

HEARING OFFICER'S REPORT

TO: The Honorable Shawn M. Garvin
Cabinet Secretary, Dept. of Natural Resources and Environmental Control

FROM: Theresa Newman, Regulatory Specialist, Office of the Secretary,
Dept. of Natural Resources and Environmental Control 

RE: **Proposed Regulation Amendments to 7 DE Admin. Code 1125:**
Requirements for Preconstruction Review

DATE: November 06, 2019

I. BACKGROUND AND PROCEDURAL HISTORY:

A public hearing was held on Wednesday, September 25, 2019, at 6:00 p.m. at the Department of Natural Resources and Environmental Control (“DNREC,” “Department”), 89 Kings Highway, Dover, Delaware to receive comment on proposed amendments to 7 DE Admin. Code 1125: *Requirements for Preconstruction Review* (“Amendments”). The Department is proposing to amend 7 DE Admin. Code 1125 to incorporate by reference the most recent revisions to the United States Environmental Protection Agency (“EPA”) Guideline set forth in Appendix W to 40 CFR Part 51 — *Requirements for Preparation, Adoption, and Submittal of Implementation Plans*.

In the 1977 Clean Air Act (CAA), Congress mandated consistency and encouraged the standardization of air quality models for regulatory purposes. To satisfy the requirements of the CAA, the EPA published the *Guideline on Air Quality Models* in April 1978 (“Guideline”). The Guideline specifies air quality models, while providing guidance for their use, and a common basis for estimating the air quality concentrations of criteria pollutants used in assessing control strategies and developing emissions limits.

The Guideline is updated on an as-needed basis, with consideration of three primary activities: (1) a series of periodic EPA workshops and modeling conferences conducted for the purpose of ensuring consistency and providing clarification in the

application of models; (2) the solicitation and review of new models from the technical and user community; and (3) the extensive on-going research efforts by the EPA and others in air quality and meteorological modeling.

The EPA promulgated revisions to the Guideline at Appendix W to 40 CFR Part 51, effective February 16, 2017. The revisions to the Guideline provide a consistent basis for the most accurate models and databases for use in air quality assessments. Appendix W to 40 CFR Part 51 provides the EPA's preferred models and other recommended techniques, as well as guidance for their use in estimating ambient concentrations of air pollutants. In addition, Appendix W to 40 CFR Part 5 includes enhancements to the formulation and application of the EPA's preferred near-field dispersion modeling system, AERMOD (American Meteorological Society/EPA Regulatory Model), and the incorporation of a tiered demonstration approach to address the secondary chemical formation of ozone and fine particulate matter (PM_{2.5}) associated with precursor emissions from single sources.

The Department has determined that, based upon the conclusions set forth in EPA's Regulatory Flexibility Act (submitted with the promulgation of the Guideline revisions noted above), Delaware's proposed Amendments will not have a significant economic impact on a substantial number of small entities. Per the EPA findings, the modeling techniques described in Appendix W to 40 CFR Part 51 are primarily used by air agencies and by industries owning major sources subject to the New Source Review program's permitting requirements. To the extent that any small entities would have to conduct air quality assessments, using the models and/or techniques described in this action are not expected to pose any additional burden on these entities.

The proposed revisions to 7 DE Admin. Code 1125 reflect the most recent updates to Title 40 of the Code of Federal Regulations – *Protection of the Environment*, as published in the *Federal Register*, dated July 1, 2018.

The Department has the statutory basis and legal authority to act with regard to the proposed amendments to 7 DE Admin. Code 1125: *Requirements for Preconstruction Review*, pursuant to 7 Del. C. §6010(a) and (c). The Department published its initial proposed Amendments in the September 1, 2019 *Delaware Register of Regulations*. Thereafter, the public hearing regarding this matter was held on September 25, 2019. There was no public attendance at the public hearing. Pursuant to Delaware law, the hearing record (“Record”) remained open for fifteen (15) additional days subsequent to the date of the public hearing for receipt of public comment. The Record formally closed with regard to public comment at close of business on October 10, 2019, with no comment having been received by the Department during any phase of this regulatory promulgation.

It should be noted that all 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 Record consists of the following documents: (1) a verbatim transcript; and (2) ten (10) documents introduced by Department staff at the public hearing held on September 25, 2019, and marked by this Hearing Officer at the time of the hearing accordingly as Department Exhibits 1-10. The Department’s person primarily responsible for the drafting and overall promulgation of the proposed Amendments, Renae Held, Acting Program Manager II for the Airshed Planning and Inventory Program, Division of Air Quality, developed the Record with the relevant documents in the Department’s files.

As stated previously, no comment was received by the Department at any time during the course of this regulatory promulgation. Accordingly, the Department’s proposed Amendments are attached hereto as Appendix “A” for the Secretary’s review.

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 amendments to 7 DE Admin. Code 1125: *Requirements for Preconstruction Review*, specifically, to incorporate the recent updates made to 40 CFR Appendix W to Part 51 -*Requirements for Preconstruction Review*, as noted above. Accordingly, I recommend promulgation of the same, in the customary manner provided by law.

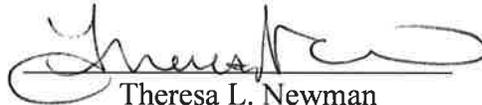
Further, I recommend the Secretary adopt the following findings and conclusions:

1. The Department has the statutory basis and legal authority to act with regard to this proposed regulatory promulgation, pursuant to 7 *Del. C.* §6010(a) and (c);
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 initial 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 same, including at the time of the public hearing held on September 25, 2019, and during the 15 days subsequent to the hearing (through October 10, 2019), before making any final decision;
4. Promulgation of the proposed Amendments to 7 DE Admin. Code 1125: *Requirements for Preconstruction Review*, will enable the Department to incorporate the updates made to the federal *Requirements for Preconstruction Review* at 40 CFR 55, as noted above;
5. The Department has reviewed the proposed Amendments in the light of the Regulatory Flexibility Act, consistent with 29 *Del.C.* §104, and has selected Exemption “B”, as this revision is a requirement of federal law, established by the EPA,

to which the EPA's impact evaluation provides that the revisions herein would not have a significant economic impact on a substantial number of small entities;

6. The Department's proposed regulatory Amendments, as initially published in the September 1, 2019 *Delaware Register of Regulations*, and 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 should be 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*; and

7. The Department shall submit the proposed Amendments as final regulatory amendments 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.


Theresa L. Newman
Public Hearing Officer

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Attachments/Appendix:
Appendix A: Proposed Reg. Amendments

APPENDIX "A"

6. NOTICE OF PUBLIC COMMENT:

A public hearing will be held on the proposed amendments to 7 DE Admin. Code 1125 at 6:00 pm on Wednesday, September 25, 2019 in the DNREC R&R Auditorium, located at 89 Kings Highway, Dover, DE 19901. Persons wishing to submit comment on the proposed amendments may do so either orally or in written form at the public hearing. In lieu of attending the public hearing, written comments may be submitted electronically by clicking the "Comment" button on the following link: <https://dnrec.alpha.delaware.gov/events/460/public-hearing-requirements-for-preconstruction-review/lic> or via USPS to the following address: Theresa Newman, Hearing Officer, DNREC – Office of the Secretary, 89 Kings Highway, Dover, DE 19901. The hearing record will open on September 1, 2019 and will remain open for receipt of comment through the close of business on Thursday, October 10, 2019.

7. PREPARED BY:

Renaë Held – renaë.held@delaware.gov – 302-739-9402

***Please Note: The Regulatory Flexibility Analysis and Impact Statement for this regulation, as required by 29 Del.C. Ch. 104, is available at:**

<http://regulations.delaware.gov/register/september2019/proposed/23 DE Reg 201RFA 09-01-19.pdf>

1125 Requirements for Preconstruction Review
(Break in Continuity of Sections)

12/11/2016

3.0 Prevention of Significant Deterioration of Air Quality

(Break in Continuity Within Section)

3.10 Air Quality Models.

3.10.1 All estimates of ambient concentrations required under Section 3.0 of this regulation shall be based on the applicable air quality models, databases, and other requirements specified in the "Guideline on Air Quality Models" (QA-QPS 1.2-080, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, N.C. 27711, April, 1978 or its subsequent revisions 40 CFR Part 51, Appendix W (July 1, 2018 ed.)). This document is incorporated by reference.

3.10.2 When an air quality impact model specified in the "Guideline on Air Quality Models" is inappropriate, the model may be modified or another model substituted. Such a change must be subject to the notice and opportunity for public comment under subsection 3.14 of this regulation. Written approval of the Department must be obtained for any modification or substitution. ~~Methods like those outlined in the "Workbook for the Comparison of Air Quality Models" (U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, N.C. 17711, May, 1978 or its subsequent revisions) should be used to determine the comparability of air quality models. Changes are also subject to the requirements specified in 40 CFR Part 51, Appendix W for evaluation and approval of alternative models.~~

***Please Note: As the rest of the sections were not amended, they are not being published. A copy of the regulation is available at:**

<http://regulations.delaware.gov/register/september2019/proposed/23 DE Reg 201 09-01-19.htm>

Health at (302) 744-4951.

Any person who wishes to make written suggestions, testimony, briefs or other written materials concerning the proposed regulations must submit them to Alanna Mozeik by Wednesday, October 2, 2019, at:

Alanna Mozeik
Division of Public Health
417 Federal Street
Dover, DE 19901
Email: Alanna.Mozeik@delaware.gov
Phone: (302) 744-4951

***Please Note:**

(1) The Regulatory Flexibility Analysis and Impact Statement for this regulation, as required by 29 Del.C. Ch. 104, is available at:

<http://regulations.delaware.gov/register/september2019/proposed/23DE Reg 200RFA 09-01-19.pdf>

(2) Due to the size of the proposed regulation, it is not being published here. A copy of the regulation is available at:

<http://regulations.delaware.gov/register/september2019/proposed/23 DE Reg 200 09-01-19.htm>

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL**DIVISION OF AIR QUALITY**

Statutory Authority: 7 Delaware Code, §6010(a) and (c); (7 Del.C. §6010(a) and (c))
7 DE Admin. Code 1125

REGISTER NOTICE**SAN #2019-06****(Docket # 2019-R-A-0018)****1125 Requirements for Preconstruction Review****1. TITLE OF THE REGULATIONS:**

Proposed amendments to 7 DE Admin. Code 1125, Requirements for Preconstruction Review

2. BRIEF SYNOPSIS OF THE SUBJECT, SUBSTANCE AND ISSUES:

The Division of Air Quality (DAQ) is proposing to amend 7 DE Admin. Code 1125 to incorporate by reference the most recent revisions to the Environmental Protection Agency's (EPA) Guideline on Air Quality Models, as set forth in Appendix W to 40 CFR Part 51 – Requirements for Preparation, Adoption, and Submittal of Implementation Plans (Guideline). In 1978, EPA published the Guideline and has subsequently made several revisions, therefore DAQ is proposing to amend 7 DE Admin. Code 1125 for consistency with the EPA.

3. POSSIBLE TERMS OF THE AGENCY ACTION:

None.

4. STATUTORY BASIS OR LEGAL AUTHORITY TO ACT:

7 Del.C. Ch. 60, Section 6010(a) and (c).

5. OTHER REGULATIONS THAT MAY BE AFFECTED BY THE PROPOSAL:

None.