

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 Revised Amendments to 7 DE Admin. Code 1130: Title V State Operating Permit Program (Hearing Docket No. 2021-R-A-0009)**

DATE: March 10, 2022

I. BACKGROUND AND PROCEDURAL HISTORY:

A virtual public hearing was held on Wednesday, October 27, 2021, at 6:00 p.m. via the State of Delaware Cisco WebEx Meeting Platform by the Department of Natural Resources and Environmental Control (“DNREC” or “Department”) to receive comment on proposed *revised* regulatory amendments to 7 DE Admin. Code 1130: *Title V State Operating Permit Program* (“Amendments”). The Department’s Division of Air Quality (“DAQ”) is proposing to amend 7 DE Admin. Code 1130 to update the public notice requirements, affirmative defense requirements, and list of greenhouse gases (“GHGs”) and their global warming potential (“GWP”) values to maintain consistency with the current federal regulations of the United States Environmental Protection Agency (“EPA”).

The Department has the statutory basis and legal authority to promulgate these proposed *revised* Amendments, pursuant to 7 *Del.C.* §6010(a) and (c). The Department published the initial proposed Amendments in the October 1, 2021, *Delaware Register of Regulations* (“*Register*”).

Title V of the federal *Clean Air Act* requires the EPA to implement air quality operating permits called Title V Permits. Title V Permits apply to sources whose emissions meet or exceed Major Source levels. These sources are typically large stationary sources such as power plants, refineries or manufacturing plants.

The Department's DAQ adopted 7 DE Admin. Code 1130 to implement the federal requirements for Title V Permits in Delaware and establish the permitting procedures and requirements for the above-referenced sources. The objective of the proposed *revised* Amendments, as noted above, is to effectuate various updates to Delaware's existing regulations to maintain consistency with the EPA's current federal regulations. The affirmative defense requirement updates were precipitated by the EPA's final rule published on July 21, 1992, in Volume 57 of the Federal Register, beginning on Page 32,250. That rule is codified in Title 40 of the Code of Federal Regulations, Section 70.6(g).

The Department's proposed updates to GHG and GWP follow the EPA's updates to Title 40 of the Code of Federal Regulations, Section 98, Table A-1. The final rules that precipitated these amendments were published on November 29, 2013 in Volume 78 of the Federal Register, beginning on Page 71,903 and on December 11, 2014 in Volume 79 of the Federal Register, beginning on Page 73,749.

Similarly, updates to the public notice requirements for Title V Permits were the result of the EPA's final rule published on October 18, 2016 in Volume 81 of the Federal Register, beginning on Page 71,613. These changes were codified in Title 40 of the Code of Federal Regulations, Section 70.7.

With regard to the proposed *revised* Amendments related to affirmative defense requirements, Title V Permits require facilities to have specific emission monitoring and reporting requirements to demonstrate compliance, so that their emissions are below the allowable limits. Understanding that deviations in operation are possible from failure in emission control equipment, the EPA included a provision in their July 21, 1992 final rule to allow for some operational flexibility. That final rule provides an affirmative defense in the event where permit limits have been exceeded due to an emergency. EPA defines an "emergency" as a reasonably unforeseeable event beyond the control of the source that requires immediate corrective action to restore normal operation, and that is not due to certain factors specified in the rule.

The affirmative defense clause for Title V Permits is currently included in Delaware's existing 7 DE Admin. Code 1130, specifically, Section 6.0. It also includes the affirmative defense case for "emergencies" and "malfunctions." "Malfunction," as defined in by Delaware in that regulation, means any sudden and unavoidable failure of air pollution control equipment or process equipment or of a process to operate in a normal or usual manner, and that causes the source to exceed a technology-based emission limitation under the permit, due to unavoidable increases in emissions attributable to the malfunction. Since the EPA's Title V Operating Permit regulation only describes affirmative defense provisions in the case of any emergency (and not malfunctions), the DAQ has proposed to remove all references to "malfunction" from Section 6.0 to maintain consistency with the current federal requirements for affirmative defense.

The second set of the Department's proposed *revised* Amendments relates to Section 2.0, "Definitions." The definition of "subject to regulation" sets the criteria for which air pollutants are required to be permitted through Delaware's Title V Program. Specifically, this definition lists the criteria for which GHGs shall be subject to, based on the potential GHG emissions for a given source. Potential emissions are calculated using the GWP values for GHG pollutants, based on the values used in the Intergovernmental Panel on Climate Change Report. The EPA issued a final rule on November 29, 2013, that revised the GWP values for 23 of the 32 compounds listed in Table 2-1 of Delaware's regulation. On December 11, 2014, the EPA issued a separate final rule that added 30 new compounds to the list of GHG compounds. The proposed *revised* Amendments include updating the "subject to regulation" definition as found in 7 DE Admin. Code 1130 to reflect the most current federal description of GHGs and GWP values and revising the GHG compounds and their GWPs, located in Table 2-1 of Delaware's regulation, to be consistent with the EPA's current regulations.

Additionally, the Department proposes to amend Section 7.0 of 7 DE Admin. Code, "Permit Issuance, Renewal, Reopening, and Revisions." Subsection 7.10.2 was adopted to implement public notification requirements for Title V Operating Permits. The regulation requires the DAQ to provide for public participation and comment when reviewing and issuing permits. There is also a requirement to publish permit application information in Delaware newspapers, in accordance with 7 *Del.C.* §§6003-6004.

Members of the public also have the opportunity to request a public hearing for the permit application if one has not already been scheduled. The Department's proposed *revised* Amendments update the list of required components for public notice publications in subsection 7.10.2 of 7 DE Admin. Code 1130, again, to be consistent with the EPA's 2016 final rule.

Subsequent to publication of the initial proposed Amendments in the *Register* on October 1, 2021, but prior to the public hearing held in this matter, the DAQ discovered minor clerical errors contained therein. The errors were corrected by DAQ staff, and then the Department's proposed *revised* Amendments were fully explained at the public hearing held in this matter on October 27, 2021, for the benefit of the hearing record ("Record") being generated in this matter.

Only one member of the public (Emily Rodden from the New Castle Prevention Coalition) offered comments at the time of the hearing regarding the proposed *revised* Amendments to 7 DE Admin. Code 1130, and those comments requested clarifications with regard to some of the regulatory language being proposed. Accordingly, the DAQ subsequently provided to this Hearing Officer a Technical Response Memorandum ("TRM"), which is discussed in more detail below. It should be noted that all 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;
- (2) thirteen documents introduced by Department staff at the public hearing held on October 27, 2021 and marked by this Hearing Officer at the time of the hearing accordingly as Department Exhibits 1-13; and
- (3) DAQ's TRM, dated November 20, 2021.

The Department's person primarily responsible for the drafting and overall promulgation of the proposed *revised* Amendments, Taylor Englert, Engineer with the Airshed Planning and Inventory Program for the DAQ, developed the Record with the relevant documents in the Department's files.

III. RECOMMENDED FINDINGS AND CONCLUSIONS:

The Department is currently proposing the adoption of the aforementioned proposed *revised* amendments to 7 DE Admin. Code 1130, *Title V Operating Permit Program*. The proposed *revised* Amendments will update the public notice publishing requirements, affirmative defense requirements, and list of GHGs and their GWP values to maintain consistency with the current federal regulations of the EPA.

As noted above, the Department received only one comment on this proposed promulgation, and that comment was received at the time of the public hearing from Emily Rodden (New Castle Prevention Coalition). Ms. Rodden offered verbal testimony at the hearing that requested clarification on the difference between the terms "emergencies" and "malfunctions" as set forth in the proposed *revised* Amendments. She further inquired as to why the Department has proposed to remove the term "malfunction" from 7 DE Admin. Code 1130.

In response to Ms. Rodden's questions (and for further clarification for the benefit of the Record being developed in this matter), the DAQ's experts provided to this Hearing Officer a TRM dated November 30, 2021. This TRM offers the formal definitions for the terms "emergencies" and "malfunctions," and explains that 7 DE Admin. Code 1130 currently allows for an affirmative defense to enforcement actions when noncompliance with certain emission limitations in operating permits occurs because of qualifying emergency or malfunction events. The EPA's current federal regulation found at 40 CFR 70.6(g) governs state operating permit programs and provides for states to develop and submit to the EPA programs for issuing operating permits for major and certain other stationary sources of air pollution.

The DAQ's TRM further explains that 40 CFR 70.6(g) provides four provisions that need to be met in order for a facility to claim affirmative defense for an "emergency". The EPA's regulation does not, however, provide affirmative defenses for a "malfunction." Therefore, to prevent confusion for Title V facilities and to provide consistency with the EPA's current federal regulation, the Department has proposed to remove the term "malfunction" from Regulation 1130.

For the Secretary's Review, the proposed *revised* Amendments to 7 DE Admin. Code 1130 and the DAQ's TRM dated November 30, 2021, are attached hereto as Appendices "A" and "B," respectively, and are expressly incorporated into this Hearing Officer's Report. It should be noted that no additional adjustments or edits were made to the proposed *revised* Amendments as a result of the questions posed at the public hearing of October 27, 2021, and that the TRM exists to provide clarity and a greater understanding to the regulated community with regard to this proposed promulgation.

Based on the Record developed in this matter, I find and conclude that the Department has provided appropriate reasoning regarding the need for the proposed *revised* Amendments. I further find that the proposed *revised* Amendments will enable the Department to update the public notice requirements, affirmative defense requirements, and list of GHGs and their GWP values to maintain consistency with the current federal regulations of the EPA and provide greater clarity and understanding to the regulated community moving forward with regard to Title V Permits that are pending before the Department. Accordingly, I recommend promulgation of the proposed *revised* amendments to 7 DE Admin. Code 1130, *Title V State Operating Permit Program*, 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 proposed *revised* amendments to 7 DE Admin. Code 1130, *Title V State Operating Permit Program*, pursuant to 7 *Del.C.* §6010(a) and (c);

2. The Department has jurisdiction under its statutory authority to issue an Order adopting the proposed *revised* Amendments as final;

3. The Department provided adequate public notice of the initial proposed Amendments and all proceedings in a manner required by the law and regulations, and provided the public with an adequate opportunity to comment on the proposed *revised* Amendments subsequent to the time of the public hearing (through November 11, 2021), in order to consider all public comment on the same before making any final decision;

4. Promulgation of the proposed *revised* Amendments will enable the Department to ensure consistency regarding updates to the public notice requirements, affirmative defense requirements, and list of GHGs and their GWP values to maintain consistency with the current federal regulations of the EPA and provide greater clarity and understanding to the regulated community moving forward with regard to Title V Permits that are pending before the Department;

5. The Department has reviewed the proposed *revised* Amendments in the light of the Regulatory Flexibility Act, consistent with 29 *Del.C.* Ch. 104, and believes the same to be lawful, feasible, and desirable, that it will not establish reporting requirements or substantive additional costs for individuals or small businesses, and that the recommendations as proposed should be applicable to all Delaware individuals or small businesses equally;

6. The Department's proposed Amendments, as initially published in the October 1, 2021, *Delaware Register of Regulations*, and then *revised* and fully vetted to the public at the aforementioned public hearing held on October 27, 2021, are adequately supported, are not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, the proposed *revised* Amendments should be approved as final *revised* Amendments, which shall go into effect ten days after publication in the next available issue of the *Delaware Register of Regulations*;

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

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

/s/Lisa A. Vest
LISA A. VEST
Regulatory Specialist

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Attachments:
Appendix A: Proposed Amendments (7 DE Admin. Code 1130)
Appendix B: TRM (11/30/21)