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DNREC – Division of Air Quality
715 Grantham Lane
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10/3/2022

RE: Public Comments on Start of Action Notice 2022-01; Amendments to 7 DE Admin. Code 1140, Delaware Low Emission Vehicle

DNREC needs legislative approval to make such a major decision as banning gasoline and diesel powered vehicles. In addition, the rule changes are only allowed if the state is in non-attainment for the national ozone standard, but that is not the case using the most recent three year data. Not only is Delaware in attainment without a single day over the 70 PPB National Ambient Air Quality Standard (NAAQS) in 2022, but it appears the entire Philadelphia region may also qualify for a status change to attainment.

DNREC lacks authority to regulate vehicle emissions for ozone or carbon dioxide

DNREC states the statutory basis for this action as 7 Del. C. Chapter 60 Environmental Control Subchapter II § 6010. Section (a) states “The Secretary may adopt, amend, modify or repeal rules or regulations, or plans, after public hearing, to effectuate the policy and purposes of this chapter. No such rule or regulation shall extend, modify or conflict with any law of this State or the reasonable implications thereof.” The legislature has passed no law in regards to regulating carbon dioxide other than at electric generating units through the Regional Greenhouse Gas Initiative which is basically a tax. Extending carbon dioxide emissions from motor vehicles would be an unpermitted extension of current law.

In addition, section (c) states “The Secretary may formulate, amend, adopt and implement, after public hearing, a statewide air resources management plan to achieve the purpose of this chapter and comply with applicable federal laws and regulations. Any implementation plan in effect at the time of enactment of this chapter shall continue to be in effect unless amended or repealed by the Secretary.” As concluded in the US Supreme Court case West Virginia v. EPA the EPA has no authority to regulate carbon dioxide emissions without an express Act of Congress. So, there is no federal law to comply with. The rest of § 6010 relates to clean water and solid waste facilities bringing into question whether (c) even applies to the Low Emission Vehicle program. High nitrous oxide, sulphur, or lead in the air can impact water quality, but none of those comes close to exceeding the NAAQS.

Furthermore, § 6095 (4) states, “For ozone nonattainment areas, sources with the potential to emit 100 tpy or more of volatile organic compounds or oxides of nitrogen in areas classified as “marginal” or “moderate,” 50 tpy or more in areas classified as “serious,” 25 tpy or more in areas classified as “severe,” and sources subject to the requirements for preconstruction review; except that the references in this paragraph to 100, 50, and 25 tpy of nitrogen oxides shall not apply with respect to any source for which the Department has made a finding, pursuant to regulations, that requirements under this section do not apply.” All Delaware Counties have met ozone attainment of the 2020 NAAQS of 70 PPB maximum 8 hour ambient levels for the fourth highest day averaged over three years. DNREC also references State Implementation Plan requirements in the federal Clean Air Act Section 177, 52.426 which relates specifically only to areas of non-attainment of NAAQS. Permits are no longer required. See Table 1 below for the three year period



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2020 to 2022 using data from the EPA Air Quality Daily Data website. Note the 2022 data is complete through 9/30/22 the last day of the ozone season.

Table 1 Most recent ozone emissions in Delaware Counties versus the 70 PPB maximum standard

County	AQM Station	2020 4 th Highest Day	2021 4 th Highest Day	2022 4 th Highest Day	3 year Average
New Castle, DE	100031010	57	65	64	62
New Castle, DE	100032004	63	68	65	65
New Castle, DE	100031007	61	64	64	63
New Castle, DE	100031013	60	64	65	63
Kent, DE	100010002	62	67	61	63
Sussex, DE	100051002	58	64	63	62
Sussex, DE	100051003	60	61	61	61

The Greater Philadelphia area has also reached attainment for ozone

Delaware is part of the Philadelphia-Wilmington-Atlantic City, PA-NJ-MD-DE 8-hour ozone nonattainment area. DNREC has been repeatedly updating State Implementation Plans as part of the goal to bring the region into attainment. This is done under Section 177 of the federal Clean Air Act, § 52.426 Control strategy plans for attainment and rate-of-progress: ozone. A case can be made the region is now in attainment. Table 2 below lists the Air Quality Monitoring Stations in the region and shows all stations except the Bucks County station near Bristol, Pennsylvania, meet the standards using the 2020-2022 period.

Table 2 Philadelphia region ozone emissions versus the 70 PPB standard

County	AQM Station	2020 4 th Highest Day	2021 4 th Highest Day	2022 4 th Highest Day	3 year Average
New Castle, DE	100031010	57	65	64	62
New Castle, DE	100032004	63	68	65	65
New Castle, DE	100031007	61	64	64	63
New Castle, DE	100031013	60	64	64	63
Kent, DE	100010002	62	67	61	63
Cecil, MD	240150003	64	70	63	66
Atlantic, NJ	340010006	59	59	60	59
Camden, NJ	340070002	62	68	62	64
Camden, NJ	340071001	59	62	63	61
Cumberland, NJ	340110007	60	68	61	63
Gloucester, NJ	340150002	64	67	69	67
Mercer, NJ	340210005	70	71	68	70
Mercer, NJ	340219991	65	67	65	66
Ocean, NJ	340290006	63	68	69	67
Bucks, PA	420170012	71	77	70	73
Chester, PA	420290100	60	62	58	60
Delaware, PA	420450002	62	67	66	65
Montgomery, PA	420910013	66	71	66	68



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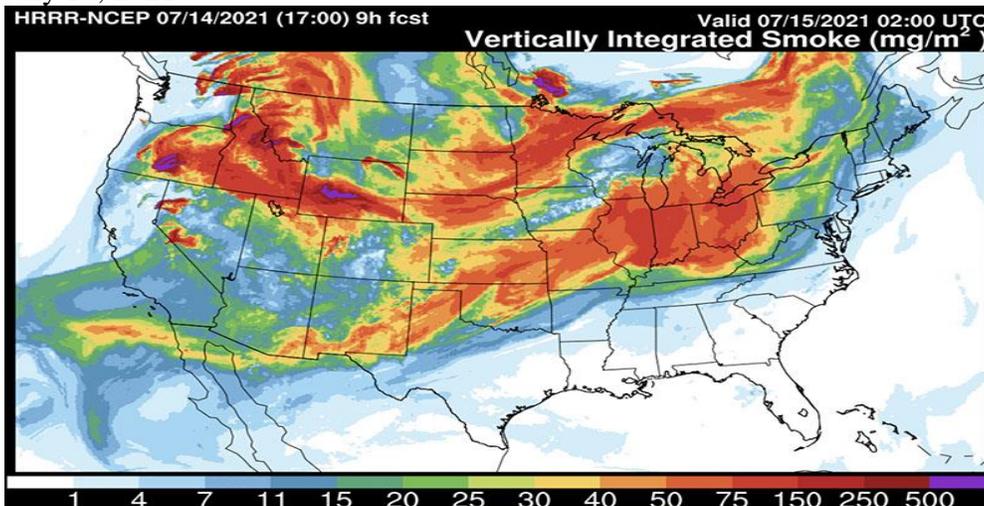
Philadelphia, PA	421010004	62	68	61	64
Philadelphia, PA	421010024	70	72	68	70
Philadelphia, PA	421010048	67	73	66	69

We note the 2021 77 PPB result at Bristol seems out of line with the 70 in 2022 and 71 in 2020. A little research turned up high days matched high wildfire smoke days from western wild fires on at least three occasions. Smoke maps dated around the four highest days (shown below) suggest smoke played a role in the high numbers. The EPA allows states to petition to exclude such days. In addition, the EPA has changed the status to attainment without all stations meeting the standard. Charlotte, NC was found to be in attainment in 2015, though one station had a 73 PPB average. A petition to the EPA to change status seems appropriate.

August 13, 2021



July 15, 2021





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August 27, 2021



Legislative approval is likely needed for such a major policy change

The recent Supreme Court finding in *West Virginia v. EPA* turned on the fact a regulatory agency may not extend a minor rule to cover a “major issue”. The US Congress has considered passing legislation to regulate carbon dioxide as part of the Clean Air Act, but has never passed such legislation. Yet the EPA tried to use a rarely used section of the Clean Air Act to basically take over regulation of the entire electric power industry. Similarly, the Delaware legislature has never passed explicit legislative to regulate carbon dioxide emissions from motor vehicles. Senate Bill 305 introduced late in the 2022 legislative session failed to pass over the concern it would be used to force a ban on gasoline powered vehicles, and to ban the use of natural gas, propane, and oil in new buildings. Legislators apparently needed to give this considerably more debate. DNREC is now attempting to regulate this very issue.

It is clear DNREC is exceeding its bounds in trying to implement the proposed regulation and may face legal challenges.

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