

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 7401: *Surface Water Quality Standards* (Hearing Docket No. 2021-R-WS-0015)**

DATE: December 12, 2022

I. BACKGROUND AND PROCEDURAL HISTORY:

A virtual public hearing was held on Wednesday, April 20, 2022, 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 7401: *Surface Water Quality Standards* (“Amendments”). The Department’s Division of Watershed Stewardship (“DWS”) is proposing to amend 7 DE Admin. Code 7401 as part of the triennial review of Delaware’s *Surface Water Quality Standards* (“SWQS”). The federal *Clean Water Act* (“CWA”) requires that all states review their SWQS every three years and adopt revised standards to comply with all requirements of the CWA. Delaware’s current SWQS were last updated in 2017.

In keeping with the goals of the CWA, Delaware’s SWQS are established to restore and maintain the chemical, physical, and biological integrity of Delaware waters. The SWQS also designates water uses and provides anti-degradation requirements. The Department’s proposed Amendments have significant updates for human health criteria, based upon updated recommendations 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 March 1, 2022, edition of the *Delaware Register of Regulations* (“*Register*”).

Subsequent to publication of the initial proposed Amendments in the *Register* on March 1, 2022, but prior to the public hearing held in this matter on April 20, 2022, the DWS discovered minor clerical errors contained therein. Specifically, there were seven (7) instances in the proposed Amendments referencing Section 4.6.3, which should have been referencing Section 4.5.9. The errors were corrected by DWS staff, and then the Department’s proposed *revised* Amendments were fully explained at the public hearing held as referenced above for the benefit of the hearing record (“*Record*”) being generated in this matter.

The only comments received by the Department in this matter were from (1) Gregory Voigt, Chief, Standards and TMDLs Section, Water Division, EPA; and (2) Danielle Ellis, Environmental Scientist III, from the Department’s Division of Fish and Wildlife (“*DFW*”). No individual members of the public provided comment at any time during this proposed regulatory action. Accordingly, the Department’s DWS provided to this Hearing Officer a Technical Response Memorandum (“*TRM*”), dated May 24, 2022, 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 April 20, 2022, and marked by this Hearing Officer at the time of the hearing accordingly as Department Exhibits 1-13; and
- (3) DWS’s TRM, dated May 24, 2022.

The Department's person primarily responsible for the drafting and overall promulgation of the proposed *revised* Amendments, Michael Bott, Environmental Program Manager II with the Watershed Assessment Section for DWS, 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 7401, *Water Quality Standards*. The proposed *revised* Amendments will satisfy the Department's requirement under the CWA that Delaware review its SWQS triennially and adopt revised standards to comply with those of the CWA.

As noted above, the Department received only two sets of comments on this proposed promulgation, namely, from the EPA, and internally from the DFW. No other comments were received at any time during the course of this proposed regulatory promulgation.

As part of the SWQS triennial review process, Delaware is required to conduct a triennial review of current surface water quality regulations every three years and determine if current criteria should be modified, or new criteria adopted. This determination is based on consideration of the EPA's recommended criteria and the best available science specific to Delaware's waters. Because the EPA's recommended criteria are developed for use nationally, local environmental conditions can result in the need to adopt different criteria that are based on the best available science and state specific data. The triennial review process allows states to review new data and scientific findings, incorporate public feedback, and determine if adoption of new standards are appropriate.

The EPA submitted comments for Delaware's consideration related to the adoption of criteria that were more stringent in some cases and less stringent in others when comparing to standards currently in Delaware's regulations. Changes to existing standards were made when the best available data specific to Delaware waters, and an understanding of the current science, supported the adoption of proposed regulations.

For the suggested criteria changes Delaware chose not to modify, it was determined that either more data needed to be collected or the best available scientific understanding did not support adoption at this time. DNREC will consider new data and scientific findings during future triennial review periods that may result in the consideration of new criteria, or adoption of previously recommended EPA criteria.

DNREC staff worked closely with the EPA Region III staff during the most recent triennial review process in order to assure that the state's current triennial review updates were supported. The EPA understands DNREC's decision to consider some of the recommended criteria changes during the next review period due to the best available data and science at the time of review.

The comments from EPA recommended that Delaware should consider several other revisions of its current criteria (in addition to those currently proposed) at this time. Accordingly, the Department provided thorough responses to EPA's suggestions in the TRM provided to this Hearing Officer for inclusion into the Record developed in this matter. For the sake of brevity, a summary of the responses contained within the aforementioned TRM provides the following information (listed in the same order as EPA's comments bulleted above):

- With regard to suggested revisions to update Delaware's "Organism Only" and "Water + Organism" human health criteria, the Department notes that EPA's recommended criteria would be much more stringent than the same criteria using DNREC's field data collected in Delaware's waters. The Department will work with EPA and stakeholders to develop appropriate statewide criteria for such pollutants in future triennial reviews. Further, Delaware will also consider revisions to its current water quality criteria for Benzo(a)pyrene, Benzo(b)fluoranthene, and Dibenzo(a,h)anthracene in place, and will consider adoption of Benzo(k)fluoranthene criteria at that time.

- In response to EPA’s suggestion for the Department to adopt the “Organism Only” component of the national recommended water quality criteria for Chlorophenoxy Herbicide, the Department notes that Delaware’s current regulations contain the Maximum Contaminant Levels (“MCLs”), which are more restrictive than EPA’s “Organism Only” criteria. DNREC left the more stringent MCLs that were previously adopted criteria in place. The Department may consider adopting the less stringent EPA recommended criteria in future triennial reviews if the best available science specific to Delaware’s waterbodies indicates that adopting the less stringent criteria is appropriate.

- Regarding the suggested adoption of EPA’s recent revisions of its aquatic life national recommended criteria for aluminum and selenium, the Department notes that, to date, EPA has not developed implementation guidance for these naturally occurring elements. Delaware will consider revising aquatic life criteria for the same, along with stakeholder input, when such guidance is issued.

- As to providing rationale as to why DNREC is deleting human health criteria for fluoride, silver, lead and total trihalomethanes, the Department states that it could not ascertain the basis for the current criteria for these pollutants. Further, DNREC lacks the resources to independently develop and propose human health criteria and has relied upon EPA guidance to propose and adopt the same. As noted in the stakeholder’s guide to the proposed standards, the Department notes that there are applicable Aquatic Life Criteria for lead and silver that are more stringent than the current human health criteria and they would remain in place.

- In response to EPA encouraging DNREC to consider adoption of recommended water quality criteria or swimming advisories for cyanotoxins, the Department states that it has limited information about the magnitude and frequency of outbreaks of Harmful Algal Blooms (“HABs”) in Delaware waters. The Department notes that it has placed signs near several waterbodies with a history of HAB outbreaks to give people information describing visual indications of possible HAB events and appropriate precautions if a HAB is likely to be occurring. As HABs are not discharged by point or nonpoint sources (but often occur as a result of excess nutrients in the water column), DNREC believes that implementation of nutrient TMDLs already in place, along with public notice, is the best strategy to prevent HAB events and the negative outcomes from the same.

The Department further notes that it is interested in working with EPA and stakeholders to work through HAB and nutrient issues, and has posted public water quality advisories, warning signs, and information about HAB on its website at <https://de.gov/bluegreen>.

- In response to EPA's recommendations for DNREC to adopt, during this triennial review, nutrient criteria for the protection of lakes and reservoirs derived using the models found in the *Ambient Water Quality Criteria to Address Nutrient Pollution in Lakes and Reservoirs*, as published by EPA in August 2021, the Department notes that this current triennial review was well underway at the time of the publication of EPA's newest recommendations for nutrients in lakes and reservoirs. As a result, Delaware may consider such recommendations, along with input from both EPA and stakeholders, in future reviews.

The only other comments received by the Department were those internally submitted by DNREC's DFW. Specifically, DFW suggests that the following regulatory boundaries be updated from the currently stated designations set forth in 7 DE Admin. Code 7401: *Migratory Fish Spawning and Nursery Designated Use*; *Open-water Fish and Shellfish Designated Use*; *Red Clay Creek (from the PA/DE line to the concrete bridge above Yorklin*; *White Clay Creek from the PA/DE line to the dam at Curtis Paper*; *Pike Creek from Route 72 to Henderson Road*; and *Designated use from PA/DE line to the dam at Curtis Paper, and designated use from PA/DE line to Wilmington city line*. In response, the TRM thanks DFW for these suggestions, and states that Delaware will consider revising those regulatory boundaries during the next triennial review to ensure that all available locational data can be considered and allow for full stakeholder participation.

For the Secretary's Review, the proposed *revised* Amendments to 7 DE Admin. Code 7401 and the aforementioned TRM dated May 24, 2022, are attached hereto as Appendices "A" and "B," respectively, and are expressly incorporated into this Hearing Officer's Report. As noted previously, the only changes made to the Department's initially proposed Amendments were made subsequent to the initial publication in the March 1, 2022, edition of the *Register*, were non-substantive in nature, and were fully vetted at the time of the public hearing referenced above. No further revisions were made to the proposed *revised* Amendments as a result of the public comment received by the Department in this matter.

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 Department's experts fully developed the Record to support adoption of the proposed *revised* Amendments, and that the same will enable the Department to conclude its triennial review of Delaware's SWQS and adopt revised standards to comply with the requirements of the federal CWA. Accordingly, I recommend promulgation of the proposed *revised* amendments to 7 DE Admin. Code 7401, *Surface Water Quality Standards*, 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 7401, *Surface Water Quality Standards*, 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, both at the time of the public hearing held on April 20, 2022, and subsequent to the time of the public hearing (through May 5, 2022), 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 conclude its triennial review of Delaware's SWQS and adopt revised standards to comply with the requirements of the federal CWA;

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 March 1, 2022, *Delaware Register of Regulations*, and then non-substantively *revised* and fully vetted to the public at the aforementioned public hearing held on April 20, 2022, 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 Revised** Amendments (7 DE Admin. Code 7401)

Appendix B: TRM (May 24, 2022)