



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1201 ELM STREET, SUITE 500
DALLAS, TEXAS 75270

November 6, 2020

Ms. Kendal Stegmann
Director, Air Quality Division
Oklahoma Department of Environmental Quality
707 North Robinson Street
P.O. Box 1677
Oklahoma City, Oklahoma 73101-1677

RE: Clarifications to the Oklahoma SIP and Part 70 Permit Program

Dear Ms. Stegmann:

The United States Environmental Protection Agency Region 6 is writing to express our continued support of the revisions to the Oklahoma Administrative Code (OAC) at Title 252, Chapter 4, Sections 4-7-13, 4-7-32, and 4-7-33 and Chapter 100, Sections 100-1-3, 100-1-4, 100-2-3, 100-7-1.1, 100-7-15, 100-7-18, 100-8-2, 100-8-4, 100-8-5, 100-8-7.2, 100-8 and Appendix Q, as proposed on September 15, 2020. As stated in our October 15, 2020, comment letter, we believe the proposed revisions could address certain areas of concern in the Oklahoma air permitting program which have been identified through several years of discussions between the Oklahoma Department of Environmental Quality (ODEQ) and the EPA Region 6.

The EPA staff attended an October 21, 2020 meeting with the Oklahoma Air Quality Advisory Council (AQAC) in support of the proposed revisions. The AQAC did not approve the proposed revisions at this meeting; instead expressing significant concerns and doubts about the necessity of the proposed revisions.

This letter provides clarification of the scope of the existing Oklahoma construction permit program in the Oklahoma State Implementation Plan (SIP) and the EPA-approved Oklahoma Part 70 air permitting program and highlights the necessity for the proposed revisions. We have several pending Oklahoma SIP submittals and revisions to the Oklahoma Part 70 air permitting program that we have not yet acted upon, choosing to work with the ODEQ in an effort to develop State regulatory solutions designed to meet federal Clean Air Act (CAA) requirements for SIPs and Title V programs. If an acceptable regulatory solution is not adopted by Oklahoma, the EPA will proceed with actions on the pending submittals and revisions consistent with our CAA obligations. Enclosed are several clarifications regarding the Oklahoma SIP and the Oklahoma Part 70 air permitting program, as well as, the impact of the proposed regulatory revisions.

We hope the enclosed clarifications will be useful to the ODEQ in its effort to support the changes necessary to address our mutual concerns in the rulemaking process. Should you have questions, please reach out to me directly at 214-665-7593, or feel free to contact Ms. Cynthia Kaleri at 214-665-6772.

Sincerely,

11/6/2020

X 

David F. Garcia, P.E.

Signed by: DAVID GARCIA

Director

Air and Radiation Division

Enclosure

cc: Melanie Foster, ODEQ

Minor New Source Review (NSR) Public Notice Requirements

We would like to start by defining the scope of the approved minor NSR permit program in Oklahoma. The ODEQ staff explained during the October 21, 2020 public meeting that the minor NSR construction permitting program is covered under both OAC 252:100, Subchapter 7 and Subchapter 8. The EPA has SIP-approved the majority of the permit issuance mechanisms under Subchapters 7 and 8, but we have taken no action on the Tier I public notice provisions under OAC 252:4 and any cross-references to those provisions within OAC 252:100, Subchapters 7 and 8. The EPA’s May 15, 2017 final action to update Oklahoma’s minor NSR SIP provisions stated that all Tier I public notice provisions were outside the scope of that rulemaking. This means that revisions to the application requirements, including the permit application, the application content, and the issuance procedures were approved into the SIP, but the Tier I provisions allowing minor NSR permit actions to proceed without public notice were not SIP-approved.

During the October 21, 2020 public meeting, the ODEQ correctly stated that federal NSR requirements at 40 CFR 51.160 – 51.164 require public notice for minor NSR permitting actions. The September 15, 2020 proposed revisions would address the federal minor NSR public notice requirements by requiring electronic notice for all Tier I construction permit actions.

Currently, the EPA has before us in our SIP backlog, portions of several SIP submittals pertaining to Tier I. We have chosen to take no action on these submittals in the hope that we could work with the ODEQ to resolve concerns identified in the pending SIP submittals. The September 15, 2020 proposed revisions were the result of several years of collaborative efforts between the EPA and ODEQ to correctly incorporate federal minor NSR public notice requirements. If these revisions are not adopted and submitted as revisions to the Oklahoma SIP, the EPA will move forward with our review and action on the backlogged portions of these pending Oklahoma SIP submittals which may include proposed disapprovals.

Disapproval of minor NSR public notice requirements could have a ripple effect on the rest of the Oklahoma air program. The Oklahoma infrastructure SIP is required to show the existence of an approved permit program under Clean Air Act (CAA) section 110(a)(2)(C) sufficient to protect air quality; this includes minor NSR and all requirements of minor NSR. Disapproval of Oklahoma’s minor NSR SIP program on the basis of deficient public notice could result in approvability issues associated with future Oklahoma infrastructure SIP submittals.

Initial Issuance of Title V Permits

The existing Part 70 air permitting program under OAC 252:100, Subchapter 8 does not require public notice of initial Title V permits as required under Title V of the CAA and 40 CFR 70.7(h). The EPA initially identified this concern in our December 5, 2001 final Title V program approval as a deficiency that would need to be corrected in the future through the EPA’s oversight capacity or through a Notice of Deficiency (NOD). *See* 66 FR 63170. More recently, the EPA has continued to note the lack of public notice for initial Title V permits through conversations with ODEQ during our monthly oversight conference calls, via comment letters on permits, and through a letter to Mr. Eddie Terrill, dated March 5, 2020.

The September 15, 2020 proposed revisions would amend the Oklahoma regulations and require all initial Title V permits to be public noticed via Tier II provisions. To date, the EPA has elected to work

with the ODEQ through our oversight capacity to address this lack of public notice. However, if these proposed revisions are not adopted and submitted as revisions to the Oklahoma Part 70 Air Operating Permits Program, the EPA may need to consider whether a NOD pursuant to 40 CFR 70.10(b)(1) is necessary to address the problem. A NOD would put the ODEQ on a timetable to correct the deficiency. If the deficiency is not corrected timely, the EPA could move, consistent with our regulations, to withdraw the EPA program approval of the Oklahoma Part 70 program and become the permitting authority under 40 CFR Part 71.

Synthetic Minor Permit Issuance

For years, the ODEQ has allowed a source to move from the major source permit program under OAC 252:100, Subchapter 8 to the minor source permit program under OAC 252:100, Subchapter 7, through a process commonly referred to as “synthetic minor” permitting. This process is not currently provided for in the existing Oklahoma regulations, but is rather implemented through guidance. The EPA Region 6 has frequently raised concerns about this process and the Oklahoma authority to issue synthetic minor permits through both our oversight monthly calls and by issuing permit comment letters.

The September 15, 2020 proposed revisions provide a clear regulatory process for limiting potential to emit emissions through legally and practically enforceable permit limits and require public notice of this transition through the Tier II provisions. Synthetic minor permitting is not a requirement of the CAA nor the EPA’s federal air permitting regulations; therefore, the ODEQ is not required to develop or adopt regulations providing for synthetic minor permitting. However, at a minimum, a state that is issuing synthetic minor permits should have a SIP-approved regulatory framework that outlines the permitting process and requires public participation consistent with the requirements of 40 CFR 51.160 and 51.161.

Conflation of Minor NSR and Minor Modifications under Title V

The Oklahoma permitting program for major sources under OAC 252:100, Subchapter 8 conflates the requirements of NSR and Title V permitting. The existing program enables minor construction activities to bypass minor NSR and be permitted directly in a Title V permit via a minor modification. This practice presents a two-fold problem. First, permitting construction activities without a valid NSR permit action could be considered circumvention of the NSR requirements. Second, the Title V minor modification procedures are separate and distinct from the minor NSR public notice requirements. Construction activities that are subject to minor NSR must undergo adequate minor NSR public notice.

The September 15, 2020 proposed revisions seek to address this conflation by requiring minor NSR construction activities to be completed under a construction permit with adequate minor NSR public notice. As mentioned above, minor NSR public notice is a federal requirement for all minor NSR permitting actions. Under Section 110(k)(5) of the Clean Air Act, should the EPA make a finding of substantial inadequacy in the Oklahoma SIP for failing to meet the Clean Air Act requirements for minor NSR SIPs, the EPA could consider a SIP call to address the deficiency in the minor NSR permit program and a NOD to address the misuse of the Title V permitting program to authorize construction permit activities.

Enhanced NSR

The September 15, 2020 proposed revisions seek to establish permitting flexibility and streamlining through the creation of an enhanced NSR program. Under this type of program, a source with an

existing Title V permit may make a construction permit modification through an enhanced NSR permitting process under the SIP that also meets the criteria for a part 70 permitting actions. The modification may be added to the existing Title V permit through an administrative amendment. *See* 40 CFR 70.7(d)(1)(v). This flexibility has the potential to shorten the overall time the permit modification is available for public review and comment under the NSR and Title V programs. The ODEQ has also clarified that this type of flexibility is only available to sources with existing part 70 permits, thus maintaining consistency with the part 70 public notice requirements for initial permits as described above. We note that enhanced NSR is not a requirement of the NSR or Title V federal permitting requirements. However, if a state chooses to implement an enhanced NSR process, the EPA must act to approve the process in the SIP and part 70 programs.

Federally Enforceable State Operating Permit (FESOP) Program

As described in the EPA’s final rulemaking amending the definition of “federally enforceable” in 40 CFR 51.165(a)(1)(xiv), the EPA interprets CAA section 110(a)(2) to allow the EPA to approve certain state operating permit programs into a SIP. *See* 54 FR 27274, 27282 (June 28, 1989). Under the policy clarification expressed in that rulemaking, the EPA noted that all terms and conditions contained in a state operating permit would be considered “federally enforceable,” provided that the state’s operating permit program was approved by the EPA and incorporated into the applicable SIP under section 110 of the Act, and provided that the operating permit meets certain requirements. *Id.* at 27281. Such permits would be enforceable for NSR and other SIP purposes. As noted previously, portions of the Oklahoma minor source permitting program at OAC 252:100, Subchapter 7 have been SIP-approved, including some provisions related to the issuance mechanisms of minor operating permits. However, the EPA never took an affirmative action to review and approve the Subchapter 7 program, applying the criteria enumerated by the EPA for an approvable FESOP program *Id.* at 27282. Furthermore, the EPA believes that it may not be able to approve Oklahoma’s Subchapter 7 operating permits program into the SIP as a FESOP program because it does not provide an opportunity for public comment on the permit applications prior to issuance of the operating permit *Id.* Therefore, the Oklahoma SIP does not include a FESOP program at this time.

The September 15, 2020 proposed revisions establish a FESOP program by providing clear implementing processes and require public notice of Tier I actions. The revisions as proposed appear to satisfy the public participation requirements for an approvable FESOP program and could be included in a proposed revision to the Oklahoma SIP. Permits issued pursuant to the SIP-approved FESOP program could then be used by the ODEQ to demonstrate attainment of the NAAQS or a source could use the terms and conditions of the permit to “net out” of major NSR requirements.

Status of Existing Subchapter 7 Operating Permits

The October 21, 2020 discussion with the Oklahoma AQAC included many questions about the status of existing Subchapter 7 Operating Permits, and whether these permits are federally enforceable. While the Subchapter 7 regulations have not been approved by the EPA as meeting the requirements for an approvable FESOP program, the EPA acknowledges that many aspects of the state’s operating permit program under Subchapter 7 have been approved into the Oklahoma SIP. The EPA generally believes that terms and conditions in permits issued pursuant to the EPA-approved SIP are federally enforceable. Additionally, any terms of state operating permits that contain limitations that are the same as limitations under a NSPS, NESHAP or MACT are independently federally enforceable by virtue of the EPA’s authority to enforce the NSPS, NESHAP, or MACT.

However, as previously discussed, the EPA may decide to initiate a rulemaking, under CAA section 110(k)(5), to find the existing Subchapter 7 Operating Permits SIP provisions substantially inadequate to comply with the CAA requirements for SIPs (e.g., public participation requirements), and require Oklahoma to revise the SIP to correct the deficiency or withdraw its state operating permits program from the SIP.

If the ODEQ wishes to pursue the creation of a FESOP program as envisioned by the EPA in its 1989 action discussed above, then existing Subchapter 7 operating permits that Oklahoma may wish to use for SIP purposes or that a source is using to qualify as a minor source, to net out of NSR requirements, or to create external emissions offsets, should be authorized under a SIP-approved FESOP program. The issuance of operating permits under a SIP-approved FESOP program would allow the EPA to enforce noncompliance with the terms and conditions of such permits as violations of the SIP.