



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII
901 NORTH 5TH STREET
KANSAS CITY, KANSAS 66101

OFFICE OF
REGIONAL ADMINISTRATOR

FEB 03 2011

Dr. Robert Moser
Secretary
Kansas Department of Health and Environment
Curtis State Office Building
1000 SW Jackson
Topeka, Kansas 66612

Dear Dr. Moser:

The Environmental Protection Agency (EPA) began reviewing the Sunflower Holcomb expansion project final permit decision and response to comments in late December, 2010. The purpose of EPA's permit review is to ensure that the Sunflower permit contains provisions to adequately protect public health, and that Kansas conducted all parts of its permit process as required by the Clean Air Act (CAA). EPA's review of the Sunflower permit decision has focused specifically on whether the permitting record for the Sunflower permit shows that the Kansas Department of Health and Environment (KDHE) followed applicable requirements under both the CAA and the federally approved State Implementation Plan (SIP) regulations. While I note that KDHE addressed most of EPA's comments on the permit, I am writing this letter to share one issue of primary concern.

New National Ambient Air Quality Standards (NAAQS)

KDHE has not adequately addressed EPA's comment from August 12, 2010, which states that KDHE needs to ensure that National Ambient Air Quality Standards (NAAQS) are protected. KDHE's response to comments stated that the CAA does not require protection of the new 1-hour NAAQS until adopted and approved into the Kansas SIP. Our understanding is this position comes from your interpretation of section 110(a) of the CAA, which allows states up to 3 years for adoption and submission of SIPs for new NAAQS. Since EPA disagrees with KDHE's interpretation of federal law, EPA would appreciate a clarification of whether KDHE believes Kansas law precludes the state from applying these standards to this permit.

Section 110(a) of the CAA should not be read and interpreted in isolation from the relevant portion of section 165(a), which pertains to preconstruction permit requirements under Prevention of Significant Deterioration (PSD). Section 165(a) of the CAA states that a source subject to Part C – relating to PSD – cannot construct unless a permit has been issued that meets the requirements of the CAA. One such requirement under section 165(a)(3) is that the proposed source must demonstrate that its emissions do not cause or contribute to a violation of “any” NAAQS. Thus, EPA does not read section 110(a)(1) of the CAA to preclude a NAAQS from becoming applicable for three years under existing SIP-approved PSD program regulations that already apply to “any NAAQS.” As you are aware, 40 CFR 52.21(k) is one of the provisions which KDHE has adopted by reference (K.A.R. 28-19-350(b)), and is part of the SIP-approved PSD program. Section 52.21(k)(1) is not limited to NAAQS applicable as of a particular date, and is sufficiently open-ended so that no revision is necessary for this provision to apply to any NAAQS in effect at the time a permit is issued.

Section 110(a)(1) of the CAA requires each state to submit “a plan which provides for implementation, maintenance, and enforcement” of a NAAQS “within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation” of a NAAQS. While the above language requires any necessary revisions to state plans to be submitted after the promulgation of a NAAQS, it does not specify that an existing portion of an EPA-approved plan should not apply immediately where the regulations approved as part of that plan are otherwise applicable to “any” NAAQS. The PSD requirement to protect any NAAQS— even during the SIP-development period for a new NAAQS — can be construed to complement the SIP requirements under section 110(a).

Accordingly, Kansas’ decision not to incorporate enforceable short-term limits that are protective of the new 1-hour NAAQS into the Sunflower permit, despite the language in their PSD rules to protect “any” NAAQS, raises serious concerns. These concerns are a lack of assurance that new or modified sources will protect any NAAQS, and the use of action levels instead of enforceable permit emission limits to control short-term or 1-hour emission levels of nitrogen oxides (NO_x) and sulfur dioxide (SO₂).

Action Levels, Not Permit Limits

The final permit limits emissions of NO_x and SO₂ for the Unit 2 on a 30-day average. The existing unit is also subject to 30-day limits. It is well known that there can be considerable variability in actual 1-hour emission rates. Therefore, to ensure protection of the 1-hour NO₂ and SO₂ NAAQS, EPA commented that the permit needs to contain NO_x and SO₂ 1-hour average emission limits for both the new and existing steam generating units. To ensure the source does not cause or contribute to air pollution in violation of the NAAQS, the emission limits should be consistent with the modeling rates and have the same averaging period, i.e. in this case maximum hourly emission limits consistent with the 1-hour NAAQS. See 40 CFR Part 51, Appendix W, section 8.1.2.

Sunflower Units 1 and 2 are capable of operating at 1-hour rates higher than the hourly rates that KDHE used to model compliance with the 1-hour NAAQS for NO₂ and SO₂. In fact, Unit 1 has historically operated at hourly emission levels above the modeled rates¹. Although, KDHE did create “action levels” for NO_x and SO₂ in the permit for Unit 2, these “action levels” do not constitute enforceable permit limits. In order to ensure and demonstrate that the proposed source will not cause or contribute to air pollution in violation of the SO₂ and NO₂ NAAQS, KDHE should include enforceable 1-hour emission limits for both the existing and new unit at Sunflower Holcomb.

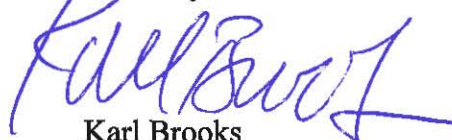
KDHE should consider a permit amendment to include enforceable 1-hour emission limits prior to the construction and/or operation of the new unit. KDHE may also want to consider the latest EPA guidance on NO₂ modeling as part of any permit amendments.

Permit Process

The Kansas SIP establishes a permitting process intended to protect public health and to satisfy public participation requirements. EPA believes that KDHE’s public participation process was consistent with the process specified in its approved SIP. Litigation between KDHE and Sierra Club pending in the Court of Appeals for the State of Kansas may further address concerns about this permit and its conformance to state laws and rules.

We look forward to a dialogue on how to effectively address the implementation of the new NO₂ and SO₂ NAAQS. EPA requests that KDHE staff contact Becky Weber at (913) 551-7487 to set up a meeting in the very near future and begin a constructive dialogue about how to resolve EPA’s concerns regarding the implementation of the new NO₂ and SO₂ NAAQS in the Sunflower permit and future permit actions.

Sincerely,



Karl Brooks
Regional Administrator

cc: John Mitchell, KDHE

¹ During the 5-year period from 2004 to 2008, Unit 1 operated above the SO₂ modeled rate 368 times and above the NO_x rate 17 times.