

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 1131 - *Low Enhanced Inspection and Maintenance Program – Kent and New Castle Counties*

DATE: November 8, 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 1131 - *Low Enhanced Inspection and Maintenance Program – Kent and New Castle Counties* (“Regulation”). The Department is proposing to amend New Castle and Kent Counties 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) expand On-Board Diagnostic Test (“OBD”) for vehicles that weigh 8,501 up to 14,000 pounds gross vehicle weight, beginning with model year 2008; (3) discontinue the current 2-speed idle tailpipe test and replace that with a curb idle tailpipe test, for vehicle model years 1981 through 1995; (4) require vehicle model years 1975 through 1995 complete a gas cap test; (5) remove the pressure integrity test of the vehicles evaporated canister and fuel system for vehicles 1975 through 1995; and (6) add language to clarify and prevent tampering of emission controls. 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, carbon monoxide, ozone, lead, particulate matter less than 10 microns in diameter (PM10), and particulate matter less than 2.5 microns in diameter (PM2.5). Throughout the State, Delaware has 11 monitoring stations to measure air pollution concentrations of these pollutants through their ambient air monitoring network to determine how high the pollution is in that area. Majority of the monitoring stations are concentrated in the northern urban/industrial areas such as New Castle County, which have the highest population and number of pollutant sources.

In 2015, Delaware’s ambient air quality monitors showed that 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.

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. The CAA developed I/M requirements for 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. Basic and enhanced I/M programs both identify vehicles that have high emissions as a result of one or more malfunctions, and by requiring them to be repaired. An enhanced program covers more of the vehicles in operation, employs inspection methods that are better at finding high emitting vehicles, and has additional features to better assure that all vehicles are tested properly and effectively repaired. Enhanced programs are required in

serious, severe, and extreme ozone nonattainment areas with urbanized population of more than 200,000.

EPA's rules for the enhanced vehicle I/M program established a low and high enhanced standard. The high enhanced I/M program is based on high technology transient test for new technology vehicles and the low enhanced I/M performance allows for idle testing in place of high-tech testing. 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 on January 1, 1983, that was also include as a part of Delaware's SIP. 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"). Under the direction of the Governor's Clean Air Task Force, the I/M program was expanded to all three Delaware counties with a subsequent amendment to Regulation 26. With all three counties under the 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.

After the EPA revised the CAA in 1990, 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. Regulation 31 replaced Regulation 26 for Kent and New Castle counties only. Regulation 31 required Kent and New Castle

Counties to implement the Low-Enhanced I/M program while Sussex County continued with a Basic program under 1126.

On February 19, 1993, EPA promulgated requirements for OBD systems on light duty vehicles and trucks, model years 1994 and later, install equipment for the purpose of detecting malfunctions or deterioration in performance, that could cause a vehicle to fail federal emission standards. Specifically, the OBD system must be capable of identifying catalyst deterioration, engine misfire, oxygen sensor deterioration, and any other deterioration or malfunction within the powertrain which could cause emission increases greater than or exceeding the threshold levels established by the CAA. The OBD system would then trigger codes and illuminate lights on the vehicles dashboard to indicate car malfunctioning issues on the vehicle's on-board computer, that would enhance the inspection process to identify issues resulting in vehicle emissions. The CAA added the OBD system inspections to vehicle I/M program requirements, with the intent to improve the accuracy of I/M programs, thus enhancing air quality benefits

All three counties require 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. Currently the New Castle County and Kent County's Low Enhanced I/M program requires emission testing performed on all gasoline and diesel-powered light duty vehicles weighing up to 8500 pounds, while vehicles 1967 and older require no emissions tests, vehicles 1968 through 1980 require an idle test, vehicles 1981 through 1995 require a curb idle test, gas cap test, and tank pressure test, and vehicles 1996 through the newest 5 model year require OBD test. In addition, 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 still 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 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 and enabled all owners of vehicles within the most recent seven-year model to easily renew their registration.

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 worked with the DMV to analyze several scenarios to offset emissions increase. The Department modeled several scenarios using EPA's Motor Vehicle Emission Simulator emission 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, due to the extension of the model year exemption, includes adding an on-board diagnostic test for vehicles weighing 8,500 pounds up to 14,000 pounds, a single-speed idle test on light weight vehicle model years 1968 to 1995, and a gas cap test for vehicle model years 1975 to 1995 weighing up to 8,500 pounds. This scenario would provide the most beneficial reduction in vehicle emissions for all three counties.

The Department then consulted with EPA's Region 3 staff, and it was decided that the emission reductions attributed to adding 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. Delaware

drivers travel through the three counties, which supports the use of Sussex County reductions towards offsetting Kent and New Castle County's vehicle emissions. Along with the revisions to the I/M program, the DMV requested the Two Speed Idle test be eliminated for older vehicles in Kent and New Castle Counties.

The Department proposes Amendments to : (1) expand the vehicle I/M program model year exemption from five to seven years; (2) increase 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 On-Board Diagnostic (OBD) test; (3) modify the older vehicle testing requirements to include curb idle and gas cap tests for vehicles 1995 and older; and (4) include language that prevents vehicle tampering.

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 meetings, to address the proposed changes and to receive feedback from those in attendance maintenance. The Department then conducted an interactive survey to which there were no comments as it pertained to 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.

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 1131. 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) aligning regulations with HB246 that expands 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 1131, 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* (§§ 2109, 2110, and 2143) by: (1) aligning with HB246 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