

Secretary's Order No.: 2010-A-0039

**RE: Approving Final Amendment to 7 DE Admin. Code 1140,
Delaware Low Emission Vehicle Program (DEL LEV)**

Date of Issuance: November 9, 2010

Effective Date of the Amendment: December 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 the proposed regulatory amendment to 7 DE Admin. Code 1140, Delaware Low Emission Vehicle Program. The primary purpose of this promulgation is to reduce vehicle emissions from new vehicles in Delaware, beginning with model year 2014. Considerable benefits to human health and the environment will be realized under this program in the long term by the adoption of California's emissions standards, which are more stringent than the current federal standards. The Low Emission Vehicle ("LEV") Program reduces emissions of ozone precursors, particulates, toxic air pollutants, and greenhouse gases.

The Department's Division of Air Quality (DAQ) commenced the regulatory development process with Start Action Notice 2009-33. The Department published the proposed regulatory amendment in the October 1, 2010 *Delaware Register of Regulation* and held a public hearing on October 22, 2010. The Department's presiding hearing

officer, Lisa A. Vest, prepared a Hearing Officer's Report dated November 5, 2010 (Report). The Report recommends certain findings and the adoption of the proposed Amendment as attached to the Report as Appendix A.

Findings and Discussion

I find that the proposed Amendment is 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 Amendment. Throughout the entire regulatory development process regarding this promulgation, 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 DAQ expert fully developed the record to support adoption of this Amendment. The adoption of the regulation amendment to 7 DE Admin. Code 1140, Delaware Low Emission Vehicle Program, will formally establish the Delaware Low Emission Vehicle Program (DEL LEV). The inclusion of Delaware into California's Low Emission Vehicle Program (CAL LEV) will allow additional reductions of motor vehicle emissions from new vehicles (less than 7,500 miles) transferred (i.e., sold, delivered, purchased, leased, rented, acquired, received, and/or registered) into Delaware, beginning with model year 2014, as the proposed program is more stringent than the current federal rule.

The amendments to 7 DE Admin. Code 1140 will also provide increased protection for Delaware citizens against a variety of potential adverse health effects linked to long-term exposure to particulate matter (PM), volatile organic compounds

(VOCs), nitrogen oxide (NOx), and greenhouse gases (GHGs). This implementation proposes to adopt requirements that are at least as health protective as requirements of the existing Federal Tier 2 standards.

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 October 22, 2010 on the proposed Amendment in order to consider public comments before making any final decision, and fully considered and responded to all timely and relevant comments received 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 change to either the intent or content of the proposed regulation Amendment as published in the October 1, 2010, *Delaware Register of Regulations*;

6.) The recommended Amendment should be adopted as final regulation Amendment because Delaware will then be enabled to (1) provide for additional reductions of motor vehicle emissions from new vehicles (less than 7,500 miles) transferred (i.e., sold, delivered, purchased, leased, rented, acquired, received, and/or

registered) into Delaware, beginning with model year 2014, as the proposed program is more stringent than the current federal rule; and (2) provide increased protection for Delaware citizens against potential adverse health effects linked to long-term exposure to particulate matter (PM), volatile organic compounds (VOCs), nitrogen oxide (NOx), and greenhouse gases (GHGs). This implementation proposes to adopt requirements that are at least as health protective as requirements of the existing Federal Tier 2 standards. Moreover, the regulation amendment is well supported by documents in the record; and

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 1140,
Delaware Low Emission Vehicle Program

DATE: November 5, 2010

I. Background:

A public hearing was held on Friday, October 22, 2010, at 6:00 p.m. at the DNREC's Richardson and Robbins Auditorium, 89 Kings Highway, Dover, Delaware, to receive comment on the Department's proposal to amend 7 DE Admin. Code 1140, Delaware Low Emission Vehicle Program. The primary purpose of this promulgation is to reduce vehicle emissions from new vehicles in Delaware, beginning with model year 2014. Considerable benefits to human health and the environment will be realized under this program in the long term by the adoption of California's emissions standards, which are more stringent than the current federal standards. The Low Emission Vehicle ("LEV") Program reduces emissions of ozone precursors, particulates, toxic air pollutants, and greenhouse gases.

The 1970 Federal Clean Air Act (CAA) established motor vehicle tailpipe emission standards to curb emissions of carbon monoxide (CO), VOCs and NOx. The standards took effect for cars and light duty trucks in model year 1975. The Federal

CAA also granted the state of California the authority to enact stricter standards than those adopted by the federal government. Thus, in the United States, there are two Federally-sanctioned motor vehicle control programs: (1) the Federal Tier 2 program; and (2) the California Low Emission Vehicle (LEV) program. The proposed amendments to existing Regulation 1140 would replace the Federal Tier 2 program with the Delaware LEV program, and as a result, only California certified vehicles could be legally sold in Delaware.

States implementing the California program must provide automobile manufacturers with at least two model years of lead-time. The proposed Delaware program contains two components that will reduce overall vehicle emissions: (1) individual vehicle emission standards; and (2) fleet-wide emissions standards. California's emission standards are at least as stringent as the Federal Tier 2 standards. The Department is proposing to implement these amendments to existing Regulation 1140 by requiring any person that transfers vehicles within Delaware to comply with California standards.

The other purpose of this proposed regulatory action is to provide increased protection for Delaware citizens against a variety of potential adverse health effects linked to a long-term exposure to particulate matter (PM), volatile organic compounds (VOCs), nitrogen oxide (NOx), and greenhouse gases (GHGs). This implementation proposes to adopt requirements that are at least as health protective as requirements of the existing Federal Tier 2 standards.

Insofar as noting the affected sources as a result of this proposed promulgation, the California standards apply to new vehicles (i.e., less than 7,500 miles) transferred (i.e., sold, delivered, purchased, leased, rented, acquired, received, and/or registered) into Delaware, beginning with the 2014 model year (so as to provide two full model year lead-time prior to adopting CAL LEV). The proposed amendments to existing Regulation 1140 were placed upon DNREC's website for public view as of September 24, 2010 (along with background information which explained the intent of the proposed regulation for furthering public knowledge of the same). Additionally, the proposed promulgation was published in the October 1, 2010 edition of the *Delaware Register of Regulations*. Although no members of the public or the regulated community attended the hearing on October 22, 2010, there was public comment received by the Department with regard to this proposed promulgation, which will be addressed below. Proper notice of the hearing was provided as required by law.

II. Summary of Hearing Record:

At the time of the hearing on October 22, 2010, Kristoffer Gontkovsky of the Department's Division of Air Quality offered the Department's fifteen (15) exhibits pertaining to this proposed amendment, 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. 2009-33), copies of the legal notices regarding the holding of this public hearing on October 22, 2010, copies of related EPA reference rules upon which the Department relied in the

drafting of this proposed amendment, and copies of the actual proposed Regulation 1140 regarding the Delaware Low Emission Vehicle Program.

In addition to the Department's fifteen (15) exhibits noted above, an additional exhibit was entered into the public hearing record by this Hearing Officer, to wit: formal written comments from the Association of International Automobile Manufacturers, Inc. ("AIAM"), received by the Department just prior to the time of the public hearing itself, on October 22, 2010, via email. This document was marked at the time of the hearing as Department Exhibit #16.

AIAM cited several concerns regarding this proposed regulation. As it is the Department's goal to maintain consistency with the other states that have already adopted the CAL LEV program, and to give careful consideration to each comment received regarding this proposed promulgation, the Department deliberated on each concern of AIAM, and addressed them fully in a Response Document dated November 4, 2010. As a result, some changes were made to Regulation 1140 as initially proposed and published on October 1, 2010. It should be noted, however, that these changes were made to increase clarity and to promote a greater understanding of the intent of this proposed regulation, and are not considered substantive changes to the originally proposed regulation. Thus, no additional legal noticing or public hearing is necessary at this time.

With regard to the aforementioned changes to the language originally proposed for Regulation 1140, it should be noted that, initially, the Department proposed this regulation to reduce vehicle emissions from new vehicles in Delaware *beginning with model year 2013*. However, as noted by AIAM, Section 177 of the Clean Air Act requires *at least two model years lead-time* before a state can adopt California emission

standards. AIAM further noted that the model year for new vehicles begins on January 2, 2011. Thus, the effect of this provision would be that, if Delaware finalized adoption of the CAL LEV program prior to January 1, 2011, then the earliest DNREC would be able to apply the proposed regulations would be the 2014 model year, and *not* 2013, as initially stated. In response to this comment, the Department concedes that it was DNREC's intent to comply with Section 177 of the CAA, specifically, to provide a period of two model year lead-time before adopting CAL LEV. Thus, the proposed regulatory language concerning this issue was changed to reflect 2014, rather than 2013 as initially proposed. The Department notes that changing the initial model year of vehicles regulated under Regulation 1140 from MY 2013 to MY 2014 in no way changes the intent or content of this proposed regulation. This Hearing Officer agrees with the Department's position as stated in this matter.

Another request of AIAM (again, for the reasons stated above) was to remove delivery dates as initially stated within the proposed language of Regulation 1140, so as to provide additional clarity to the same. The Department agrees, and has deleted the references to the delivery dates. Again, this revision in no way changes the intent or content of proposed Regulation 1140, and I concur with the Department's stance concerning same.

Lastly, AIAM also sought a non-methane organic gas ("NMOG") credit bank to be established in Delaware to aid manufacturers with the NMOG fleet-wide average exhaust emission requirement. AIAM believes pro-rating California NMOG credit balances are warranted. The Department responded to this request by stating that DNREC will not be providing previously accrued NMOG credits to manufacturers. The

origination of credits was established to reward manufacturers who were proactively achieving emissions reductions in their vehicles prior to, or in the model year in which the reductions were required. Manufacturers will still be able to benefit from credits earned in Delaware, as described in Section 5.2 of Regulation 1140. Thus, no changes were made to the proposed regulatory language with respect to this comment by AIAM.

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 amendment is 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 this 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 amendments to 7 DE Admin. Code 1140, Delaware Low Emission Vehicle Program. 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 both the public workshops 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 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;
5. Promulgation of the aforementioned proposed amendments to 7 DE Admin. Code 1140 will establish the Delaware Low Emission Vehicle Program (DEL LEV). The inclusion of Delaware into California's Low Emission Vehicle Program (CAL LEV) will allow additional reductions of motor vehicle emissions from new vehicles (less than 7,500 miles) transferred (i.e., sold, delivered, purchased, leased, rented, acquired, received, and/or registered) into Delaware, beginning with model year 2014, as the proposed program is more stringent than the current federal rule;
6. The aforementioned proposed amendments to 7 DE Admin. Code 1140 will provide increased protection for Delaware citizens against a variety of potential adverse health effects linked to a long-term exposure to particulate matter (PM), volatile organic compounds (VOCs), nitrogen oxide (NOx), and

greenhouse gases (GHGs). This implementation proposes to adopt requirements that are at least as health protective as requirements of the existing Federal Tier 2 standards;

7. The Department has an adequate record for its decision, and no further public hearing is appropriate or necessary;
8. The Department's proposed amendments to this regulation, as published in the October 1, 2010 *Delaware Register of Regulations* and as subsequently revised for non-substantive changes and set forth within Appendix "A" hereto, are adequately supported, not arbitrary or capricious, and are consistent with the applicable laws and regulations. Consequently, they should be approved as a final regulation amendment, which shall go into effect ten days after their publication in the next available issue of the *Delaware Register of Regulations*; and
9. The Department shall submit the proposed regulation amendment as final to the *Delaware Register of Regulation* for publication in its next available issue, and shall provide written notice to the persons affected by the Order.

 /s/ Lisa A. Vest .
LISA A. VEST
Public Hearing Officer