

HEARING OFFICER'S REPORT

TO: The Honorable David S. Small
Cabinet Secretary, Department of Natural Resources and Environmental Control

FROM: Lisa A. Vest
Public Hearing Officer, Office of the Secretary
Department of Natural Resources and Environmental Control

RE: **Proposed New Revised Regulation 7 DE Admin. Code §2105:
Evaluation, Measurement & Verification Procedures and Standards
(“EM&V Regulations”)**

DATE: December 2, 2016

I. BACKGROUND AND PROCEDURAL HISTORY:

A public hearing was held on Monday, August 29, 2016, at 6:00 p.m. by the Department of Natural Resources and Environmental Control (“DNREC”, “Department”), at the Richardson & Robbins Auditorium, 89 Kings Highway, Dover, Delaware to receive comment on proposed new regulations (“Regulations”) to 7 DE Admin. Code §2105: *Evaluation, Measurement & Verification Procedures and Standards* (“EM&V”, “EM&V Regulations”). Senate Bill 150 (with House Amendment 2) passed on July 1, 2014, was signed by Governor Markell on August 6, 2014, and was codified as 29 *Del.C.* §8059. This legislation enables Delaware electric and gas utilities to provide cost-effective energy efficiency programs to their customers, and helps Delaware meet the requirements of the Energy Efficiency Resource Standard Act (“EERS Act”, “EERS”). Said legislation also requires DNREC to develop regulations to govern the expansion of cost-effective energy efficiency programs in Delaware, pursuant to 29 *Del.C.* §8059(h)(3).

The State of Delaware’s Energy Efficiency Advisory Council (“EEAC”) was also created pursuant to 29 *Del.C.* §8059. This thirteen-person council is comprised of energy efficiency

stakeholders from DNREC, the Delaware Sustainable Energy Utility (“SEU”), and affected energy providers and representatives from the manufacturing, commercial environmental, agricultural, low-income, and residential sectors. The EEAC assists affected energy providers in the development of energy efficiency, peak demand reduction, and emission-reducing fuel switching programs. In collaboration with the Delaware Public Advocate (“DPA”) and Public Service Commission (“PSC”), the EEAC is tasked to review energy efficiency program plans to ensure that programs are deployed and energy savings targets are met through evaluation, measurement, and verification standards.

The Department oversees the competitive process for acquiring EEAC consulting services, as well as the management of day-to-day consultant efforts. The Chair of the EEAC, and any subcommittees therein, are charged to plan, implement and review the responsibilities defined within the proposed new EM&V Regulations. The EEAC reviews and recommends programs submitted by Program Administrators (“PAs”), reviews and approves the recommendations of subcommittees, and reviews and recommends portfolio-level EM&V plans and budgets. Independent Evaluation Contractors (“IECs”) provide technical advice and information, develop and recommend EM&V plans and budgets, and conduct all EM&V research and tasks.

Facilitating the efforts of the EM&V (and working to reach consensus on all EM&V issues in general) are the EEAC consultants. These EEAC consultants advise, inform and provide services related to developing, reviewing and monitoring all EM&V planning and implementation activities, and work closely with the IECs to ensure the independence of the process. The PAs then designate a representative that is an active participant in all EM&V activities, and provide day-to-day management of the IECs.

The reporting requirements outlined in the proposed new EM&V Regulations provide that EM&V reports shall provide an assessment of all activities completed in a manner consistent with the regulations and accepted best practices. Such assessments are further defined in Section 6.0 of the proposed regulations, which include, but are not limited to, the following: energy impact estimates for each year of a program's operation; key findings from the process evaluation; key findings from the market effects evaluation; prospective and retrospective benefit-cost information (Total Resource Cost [TRC] testing); and development of comprehensive three-year EM&V plans. Additionally, annual portfolio plan updates shall occur, allowing for justified modifications to the overall three-year plans to accommodate new information or program changes. Each PA shall submit an EM&V report to the EEAC on an annual basis, and DNREC shall annually publish a report on statewide electricity and natural gas consumption and peak demand. This report shall be made available to the public.

The Delaware Technical Reference Manual, or TRM, shall serve as the primary source for deemed gross savings and the associated calculation approaches used in Delaware. The Energy Impact Baseline shall be established in the Delaware TRM. The Delaware TRM shall consist of the current version of the Mid-Atlantic TRM, as published by the Northeast Energy Efficiency Partnership ("NEEP"), plus any additional measures or revisions to address Delaware-specific conditions. In order to maximize transparency, the Delaware TRM and the Mid-Atlantic TRM are included as part of the regulations, and not simply referenced therein.

The aforementioned proposed new EM&V Regulations define the standards for EM&V procedures as administered by the EEAC. The Department believes that EM&V is a vital tool in creating consensus around the impact of current and future investments to reduce energy use and

peak demand in Delaware. Results from EM&V are critical to the assessment of progress in meeting Delaware's energy efficiency and peak demand targets as outlined in the EERS, the State of Delaware's "Lead by Example" policy, and the Delaware SEU's legislated goals. The results from EM&V provide valuable feedback to improve programs during implementation (or suggest their cancellation), inform the development of new programs, and guide the allocation of resources.

The purpose of these proposed new EM&V regulations is as follows, to wit: (1) develop and govern the overall approach to the evaluation of energy efficiency and demand response programs in Delaware; (2) standardize evaluation approaches for the assessment of energy efficiency and demand response programs; (3) provide specific guidance to Program Administrators, contractors and stakeholders for the evaluation of energy efficiency and demand response programs; and (4) ensure consistency between Program Administrators' energy efficiency evaluation plans, analysis, and reporting efforts.

The Department's Division of Energy and Climate prepared its Start Action Notice ("SAN") No. 2014-08 to officially begin this proposed promulgation on October 23, 2014. The initial proposed new regulation as referenced above was initially published in the *State of Delaware Register of Regulations* on August 1, 2016. After numerous public workshops, stakeholder meetings, discussions and reviews, the Department placed legal notices in both the News Journal and the Delaware State News advertising that a public hearing would be held on August 29, 2016, to provide an opportunity for the public to comment on the draft regulation.

The Department has the statutory basis and legal authority to act with regard to the proposed new EM&V Regulations, pursuant to the *Delaware Energy Act, 29 Del.C. §8059(h)*. Members of the public attended the August 29, 2016 hearing, and comment was received by the

Department with regard to the proposed measures referenced above. It should also be noted that 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 public hearing record consists of the following: (1) nine (9) documents introduced by responsible Department staff at the public hearing held on August 29, 2016, and marked by this Hearing Officer accordingly as Department Exhibits 1-9; and (3) the Department's Technical Response Memorandum ("TRM") from Emily St. Clair, Planner II, DNREC Division of Energy & Climate, dated October 12, 2016. The Department's person primarily responsible for the drafting and overall promulgation of this proposed new Regulation, Emily St. Clair, developed the record with the relevant documents in the Department's files.

As noted above, the purpose of this proposed regulatory promulgation is to propose rules to govern how the Department administers its obligation to develop regulations to govern the expansion of cost-effective energy efficiency programs in Delaware, pursuant to 29 *Del.C.* §8059(h)(3). The aforementioned proposed new regulation was presented and thoroughly vetted by the Department at several workshops, stakeholder meetings, and at the public hearing held on August 29, 2016. Members of the public attended that hearing, and comment was received by the Department, both at the time of the hearing and during the post-hearing phase of this rulemaking process. Again, all proper notification and noticing requirements concerning this proposed promulgation were met by the Department in this matter.

Subsequent to the close of the hearing record for public comment on September 13, 2016, the Department's Division of Energy & Climate ("DEC") thoroughly reviewed the hearing record, which includes comment received from the following: (1) Tony DePrima (Delaware

SEU); (2) Regina Iorii (Delaware Division of the Public Advocate); and (3) Jamie Nutter (Delaware Municipal Electric Corporation, Inc.). The DEC then prepared its formal Technical Response Memorandum (“Division TRM”), dated October 12, 2016. This Division TRM summarizes the hearing record compiled in this matter, documents the exhaustive review performed by the Department with regard to the comment received regarding this proposed regulatory promulgation, and offers the Department’s response to all comments received throughout this long regulatory process. Of note is the fact that, in response to some of the comment received, the Department has made changes to the proposed new regulation. These changes do not alter the meaning or function of the proposed regulation, but rather provide additional clarity and greater understanding for the regulated community. Thus, since these changes are not construed to be substantive in nature, no additional re-publication or noticing of this proposed regulation is necessary at this time.

The Department’s aforementioned TRM does an excellent job of identifying all of the comment received concerning this detailed and complex rulemaking, and discusses the same in a thorough and balanced manner, while accurately reflecting the information contained in the hearing record. Thus, the Department’s Division TRM of October 12, 2016 is expressly incorporated into this Report, and attached hereto for that purpose as Appendix “A”.

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 *revised* 7 DE Admin. Code §2105: *Evaluation, Measurement & Verification Procedures and Standards*, as noted above. Accordingly, I recommend promulgation of this proposed *revised* new regulation, 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 proposed *revised* new regulation, pursuant to 29 *Del.C.* §8059(h);
2. The Department has jurisdiction under its statutory authority, pursuant to 7 *Del.C.* Ch. 60, to issue an Order adopting this proposed *revised* new regulation as final;
3. The Department provided adequate public notice of the initial proposed new regulation and all proceedings in a manner required by the law and regulations, provided the public with an adequate opportunity to comment on said new regulation, including at the times of each public hearing and all post-hearing phases of this promulgation as referenced in detail above, consistent with 29 *Del.C.* §10118(a), in order to consider all public comment on the same before making any final decision;
4. While the Department made changes to the initially proposed regulatory language, as set forth in the above-referenced Division TRM of October 12, 2016, such changes do not alter the meaning or function of the proposed new regulation, and therefore no additional re-publication or noticing of this proposed regulation is necessitated at this time;
5. Promulgation of the proposed *revised* new regulation, 7 DE Admin. Code §2105: *Evaluation, Measurement & Verification Procedures and Standards*, will allow Delaware to (1) develop and govern the overall approach to the evaluation of energy efficiency and demand response programs in Delaware; (2) standardize evaluation approaches for the assessment of energy efficiency and demand response programs; (3) provide specific guidance to Program Administrators, contractors and stakeholders for the evaluation of energy efficiency and demand response programs; and (4) ensure consistency between Program Administrators' energy efficiency evaluation plans, analysis, and reporting efforts;

6. The Department has reviewed this proposed *revised* new regulation in the light of the Regulatory Flexibility Act, consistent with 29 *Del.C.* Ch. 104, and believes the same to be lawful, feasible and desirable, and that the recommendations as proposed should be applicable to all Delaware citizens equally;

7. The Department's proposed *revised* new regulation, as originally published in the August 1, 2016 *Delaware Register of Regulations*, and as *revised* and set forth in Appendix "B" hereto, is adequately supported, is not arbitrary or capricious, and is consistent with the applicable laws and regulations. Consequently, it should be approved as a final *revised* new regulation, which shall go into effect ten days after its publication in the next available issue of the *Delaware Register of Regulations*; and

8. The Department shall submit the proposed *revised* new regulation as a final new regulation, to wit: 7 DE Admin. Code §2105: *Evaluation, Measurement & Verification Procedures and Standards* 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.

LISA A. VEST
Public Hearing Officer

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Attachments/Appendix:

Appendix A: Div. of Energy and Climate TRM (10/12/16)

Appendix B: Proposed *revised* new regulation