

Secretary's Order No.: 2010-A-0008

RE: Approving Final Amendments to 7 DE Admin. Code 1141, Limiting Emissions of Volatile Organic Compounds from Consumer and Commercial Products, Section 3.0, "Portable Fuel Containers"; and a Corresponding Revision to the Delaware State Implementation Plan (SIP) for Attainment of Ground-Level Ozone Standard

Date of Issuance: March 11, 2010

Effective Date of the Amendment: April 11, 2010

Under the authority vested in the Secretary of the Department of Natural Resources and Environmental Control ("Department" or "DNREC") the following findings, reasons and conclusions are entered as an Order of the Secretary in the above-referenced rulemaking proceeding.

Background and Procedural History

This Order considers proposed regulatory amendments to 7 DE Admin. Code 1141, Limiting Emissions of Volatile Organic Compounds from Consumer and Commercial Products, Section 3.0, "Portable Fuel Containers", and a corresponding revision to the Delaware State Implementation Plan (SIP) for attainment of ground-level ozone standard. The Department's Air Quality Management (AQM) Section of the Divisions of Air and Waste Management (DAWM) commenced the regulatory development process with Start Action Notice 2009-21. The Department published the proposed regulatory amendments in the December 1, 2009 *Delaware Register of Regulations* and held a public hearing on January 5, 2010¹. The Department's presiding hearing officer, Lisa A. Vest, prepared a Hearing Officer's Report dated February 26,

¹ A typographical error was made by the Delaware Register of Regulations when publishing the Register Notice for this proposed regulation in its Dec. 1, 2009 issue. Although the correct SAN number is 2009-21 as referenced above, it was incorrectly published by the Register as 2009-28 at that time. At the request of the Delaware Register of Regulations, this error is being noted at this time.

2010 (Report). The Report recommends certain findings and the adoption of the proposed Amendments as attached to the Report as Appendix A.

Findings and Discussion

I find that the proposed Amendments are well-supported by the record developed by the Department, and adopt the Report to the extent it is consistent with this Order. The Department's experts developed the record and drafted the proposed Amendments. Throughout the entire regulatory development process regarding this promulgation, the Department received no public comments, as noted in the Report.

I find that the Department's experts in the AQM Section of the DAWM fully developed the record to support adoption of these Amendments. With the adoption of this Order, Delaware regulations regarding portable fuel containers will no longer apply to portable fuel containers manufactured on and after January 1, 2009, but will be subject to regulation under Federal Rule 72 FR 8428. This change will enable Delaware to more efficiently and effectively reduce VOC emissions from portable fuel containers, as the Federal Rule provides for better VOC emission control of said containers, and therefore achieves greater VOC emission reductions than the previously existent Delaware regulation regarding this matter. Additionally, the Department's corresponding revision to Delaware's State Implementation Plan (SIP) will demonstrate that this promulgation and the reliance on the Federal Rule will not adversely impact Delaware's efforts for attaining the ozone air quality standard.

In conclusion, the following findings and conclusions are entered:

1.) The Department has jurisdiction under its statutory authority to issue an Order adopting these proposed Amendments as final;

2.) The Department provided adequate public notice of the proposed Amendments, and provided the public with an adequate opportunity to comment on the proposed Amendments, including at a public hearing;

3.) The Department held a public hearing on January 5, 2010 on the proposed Amendments in order to consider public comments before making any final decision, however, no public comments were received either prior to or after said hearing date;

4.) The Department's Hearing Officer's Report, including its recommended record and the recommended Amendments as set forth in Appendix A, are adopted to provide additional reasons and findings for this Order;

5.) The recommended Amendments do not reflect any substantive changes from the proposed regulation Amendments as published in the December 1, 2009, *Delaware Register of Regulations*;

6.) The recommended Amendments should be adopted as final regulation Amendments because (1) Delaware will be enabled to more efficiently and effectively reduce VOC emissions from portable fuel containers, as Federal Rule 72 FR 8428 provides for better VOC emission control, and therefore achieves greater VOC emission reductions, of said containers than the previously existent Delaware regulation regarding this matter; (2) the Department's corresponding revision to Delaware's State Implementation Plan (SIP) will demonstrate that this promulgation and the reliance on the Federal Rule will not adversely impact Delaware's efforts for attaining the ozone air quality standard; and (3) the regulation amendments are well supported by documents in the record; and that

7.) The Department shall submit this Order approving the final regulation 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.

/s/ Collin P. O'Mara
Collin P. O'Mara
Secretary

MEMORANDUM

TO: The Honorable Collin P. O'Mara
Cabinet Secretary, Dept. 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 Amendment to 7 DE Admin. Code 1141, Limiting Emissions of Volatile Organic Compounds from Consumer and Commercial Products, Section 3.0, "Portable Fuel Containers", and a corresponding revision to the Delaware State Implementation Plan (SIP) for attainment of ground level ozone standard

DATE: February 26, 2010

I. Background:

A public hearing was held on Tuesday, January 5, 2010, at 6:00 p.m. at the DNREC's Priscilla Building, 156 S. State Street, Dover, Delaware, to receive comment on proposed amendments to 7 DE Admin. Code 1141, Limiting Emissions of Volatile Organic Compounds from Consumer and Commercial Products, Section 3.0, "Portable Fuel Containers", and a corresponding revision to the Delaware State Implementation Plan (SIP) for attainment of ground level ozone standard. Delaware adopted Section 3.0 of 7 DE Admin. Code 1141 in January of 2001 in order to reduce volatile organic compound ("VOC") emissions from portable fuel containers (otherwise known as gas cans).

Effective January 1, 2009, the EPA began to regulate emissions from portable fuel containers under Federal Rule, to wit: 72 FR 8428². The Federal Rule provides for better

² 72 FR 8428 (February 26, 2007), "Control of Hazardous Air Pollutants From Mobile Sources", Final Rule.

emission control of portable fuel containers, and therefore achieves greater VOC emission reductions than the current Delaware regulation. Therefore, DNREC is proposing that Section 3.0 of 7 DE Admin. Code 1141 no longer apply to portable fuel containers manufactured on and after January 1, 2009, and that Delaware rely on the Federal Rule to control emissions from this source.

Additionally, DNREC proposed to make a corresponding revision to its ozone State Implementation Plan (SIP), in which DNREC demonstrates that the above proposed revision to Section 3.0 of 7 DE Admin. Code 1141 and the reliance upon the new Federal Rule will not adversely impact efforts from attaining the ozone air quality standard.

It should be noted that no public comments were received by the Department with regard to this proposed promulgation. Proper notice of the hearing was provided as required by law.

II. Summary of Hearing Record:

At the time of the hearing on January 5, 2010, Gene Pettingill of the Department's Air Quality Management (AQM) Section of the Divisions of Air and Waste Management (DAWM), offered the Department's eight exhibits pertaining to these proposed amendments, and this Hearing Officer entered them into the formal hearing record developed in this matter. Included within those Departmental exhibits were copies of the Start Action Notice for this promulgation, copies of the legal notices regarding the holding of this public hearing on January 5, 2010, a copy of 72 FR 8428, a copy of the EPA Draft Regulatory Impact Analysis³, and copies of the actual proposed amendments to both 7 DE Admin. Code 1141, Section 3.0 and Delaware's ozone State Implementation Plan (SIP).

For the Secretary's review, and in order for the Secretary to gain a thorough understanding of this proposed promulgation, copies of the above-referenced proposed amendments are attached hereto as Appendix "A", and the same are expressly incorporated into this Hearing Officer's Report.

It should be noted that the Department adhered to all appropriate Delaware statutes and the regulatory development process in this matter, and that the Department has met the required public notice obligations regarding these proposed amendments. It should also be noted that the Department has reviewed this proposed amendment in the light of the Regulatory Flexibility Act, and believes the same to be lawful, feasible and desirable, and that the recommendations as proposed should be applicable to all Delaware citizens equally.

III. Conclusions and Recommendations:

Based on the record developed in this matter, I conclude that the Department has provided appropriate reasoning regarding the need for these proposed amendments to 7 DE Admin. Code 1141, Section 3.0, as well as the need for the corresponding revision to its ozone SIP, which demonstrate that this promulgation and reliance on the new Federal Rule will not adversely impact efforts from attaining the ozone air quality standard. Accordingly, I recommend promulgation of these proposed amendments in the customary manner provided by law.

Further, I recommend the following findings:

1. The Department has jurisdiction under its statutory authority, 7 Del.C., Chapter 60, to make a determination in this proceeding;

³ Draft Regulatory Impact Analysis: "Control of Hazardous Air Pollutants from Mobile Sources", EPA420-D-06-004, Feb., 2006.

2. The Department provided adequate public notice of the proceeding and the public hearing in a manner required by the law and regulations;
3. The Department held a public hearing in a manner required by the law and regulations;
4. The Department has reviewed these proposed amendments in the light of the Regulatory Flexibility Act, and believes the same to be lawful, feasible and desirable, and that the recommendations as proposed should be applicable to all Delaware citizens equally;
5. Promulgation of these proposed amendments will eliminate the applicability of 7 DE Admin. Code 1141, Section 3.0 to portable fuel containers manufactured on and after January 1, 2009, and will allow Delaware to rely solely upon Federal Rule 72 FR 8428 to control emissions from this source;
6. Reliance solely upon Federal Rule 72 FR 8428 will enable Delaware to more efficiently and effectively reduce VOC emissions from portable fuel containers, as the Federal Rule provides for better VOC emission control of said containers and therefore achieves greater VOC emission reductions than the current Delaware regulation;
7. The Department's corresponding revision to its ozone SIP will demonstrate that this promulgation and the reliance on the Federal Rule will not adversely impact Delaware's efforts for attaining the ozone air quality standard;
8. The Department has an adequate record for its decision, and no further public hearing is appropriate or necessary;

