

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 Revision to the Delaware State Implementation Plan: *Motor Vehicle Emissions Inspection Program; Plan for Implementation (PFI) for 7 DE Admin Code 1126 and 7 DE Admin. Code 1131*; formally known as *Delaware's Low Enhanced Inspection and Maintenance Program, Plan for Implementation*

DATE: November 11, 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 revision to Delaware’s *State Implementation Plan (“SIP”), Low Enhanced Inspection and Maintenance program, Plan for Implementation (PFI)* to establish the SIP as standalone document and striking the SIP from regulation 7 DE Admin Code 1131 - *Low Enhanced Inspection and Maintenance Program; Plan for Implementation (PFI)* and revise Delaware’s vehicle I/M programs covered by 7 DE Admin. Code 1131 - *Low Enhanced Inspection and Maintenance Program (“Regulation 1131”)* (Kent & New Castle Counties) and 7 DE Admin. Code 1126 - *Motor Vehicle Emissions Inspection Program (“Regulation 1126”)* (Sussex County.)

Delaware is required by Section 110 of the *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 the EPA. The EPA established the NAAQS for criteria pollutants shown to threaten human health, welfare, and the environment. 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.

To improve air quality the CAA established the I/M program by implementing emissions standards to meet the NAAQS. The I/M program identifies major malfunctions in the emission control system and ensures repairs of vehicles to reduce emissions produced by vehicles.

When an area measures pollutants above NAAQS, the EPA designates that area as nonattainment and based on the pollutant levels the area is classified. Those areas classified as “moderate” or above (i.e. Serious, Severe, Extreme) NAAQS, are required to identify control measures that will reduce emissions from pollutant sources and develop a SIP that explains the controls it will use to clean up nonattainment areas. Under the 1979 1-Hour ozone standard, Delaware was designated as non-attainment with New Castle County classified as being “severe” and Sussex County classified as being “marginal”.

In 1979, the Department submitted its initial SIP to the EPA to establish the I/M program, along with many other transportation initiatives to meet the 1977 CAA Amendments. The control measures include requiring pollution control through one of Delaware’s highest sources of pollutants, on-road vehicles. Motor vehicles are significant contributors of volatile organic compounds (“VOCs”), carbon monoxide, and nitrogen oxide emissions (“NOx”). A motor vehicle I/M program is used as a control measure to reduce these emissions.

On January 1, 1983, Delaware implemented 7 DE Admin Code 1126, establishing New Castle County’s I/M program. Subsequent to the commencement of the regulation, the EPA approved the initial SIP. Soon after the implementation of the New Castle County I/M program, the Governor expanded the program throughout the State, adding Kent and Sussex County. In doing so, the emission reductions attributed to Sussex County vehicles participating in the I/M program could be used as a SIP strengthening measure.

In 1990, the CAA amended the vehicle I/M program to require that polluted areas adopt either “basic” or “enhanced” I/M programs, depending on the severity of the problem and the population of the area. 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” programs have two standards, high and low. The high “enhanced” I/M program achieves a greater reduction in emissions (approximately 36%) and uses a highly technical test method. 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 (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%.

During that time, Sussex County implemented a “basic” I/M testing program because its Metropolitan Statistical Area was less than 200,00, while New Castle County and Kent County, implemented a “Low Enhanced” I/M program with the area being designated as “severe” ozone nonattainment. Delaware then revised Regulation 1126 to meet the requirements of the Low Enhanced I/M Program to remain in compliance with the CAA. Subsequently, the revisions to New Castle and Kent County I/M program triggered revisions to Delaware’s SIP. It should be noted the CAA did not require a SIP for areas designated as “marginal” nonattainment, therefor Sussex County I/M program was not included to the revisions of the SIP.

On June 16, 1998, Delaware implemented a new Regulation 1131-Low Enhanced Inspection and Maintenance Program, for the purpose of addressing the program deficiencies. Regulation 1131 replaced the Regulation 1126 for New Castle and Kent County, while Sussex County remained under Regulation 1126. Regulation 1131 required Kent and New Castle Counties to implement the “LEIM” program, and Sussex County continued with a “basic” program.

Currently the New Castle County and Kent County vehicle I/M program requires emission testing performed on all gasoline and diesel-powered light duty vehicles weighing up to 8500 pounds. 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.

Sussex County's vehicle I/M program currently requires similar emission testing to the New Castle and Kent County I/M program. Sussex County I/M program also performs emission test on all gasoline and diesel-powered light duty vehicles weighing up to 8500 pounds biennially as a part of the vehicle registration or renewal process, vehicles 1967 and older require no emissions tests. Unlike New Castle and Kent County's I/M program, Sussex County I/M requires an idle test on vehicles 1968 through 1980 and a curb idle test on vehicles 1981 and newer. All Delaware I/M programs exempt vehicles from emission testing that are 5 years or newer.

In 2017, House Bill 246 ("HB246") was passed and signed into law, codified in 21 *Del.C.* §2143, which increased the vehicle inspection exemption from five to seven years for all new vehicles. While the new law reduced vehicle inspections by 45,000 per year, it adversely increased vehicle emissions. The expanded vehicle exemption resulted in emissions increases of 19.2 tons per year in NO_x and 15.3 tons per year in VOC for Kent and New Castle counties as well as an increase of 1.1 tons per year in VOC and no impact on NO_x emissions in Sussex County. The new legislative mandate resulting from the expansion of the new model year exemption requires the Department to amend Regulation 1126 and Regulation 1131. In addition, the Department must develop additional control measures to address the increase in emissions.

The Department must submit a demonstration to the EPA, for review and approval, to revise Delaware's regulations pertaining to I/M in accordance with Section 110(l) of the CAA. Section 110(l) of the CAA prohibits EPA from approving any SIP

revision that would interfere with the attainment and maintenance of any of the NAAQS in effect at the time of the revision.

The Department proposes changes to Regulations 1126 and 1131 to reduce vehicle emissions and assist in the equitable distribution of emission reductions responsibilities between New Castle, Kent and Sussex Counties. The amendments to both Regulation 1126 and Regulation 1131 include aligning with HB246, expanding the inspection model year exemption from five to seven years and include additional language to clarify and prevent tampering of emission controls.

More specific to Regulation 1126, the regulatory amendment will require OnBoard Diagnostic Test (“OBD”) for vehicles 1996 and newer with a weight of up to 8,500 pounds, replacing the current curb idle tailpipe test on vehicles in the same vehicle weight range. The amendment will require vehicles that weigh 8,501 up to 14,000 pounds gross vehicle weight, beginning with model year 2008 to undergo an OBD test. In addition to the curb idle tailpipe test, vehicle model years 1995 and older will be required to complete a gas cap pressure test. To obtain an emission waiver in Sussex County the amendment will increase the cost repair requirement to achieve parity with the New Castle and Kent County by the year 2027. A phased-in schedule will include no change for pre-1981 model year repair cost remaining at \$75.00, however vehicles models 1981 and newer will increase repair cost to \$200 in years 2023-2023, and then to \$450 for years 2025-2026.

The Regulation 1131 proposed amendments will add the OBD Test requirement for vehicles that weigh 8,501 up to 14,000 pounds gross vehicle weight, beginning with model year 2008. In addition, the current two speed curb idle tailpipe test will be discontinued and replaced by a curb idle tailpipe test, for vehicle model years 1981 through 1995. Tailpipe pipe test for vehicle model years 1968 through 1980 will remain unchanged. Vehicle model year 1975 through 1995 will also be required to complete a gas cap test. The pressure integrity test of the vehicle’s evaporative canister and fuel system for vehicle 1975 through 1995 will be removed.

Additionally, the Department proposes to correct a mistake in the SIP that was approved by the EPA in 2006. The SIP was mistakenly included as Regulation 1131-*Low Enhanced Inspection and Maintenance Program; Plan for Implementation (PFI)*, however the SIP should be a standalone document and separate from regulatory language. The Department proposes to make the SIP a standalone document, in addition to, will encompass Sussex County's I/M program with the proposed revisions to Regulation 1126 and the proposed revisions to Regulation 1131 into the SIP. Approval of the proposed SIP revision will enable the Department to formally address EPA's requirements and incorporate the same into Delaware's SIP document.

The Department periodically submits revisions to the SIP as required by the CAA to address air quality nonattainment 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.

The Department has the statutory basis and legal authority to act with regard to the proposed SIP revision described herein, pursuant to *7 Del.C.* Chapter 60. The Department published a General Notice of the aforementioned proposed SIP revision, and of the September 29, 2022 public hearing held in this matter, in the September 1, 2022 *Delaware Register of Regulations*.

The Department has the statutory basis and legal authority to act with regard to proposed SIP revision described herein, pursuant to *7 Del.C.* Chapter 60. The Department published its initial proposed SIP Amendments to strike language in effort to remove the SIP document from the Regulation as proposed in the September 1, 2022, *Delaware Register of Regulations*. 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-five (35) exhibits introduced by the responsible Department staff at the time of the aforementioned public hearing and marked by this Hearing Officer accordingly as “Department Exhibits 1-35”. The Department’s responsible staff member for the drafting and overall promulgation of these proposed SIP Amendments, James Coverdale, Program Manager II, Division of Air Quality, developed the Record with the relevant documents in the Department’s files.

As noted previously, the aforementioned proposed SIP revision was presented and thoroughly vetted by the Department at the virtual public hearing on September 29, 2022. 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 October 14, 2022, with no public comment having been received by the Department during any phase of this hearing matter.

Accordingly, the Department’s proposed Amendments to 7 DE Admin Code 1131 - *Low Enhanced Inspection and Maintenance Program; Plan for Implementation (PFI)*, striking the SIP language is attached hereto as Appendix “B” and is expressly incorporated herein by reference. For the Secretary’s review, a copy of the Department’s proposed SIP revision, 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 revision 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 revision, 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 the proposed SIP revision as final;
3. The Department provided adequate public notice of the proposed SIP revision, 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 revision, and held the Record open for receipt of public comment subsequent to the date of the hearing (through October 14, 2022), consistent with Delaware law, in order to consider the same before making any final decision;
4. Promulgation of the proposed SIP revision will enable the Department to establish the SIP as separate document by striking 7 DE Admin Code 1131 - *Low Enhanced Inspection and Maintenance Program; Plan for Implementation (PFI)* and provide EPA with revisions to Delaware's

vehicle I/M programs covered by 7 DE Admin. Code 1131 (Kent & New Castle Counties) and 7 DE Admin. Code 1126 (Sussex County);

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