

HEARING OFFICER'S REPORT

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

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

RE: Proposed Regulation Amendments to 7 DE Admin. Code 1130 - *Title V State Operating Permit Program*

DATE: June 15, 2024

I. BACKGROUND AND PROCEDURAL HISTORY:

A virtual public hearing was held on Thursday April 25, 2024, at 6:00 p.m. via the State of Delaware's Zoom Video Communication 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 1130 - *Title V State Operating Permit Program* ("Regulation"). The Department is proposing to amend 7 DE Admin. Code 1130, Section 6.0 - *Permit Contents*, subsections 6.7 and 6.1.3.3.3.1 to remove emergency affirmative defense provisions and references. Additionally, the Department proposes to amend a typographical error to Section 8.0 of Appendix A "Insignificant Activities".

Established in Title V of the Clean Air Act ("CAA") the Environmental Protection Agency ("EPA") is required to implement air quality operating permits ("Title V permits") for major sources of air emissions. Title V permits apply to sources whose emissions meet or exceed major source levels. These pollutants include volatile organic compounds, nitrogen oxide, carbon monoxide, sulfur particulates, hazardous air pollutants and other contaminants. They are typically emitted from large stationary sources such as power plants, refineries, or manufacturing plants.

The Department implemented the federal requirements established by the EPA for Title V permits in Delaware. Title V operating permits mandate that facilities adhere to

specific emission monitoring and reporting requirements to demonstrate compliance and ensure their emissions stay within allowable limits.

Recognizing that deviations may occur due to failures in emission control equipment, the EPA included a provision in a final rule (57 FR 32250) published on July 21, 1992, to allow for some operational flexibility due to an emergency. As defined in 40 CFR 70.6(g), an emergency is “any situation arising from sudden and reasonably unforeseeable events beyond the control of the source, including acts of God, which situation requires immediate corrective action to restore normal operation, and that causes the source to exceed a technology-based emission limitation under the permit, due to unavoidable increases in emissions attributable to the emergency.”

On September 9, 2010, the EPA issued a final rule (75 FR 54970) that established affirmative defense provisions within its National Emission Standards for Hazardous Air Pollutants (NESHAP) for Portland cement facilities. The affirmative defense provisions account for excess emissions during different modes of source operations, which includes emergencies. Affirmative Defenses for emergencies allow a permitted source to avoid liability for noncompliance when emission limits have been exceeded due to an emergency. Sources could use the provisions to assert in civil enforcement proceedings when violation of emissions limitations occurred.

To that, several environmental agencies filed petitions for review with the U.S. Court of Appeals, arguing that the provision contradicted the enforcement provisions in the CAA by limiting the authority of courts to decide an appropriate remedy in an enforcement action.

Subsequent to the 2010 ruling the EPA evaluated the legality of affirmative defense provisions in many of their CAA requirements, including their stance on affirmative defense provisions for state and federal Title V operating permit programs. The requirements for state Title V operating permit programs in 40 CFR Part 70 are applicable to state/local/tribal permitting authorities, while the requirements for federal

Title V operating permit programs in 40 CFR Part 71 are applicable when EPA is the permitting authority. Both Part 70 and 71 programs include identical affirmative defense provisions for emergency cases, which are similar to the provisions that were created in the 2010 final rule for the Portland cement industry.

On July 21, 2023, the EPA issued a final rule (88 FR 47029) that removed all “emergency” affirmative defense provisions for state and federal operating permit programs from 40 CFR Part 70.6(g) and 71.6(g). The EPA determined that these provisions were inconsistent with the enforcement structure of the CAA and as such, States with Part 70 programs containing these provisions must submit a program revision by August 21, 2024.

In accordance with this final ruling, the Department proposes amendments to Section 6.0 – Permit Contents, subsections 6.7 and 6.1.3.3.1. to maintain consistency with current federal regulations. The Amendment removes all affirmative provisions and references.

The July 2023 final rule also requires the removal of affirmative defense provisions from individual operating permits based on Title V authority. The EPA expects these changes to occur during routine permit renewals or revisions. At the latest, states must remove these provisions by the next periodic permit renewal following the effective date of the July 2023 final rule or the EPA's approval of state program revisions.

The Department began the process of removing affirmative defense provisions from their Title V permits during the periodic permit renewal schedule. A review of the permits indicates that 30% of Delaware’s Title V permits have been updated to remove the provisions as of January 1, 2024, and by the end of 2024, it is estimated that 70% of the permits will be updated. For all others, the Department will continue to remove the affirmative defense provisions during the periodic reviews until all Title V permits have been updated.

Furthermore, the proposed Amendments are not indicative to result in any emission reductions or increases due to the removal affirmative defense language since it was used only to avoid liability for noncompliance when emission limits have been exceeded. Additionally, the proposed amendment is not expected to impact overburdened or underserved communities located in Delaware.

The Department also proposes to amend Section 8.0, more specifically these changes correct a typographical error, changing the word “and” to “in”. This amendment is not substantive and does not alter the intent of the Regulation.

The Department has the statutory basis and legal authority to act with regard to proposed regulatory promulgation, pursuant to 7 *Del.C.* §§6001(c) and 6010. The Department published its proposed Amendments in the April 1, 2024, Delaware Register of Regulations. There were three (3) members of the public in attendance, with one 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 May 10, 2024, with one comment received by the Department in this matter. This verbal comment submitted by a member of the public is in support of the Amendment.

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.

SUMMARY OF THE PUBLIC HEARING RECORD:

The Record consists of the following documents: (1) a verbatim transcript of the virtual public hearing held on April 25, 2024; and (2) ten (10) 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 1-10”. The Department’s staff

primarily responsible for the drafting and overall promulgation of the proposed Amendments, Taylor Englert, Engineer III with the Division of Air Quality, developed the Record with the relevant documents in the Department's files.

The Department received one comment in support of the promulgation of the hearing record developed, and as such, this hearing officer suggest the approval Amendments as presented. Accordingly, the Department's proposed Amendments is 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 proposed amendments to 7 DE Admin. Code 1130. I further find that the proposed Amendments will enable the Department to maintain consistency with current federal regulations, EPA final rule 88 FR 47029 by amending 7 DE Admin. Code 1130, Section 6.0 - *Permit Contents*, subsections 6.7 and 6.1.3.3.3.1, removing emergency affirmative defense provisions and references. Additionally, the Department proposes to amend a typographical error in Section 8.0.

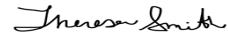
Further, I recommend the Secretary adopt the following findings and conclusions:

1. The Department has the statutory basis and legal authority to act with regard to this proposed regulatory promulgation, pursuant to 7 *Del. C.* 6001(c) & 6010;
2. The Department has jurisdiction under its statutory authority, pursuant to 7 *Del.C.* Chapter 60, to issue an Order adopting these proposed Amendments as final;

3. The Department provided adequate public notice of the 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 April 25, 2024, and during the 15 days subsequent to the hearing (through May 10, 2024), before making any final decision;
4. Promulgation of the proposed amendments to 7 DE Admin. Code 1130, as set forth herein, will enable the Department to maintain consistency with current federal regulations, EPA final rule 88 FR 470295 by amending 7 DE Admin. Code 1130, Section 6.0 - Permit Contents, subsections 6.7 and 6.1.3.3.3.1, removing emergency affirmative defense provisions and references. Additionally, the Department proposes to amend a typographical error in Section 8.0 of Appendix A - *Insignificant Activities*;
5. The Department has reviewed the revised proposed Amendments in light of the *Regulatory Flexibility Act*, consistent with 29 *Del.C.* §104, and has selected Exemption “B5,” as this regulation is not substantially likely to impose additional cost or burdens upon individuals and/or small businesses;
6. The Department has reviewed this proposed regulatory promulgation in the light of 7 *Del.C.* §10003 and 29 *Del.C.* §10118(b)(3), and has determined that conducting such an assessment regarding the impact of this regulation on the achievement of the State of Delaware's greenhouse gas emissions reduction targets is not practical;
7. The Department’s proposed regulatory Amendments, as initially published in the April 1, 2024, Delaware Register of Regulations, 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

8. 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. Smith
Public Hearing Officer