

HEARING OFFICER'S REPORT

TO: The Honorable Shawn M. Garvin
Cabinet Secretary, Department of Natural Resources and Environmental Control

FROM: Lisa A. Vest
Regulatory Specialist, Office of the Secretary
Department of Natural Resources and Environmental Control

RE: Proposed Revisions to the Delaware State Implementation Plan ("SIP"):
(1) Certification of Delaware's Emission Statement Program, specifically, under 7 DE Admin. Code 1117;
(2) Certification of Delaware's Nonattainment New Source Review ("NNSR") Program, specifically, under 7 DE Admin. Code 1125; and
(3) Certification of Delaware's Requirements for Reasonably Available Control Technology ("RACT").

DATE: June 22, 2020

I. BACKGROUND AND PROCEDURAL HISTORY:

A virtual public hearing was held on Wednesday, March 25, 2020, at 6:00 p.m. via the State of Delaware Cisco WebEx Meeting Platform by the Department of Natural Resources and Environmental Control ("DNREC," "Department") to receive comment on the following proposed revisions to Delaware's State Implementation Plan ("SIP"): (1) Certification of Delaware's Emission Statement Program, specifically, under 7 DE Admin. Code 1117; (2) Certification of Delaware's Nonattainment New Source Review ("NNSR") Program, specifically, under 7 DE Admin. Code 1125; and (3) Certification of Delaware's Requirements for Reasonably Available Control Technology ("RACT"), as codified in the Department's Division of Air Quality ("DAQ") Regulations set forth in Title 7 of the *Delaware Administrative Code*. Delaware is required by Section 110 of the Federal Clean Air Act ("CAA") to submit to the U.S. Environmental Protection Agency ("EPA") a SIP that provides for the implementation, maintenance, and enforcement of the National Ambient Air Quality Standard ("NAAQS") as established by EPA.

The objectives of the proposed SIP revisions are to provide EPA with certifications that Delaware's programs for Emission Statements, NNSR, and RACT, as codified in the Department's DAQ Regulations, meet all the requirements of the 2015 Ozone NAAQS. Approval of these proposed SIP revisions will enable the Department to formally address EPA's requirements, and incorporate the same into Delaware's SIP document.

A SIP is a state plan that identifies how that state will attain and maintain air quality that conforms to each primary and secondary NAAQS. The SIP is a complex, fluid document containing regulations, source-specific requirements, and non-regulatory items such as plans and inventories. Delaware submitted its initial SIP to EPA in 1972. Delaware periodically submits revisions to the SIP as required by the CAA to address air quality non-attainment and maintenance issues. The CAA requires that any proposed SIP revision be made available for public comment and presented at a public hearing prior to submitting to EPA for adoption.

On October 1, 2015, the EPA promulgated a revised NAAQS for ground-level ozone at a level of 0.070 parts per million. Promulgation of a revised NAAQS triggers a requirement for the EPA to designate areas as nonattainment, attainment, or unclassifiable, and to classify the nonattainment areas based upon the severity of nonattainment at the time of designation. New Castle County, Delaware, was designated as marginal nonattainment as part of the Philadelphia-Wilmington-Atlantic City nonattainment area for the 2015 Ozone NAAQS, effective August 3, 2018. Delaware's Kent and Sussex Counties were designated as attainment areas for the same 2015 Ozone NAAQS. Depending on the classification of nonattainment counties within a state, states are required to submit SIP revisions to demonstrate how they are complying with the mandatory plan submission requirements for nonattainment areas under the CAA.

With each new NAAQS, the EPA summarizes the plan requirements to implement the provisions of the CAA which are applicable to attainment and nonattainment areas, or Implementation Plan Requirements ("IPR"), as these are more commonly known. The EPA finalized the IPR for the 2015 Ozone NAAQS on December 6, 2018.

As a marginal nonattainment area, Delaware's New Castle County is subject to specific requirements in this final rule. However, as Delaware is part of the Ozone Transport Region (a group of states identified under the CAA for the purposes of addressing interstate transport), all counties in Delaware are subject to certain IPRs.

For the benefit of this hearing record ("Record"), it should be noted that EPA has requested that a separate Secretary's Order be issued for each of the three proposed SIP revisions presented at the March 25, 2020 public hearing noted above, so that EPA may reference individual, independent SIP documents for each certification matter referenced above. This Hearing Officer's Report, however, shall cover all three proposed SIP revisions that were addressed at the virtual public hearing held by the Department on March 25, 2020.

As an option allowed by the EPA, where an air agency (such as DNREC) determines that an existing regulation is adequate to meet applicable nonattainment area planning requirements, that air agency's SIP revision may provide a written statement certifying that determination in lieu of promulgating new, revised regulations (December 6, 2018, 83 FR 63001). Since DNREC is choosing to provide written certification in lieu of submitting new or revised regulations, the certification must be provided to EPA as a SIP revision to its SIP document, in accordance with CAA Section 110 and 40 CFR 51.102,103 and Part 51, Appendix V.

The State of Delaware's finalized SIP document serves as the formal certification that DNREC is relying upon its existing regulations to meet EPA's requirements under the 2015 Ozone NAAQS. The proposed SIP revision serves as the mechanism by which the Department will incorporate that formal certification into its SIP document, thereby providing EPA with each of the proposed Certifications as referenced above.

As noted above, Delaware is currently proposing three specific SIP revisions to address EPA's requirements for incorporation into Delaware's SIP document, the first of which identifies SIP submission requirements to include rules which establish annual reporting requirements for certain stationary sources. This proposed SIP revision would provide EPA with Certification that Delaware's Emission Statement Program, under 7 DE Admin. Code 1117, meets the "Emissions Statement" requirement under the 2015 Ozone NAAQS.

The second SIP requirement concerns the certification of Delaware's NNSR Program. The NNSR is a preconstruction review permit program that applies to new major stationary sources or major modifications at existing sources located in a nonattainment area. This NNSR requirement is statewide, due to Delaware being geographically located in the Ozone Transport Region. The second proposed SIP revision, therefore, would provide EPA with Certification that Delaware's NNSR Program, specifically, under 7 DE Admin. Code 1125, meets the requirements under the 2015 Ozone NAAQS.

The third and final SIP requirement concerns the certification of Delaware's Requirements for RACT. Delaware is required to demonstrate that all major sources of nitrogen oxide and volatile organic compound emissions are required to implement controls which represent RACT, as well as all sources and source categories covered by Control Technique Guidelines and Alternate Control Techniques issued by the EPA. As noted previously, RACT is required statewide, since Delaware is in the Ozone Transport Region. Thus, the third proposed SIP revision is a certification that Delaware's DAQ Regulations, as codified in Title 7 of the *Delaware Administrative Code*, meet the requirements for RACT under the 2015 Ozone NAAQS.

The Department has the statutory basis and legal authority to act with regard to the proposed SIP revisions described herein, pursuant to 7 *Del.C.* Chapter 60. The Department published a General Notice of each of the aforementioned proposed SIP revisions, and of the March 25, 2020 public hearing held in this matter, in the March 1, 2020 *Delaware Register of Regulations*.

Subsequent to the publication of the General Notices in the *Delaware Register of Regulations*, Governor John Carney issued a State of Emergency (“SOE”) Declaration to enable the State of Delaware to prepare for the spread of COVID-19. This SOE Declaration (which became effective on Friday, March 13, 2020) specifically directed and authorized that all public meetings of executive branch public bodies, such as the DNREC public hearing scheduled in this matter for March 25, 2020, may be conducted electronically, either by means of telephone conference call or video conference call. In addition to all the standard notifications and noticing requirements that were met by DNREC in this matter, the Department formally addressed the change in meeting format (e.g., from standard face-to-face public gathering to virtual via the State of Delaware Cisco WebEx Meeting Platform) as follows: (1) formal news releases were issued by the Department on March 17, 2020, and again on March 20, 2020; (2) an updated meeting notice was published on the State of Delaware Public Meeting Calendar on March 24, 2020; and (3) an updated meeting notice was posted on the website for DNREC Public Hearings on March 24, 2020. These efforts were made to ensure the public was made aware of the format change of this public hearing as noted above, and that comments were still able to be submitted to the Department concerning the proposed SIP revisions being proposed at this time.

Subsequent to the virtual public hearing on March 25, 2020, the hearing record (“Record”) remained open for comment through April 9, 2020. No public comment was received by the Department during any phase of this hearing matter. As set forth above, all proper notification and noticing requirements concerning this matter were met by the Department. Proper notice of the hearing was provided as required by law.

II. SUMMARY OF THE PUBLIC HEARING RECORD:

The Record consists of the following documents: (1) a verbatim transcript of the virtual public hearing held on March 25, 2020; and (2) seventeen (17) exhibits introduced by responsible Department staff at the time of the aforementioned public hearing, and marked by this Hearing Officer accordingly as “Department Exhibits 1-17”. The Department’s person primarily responsible for the drafting and overall promulgation of these proposed SIP Amendments, Mark Prettyman, Environmental Scientist, Division of Air Quality, developed the Record with the relevant documents in the Department’s files.

As noted previously, the aforementioned proposed SIP revisions were presented and thoroughly vetted by the Department at the virtual public hearing on March 25, 2020. No formal comment was received by members of the public at that time. Pursuant to Delaware law, the record remained open subsequent to the date of the public hearing for the purpose of allowing additional public comment to be received regarding this matter. The hearing record closed for comment in this matter on April 9, 2020, with no public comment having been received by the Department during any phase of this hearing matter.

For the Secretary's review, a copy of each of the Department's proposed SIP revisions as presented at the aforementioned virtual public hearing is attached hereto as Appendix "A". Again, all proper notification and noticing requirements concerning this proposed promulgation were met by the Department in this matter.

III. RECOMMENDED FINDINGS AND CONCLUSIONS:

Based on the record developed, I find and conclude that the Department has provided appropriate reasoning regarding the need for the proposed SIP revisions to Delaware's SIP document. Accordingly, I recommend promulgation of the same in the customary manner provided by law.

Further, I recommend the Secretary adopt the following findings and conclusions:

1. The Department has the statutory basis and legal authority to act with regard to the aforementioned proposed SIP revisions, pursuant to 7 *Del.C.* Ch. 60;

2. The Department has jurisdiction under its statutory authority, pursuant to 7 *Del.C.* Ch. 60, to issue an Order adopting each of the three aforementioned proposed SIP revisions as final;

3. The Department provided adequate public notice of the proposed SIP revisions, and all proceedings associated with the same, in a manner required by the law and regulations. The Department provided the public with an adequate opportunity to comment on the proposed SIP revisions, and held the Record open for receipt of public comment subsequent to the date of the hearing (through April 9, 2020), consistent with Delaware law, in order to consider the same before making any final decision;

4. Promulgation of the proposed SIP revisions will enable the Department to provide EPA with Certifications that Delaware's Programs for its Emissions Statement and NNSR, as well as its Requirements for RACT, as codified in the Department's DAQ Regulations set forth in Title 7 of the *Delaware Administrative Code*, meet all the requirements of the 2015 Ozone NAAQS;

5. The Department's proposed SIP revisions, as set forth in Appendix "A" hereto, are adequately supported, are not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, the Department's proposed SIP revisions should be approved as final revisions to Delaware's SIP document, which shall become effective immediately upon the signing of the Secretary's Order dedicated to each of these three proposed SIP revisions as set forth above;

6. The Department has an adequate Record for its decision, and no further public hearing is appropriate or necessary; and

7. The Department shall submit the proposed SIP revisions as final SIP revisions to the *Delaware Register of Regulations* for publication in its next available issue, and provide such other notice as the law and regulation require and the Department determines is appropriate.

/s/Lisa A. Vest
LISA A. VEST
Public Hearing Officer