

**Secretary's Order No.: 2010-A-0006**

**RE: Approving Final Amendments to 7 DE Admin. Code 1125,  
Requirements for Preconstruction Review:  
Section 3.0, "Prevention of Significant Deterioration of Air Quality"**

**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 1125, Requirements for Preconstruction Review: Section 3.0, "Prevention of Significant Deterioration of Air Quality" in order to cite explicitly that nitrogen oxide (NO<sub>x</sub>) is a precursor to the formation of ground level ozone.

On October 13, 2009, the Department's Air Quality Management (AQM) Section of the Division of Air and Waste Management (DAWM) commenced the regulatory development process with Start Action Notice 2009-28. The Department published the proposed regulatory amendments in the December 1, 2009 *Delaware Register of Regulations* and held a public hearing on January 5, 2010. The Department's presiding hearing officer, Lisa A. Vest, prepared a Hearing Officer's Report dated February 26, 2010 (Report). The Report recommends certain findings and the adoption of the proposed regulatory 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. The Department received public comments from the regulated community, as noted in the Report, and considered and responded to all timely and relevant public comments in making its determination.

I find that the Department's experts in the AQM Section of the DAWM fully developed the record to support adoption of this Amendment. With the adoption of the regulatory amendment to 7 DE Admin. Code 1125, Requirements for Preconstruction Review: Section 3.0, "Prevention of Significant Deterioration of Air Quality", Delaware will be in compliance with the Completeness Finding of the U.S. Environmental Protection Agency (EPA), which requires this revision at the State level (see 73 FR 16205, March 27, 2008), based on EPA's determination that the current language is not clear that NO<sub>x</sub> (in addition to volatile organic compounds [VOCs]) is a ground level ozone precursor.

In conclusion, the following findings and conclusions are entered:

- 1.) The Department has jurisdiction under its statutory authority to issue an Order adopting this proposed Amendment as final;
- 2.) The Department provided adequate public notice of the proposed Amendment, and provided the public with an adequate opportunity to comment on the proposed Amendment, including at a public hearing;

3.) The Department held a public hearing on January 5, 2010 on the proposed Amendment in order to consider public comments before making any final decision, however, no comments were received by the Department from the regulated community concerning this matter;

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

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

6.) The recommended Amendment should be adopted as a final regulation Amendment because (1) Delaware will be enabled to be in compliance with the Completeness Finding of the U.S. Environmental Protection Agency (EPA), which requires this revision at the State level (see 73 FR 16205, March 27, 2008), based on its determination that the current regulatory language is not clear that NO<sub>x</sub> (in addition to volatile organic compounds [VOCs]) is a ground level ozone precursor; and (2) the regulation amendment is 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 Amendments to 7 DE Admin. Code 1125, Requirements for Preconstruction Review: Section 3.0, "Prevention of Significant Deterioration of Air Quality"

**DATE:** February 26, 2010

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**I. Background:**

A public hearing was held on Tuesday, January 5, 2010, at 6:13 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 1125, Requirements for Preconstruction Review: Section 3.0, "Prevention of Significant Deterioration of Air Quality". Delaware Air Regulation No. 1125 regulates emissions of pollutants from new and modified facilities, and is organized by attainment status of pollutants emitted relative to Federal National Ambient Air Quality Standards (NAAQS). 7 DE Admin. Code 1125, Section 2.0, "Emission Offset Provisions", covers non-attainment areas, while Section 3.0 within that same regulation covers attainment areas. The Department proposes this action to amend Section 3.0 of 7 DE Admin. Code 1125 to cite explicitly that nitrogen oxide (NOx) is a precursor to the formation of ground level ozone.

The U.S. Environmental Protection Agency (EPA) requires this revision at the State level (see 73 FR 16205, March 27, 2008) because they have determined the current

regulatory language is not clear that NO<sub>x</sub> (in addition to volatile organic compounds [VOCs]) is a ground level ozone precursor. Moreover, this revision requirement was specified in a Federal Completeness Finding, which provided for a twenty-four month compliance period.<sup>1</sup> EPA revised the “Prevention of Significant Deterioration of Air Quality” section of the Federal new source review (NSR) rules on November 29, 2005, in the final rule 70 FR 7162 for the implementation of the 8-hr. ozone NAAQS by requiring that the statement “[a] major source that is major for volatile organic compounds or NO<sub>x</sub> shall be considered major for ozone”.<sup>2</sup>

This action has no immediate impact to Delaware, because all of Delaware is classified as non-attainment of the ground level ozone NAAQS, and is regulated under Section 2.0 of 7 DE Admin. Code 1125. Section 3.0 of Delaware’s NSR Regulation, 7 DE Admin. Code 1125, does not clearly specify that NO<sub>x</sub> is also considered a precursor for ground level ozone formation. Section 2.0, which deals with non-attainment situations, clearly recognizes both NO<sub>x</sub> and VOX as ozone precursors to the formation of ground level ozone.

It should be noted that no members of the public attended the hearing on January 5, 2010, nor was there any public comment received by the Department with regard to this proposed promulgation. Proper notice of the hearing was provided as required by law.

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<sup>1</sup> Completeness Finding for Section 110(a) State Implementation Plans for the 8-hour Ozone NAAQS, 73 FR 16205 (March 27, 2008) Final Rule, <http://edocket.access.gpo.gov/2008/pdf/E8-6171.pdf>

<sup>2</sup> Final Rule to Implement the 8-hr Ozone National Ambient Air Quality Standard, 70 FR 71612 (November 29, 2005) <http://edocket.access.gpo.gov/2005/pdf/05-22698.pdf>

## **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 six (6) 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 was a copy of the Start Action Notice for this promulgation (SAN No. 2009-28), copies of the legal notices regarding the holding of this public hearing on January 5, 2010, a copy of the Federal Completeness Finding as referenced above, and copies of the actual proposed amendments to Section 3.0 of 7 DE Admin. Code 1125.

For the Secretary's review, and in order for the Secretary to gain a thorough understanding of this proposed promulgation, a copy of the above-referenced proposed amendment is attached hereto as Appendix "A", and the same is 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 amendment. 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 the proposed amendment to 7 DE Admin. Code 1125, Requirements for Preconstruction Review: Section 3.0, “Prevention of Significant Deterioration of Air Quality”. 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;
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 the aforementioned proposed amendment to Section 3.0, “Prevention of Significant Deterioration of Air Quality” to 7 DE Admin. Code 1124 will allow Delaware to conform to the 24-month compliance period as set forth in the aforementioned Completeness Finding for Section 110(a) State Implementation Plans for the 8-hour Ozone NAAQS, 73 FR 16205 (March 27, 2008) Final Rule;

