's SIP, as referenced in 40 CFR Part 52, Subpart LL – Oklahoma, have approved or acknowledged receipt of several versions of excess emissions reporting requirements implemented by the Oklahoma Department of Environmental Quality (DEQ), and its predecessor agency, the Oklahoma State Department of Health (OSDH), as listed below.

**40 CFR § 52.1920 Identification of plan**

Table in § 52.1920(c) *EPA approved regulations.*

EPA APPROVED OKLAHOMA REGULATIONS				
State citation	Title/subject	State effective date	EPA approval date	Explanation
***				
<b>CHAPTER 100 (OAC 252:100). AIR POLLUTION CONTROL</b>				
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<b>Subchapter 9. Excess Emission and Malfunction Reporting Requirements</b>				
252:100-9-1 .....	Purpose .....	05/26/1994	11/03/1999, 64 FR 59629.	
252:100-9-2 .....	Definitions .....	05/26/1994	11/03/1999, 64 FR 59629.	
252:100-9-3 .....	General requirements .....	05/26/1994	11/03/1999, 64 FR 59629.	
252:100-9-4 .....	Maintenance procedures .....	05/26/1994	11/03/1999, 64 FR 59629.	
252:100-9-5 .....	Malfunctions and releases .....	05/26/1994	11/03/1999, 64 FR 59629.	
252:100-9-6 .....	Excesses resulting from engineering limitations .....	05/26/1994	11/03/1999, 64 FR 59629.	
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**§ 52.1960 Original Identification of plan section.**

(a) This section identifies the original “State of Oklahoma Air Quality Control Implementation Plan” and all revisions submitted by Oklahoma that were federally approved prior to June 1, 2000.

(b) The plan was officially submitted on January 28, 1972.

(c) The plan revisions listed below were submitted on the dates specified.

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(30) Revision to Oklahoma Regulation No. 1.5 – Reports Required: Excess Emissions During Startup, Shutdown and Malfunction of Equipment was submitted by the Governor on February 8, 1983. Letters of clarification were submitted by the State on October 18, 1982 and May 24, 1983.

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(37) On May 8, 1989, the Governor submitted Oklahoma Air Pollution Control Regulation 1.5 “Excess Emission and Malfunction Reporting Requirements”. This regulation was adopted

by the Oklahoma Board of Health on June 23, 1988, and approved by the Oklahoma Legislature on February 24, 1989. The regulation became effective on March 11, 1989.

(i) Incorporation by reference.

(A) Revisions to Oklahoma Air Pollution Control Regulation 1.5 "Excess Emission and Malfunction Reporting Requirements", OAPCR 1.5 title change, §1.5(a)(1), § 1.5(b)(1)(B), § 1.5(b)(1)(E), § 1.5(c), title, § 1.5(c)(1), § 1.5(e)(1), and § 1.5(e)(2), as adopted by the Oklahoma Board of Health on June 23, 1988, and approved by the Oklahoma Legislature on February 24, 1989.

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(48) Revisions to Oklahoma Department of Environmental Quality (ODEQ) regulations in the Oklahoma SIP adopted by the Oklahoma Legislature on March 30, 1994, effective May 26, 1994, and submitted by the Governor on May 16, 1994.

(i) Incorporation by reference.

(A) *Oklahoma Register*, May 16, 1994, pages 2031 and 2032, approving the transfer of the Oklahoma Air Quality Control Rules into Title 252, Chapter 100, of the Oklahoma Administrative Code.

(B) Oklahoma Administrative Code, Title 252, Chapter 100 (OAC:252:100), Oklahoma Air Quality Control Rules, adopted by the Oklahoma Legislature on March 30, 1994, effective May 26, 1994.

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(4) Subchapter 9, Excess Emissions and Reporting Requirements.

## **Attachment B**

### **Public Participation Process**

Oklahoma's public participation procedures for SIP submittals were submitted to EPA for review under 40 CFR § 51.102. In a letter dated August 23, 2012, EPA concurred that Oklahoma's procedures are consistent with the requirements of 40 CFR § 51.102 and associated guidance. Public notice for this submittal was posted on DEQ's web site on September 21, 2016, to allow the opportunity to provide comments and to request a public hearing preliminarily scheduled for October 25, 2016 at DEQ's offices. {Option: No hearing requests were received during the minimum 30-day comment period (9/21/16 – 10/21/16). Therefore, a notice of hearing cancellation was posted on October XX, 2016.} Documentation of this public notice and submittal process are included in this attachment, along with copies of comments received during the comment period and the public hearing, and a Response to Comments document.