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**DEPARTMENT OF NATURAL RESOURCES AND  
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SECRETARY

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**Secretary's Order No.: 2024-A-0021**

**RE: Approving Final Regulations to Amend 7 DE Admin. Code 1130 –  
Title V State Operating Permit Program**

**Date of Issuance: July 8, 2024  
Effective Date of the Amendment: August 11, 2024**

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC"), pursuant to 7 *Del.C.* §§6006 and 6010, and all other relevant statutory authority, the following findings of fact based on the record, reasons and conclusions are entered as an Order of the Secretary in the above-referenced promulgation.

**Background, Procedural History and Findings of Fact**

This Order relates to the proposed regulation amendments ("Amendments") to 7 DE Admin. Code 1130 – *Title V State Operating Permit Program* ("Regulation"). The Department is proposing to amend the Regulation to maintain consistency with the Environmental Protection Agency's ("EPA") final rule (88 FR 47029). More specifically the Department is amending subsection 6.7 and 6.1.3.3.3.1 to remove emergency affirmative defense provisions and references and is also proposing to amend Section 8 of Appendix A, "Insignificant Activities," to correct a typographical error.

Title V of the Clean Air Act ("CAA") requires EPA to implement air quality operating permits, known as Title V permits, for major sources of air emissions. These 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 7 DE Admin. Code 1130 to adhere to the federal requirements established by the EPA for Title V permits in Delaware. The Regulation establishes the permitting procedures and requirements for Delaware's Title V operating permits. More specifically, it mandates that Title V permit facilities comply with specific emission monitoring and reporting requirements to demonstrate compliance and ensure their emissions remain within allowable limits.

Recognizing that deviations may occur due to failures in emission control equipment, the EPA included a provision for operational flexibility in a final rule (57 FR 32250) published on July 21, 1992, to allow for some operational flexibility due to an emergency. According to 40 CFR 70.6(g), an "emergency" is defined as "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 the National Emission Standards for Hazardous Air Pollutants (NESHAP) for Portland cement facilities. These provisions allow facilities to avoid liability for noncompliance with emission limits during malfunctions. Several environmental agencies challenged this rule, arguing it limited courts' authority to decide on enforcement actions.

This action triggered the EPA to review the legality of similar affirmative defense provisions across various CAA requirements, including those for state and federal Title V operating permit programs. These programs, outlined in 40 CFR Parts 70 and 71, include affirmative defense provisions for emergencies. Part 70 applies to state, local, and tribal authorities, while Part 71 applies when the EPA is the permitting authority.

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 CAA enforcement structure.

In line with this ruling, the Department proposes amendments to Section 6.0 – *Permit Contents*, specifically subsections 6.7 and 6.1.3.3.1, to align with current federal regulations by removing all affirmative defense provisions and references. The rule also requires removing affirmative defense provisions from individual operating permits during routine renewals or revisions, with a deadline set for the next periodic permit renewal following the rule's effective date or state program revisions approval. To that end, as of January 1, 2024, 30% of Delaware's Title V permits have been updated with an estimated 70% completion by the end of 2024, and the Department will continue to update the remaining permits during periodic reviews.

Furthermore, the proposed Amendments are not expected to lead to any changes in emissions since the affirmative defense language was solely used to avoid liability for noncompliance when emission limits were exceeded. Additionally, the proposed amendment is not anticipated to impact overburdened or underserved communities in Delaware. The Department is also proposing amendments to Section 8.0 to correct a typographical error, changing "and" to "in" and does not alter the intent of the Regulation.

The Department published its proposed Amendments in the April 1, 2024, *Delaware Register of Regulations*. The virtual public hearing regarding this matter was held on April 25, 2024. There were three 3 members of the public in attendance provided at the Department's virtual public hearing with one public comment in support of the promulgation. Pursuant to 29 *Del.C.* §10118(a), the Hearing Record ("Record") remained open for receipt of written comment for 15 days following the public hearing. The Record formally closed for comment in this matter on May 10, 2024, with no additional comments received by the Department.

Thereafter, Hearing Officer Theresa Smith prepared her report dated June 15, 2024 ("Report"), which expressly incorporated into the Record the proposed Amendment, attached thereto as Appendix "A." Mrs. Smith's Report set forth the procedural history, summarized and established the record of information ("Record") relied on in the Report and provided findings of fact, reasons, and conclusions that recommend the approval of the proposed Amendments pending before the Department.

The Department has the statutory basis and legal authority to act with regard to the formal promulgation of these proposed Amendments, pursuant to 7 *Del.C.* §§ 6001(c) & 6010. All notification and noticing requirements concerning this matter were met by the Department and proper notice of the hearing was provided as required by law.

## Reasons and Conclusions

Currently pending before the Department are the proposed regulatory amendments to 7 DE Admin. Code 1130 – *Title V Operating Permit Program*. Based on the record developed by the Department’s staff in the Division of Air Quality, and established by the Hearing Officer’s Report, I find that the proposed regulatory Amendments are well-supported and will enable the Department to maintain consistency with federal requirements established by EPA’s final rule (88 FR 47029) and will correct a typographical error in the Regulation. I also find that the proposed Amendments comply with all applicable federal and state laws and regulations. Further, the proposed Amendments as published in the April 1, 2024, *Delaware Register of Regulations*, are reflective of the Department’s authority under 7 *Del.C.* §§ 6001(c) & 6010, to ensure continued protection of public health and the environment by regulating emissions and reducing air pollution and air contaminants.

The following reasons and conclusions are hereby entered:

1. The Department has the statutory basis and legal authority to adopt and enforce these proposed regulatory amendments 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 proposed Amendments, including at the time of the virtual 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 – *Title V Operating Permit Program*, will enable the Department to maintain consistency with federal requirements established by EPA’s final rule (88 FR 47029) and will correct a typographical error in the Regulation;
5. The Department has reviewed the 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, 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 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 any impact of this regulation on the achievement of the State of Delaware’s greenhouse gas emissions reduction targets will be de minimis;

7. Furthermore, the Department has reviewed the Record generated in this matter with the consideration of the Environmental Justice issues related to the proposed Amendments, and has determined that the approval of the same is consistent with the Department's Environmental Justice policy;
9. The Department's Hearing Officer's Report, including its established record and the recommended proposed Amendments as set forth in Appendix "A," are hereby adopted to provide additional reasons and findings for this Order;
10. The Department's proposed regulatory Amendments, as 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 regulations. Consequently, they are 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*;
11. The Department has an adequate Record of its decision, and no further public hearing is appropriate or necessary; and
12. The Department shall submit this Order approving the proposed Amendments as final regulations 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; and
13. The Department shall serve and publish its Order on its internet site.

  
For Shawn M. Garvin  
Secretary