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March 13, 2020

VIA EMAIL: brooks.richardson@clr.com

Brooks A. Richardson
Assistant General Counsel
And Director – Enterprise Risk
Continental Resources, Inc.
20 North Broadway
Oklahoma City, OK 73102

Re: N.D. Admin. Code § 33.1-15-07-02(1) Rulemaking Petition

Dear Mr. Richardson:

Enclosed please find the Department of Environmental Quality's Final Determination on Continental Resources, Inc.'s Rulemaking Petition. In making this determination, the Department carefully considered the information presented by Continental and other stakeholders. But, as explained in the Final Determination, the Department has concluded that additional rulemaking – beyond the current effort to adopt Quad-O/Oa by reference – is not appropriate at this time.

The Department looks forward to continuing the conversation with Continental and other stakeholders after it has had experience implementing Quad-O/Oa and more information is known on the impact of Quad-O/Oa on North Dakota's air quality and compliance with SIP commitments. The Department remains committed to continually improving environmental regulation for the benefit of all, and appreciates Continental's interest in these important issues.

Sincerely,

A handwritten signature in cursive script that reads "Margaret I. Olson".

Margaret I. Olson
Assistant Attorney General

jjt

Enclosure

cc: Dave Glatt, Director, Department of Environmental Quality

Rulemaking Petition | Final Determination

Petition to amend N.D. Admin. Code § 33.1-15-07-02(1) submitted by
Continental Resources, Inc.

Background

By letter dated June 12, 2019, Continental Resources, Inc., petitioned the Department of Environmental Quality (DEQ) to amend N.D. Admin. Code § 33.1-15-07-02(1) (referred to as the “Rule”). The Rule is a long-standing part of North Dakota’s air pollution control program, which DEQ administers and enforces. See N.D.C.C. § 23.1-06-04(1). DEQ became an agency on April 29, 2019, prior to that the state’s environmental programs were implemented by the Department of Health’s Environmental Health Section.¹

Under the Clean Air Act, the United States Environmental Protection Agency (EPA) establishes national standards to control air pollution. As relevant here, these include the National Ambient Air Quality Standards (NAAQS) and New Source Performance Standards (NSPS). EPA oversees the DEQ’s implementation of these standards.

The NAAQS are maximum permissible levels of common pollutants. EPA has established NAAQS for six pollutants (referred to as “criteria pollutants”): sulfur dioxide, particulate matter, nitrogen dioxide, carbon monoxide, ozone, and lead. Every state must formulate a state implementation plan (SIP) for achieving compliance with the NAAQS. 42 U.S.C. § 7407(a) (listing requirements for SIPs). The NAAQS set a standard that the states must maintain through additional state requirements as outlined and listed in the SIPs. SIPs are subject to EPA review and approval. 42 U.S.C. § 7410. North Dakota has had an EPA-approved SIP since 1972. See 40 C.F.R. §§ 52.1820–52.1837; 37 Fed. Reg. 10,842 (May 31, 1972).

The NSPS contain standards and other requirements that apply to new or modified sources, which may require controls or emissions limits. 42 U.S.C. § 7411. These standards are codified at 40 C.F.R. part 60. The Clean Air Act authorizes EPA to delegate to a state the authority for implementing NSPS if the state has submitted an adequate plan. 42 U.S.C. § 7411(c). If a state incorporates the federal NSPS by reference, the delegation can be automatic. 79 Fed. Reg. 60993, 60994 (Oct. 9, 2014). EPA has approved North Dakota to receive automatic delegation of NSPS when it adopts them by reference. *Id.* NSPS adopted by reference are not included in a state’s SIP.

¹ On April 29, 2019, DEQ became the agency responsible for the administration and enforcement of the environmental protection programs, laws, and rules previously administered and enforced by the North Dakota Department of Health’s Environmental Health Section, pursuant to 2017 N.D. Sess. Laws ch. 199.

The petition asks DEQ to amend the Rule, which is part of North Dakota's SIP, to "realign" it with NSPS 40 C.F.R. Part 60, Subparts OOOO and OOOOa (referred to as "Quad-O/Oa"). Quad-O/Oa addresses certain organic compounds emissions, primarily through leak detection requirements. The Rule also addresses organic compounds emissions by requiring organic compounds gases and vapors be burned by a DEQ-approved control device.

Organic compounds are not themselves criteria pollutants but include ozone precursors, such as volatile organic compounds (VOCs), which react with nitrogen oxides to form ozone. 73 Fed. Reg. 16,436, 16,437 (Mar. 27, 2008). "Ozone is a significant health concern, particularly for children and people with asthma and other respiratory diseases." 69 Fed. Reg. 23,858, 23,859 (April 30, 2004). Sources that emit ozone precursors are regulated to reduce ground-level ozone in the ambient air, to attain or maintain compliance with the ozone NAAQS. See 73 Fed. Reg. 16,436 (discussing basis for ozone NAAQS).

N.D. Admin. Code § 33.1-15-07-02(1) (The Rule)

The Rule currently provides:

No person may cause or permit the emission of organic compounds gases and vapors, except from an emergency vapor blowdown system or emergency relief system, unless these gases and vapors are burned by flares, or an equally effective control device as approved by the department. Minor sources, as determined by the department and not subject to New Source Performance Standards (NSPS), may be granted exemptions to this subsection.

The Rule is not limited to a specific industry; it applies to all sources of organic compounds and limits the emission of organic compounds gases and vapors. Nothing in Chapter 7, which includes the Rule, specifies recordkeeping, reporting, or monitoring requirements or a leak detection and repair (LDAR) program. Under the Rule, fugitive emissions resulting from sources other than emergency vapor blowdown systems or emergency relief systems (i.e. pressure relief valves [PRVs] operating to release pressure as a safety mechanism, excluding PRVs open or leaking due to poor maintenance) may be considered a violation.

The Rule is part of North Dakota's EPA-approved SIP required by the Clean Air Act. See 40 C.F.R. § 52.1820 (listing EPA-approved rules); 84 Fed. Reg. 1,610 (February 5, 2019) (approving transfer of authority and recodification of rules). Nearly identical language

has been in the state's air pollution control rules since 1972 and was in the original SIP. N.D. Admin. Code § 23-25-07.200 (1972); 37 Fed. Reg. 10,885 (May 31, 1972).

Because the Rule controls organic compounds emissions, it is part of the state's plan for meeting the ozone NAAQS. EPA is required to review the ozone NAAQS every 5 years. 42 U.S.C. § 7409(b)(1). The ozone NAAQS was revised in 1997 to an 8-hour standard of 80 parts per billion (ppb), and that standard was lowered in 2008 to 75 ppb and again in 2015 to 70 ppb (i.e., the standard has become more stringent)². EPA has also discussed lowering the ozone standard further to 60 ppb, which could cause North Dakota to be classified as a "nonattainment" area (i.e., not in compliance with the NAAQS). If North Dakota is classified as "nonattainment," it would be subject to developing a nonattainment SIP with requirements for getting the ambient air back to attainment status, including "implementation of all reasonably available control measures" (RACM) that would be more stringent than those control measures required under NSPS. 42 U.S.C. § 7502.

Organic compounds may also contain Hazardous Air Pollutants (HAPs). Therefore, the Rule has a co-benefit of controlling air toxics. This can decrease the permitting and compliance burden on industry for Air Toxics and air dispersion modeling requirements for several facility types, while ensuring organic compounds and HAP emissions are controlled.

40 C.F.R. 60, Subparts OOOO and OOOOa (Quad-O/Oa)

EPA first published 40 CFR 60, Subpart OOOO (Quad-O) in 2012³. On September 18, 2015, the EPA published 40 CFR 60, Subpart OOOOa (Quad-Oa). These two regulations have undergone several rulemaking actions by EPA and legal challenges.⁴ In 2019, during the 66th Legislative Session, DEQ was encouraged to adopt and implement these two subparts, which would mean that DEQ would be the agency implementing these two regulations instead of EPA, which currently implements them in North Dakota. If DEQ adopts Quad-O/Oa, EPA still retains oversight authority.⁵

² For more information on the Ozone NAAQS, see: <https://www.epa.gov/ground-level-ozone-pollution> (last visited March 12, 2020).

³ For more information about EPA's rulemaking on Quad-O, see <https://www.epa.gov/stationary-sources-air-pollution/crude-oil-and-natural-gas-production-transmission-and-distribution> (last visited March 12, 2020).

⁴ For more information about EPA's rulemaking on Quad-Oa, see <https://www.epa.gov/controlling-air-pollution-oil-and-natural-gas-industry/new-source-performance-standards-and> (last visited March 12, 2020).

⁵ Letter from Stephen S. Tuber, EPA, to Terry O'Clair, N.D. Dep't of Health (August 6, 2009), *available at* https://deq.nd.gov/publications/AQ/policy/PC/EPA_NSPS090831.pdf (last visited March 12, 2020).

Quad-O/Oa apply to volatile organic and methane emissions from the natural gas and oil wells, crude oil transport, and natural gas transmission sectors. These subparts focus on design requirements for gas collection to route to control devices and best practices for the control of emissions. It specifies a leak detection and repair (LDAR) program with requirements for an operating and maintenance (O&M) program and specifies recordkeeping, monitoring, and reporting requirements. Leaks that are discovered during the required LDAR checks (quarterly to semi-annually, depending on the source) are not considered violations under Quad-O/Oa, but rather initiates the requirement for timely repairs. If the discovered leaks are not addressed within a specified time period, an enforcement action may be warranted. The intent of an LDAR program is to codify O&M requirements and fix leaks at specified intervals (quarterly, semi-annually) rather than allow leaks (emissions) for possibly years.

Procedural History

The Petition

The petition was filed pursuant to N.D.C.C. §§ 23.1-01-04(3) and 28-32-16. N.D.C.C. § 23.1-01-04(3) allows a person affected by a rule to petition DEQ to determine if the rule is more stringent than a corresponding federal rule and, if it is, to review and revise the rule. N.D.C.C. § 28-32-16 allows “[a]ny person substantially interested in the effect of a rule” to petition DEQ for “reconsideration of the rule or for an amendment or repeal of the rule.”

Petitioner’s proposed amendment to the Rule⁶ is as follows:

No person shall cause or permit the emission of organic compounds gases and vapors, except from a vapor blowdown system or emergency relief system, unless these gases and vapors are “fugitive emissions” as defined in section 1(14)⁷, and emissions control equipment burned by flares, or an equally effective control device as approved by the department is installed and operated in accordance with sections [the Department’s implementing regulations for Quad O and Quad Oa]. Provided the requirements of these sections are met, then fugitive emissions from such equipment shall be exclusively regulated under section 17 (“Restriction of Fugitive Emissions”)⁸. Minor sources, as determined by the department and not subject to New

⁶ The petition references N.D. Admin. Code § 33-15-07-02(1) but, due to the transition to DEQ, the current citation is N.D. Admin. Code § 33.1-15-07-02(1). Similarly, the reference to N.D.C.C. § 23-01-04.1(3) should now be to N.D.C.C. § 23.1-01-04(3).

⁷ DEQ assumes this is a reference to N.D. Admin. Code § 33.1-15-01-04(14).

⁸ DEQ assumes this is a reference to N.D. Admin. Code ch. 33.1-15-17 a/k/a “Chapter 17.”

Source Performance Standards (NSPS), may be granted exemptions to this subsection.

Related Litigation Involving the Rule

At the time the petition was filed, a case brought by Petitioner against DEQ involving the Rule was pending before the North Dakota Supreme Court. Petitioner had appealed a district court order dismissing a declaratory judgment action brought against DEQ, which sought to require DEQ to effectively amend the Rule by forcing it to interpret the Rule contrary to its plain language. One argument raised by DEQ to the district court and again to the Supreme Court in its June 3, 2019 brief was that Petitioner's claim was not ripe because it had not exhausted its available administrative remedy to petition DEQ under N.D.C.C. §§ 23.1-01-04(3) and 28-32-16. The Supreme Court agreed the claim was not ripe in its November 26, 2019 opinion.

The language of the petition's proposed amendment is not identical to the language of the requested relief in Petitioner's declaratory action, but they would both similarly limit DEQ's ability to enforce the Rule at facilities leaking organic compounds gases and vapors. The main difference is that the petition ties an exemption to the Rule to compliance with Quad-O/Oa. As discussed above, Quad-O/Oa are federal rules not yet adopted by DEQ. EPA currently implements them in North Dakota. Thus, the petition's proposed amendment was not at issue in the previous litigation and DEQ is addressing it for the first time here.

DEQ's Review of the Petition

DEQ did not begin its technical review of the petition until mid-August 2019. There were two main reasons for the delay. First, DEQ had to verify the Clean Air Act procedures that would apply if DEQ decided to amend the Rule. In its petition, Petitioner stated that "we have confirmed with EPA that a minor rule change such as the one we have proposed will not require an official revision to the SIP through the Federal Register." This is contrary to DEQ's understanding of the Clean Air Act SIP approval requirements. In a June 21, 2019 letter, counsel for DEQ requested EPA to confirm Petitioner's statement. In its July 17, 2019 response, EPA stated that it was unable to confirm Petitioner's statement and that the proposed amendment "would require a formal SIP revision to be submitted to EPA."

Second, DEQ did not receive funding for Quad-O/Oa until July 2019⁹. As soon as funding became available, DEQ hired two staff members and began developing the state's Quad-O/Oa program. After the initial review of the petition, DEQ determined the issue was of statewide significance and should be subject to public comment. See N.D.C.C. § 28-32-16 (agency may grant petitioner "a public hearing on the terms and conditions as the agency prescribes"). Additionally, around this time, EPA proposed rulemaking to change Quad-Oa that could potentially remove an entire industry sector from being subject to NSPS OOOOa.¹⁰

On October 11, 2019, DEQ issued its "Notice of Opportunity to Comment on Rulemaking Petition and Solicitation of Views on Administrative Rules Relating to Air Emissions from Oil and Gas Production Facilities." The notice sought input on the two related issues – the rulemaking petition and DEQ's anticipated adoption of Quad-O/Oa. Although comment on any relevant or technical issues was sought, DEQ did identify three specific issues for comment:

- How do recent EPA rulemakings involving Quad-O/Oa impact DEQ's anticipated adoption of these rules?
- Anticipating that DEQ adopts Quad-O/Oa, should it: 1) amend N.D. Admin. Code § 33.1-15-07-02(1) as requested in the Petition for Rulemaking, 2) amend N.D. Admin. § 33.1-15-07-02(1) in a different way, or 3) not amend N.D. Admin. Code § 33.1-15-07-02(1)?
- If DEQ decides to undertake rulemaking to both adopt Quad-O/Oa and amend N.D. Admin. § 33.1-15-07-02(1), should the DEQ conduct one proceeding, or should it first adopt Quad-O/Oa and obtain EPA's approval for implementing those rules before proposing any amendments to N.D. Admin. Code § 33.1-15-07-02(1)?

During the public comment period, DEQ made available its Preliminary Analysis of these issues on its website. In its Preliminary Analysis, DEQ raised several concerns with the petition's proposed amendment to the Rule.

DEQ accepted comments until December 13, 2019. A public hearing was held on November 12, 2019. Written and oral comments were received from various stakeholders (Petitioner, other members of industry, public interest groups, and private citizens).

⁹ Most funding for the new program is not available until July 1, 2020. See 2019 N.D. Sess. Laws ch. 24, § 7.

¹⁰ See 84 Fed. Reg. 50244-50286 (Sept. 24, 2019).

Public Interest Group/Private Citizen Comments

Several members of the public and public interest groups provided comments. In general, the comments expressed concern over weakening organic compounds control requirements. The main comments are summarized as follows:

- DEQ should keep in place a “ban” on organic compounds.
- DEQ should conduct more monitoring for air pollution.
- Allowing more organic compounds emissions will affect compliance with the ozone ambient air quality standard.
- Concerns were expressed regarding air toxics emitted with organic compounds.
- DEQ should protect the air quality on the Ft. Berthold Indian Reservation.
- DEQ should not weaken air quality rules.
- The Quad-O/Oa rules should be adopted by DEQ but not until all changes to the Quad-O/Oa rules are finalized. Adopting Quad-O/Oa before the rules are finalized will result in regulatory uncertainty.
- Concerns were expressed regarding the amount of natural gas flaring in the state.
- The “no venting” law should be kept in place and should not be replaced with Quad-O/Oa.
- The petition states that “zero leaks” technology is impossible but does not provide adequate support for this statement. Petitioner has not demonstrated that leak-less or low-leak technology is infeasible.
- Petitioner wants less regulatory requirements under the guise of wanting regulatory “certainty”. Requiring zero emissions technology also provides “certainty”.
- Petitioner states that North Dakota has the nation’s “cleanest” air; however, as DEQ stated in a Preliminary Analysis, lowering of the ozone standard could cause the entire state to be in non-attainment.
- With the increasing destruction from man-made climate change, emissions must be prevented as much as possible.
- The language proposed by Petitioner could threaten DEQ’s approved 2015 ozone SIP. Demonstrating that changes to Chapter 7 don’t interfere with attainment of the ozone NAAQS in North Dakota (or other states) could be very difficult and time consuming.
- Removing the requirement to control tank emissions would remove current federally enforceable restrictions on emissions and make tanks currently restricted under Chapter 7 now subject to Quad-O/Oa. This would have the effect of increasing the permitting and recordkeeping burden on industry and DEQ without any appreciable environmental benefit. In addition, all minor

sources would need to be re-evaluated and re-permitted for organic compounds control and air toxics.

- Methane is a potent greenhouse gas which must be aggressively controlled.
- Chapter 7 currently requires a flare to control organic compounds, which is common sense. This rule should not be changed.
- Quad-O/Oa is a separate issue from Chapter 7. Trying to consider these rules together is confusing and needlessly complicated.
- The state should be doing more, not less, to mitigate organic compounds emissions, especially with thousands of new organic compounds emitting oil and gas wells being proposed.
- DEQ should be more aggressive in enforcing Chapter 7 given the high likelihood that the state will go into ozone nonattainment without significant efforts to mitigate organic compounds emissions.

Industry Comments

The oil and gas industry submitted three main sets of comments. Generally, the comments support changes to the air pollution control rules but there is not agreement on what exactly the changes should be. The three sets of comments are summarized as follows:

- The North Dakota Petroleum Council (NDPC) submitted comments on behalf of the oil and gas industry; some oil companies also submitted comments in support of the NDPC comments. NDPC proposed alternative changes to DEQ's air pollution control rules, which include an amendment to the Rule and a proposed new section to Chapter 17.
- Petitioner submitted comments indicating that Petitioner now appears to agree with the NDPC proposed changes.
- Hess Corporation, Marathon Oil Company and Hunt Oil Company also submitted comments. Hess/Marathon/Hunt appear to be similar to the NDPC proposed changes, although Hess/Marathon/Hunt proposed the changes as a change to Chapter 7, not Chapter 17.

Current Status of Quad-O/Oa

DEQ decided to move forward with adopting by reference Quad-O/Oa. On December 17, 2019, DEQ issued a public notice of the proposed adoption of Quad-O/Oa and additional amendments to the air pollution control rules. DEQ held a public comment hearing on

February 7, 2020, and accepted public comment until February 17, 2020. DEQ is currently reviewing the public comments, though no comments were received on the proposed adoption of Quad-O/Oa. The public notice did not include any proposed amendments to the Rule.

DEQ determined it was not necessary to wait to begin adoption of Quad-O/Oa until after it reached a decision on the petition because the Rule contains different requirements than Quad-O/Oa. The adoption of Quad-O/Oa does not preclude DEQ's continued enforcement of the Rule. Additionally, with HB 1024, the Legislature indicated its preference that DEQ proceed to adopt Quad-O/Oa as expeditiously as possible.

Analysis and Final Determination

DEQ has conducted a review of the petition and comments received during the comment period. Based on its review, DEQ is denying the petition. In reaching this decision, DEQ finds (1) Petitioner's arguments in support of its proposed amendment are unconvincing; and (2) Petitioner has not shown any flaw in the Rule requiring such amendment. A discussion of the main reasons for denying the petition follows.

Concerns with the Proposed Amendment

➤ The proposed amendment is ambiguous

The proposed amendment would remove the language that requires organic compounds gases and vapors to be burned by flares or an equally effective control device. Instead, fugitive emissions would apparently be allowed if control equipment is installed and operated in accordance with Quad-O/Oa. The proposed amendment would make such fugitive emissions subject to regulation solely under Chapter 17. This would create ambiguity that does not currently exist.

First, the proposed amendment would create confusion over the regulation of organic compounds emission from facilities (including certain oil and gas production facilities) not subject to Quad-O/Oa. Petitioner's proposed amendment is based on the incorrect premise that the Rule only applies to oil and gas production facilities subject to Quad-O/Oa. In actuality, the Rule is much broader. The Rule applies to many oil and gas production facilities that are exempt from Quad-O/Oa (i.e., pre-2011 facilities). Additionally, the Rule applies to thousands of facilities in several other types of source categories (e.g., ethanol plants, oil seed processing plants, potato processing plants, waste water treatment plants, etc.).

The proposed amendment could be interpreted as requiring that all oil and gas production facilities would need to comply with Quad-O/Oa, which could make the state rule more stringent than the corresponding federal rule in violation of N.D.C.C. § 23.1-01-04. And, facilities in other source categories would have no means to comply with the Rule. Alternatively, the Rule could be interpreted as exempting sources not subject to Quad-O/Oa from any requirement to install control equipment. In other words, the proposed amendment is so ambiguous that DEQ cannot determine which sources would or would not be affected.

As a result, the proposed amendment could limit and prevent DEQ from being able to control organic compounds from sources other than those in the oil and natural gas industrial sectors covered by Quad-O/Oa, which would likely result in higher emissions of organic compounds from other industrial and agricultural sources throughout the state. The proposed language could also threaten DEQ's approved 2015 Ozone Infrastructure-SIP. Section 110(l) of the Clean Air Act, 42 U.S.C. § 7410(l), states that EPA may not approve a SIP revision if it would interfere with any applicable requirement concerning attainment and reasonable further progress. Additionally, EPA cannot approve a SIP in one state that contributes to the nonattainment of another state. The demonstration that the changes to Chapter 7 do not interfere with attainment of the ozone NAAQS in North Dakota or in other states could be very difficult and time-consuming.

Second, the proposed amendment would create confusion about non-fugitive emissions (e.g., emissions from flares). The proposed language could be interpreted as allowing no organic compounds emissions except for those fugitive emissions regulated by Quad-O/Oa. This is problematic because control devices do not currently control 100% of organic compounds gases and vapors that pass through the devices.

Third, the proposed amendment would create confusion of how fugitive emissions are regulated under N.D. Admin. Code ch. 33.1-15-17 (Chapter 17). Chapter 17 currently contains no restrictions specific for organic compounds emissions. Petitioner's written comments, along with the other industry written comments, indicate that the proposed amendment is not feasible and that changes to Chapter 17 may also be required if the Rule is amended.

In contrast, as DEQ explained extensively in its briefs filed in the related litigation which DEQ incorporates herein by reference, the Rule's meaning is clear. By its plain language, the Rule not only requires a control device be installed and operating; it also requires that it be working properly to control emissions (i.e., that emissions be "burned by" the control device). And so to comply with the Rule, a facility needs to: (1) have an installed and operating approved control device that is as efficient as a flare (i.e., have the proper type

of equipment); and (2) ensure gases and vapors actually reach and are burned by the control device (i.e., have properly working equipment). See Br. of DEQ at ¶ 25, *Cont'l Res., Inc. v. N.D. Dep't of Env'tl. Quality*. The North Dakota Supreme Court agrees that the Rule is unambiguous, stating that Petitioner “wants the district court to read ambiguity into the Rule where it doesn’t otherwise exist.” *Cont'l Res., Inc. v. N.D. Dep't of Env'tl. Quality*, 2019 ND 280, ¶ 14, 935 N.W.2d 785.

➤ **The proposed amendment could have negative consequences**

DEQ is concerned the proposed amendment could have negative consequences not only for public health and the environment, but also for regulated entities. For example, the midstream oil and natural gas industry sector (i.e., compressor stations, crude oil storage tanks, etc.) has used the Rule’s “*flare or equally effective control device*” requirement to determine Quad-O/Oa applicability. Through policy¹¹, DEQ has set the same level of control as Quad-O/Oa, six tons per year per tank VOC emissions, without the recordkeeping and reporting requirements of Quad-O/Oa.

40 C.F.R. 60, Subpart OOOO states:

§60.5365 Am I subject to this subpart?

You are subject to the applicable provisions of this subpart if you are the owner or operator of one or more of the onshore affected facilities listed in paragraphs (a) through (g) of this section for which you commence construction, modification or reconstruction after August 23, 2011, and on or before September 18, 2015.

....

(e) Each storage vessel affected facility, which is a single storage vessel located in the oil and natural gas production segment, natural gas processing segment or natural gas transmission and storage segment, and has the potential for VOC emissions equal to or greater than 6 tpy as determined according to this section by October 15, 2013 for Group 1 storage vessels and by April 15, 2014, or 30 days after startup (whichever is later) for Group 2 storage vessels, except as provided in paragraphs (e)(1) through (4) of this section. The potential for VOC emissions must be calculated using a generally accepted model or calculation methodology, based on the maximum average daily throughput determined for a 30-day period of production prior to the applicable emission determination deadline specified in

¹¹ See <https://deq.nd.gov/AQ/oilgas/VOC.aspx> for VOC-related DEQ policies.

*this section. **The determination may take into account requirements under a legally and practically enforceable limit in an operating permit or other requirement established under a Federal, State, local or tribal authority.*** (emphasis added)

40 C.F.R. 60, Subpart OOOOa states:

§60.5365a Am I subject to this subpart?

You are subject to the applicable provisions of this subpart if you are the owner or operator of one or more of the onshore affected facilities listed in paragraphs (a) through (j) of this section for which you commence construction, modification, or reconstruction after September 18, 2015.

....

*(e) Each storage vessel affected facility, which is a single storage vessel with the potential for VOC emissions equal to or greater than 6 tpy as determined according to this section. The potential for VOC emissions must be calculated using a generally accepted model or calculation methodology, based on the maximum average daily throughput determined for a 30-day period of production prior to the applicable emission determination deadline specified in this subsection. **The determination may take into account requirements under a legally and practically enforceable limit in an operating permit or other requirement established under a federal, state, local or tribal authority.*** (emphasis added)

The proposed amendment would remove the Rule's federally enforceable tank limits and make every previous tank restricted under Chapter 7 now subject to Quad-O/Oa. This would have the effect of increasing the permitting and recordkeeping burden on industry and DEQ without any appreciable environmental benefit. All minor sources would need to be re-evaluated and re-permitted for VOC controls and air toxics.

➤ **No commenters support the proposed amendment**

Notably, none of the commenters – including industry – supported Petitioner's proposed amendment. Even Petitioner appears to now recognize at least some of these potential negative consequences from its proposed ambiguous amendment, based on statements in its written comments. Petitioner appears to instead support the alternative

amendments proposed by NDPC, although it is not clear whether Petitioner continues to support its proposed amendment as stated in its petition.

The Current Rule is not Flawed

➤ The Rule does not set an impossible standard

DEQ acknowledges that “completely leakless” technology is not currently available. But that does not mean compliance with the Rule is impossible. As explained by DEQ (and its predecessor) in several guidance documents, leaks can and must be eliminated through proper design and maintenance.

Besides stating leakless technology is not currently available, Petitioner has not submitted any evidence in support of its claim that the Rule’s standard is impossible to meet. Without any technical justification for adopting the proposed amendment, DEQ does not believe it is appropriate to grant Petitioner’s rulemaking petition. Notably, DEQ would have to submit detailed technical data to EPA to show that North Dakota is still able to comply with the ozone NAAQS and its SIP submittals without the Rule restricting emissions from numerous facilities; Petitioner has provided no such data. Compiling such data would place an extreme burden on DEQ, and DEQ is uncertain if it is even feasible to make such a showing.

DEQ’s determination that the Rule does not set an impossible standard is supported by its experience in the field. DEQ routinely inspects oil production facilities, and in recent years the Department has seen only a small percentage of facilities having non-compliance issues with the Rule as operators have increased efforts to prevent and control leaks.

DEQ acknowledges that, especially for operators with poorly-designed facilities, it may be a challenge to comply with the Rule. But DEQ believes these facilities can comply by ensuring facilities are properly designed and maintained. DEQ remains committed to working with operators on compliance concerns. It is important to remember that the Rule is an essential part of North Dakota’s plan to meet the ozone NAAQS to protect public health and the environment. As such, it is not appropriate to exempt from the Rule a large portion of the oil and gas industry – one of the state’s major emitters – simply because some operators may find it too burdensome. Additionally, the responses to comments show that there is public support for the Rule and opposition to weakening of the organic compounds restrictions.¹² DEQ is mindful of the public policy of N.D.C.C. ch.

¹² See, e.g., written comments submitted by Theodora Bird Bear, the Northwest Landowners, and the Dakota Resource Council.

23.1-06, air pollution control, which is to “achieve and maintain the best air quality possible.” N.D.C.C. § 23.1-06-02 (emphasis added).

Petitioner points to DEQ’s response to comments for a petroleum refinery permit. There DEQ stated “a completely leakless fugitive component does not currently exist” and “monitoring of other type of observation is appropriate to ensure that leaks are caught if they develop.” Although a different regulatory context, these statements support DEQ’s position. By reading the response to comments in its entirety, it is clear that DEQ required the petroleum refinery to comply with stringent permit conditions to prevent and control leaks to comply with the Rule.¹³ Notably, petroleum refineries are subject to both strict leak detection and repair programs under NSPS and the Rule. Although DEQ does not think it appropriate to require every oil and gas production facility to have an individualized permit like refineries, it is still necessary for oil and gas production facilities to prevent and control leaks to comply with the Rule.

➤ The Rule is not more stringent than federal rules

In support of its petition, Petitioner argues that the Rule “violates N.D.C.C. § 23.1-01-04¹⁴, which prohibits the Department from adopting any rule that is more stringent than corresponding federal regulations adopted under the Federal Clean Air Act.” Specifically, Petitioner alleges that by prohibiting all leaks, the Rule is more stringent than “[f]ederal counterparts [that] focus on the operation of a routine maintenance, leak detection, and repair program, with objective timelines.” In its comments, Petitioner also states that in addition to N.D.C.C. § 23.1-01-04, the Rule also violates § 23.1-06-07¹⁵, which similarly prohibits DEQ from adopting any air quality rules that are stricter than federal rules under the federal Clean Air Act, unless it first conducts a risk assessment. DEQ disagrees with Petitioner’s arguments.

First, although both the Rule and Quad-O/Oa address organic compounds emissions, they focus on different aspects of facility emissions. The Rule focuses on having functioning control equipment on sources of organic compounds to reduce the amount of organic compounds released into the atmosphere (i.e., that these organic compounds be routed to controls and that the controls are operated properly as designed by the manufacturer). Significant leaking due to poor maintenance or poor design, open thief hatches, means the organic compounds are bypassing the required control equipment. Quad-O/Oa also

¹³ The entire response to comment 22.e referenced in App. 155 is available at <https://deq.nd.gov/AQ/Notices/Meridian/Final/DeptResp.pdf> (last visited March 12, 2020).

¹⁴ N.D.C.C. § 23.1-01-04 was originally codified as § 23-01-04.1 in 1995.

¹⁵ N.D.C.C. § 23.1-06-07 was originally codified as § 23-25-03.3 in 1997.

requires control devices on tanks, centrifugal compressors, and pneumatic pumps like the Rule does, but Quad-O/Oa focuses on leak detection and repair programs to find any leaks that occur due to normal wear and tear, not from poor design or poor maintenance. It is possible that Quad-O/Oa will be so successful at preventing and quickly eliminating leaks that it may no longer be necessary to have the Rule in its current form, but that information will not be known until further study is done after the implementation of Quad-O/Oa in North Dakota by DEQ. In summary, the Rule cannot be more stringent than Quad-O/Oa because they focus on different compliance methodologies.

Second, the Rule is not only a state rule but is required to be in place under the Clean Air Act. As explained above, the Rule is part of North Dakota's Clean Air Act-required and EPA-approved SIP. As such, it is "enforceable as federal law and may be enforced by the state, the EPA, or individuals under the CAA citizen-suit provision." *US Magnesium, LLC v. E.P.A.*, 690 F.3d 1157, 1159 (10th Cir. 2012); *see also Cal. Dump Truck Owners Ass'n v. Nichols*, 924 F. Supp. 2d 1126, 1138 n.6 (E.D. Cal. 2012) (noting general agreement "that a SIP becomes federal law upon its approval by EPA"). And, as discussed in EPA's July 17, 2019 letter, DEQ cannot amend the Rule without EPA's approval. 42 U.S.C. § 7410(l). Based on this EPA letter, DEQ experience, and the fact that VOC control requirements are integral to DEQ demonstrating the ability to ensure compliance with the ozone NAAQS, any rulemaking related to VOC control requirements in Chapter 7 and/or 17 will likely face a lengthy EPA review process. Further, the Rule was adopted into the SIP and became federal law in 1972, decades before N.D.C.C. §§ 23.1-01-04 and 23.1-06-07's adoption. *See* N.D. Admin. Code § 23-25-07.200 (1972); 37 Fed. Reg. 10,885. The Rule is part of the Code of Federal Regulations, 40 C.F.R. 52, Subpart JJ-North Dakota. Because the Rule is federal law, it cannot violate N.D.C.C. §§ 23.1-01-04 and 23.1-06-07 by being more stringent than federal law.

In addition, in its written comments, Petitioner argues that the Rule isn't necessary because other states simply rely on Quad-O/Oa. In support of this assertion, it points to Oklahoma rules. While DEQ isn't familiar with Oklahoma's air quality program, not all jurisdictions rely only on Quad-O/Oa.¹⁶ For example, within North Dakota, EPA's federal implementation plan (FIP) for the Fort Berthold Indian Reservation is similar to the Rule in that it requires "all standing, working, breathing, and flashing losses from the produced oil storage tanks and any produced water storage tank interconnected with the produced

¹⁶ States address VOC emissions in a variety of ways. *See* EPA Memorandum, Docket ID No. EPA-HQ-OAR-2017-0483 Subject: Equivalency of State Fugitive Emissions Programs for Well Sites and Compressor Stations to Proposed Standards at 40 CFR Part 60, Subpart OOOOa, available at https://www.epa.gov/sites/production/files/2018-09/documents/equivalency_of_state_fugitive_emissions_programs_for_well_sites_and_compressor_stations.pdf (last visited March 12, 2020).

oil storage tanks through a closed-vent system” be routed to a recovery system or control device. 40 C.F.R. § 49.4164 (emphasis added). In adopting the FIP, EPA noted it was needed to address VOC emissions not addressed by any other federal rule, include Quad-O, and that off-reservation such emissions were being addressed by state rules.¹⁷

➤ The Rule does not conflict with Chapter 17

Petitioner argues that the Rule conflicts with Chapter 17, which addresses fugitive emissions. But DEQ believes the Rule is easily read in harmony with Chapter 17, as a facility leaking organic compounds emissions would not only be violating the Rule’s specific restriction on emitting organic compounds but also likely the Rule’s general requirement to take “reasonable precautions” to prevent fugitive emissions of all pollutants. Importantly, Chapter 17 does not now currently address organic compounds emissions so, as Petitioner acknowledges in its written comments that include a request to add a new section to Chapter 17, its originally proposed amendment is not feasible.

Conclusion

DEQ appreciates the comments received by Petitioner, industry, and the public on this important issue. Based on these comments and its own review of the petition, DEQ declines to begin a proceeding to adopt the proposed amendment to the Rule or otherwise revise the air pollution control rules in response to the petition. DEQ’s decision to deny the petition is based on the concerns discussed above.

While Petitioner and other industry commenters suggested alternative amendments in their comments and DEQ did consider these comments in making its final determination,

¹⁷ “In promulgating this rule, the EPA is exercising its discretionary authority under Sections 301(a) and 301(d)(4) of the Clean Air Act (CAA) to promulgate regulations as necessary to protect tribal air resources. Promulgating this final rule addresses an important initial step to fill a regulatory gap between state and federal requirements with regard to controlling volatile organic compound (VOC) emissions from oil and natural gas operations on the FBIR. There is no other federal rule, including the recently finalized New Source Performance Standards (NSPS) and National Emissions Standards for Hazardous Air Pollutants (NESHAP) for the Oil and Natural Gas Sector (NSPS OOOO and NESHAP HH), that establishes regulations for the particular oil and natural gas production operations that exist on the FBIR. This is in contrast to oil and natural gas operations off the Reservation, which are governed by the North Dakota Department of Health (NDDoH) regulations and North Dakota Industrial Commission (NDIC) regulations within the State of North Dakota’s jurisdiction. The NDDoH requirements were developed with an understanding of the high VOC emissions and infrastructure constraints that exist in the region. Consistent with the regulatory structure that exists off the FBIR, and NSPS OOOO, this rule has requirements for VOC emissions control and reductions, monitoring, recordkeeping, and reporting. This rule also establishes requirements that are clear and legally and practicably enforceable.”

78 Fed. Reg. 17836-01 (March 22, 2013).

these alternative amendments were not the subject of this proceeding and DEQ's final determination does not include an analysis of all potential issues relating to them. Notably, these alternative amendments would also require a thorough analysis and would likely face obstacles similar to the petition's proposed amendment, such as requiring a SIP amendment. Additionally, it could be argued that these alternative amendments could be considered more stringent than federal rules under N.D.C.C. § 23.1-06-07 and require a risk assessment. The technical data needed to support a SIP amendment or risk assessment is not currently available and would likely require more information on the impact of DEQ's adoption of Quad-O/Oa.

DEQ is currently in the process of adopting Quad-O/Oa. Assuming those rules are adopted as expected, DEQ will begin implementing the Quad-O/Oa program in North Dakota. After DEQ has sufficient experience in implementing that program, it may reexamine whether revisions to the Rule or Chapter 17 – such as the alternative amendments – are appropriate.