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ATTORNEY GENERAL

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Via Email

Oklahoma Department of Environmental Quality
Air Quality Division
Attn: Melanie Foster
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Oklahoma City, OK 73101-1677
AQDRuleComments@deq.ok.gov

RE: Proposed Amendments to OAC 252:100, Subchapters 7 and 8, and Proposed New Subchapter 10, Emission Reduction Credits and Ozone Precursor Offsets in Prevention of Significant Deterioration Permitting

Dear Ms. Foster:

The Office of the Oklahoma Attorney General submits these comments on the Department of Environmental Quality's (DEQ's) proposed amendments to OAC 252:100, Subchapters 7 and 8, and proposed new Subchapter 10 (the "Proposed Rules"). The Attorney General is the State's chief law officer. This office is also litigating, on behalf of the State, to prevent an anticipated public nuisance from a proposed primary aluminum smelter in Inola. *State ex rel. Drummond v. Century Aluminum Co.*, No. CV-26-108 (Rogers Cnty. Dist. Ct. filed June 2, 2026). The air quality construction permit application for that project is pending before DEQ. PSD Application to Construct, Oklahoma Aluminum: New Primary Aluminum Smelter (filed Feb. 9, 2026, amended Sept. 3, 2026) ("Application"). This office therefore has a direct interest in ensuring that the rules governing that review are lawful, enforceable, and protective of the Oklahomans who live nearby.

Prevention of Significant Deterioration (PSD) is, as its name says, a prevention program. Under the Clean Air Act and DEQ's existing rules, a major source cannot be permitted unless its owner or operator demonstrates that its emissions "would not cause or contribute to any increase in ambient concentrations that would exceed" a National Ambient Air Quality Standard (NAAQS). OAC 252:100-8-35(a)(1); *see* 42 U.S.C. § 7475(a)(3); 40 C.F.R. § 51.166(k)(1). The Proposed Rules would add an alternative. If that demonstration fails for ozone, "the applicant may elect to offset air quality impacts by extinguishing sufficient Emission Reduction Credits (ERCs)." Proposed OAC 252:100-8-35(a)(2).

This office recognizes that federal law leaves room for offsets in this setting. A state plan may allow a source that would otherwise cause or contribute to a NAAQS violation “to reduce the impact of its emissions upon air quality by obtaining sufficient emission reductions to, at a minimum, compensate for its adverse ambient impact.” 40 C.F.R. § 51.165(b)(3). DEQ’s rules already incorporate that provision by reference. *See* OAC 252:100-8-52(a). The Proposed Rules, however, do not hold applicants to that standard. To ensure that offsets remain a means of protecting air quality and do not become a means of permitting what PSD would otherwise forbid, this office has the following concerns and recommendations.

The Proposed Rules measure offsets in tons, but the governing standard is measured in air quality. Under the Proposed Rules, an applicant must extinguish 1.1 tons of credits for each ton of project emissions increase. Proposed OAC 252:100-10-4(b)(1), 10-7(b)(2). Nothing requires the applicant to show, or DEQ to find, that those credits actually cure the modeled exceedance in the place where it would occur. Ozone does not work ton for ton. It forms downwind through reactions that depend on local chemistry, weather, and the mix of nitrogen oxides (NO_x) and volatile organic compounds (VOCs) already in the air. The Inola Application illustrates the point. The screening data it relies on assign roughly ten times more ozone to a ton of NO_x than to a ton of VOCs from the same hypothetical source. Application, Class II PSD Air Quality Dispersion Modeling Protocol (dated May 1, 2026) (“Protocol”) § 3.6, tbl. 3-6, at 14. Location matters just as much. A ton of NO_x removed 100 miles from a project does not do the work of a ton of NO_x emitted at the project. Proposed Section 10-1 says the program “is intended . . . to ensure that the project does not cause or contribute to a violation of the ozone national ambient air quality standard,” but an intention is not a demonstration.

This office recommends revising proposed Sections 8-35(a)(2) and 10-7 to make the ambient-compensation standard of 40 C.F.R. § 51.165(b)(3) an express condition of credit use. The applicant should be required to demonstrate, and DEQ should be required to find in the permit record, that the credited reductions at least compensate for the project’s ozone impact at each location where an exceedance is predicted. That demonstration should rest on modeling that satisfies OAC 252:100-8-35(b). The extinguishment ratio should operate as a floor on top of that showing, not as a substitute for it.

The Proposed Rules fail to account for geographic and seasonal factors. Credits may be generated up to 100 miles from the facility that uses them, measured center point to center point. Proposed OAC 252:100-10-7(a)(2). DEQ may then waive even that limit if “[i]n the judgment of DEQ, such an allowance is appropriate” and the applicant’s justification is supported by “air quality modeling, prevailing weather patterns, or other criteria specified by the Director.” Proposed OAC 252:100-10-7(a)(2)(B). That is not a standard. The only fixed boundary is the state line. *See* Proposed OAC 252:100-10-3(c)(1)(F). The Proposed Rules also count credits in tons per year without regard to when the reductions occur, although ozone exceedances are a warm-weather problem. A reduction achieved in January would be credited the same as one achieved in July. This office recommends deleting the exception in Section 10-7(a)(2)(B), or at a minimum conditioning it on the ambient demonstration described above, and requiring that credited reductions be shown to occur during the months in which ozone exceedances are predicted.

Credits should reflect reductions that are representative, timely, and current. Baseline emissions are generally calculated from a 24-month period within the preceding five years, but “[t]he Director shall allow the use of a different time period upon the determination that it is more representative of normal source operation.” Proposed OAC 252:100-10-4(a)(1)(B). That language is mandatory and has no outer limit. It invites applicants to reach back to high-emitting years that no longer reflect how a facility operates, which inflates the credits available for sale. The alternative period should be discretionary and bounded. In addition, nothing in the Proposed Rules requires the credited reduction to be in effect before the new source begins to emit. The PSD permit need only “specify the date(s) and/or the action(s) which will trigger the extinguishment of the ERCs.” Proposed OAC 252:100-10-7(f). The rule should require that the generating facility’s reduction be enforceable and in effect before the user’s start-up date. Credits also expire after five years “unless the ERCs have been included in an administratively complete application for a PSD construction permit.” Proposed OAC 252:100-10-6(c)(3). The Proposed Rules do not say what happens if that application is later withdrawn or denied, or simply remains pending. As written, a filing could preserve a credit indefinitely. The rule should provide that such credits expire if the permit is not issued within a defined period. And because public review depends on access to the underlying information, the rule should require DEQ to post the ERC registry, baseline calculations, and surplus determinations on its website.

Several provisions are internally inconsistent and should be reconciled before adoption. Proposed Section 10-7(b)(4) states that “ERCs must be acquired by the ERC user before the draft permit is published,” while Section 10-7(e)(2) states that the user “must have acquired all necessary ERCs before the PSD permit may be issued.” Proposed Section 10-3(d)(2) allows a facility operating under a Federally Enforceable State Operating Permit (FESOP) to generate credits through a construction permit that undergoes “Tier II or Tier III public review,” while Section 10-5(d)(1)(A) requires “Tier II public review” for the same permit. Proposed Section 10-4(a) calculates credits from “permit-limited potential emissions,” a term the Proposed Rules do not define, while Sections 10-2 and 10-4(a)(2)(A) use the defined term “permit limited emissions for ERC generation.” And Section 10-7(b)(1) requires credits to “offset all project emission increases,” without limiting that phrase to the ozone precursors for which credits are available under Section 10-3(a). Each of these provisions will govern whether a particular permit may issue, and each should say one thing.

DEQ should state how the Proposed Rules will apply to pending applications and when they will take effect. The Inola Application was filed in February 2026 and amended on September 3, 2026. DEQ released the first version of this proposal on June 15, 2026, and the current version on September 8, 2026. The Application projects 316.2 tons per year of NO_x and 217.6 tons per year of VOCs, and its preliminary screening analysis estimates the project’s ozone impact at 0.963 parts per billion against a significance level of 1 part per billion. Protocol § 1.1, tbl. 1-1, at 3; *id.* § 3.6, at 14. That is a margin of less than four percent. On the applicant’s own figures, roughly 13 additional tons per year of NO_x would erase it. The estimate rests on a first-tier screening calculation that borrows a hypothetical source in Muskogee County with a 90-meter stack, although the Application describes the project’s principal stacks only as “at least 55 meters tall.” *Id.* § 3.5, at 12; *id.* § 3.6, at 14. Despite such a narrow margin, the applicant relied on the preliminary screening analysis estimate as the basis for its decision not to select a background ozone monitor. *Id.* § 6, at 18. The applicant treats that screening estimate as the end of the ozone

inquiry. *Id.* § 3.6, at 14 (“the demonstration is complete”). If a refined analysis, or any later change to the project, puts its ozone impact over the line, the Proposed Rules would supply a path to a permit that does not exist today.

This office therefore asks DEQ to add an applicability provision stating that the offset option in proposed Section 8-35(a)(2) is not available for a permit application filed before the Proposed Rules take effect. DEQ should also confirm that, because the Proposed Rules revise Oklahoma’s federally approved PSD program, no permit will issue in reliance on ERCs until the Environmental Protection Agency has approved the revision to the State Implementation Plan, and DEQ should explain how the revision satisfies 42 U.S.C. § 7410(l). Finally, DEQ should state in the rulemaking record whether it anticipates that any pending application, including the Inola Application, will rely on offsets.

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This office appreciates DEQ’s work on a complex subject and the opportunity to comment. An offset program is consistent with PSD only if it holds each applicant to the showing that federal law and DEQ’s own rules already require, which is that the air where people live will be no worse for the project. I respectfully ask DEQ to revise the Proposed Rules in line with the above recommendations before they are presented for adoption.

Sincerely,



GENTNER DRUMMOND
Oklahoma Attorney General