

HEARING OFFICER'S REPORT

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

FROM: Theresa Newman, Regulatory Specialist, Office of the Secretary,
Dept. of Natural Resources and Environmental Control

RE: Proposed Regulation Amendments to 7 DE Admin. Code 1126 - *Motor Vehicle Emissions Inspection Program*

DATE: November 3, 2022

I. BACKGROUND AND PROCEDURAL HISTORY:

A virtual public hearing was held on Thursday September 29, 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,” “Department”) to receive comment on the proposed amendments (“Amendments”) to 7 DE Admin. Code 1126 - Motor Vehicle Emissions Inspection Program (“Regulation”). The Department is proposing to amend Sussex County’s vehicle inspection and maintenance (“I/M”) program to: (1) align with Delaware’s House Bill 246 (2017) (“HB246”) as codified in 21 *Del.C.* § 2143 expanding the vehicle I/M program model year exemption from five to seven years; (2) replace the current curb idle tailpipe test with On-Board Diagnostic Test (“OBD”) on vehicles 1996 and newer, up to 8,500 lbs.; (3) require vehicles that weigh 8,501 up to 14,000 pounds gross vehicle weight, beginning with model year 2008 to undergo an OBD test; (4) modify that in addition to curb idle tailpipe test, vehicle model years 1995 and older will also be required to include gas cap tests; (5) add language to clarify and prevent tampering of emission controls; and (6) phase in an increased cost of repairs for receiving a program waiver in Sussex County. In turn, the proposed Amendments will establish identical emissions testing requirements statewide.

In 1970, Congress amended the Clean Air Act (“CAA”) and authorized the U.S. Environmental Protection Agency (“EPA”) to establish the National Ambient Air Quality Standards (“NAAQS”) for criteria pollutants shown to threaten human health, welfare, and the environment. There are seven criteria pollutants: sulfur dioxide, nitrogen dioxide

("NOX"), carbon monoxide ("CO"), ozone, lead, particulate matter less than 10 microns in diameter ("PM10"), and particulate matter less than 2.5 microns in diameter ("PM2.5").

Delaware has 11 monitoring stations throughout the state to measure air pollution concentrations, of the aforementioned pollutants, through their ambient air monitoring network to determine how high the pollution is in that area. In 2015, Delaware's ambient air quality monitors showed that only New Castle County did not record pollution concentrations below Ozone standards. Furthermore, under EPA final rule (83 FR 25766), New Castle County was designated as nonattainment, as a part of the Philadelphia-Wilmington-Atlantic City Marginal Nonattainment Area under the 2015 8-hour ozone NAAQS. Throughout the State, the largest source of ozone pollution is from the on-road cars and trucks we drive. As New Castle County's air pollution thresholds did not meet NAAQS, the State was designated as non-attainment for ozone. The State was required to identify control measures of how that state will attain and maintain air quality, reducing emissions from sources in Delaware to meet NAAQS through a State Implementation Plan ("SIP").

In effort to improve air quality the CAA developed the vehicle I/M program as a control measure to reduce pollutants. The CAA, as amended in 1990, required that most polluted areas adopt either "basic" or "enhanced" I/M programs, depending on the severity of the problem and the population of the area. Basic and enhanced I/M programs both identify vehicles that have high emissions as a result of one or more malfunctions and require the malfunction to be repaired. The moderate ozone nonattainment areas, plus marginal ozone areas with existing or previously required I/M programs, fall under the "basic" I/M requirements. The low enhanced standard provides flexibility for nonattainment areas that are required to implement enhanced I/M programs which can meet the CAA emission reduction requirements for reasonable further progress (commonly referred to as 15% plans) and attainment from other sources without the stringency of the high enhanced I/M performance standard (60 FR 48029). States may select the low enhanced performance standard if they have an approved SIP for 15%.

In 1979, Delaware developed a State Implementation Plan that established an Inspection & Maintenance program. Subsequent to the SIP, Delaware implemented 7 DE Admin. Code 1126 in 1982 to establish regulation for the New Castle County I/M program. The regulation established the New Castle County vehicle I/M program as a control measure to reduce pollutants caused by on road vehicles that was administered by the Division of Motor Vehicles (“DMV”). On January 1, 1983, the vehicle I/M program commenced, following the approval of the EPA later that year.

Under the direction of the Governor’s Clean Air Task Force, the I/M program was then expanded to all three Delaware counties with a subsequent amendment to Regulation 26 and the SIP. With all three counties participating in the vehicle I/M program, the emission reductions attributed to Sussex County vehicles could be used as a SIP strengthening measure for demonstrating the 15% rate of progress.

In 1990, the CAA amended the I/M program to require that polluted areas adopt either the “basic” or “enhanced” I/M programs, depending on the severity of the problem and the population of the area. The CAA developed I/M requirements for the metropolitan statistical area within the Ozone Transport Region (“OTR”) with populations of 100,000 or more, regardless of attainment status for ozone. The moderate ozone nonattainment areas, plus marginal ozone areas with existing or previously required I/M programs, fall under the “basic” I/M requirements. The “enhanced” vehicle I/M requirements were provided for more polluted areas classified as serious, severe, and extreme nonattainment areas with populations of 200,000 or more. The EPA’s rule for the “enhanced” I/M program established two standards codified in 40 CFR 51.351(f) - High Enhanced Performance Standard and 40 CFR 51.351(g) - Low Enhanced Performance Standard. The “high enhanced” performance standard achieves a greater reduction in emissions and uses a highly technical test method. The “low enhanced” performance standard provides flexibility for nonattainment areas that are required to implement enhanced I/M programs and can meet the Act’s emission reduction requirements for reasonable further progress (referred to as 15% plans) and attainment

from other sources. States may select the low enhanced performance standard if they have an approved SIP for 15%.

As Sussex County was designated as marginal non-attainment for the one-hour standard, Delaware implemented the performance standards for the basic program in Sussex County and the Alternate Low Enhanced I/M program in Kent and New Castle Counties.

To comply with the “basic” I/M requirements, the State is required to identify control measures that will reduce emissions from sources in Delaware. Additionally, the State must develop state implementation plans (“SIPs”) that explain the regulations and control measures it will use to clean up the nonattainment areas. New Castle County and Kent County were designated as severe ozone nonattainment. Delaware went through revisions of the SIP to meet the requirements of the CAA and the I/M rule. On June 16, 1998, Delaware submitted a new Regulation 31-Low Enhanced Inspection and Maintenance Program, for the purpose of addressing the program deficiencies and higher pollution standards for New Castle and Kent County. Regulation 1131 replaced Regulation 26 for Kent and New Castle counties only. Regulation 1131 required Kent and New Castle Counties to implement the Low-Enhanced I/M program while Sussex County continued with a Basic program under Regulation 1126.

Currently Delaware requires vehicles to be tested for an array of safety measures and emission test at the Division of Motor Vehicles (“DMV”) biennially as a part of the vehicle registration or renewal process. Emission testing is performed on all gasoline and diesel-powered light duty vehicles weighing up to 8500 pounds. Vehicles 1967 and older require no emissions tests, while 1968 through 1981 require an idle test, and vehicles 1981 and newer require a curb idle test. All vehicles that are 5 years or newer are exempt from vehicle emission test. While these tests were expected to reduce the emission of pollutants, they also are contributing factors of air pollution caused by on road vehicles. Today, 45% of Delaware’s air pollution is attributed by on-road cars and trucks.

In 2017, Delaware enacted HB246, to provide a higher level of service to DMV customers while providing a more efficient renewal processes for vehicle owners. The enactment of HB246 increased exemption for vehicle emission inspection from the current 5- years to 7-years, for all new vehicle models. The enactment of this legislation reduces the number of inspections per year by approximately 45,000 vehicles, enabling all owners of vehicles within the most recent seven-year model to easily renew their registration for an additional two years via mail, by using the DMV drive-thru, or by using DMV's online registration renewal tool once they are within 90 days of expiration.

While the HB246 provided an ease of convenience for citizens renewing their vehicle registration, it also created a deficit that weakened the vehicle I/M program in Kent and New Castle County, causing an increase of 19.2 tons of nitrogen oxides, 15.3 tons of volatile organic compounds, and caused an increase of 1.1 tons per year in volatile organic compounds with no emissions benefit in Sussex County. It should be noted that Sussex County reported no impact on nitrogen oxides. The Department then consulted with EPA's Region 3 staff, and it was decided that the emission reductions attributed by onboard diagnostic testing programs in Sussex County could be used to offset, in part, the emissions increases attributed to the vehicle emissions exemption extension for Kent and New Castle Counties.

The Department worked with the DMV to analyze several scenarios to offset emissions increase. The Department modeled several scenarios using EPA's Motor Vehicle Emission Simulator modeling system ("MOVES2014b") that estimates emissions for mobile sources at the national, county, and project level for criteria air pollutants, greenhouse gases, and air toxics. There were 7 case scenarios conducted, with many scenarios having no benefit to the emission increases. The Department concluded the best scenario to provide a sufficient reduction of emission increases, included on-board diagnostic test for vehicles weighing up to 8,500 pounds, a single-speed idle test, and a gas cap test for vehicles up to 8,500 pounds, along with the extension of the model year exemption.

More specifically, the Department proposes Amendments to : (1) align with HB246 expanding the vehicle I/M program model year exemption from five to seven years; (2) replace the current curb idle tailpipe test with On-Board Diagnostic Test (“OBD”) on vehicles 1996 and newer, up to 8,500 lbs.; (3) require vehicles that weigh 8,501 up to 14,000 pounds gross vehicle weight, beginning with model year 2008 to undergo an OBD test; (4) modify that in addition to curb idle tailpipe test, vehicle model years 1995 and older will also be required to include gas cap tests; (5) add language to clarify and prevent tampering of emission controls; and (6) phase in an increased cost of repairs for receiving a program waiver in Sussex County. Vehicle model year 1981 and newer will be subject to increased cost of \$200 in repairs to receive an emission waiver in years 2023- 2024 and then increases to \$450 in years 2025-2026. The cost of repairs will achieve parity with New Castle and Kent counties in 2027.

It should be noted that the proposed Amendments maintain consistency with current federal regulations, 40 CFR 51 50 Subpart S - *Inspection and Maintenance Program Requirements*, the CAA (42 U. S. C. 7522(a)) Section 203 and State Regulation 21 *Del. C. Ch. 21, Registration of Vehicles* (§§ 2109, 2110, and 2143). As such, the proposed Amendments encourage proper vehicle maintenance, discourages tampering of vehicle emission controls by vehicle owners, reduces vehicle emissions, improves air quality, will help maintain a healthy environment, and will help provide improve healthy related impacts.

The Department held three public workshops, one physical meeting in Sussex County and two virtual meeting, to inform citizens about upcoming changes to the vehicle maintenance programs in all three counties within Delaware. The Department also conducted an interactive survey to which they received two responses. Both responses were in agreement with the proposed Amendments, except for the phase-in schedule for the increase in the cost of repairs to obtain an emission waiver in Sussex County that was proposed at the time of the public meetings. The Department then adjusted the phased-in repair cost amounts as presented within the proposed Amendments.

The Department has the statutory basis and legal authority to act with regard to proposed regulatory promulgation, pursuant to 7 *Del.C.* §§6010(a) and (c). The Department published its initial proposed regulation Amendments in the September 1, 2022, *Delaware Register of Regulations*. It should be noted, after publishing the proposed regulations, the Department made non-substantive changes that were identified for the Record in an Errata Table (Exhibit 33.) Thereafter, a virtual public hearing was held on September 29, 2022. There were two (2) members of the public in attendance, with no public comment provided during the virtual hearing. Pursuant to Delaware law, the hearing record (“Record”) remained open for fifteen (15) days subsequent to the public hearing for receipt of public comment. The Record formally closed with regard to public comment on October 14, 2022, with no written comment received by the Department in this 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 September 29, 2022; and (2) thirty-four (34) documents introduced by the responsible Department staff at the time of the virtual public hearing and marked by this Hearing Officer accordingly as “Department Exhibits “1-34”. The Department’s staff primarily responsible for the drafting and overall promulgation of the proposed Amendments, James Coverdale, Program Manager II with the Division of Air Quality, developed the Record with the relevant documents in the Department’s files.

The Department proposes to revise the Amendments as shown below in bold/bracket text, to indicate the following non-substantive changes:

1.1.2 Except as exempted in subsection 1.2, the requirements shall apply to all 1968 and later model year, light duty passenger cars and 1970 and later model year truck pounds gross vehicle weight rating registered in Sussex County. beginning on xx/xx/2023 s up to 14,000 pounds gross vehicle weight rating registered in Sussex County [-] beginning on xx/xx/2023 [.]

Accordingly, the Department's *revised* proposed Amendments and the Department's TRM are attached hereto as Appendix "A" and is expressly incorporated herein by reference.

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 *revised* proposed amendments to 7 DE Admin. Code 1126. I further find that the *revised* proposed Amendments will enable the Department to maintain consistency with current federal regulations, 40 CFR 51.50 Subpart S - *Inspection and Maintenance Program Requirements*, the CAA (42 U.S.C. 7522(a)) Section 203 and State Regulation 21 *Del. C. Ch. 21, Registration of Vehicles* (§§ 2109, 2110, and 2143) by: (1) expanding the vehicle I/M program model year exemption from five to seven years, (2) increasing the applicability of the regulation to include vehicles that weigh 8,501 up to 14,000 pounds (gross vehicle weight) beginning with model year 2008 for the OBD, (3) modifying the older vehicle testing requirements to include curb idle and gas cap tests for vehicles 1995 and older; (4) adding anti-tampering language; and (5) phasing in an increased cost of repairs for receiving a program waiver in Sussex County. 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 this proposed regulatory promulgation, pursuant to 7 *Del. C.* 6010(a) and (c);
2. The Department has jurisdiction under its statutory authority, pursuant to 7 *Del.C.* Chapter 60, to issue an Order adopting these *revised* proposed 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 same, including at the time of the public hearing held on September 29, 2022, and during the 15 days subsequent to the hearing (through October 14, 2022), before making any final decision;
4. Promulgation of the *revised* proposed amendments to 7 DE Admin. Code 1126, as set forth herein, will enable the Department to maintain consistency with current federal regulations, 40 CFR 51 50 Subpart S - *Inspection and Maintenance Program Requirements*, the CAA (42 U. S. C. 7522(a)) Section 203 and State Regulation 21 *Del. C.* Ch. 21, *Registration of Vehicles* by: (1) expanding the vehicle I/M program model year exemption from five to seven years; (2) replacing the current curb idle tailpipe test with OBD on vehicles 1996 and newer, up to 8,500 lbs.; (3) requiring vehicles that weigh 8,501 up to 14,000 pounds gross vehicle weight, beginning with model year 2008 to undergo an OBD test; (4) modifying that in addition to curb idle tailpipe test, vehicle model years 1995 and older will also be required to include gas cap tests; (5) adding language to clarify and prevent tampering of emission controls; and (6)

phasing in an increased cost of repairs for receiving a program waiver in Sussex County;

5. The Department has reviewed the *revised* proposed Amendments in light of the *Regulatory Flexibility Act*, consistent with 29 *Del.C.* §104, and believes the same to be lawful, feasible and desirable, and the recommendations as proposed should be applicable to all Delaware citizens equally;
6. The Department’s proposed regulatory Amendments, as initially published in the September 1, 2022, *Delaware Register of Regulations*, and then subsequently *revised*, as set forth in Appendix “A” hereto, are adequately supported, are not arbitrary or capricious, and are consistent with the applicable laws and regulation. Consequently, they should be approved as final regulatory Amendments, which shall go into effect ten days after their publication in the next available issue of the *Delaware Register of Regulations*; and
7. The Department shall submit the *revised* proposed Amendments as final regulatory amendments 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.



Theresa L. Newman
Public Hearing Officer