



Oklahoma Attorney General Comments to the
United States Environmental Protection Agency

on the

Federal Implementation Plans for Iowa, Kansas, Michigan,
Missouri, Oklahoma and Wisconsin to Reduce Interstate
Transport of Ozone; Proposed Rule, Supplemental

Docket ID No. EPA-HQ-OAR-2009-0491

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Air Docket
Environmental Protection Agency, Mailcode:6102T
1200 Pennsylvania Ave., NW
Washington, DC 20460

Via fax at 1-(202) 566-1741 and submitted to www.regulations.gov

Re: Docket ID No. EPA-HQ-OAR-2009-0491

Comments of the Oklahoma Attorney General to the EPA on:

“Federal Implementation Plans for Iowa, Kansas, Michigan, Missouri, Oklahoma, and Wisconsin to Reduce Interstate Transport of Ozone; Proposed Rule, Supplemental”
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A. Introduction

On July 11, 2011, the EPA issued in the Federal Register “Federal Implementation Plans for Iowa, Kansas, Michigan, Missouri, Oklahoma, and Wisconsin to Reduce Interstate Transport of Ozone.” To the extent they are consistent with the comments made herein, the Oklahoma Attorney General hereby incorporates by reference and in their entirety, the comments submitted in Docket No. EPA-HQ-OAR-2009-0491 by the Oklahoma Department of Environmental Quality, Oklahoma Gas & Electric (OG&E), and Public Service Company of Oklahoma (PSO).

The Oklahoma Attorney General's Office (hereafter Attorney General) is charged by statute with the duty of “represent[ing] and protect[ing] the collective interests of all utility consumers ... in rate related proceedings before the Corporation Commission or in any other state or federal judicial or administrative proceeding.” *See* 74 O.S.2001, §18b(20). The Attorney General submits these comments in response to the Environmental Protection Agency’s (“EPA”) Supplemental Proposal to Include Oklahoma in the Cross State Air Pollution (CSAP) Program. As the officer charged with the task of representing consumers and citizens within the State of Oklahoma, the

Attorney General is greatly concerned about issues including: cost to utilities and consumers to comply with EPA's CSAP Program; the legal authority of EPA to include Oklahoma in the CSAP Program; the greatly truncated time frame for utility compliance with the Program; and the basis upon which EPA has determined Oklahoma contributes significantly to nonattainment of the 1997 Ozone National Ambient Air Quality Standards (NAAQS) in Michigan.

B. The cost of compliance creates a substantial burden upon consumers and may affect the availability of electricity and the reliability of transmission within the region.

The Attorney General is concerned about the cost of compliance for utilities within Oklahoma and the effect those costs will have on consumers when they are inevitably transferred to ratepayers. The cost of compliance for just the two largest electric utilities in Oklahoma is estimated to be approximately \$150 million. Those costs, when combined with the substantial costs of compliance with other EPA mandates and proposed rules create an unprecedented burden upon the electric energy consumers of Oklahoma. The EPA should be mindful of the fact that electricity consumers are not only paying the cost of compliance with its rules, they are also responsible for additional costs mandated by other entities for transmission development, demand-side management and energy efficiency programs, renewable energy programs, etc.

The Attorney General is also concerned about the effect of compliance upon the availability of electricity and the reliability of the grid in this region. To the knowledge of the Attorney General, there has been no complete or formal electric reliability assessment in cooperation with FERC for the CSAP Program, either alone or in combination with EPA's other proposed rules. FERC's informal analysis regarding the CSAP Program indicates that over 80 gigawatts of coal-fired generation may be retired in response to EPA regulations. Instead of obtaining a complete reliability

assessment from FERC, EPA instead relied upon emission projections and analyses developed using its Integrated Planning Model (“IPM”). However, a major limitation of the IPM model is that it assumes adequate transmission capacity exists to deliver any resource located in, or transferred to, the region in question and thereby fails to accurately evaluate impacts on reliability resulting from EPA programs such as CSAP, or combinations of EPA programs. The Attorney General is concerned that deficiencies in the IPM modeling could result in a shortage of replacement purchased power during the times in which either generating units are down or usage is curtailed due to efforts to comply with CSAP or other EPA rules. Electricity shortages could also result from the inability of utilities to timely obtain needed permits and control equipment. Oklahoma electric utilities doubt that they can take the measures required to attain compliance with CSAP Rules within the six-month time frame currently allowed by EPA. Instead, they estimate needing twelve to eighteen months to acquire all necessary permits and equipment is given, with a total of twenty-one months estimated for the controls to be operational. Failure to obtain needed permits and control equipment by May 2012 would result in the utilities’ de-rating its non-compliant generating units to a point necessary to comply with ozone standards, meaning each of those units would be operating at far less than its rated capacity. As a result, uncertainty currently exists regarding the availability and price of purchased power, even assuming adequate transmission capabilities, due to the widespread imposition of CSAP requirements across many states.

C. The EPA lacks authority under the CAA to issue a FIP before disapproving or taking action on Oklahoma’s 2007 Interstate Transport SIP

On May 1, 2007, the State of Oklahoma provided EPA with an Interstate Transport SIP addressing the requirements of CAA section 110(a)(2)(D)(I). At the time of the submittal, Oklahoma

informed EPA as follows: “As required by Section 110(a)(2)(D)(I) of the Clean Air Act, the State of Oklahoma submits to the US EPA that it has met the requirements for the 8-hour ozone and PM2.5 National Ambient Air Quality Standards (“NAAQS”) and does not significantly contribute to non-attainment or interfere with maintenance of the NAAQS in another State.” *See* EPA-R06-OAR-2007-0314-0002[1]. Then on December 5, 2007, Oklahoma supplemented its interstate transport SIP with additional assessments and provided EPA with the following certification regarding the adequacy of its SIP under CAA section 110(a)(1) and (2): “We have evaluated our existing SIP for implementation of the 1997 8-hour ozone NAAQS to determine if it includes all the requirements in Section 110(a)(1) and (2) of the CAA and is consistent with the guidance provided to the Regional Air Division Directors from William T. Harnett, Director, Air Quality Policy Division on October 2, 2007. We conclude and certify that our SIP does meet these requirements.” *See* EPA-R06-OAR-2007-0314-0003[1].

The guidance document referenced in Oklahoma’s December 5, 2007, certification is an EPA memorandum titled “Guidance on SIP Elements Required Under Sections 110 (a)(1) and (2) for the 1997 8-hour Ozone and PM2.5 National Ambient Air Quality Standards.” This included an Attachment A to the memo that listed the basic elements that should be part of a SIP. The EPA memorandum also states: “To the extent that existing SIPs for ozone and particulate matter already meet these requirements, States need only certify that fact to the [EPA].”

Following the 2007 guidance, Oklahoma certified in 2007 that the State’s Interstate Transport SIP met all the requirements of CAA section 110(a)(1) and (2), which includes CAA section 110(a)(2)(D)(i)(I). Since then, the EPA has approved certain portions of the Oklahoma SIP relating to Prevention of Significant Deterioration (“PSD”) requirements and has also issued a proposal to

partially approve and partially disapprove other specific portions related to visibility. In its current Supplemental Rulemaking Proposal, the EPA claims the authority to include Oklahoma in the CSAP Program through the EPA's general State Implementation Plan ("SIP") deficiency finding, issued April 25, 2005. This deficiency finding was issued to address the requirements of Clean Air Act ("CAA") section 110(a)(2)(D)(i) regarding the 1997 ozone NAAQS. *See* 70 Fed. Reg. 21,147. Along with several other states and territories, Oklahoma was named in the April 2005 deficiency finding. In this Supplemental Proposal, the EPA states that it "has not, subsequent to that date, received or approved a SIP revision to correct the deficiency" for Oklahoma.

However, EPA's statement is inaccurate because, as set forth above, Oklahoma has submitted an Interstate Transport SIP that addresses the requirements of CAA section 110(a)(2)(D)(i). The EPA has failed to take any action to approve or disapprove of the State's conclusion in 2007 that its submitted SIP meets the requirements of CAA section 110(a)(2)(D)(i)(I) related to the contribution to non-attainment of, or interference with maintenance of, the 1997 8-hour ozone NAAQS. The EPA is now proposing to move directly to imposing a Federal Implementation Plan ("FIP"), eliminating the State's opportunity to receive notice of, and correct, a perceived deficiency in the 2007 SIP submittal as it relates to the requirements of CAA section 110(a)(2)(D)(i)(I). The EPA does not have authority under the CAA to proceed with implementing a FIP prior to approving or disapproving the State's 1997 SIP as it relates to the requirements of CAA section 110(a)(2)(D)(i)(I). The CAA requires the EPA to act on a SIP revision within 12 months of having received a completed submission (such SIP submissions are deemed complete after 6 months unless EPA makes a finding otherwise) see CAA section 110 (k)(1)(B), (k)(2). When a State submits a SIP, the CAA allows EPA to issue a FIP within 2 years after the Administrator disapproves the SIP in whole

or part. Also, the CAA gives the EPA the authority to issue a FIP within two years after finding that a State failed to submit a SIP, or submitted a SIP that was found to be incomplete. However, the authority to issue a FIP expires two years after EPA issues a finding of failure to submit a SIP. The EPA has missed that two year deadline here and therefore, lacks authority under the CAA to issue the proposed FIP. Furthermore, where a State submits a SIP after the issuance of a deficiency finding by the Administrator, the EPA must act on the SIP submittal before issuing a FIP.

Pursuant to 42 U.S.C. § 7410(c)(1)(B),

- (1) The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator -
 - (A) finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under subsection(k)(1)(A) of this section, or
 - (B) disapproves a State implementation plan submission in whole or part, unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.

In this Supplemental Proposal, the EPA has not followed the CAA mandate requiring that prior to promulgating a FIP, the EPA must find that a State has failed to make a required submission, or find that the plan or plan revision submitted by the State does not satisfy minimum criteria, or must disapprove a SIP submission in whole or part. As set forth above, the EPA has not taken any action in regards to the May 1, 2007, Interstate Transport SIP that addressed the requirements of CAA 110(a)(2)(D)(i). In addition, the EPA has not taken action to approve or disapprove the December 2007 State of Oklahoma SIP revision and certification that was submitted pursuant to an October 2007, EPA guidance document. In that submission, Oklahoma certified (following the dictates in the EPA Guidance Document) in December 2007 that Oklahoma's Interstate Transport

SIP met all the requirements of CAA section 110(a)(1) and (2), which includes CAA section 110(a)(2)(D)(i)(I). Therefore, the EPA does not have the authority under the CAA to issue the FIP it is proposing in this Supplemental Rule under the CSAP Program.

D. The EPA's Supplemental Rule Proposal for Oklahoma under the CSAP Program intrudes upon the role generally left to the States under the CAA.

In *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975), the United States Supreme Court found that although the CAA plainly charges the EPA with the responsibility for setting the national ambient air quality standards, the Act, just as plainly, relegates the EPA to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations that are necessary if the national standards are to be met. According to the Court, the Act gives the agency no authority to question the wisdom of a State's choice of emission limitations if they are part of a plan that satisfies the standards of section 110(a)(2), and the agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan that satisfies those standards. To this point, the Court stated: "So long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." *Id.* at 79.

The CAA then "establishes a partnership between EPA and the states for the attainment and maintenance of national air quality goals." See *Natural Res. Def. Council, Inc. v. Browner*, 57 F.3d 1122, 1123 (D.C. Cir. 1995). "Air pollution prevention . . . at its source is the primary responsibility of States and local governments. . . ." 42 U.S.C. § 7401(a)(3). Congress "carefully balanced State and national interests by providing for a fair and open process in which State and local governments,

and the people they represent, will be free to carry out the reasoned weighing of environmental and economic goals and needs.”

In the current Supplemental Proposal, the EPA is proposing a FIP in Oklahoma regarding summertime NOx reductions under the CSAP ozone-season control program. The EPA is proposing to promulgate this FIP despite the fact that Oklahoma has submitted a SIP that meets the requirements of the CAA and despite the fact that EPA has not taken any action on Oklahoma’s SIP, as required in the CAA. Such action by the EPA is an impermissible intrusion upon the authority reserved to Oklahoma and exceeds the authority granted to the EPA under the CAA.

E. There is no reasonable basis for EPA’s conclusion that Oklahoma is a significant contributor to non-attainment of the 1997 Ozone NAAQS in Michigan

Under the EPA’s Supplemental Proposal, the State of Oklahoma is being required to significantly reduce emissions of NOx during the ozone season for the maintenance of a single county in Michigan (Allegan County). The county in question is hundreds of miles away from Oklahoma, and modeling data shows that Allegan County, Michigan, is not expected to have attainment maintenance issues and, in fact, is already in attainment with the NAAQS targeted by the proposed rulemaking. It does not make sense for the EPA to require significant reductions in Oklahoma for attainment in Allegan County, Michigan, in an area directly across Lake Michigan from the Chicago/Milwaukee airshed (and also the Gary, Indiana, and St Louis, Missouri, airsheds), where these areas would be far greater contributors to nonattainment in Allegan County, Michigan, than any contribution from Oklahoma. In addition, the fact that Allegan County, Michigan, is already in attainment, as shown by modeling, supports the exclusion of Oklahoma in the Supplemental Proposal rulemaking.

F. Conclusion and Recommendation

In conclusion, the Attorney General has concern that the cost of compliance with the current EPA proposed rulemaking will create a substantial burden on Oklahoma consumers and may unnecessarily affect the availability and reliability of electricity and it's transmission in the region. Furthermore, the EPA lacks authority under the CAA to issue the FIP in the current proposed rulemaking because it has not taken action to approve or disapprove Oklahoma's 2007 Interstate Transport SIP. The EPA also lacks authority under the CAA to issue the FIP in the current proposed rulemaking because it did not issue the FIP within the two year time-frame established in the CAA. Lastly, the EPA's Supplemental Proposal for Oklahoma under the CSAP improperly usurps the role generally left to the States under the CAA and there is no reasonable basis for EPA's conclusion that Oklahoma is a significant contributor to nonattainment of the 1997 Ozone NAAQs for a single county in Michigan. For these reasons, the Attorney General respectfully requests that the EPA withdraw its FIP under the current Supplemental Proposal rulemaking and approve Oklahoma's 2007 Interstate Transport SIP.