



STATE OF DELAWARE
DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL

OFFICE OF THE
SECRETARY

89 KINGS HIGHWAY
DOVER, DELAWARE 19901

PHONE: (302) 739-9000
FAX: (302) 739-6242

Secretary's Order No.: 2013-A-0031

**RE: Approving Final Regulations to Amend 7 DE Admin. Code 1125,
*Requirements for Preconstruction Review, Section 2.5 ("Offsets")***

Date of Issuance: August 13, 2013

Effective Date of the Amendment: September 11, 2013

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 regulations to amend 7 DE Admin. Code 1125, Requirements for Preconstruction Review: Section 2.5 ("Offsets"). The Department's Division of Air Quality commenced the regulatory development process with Start Action Notice 2012-12. The Department published its initial proposed Regulation Amendments in the September 1, 2012 *Delaware Register of Regulations*, and held a public hearing on September 27, 2012. Public comment was received by the Department in this matter from three organizations, and the same was thoroughly addressed and responded to by the Department's Division of Air Quality in their Technical Response Memorandum of July 22, 2013.

Delaware's Good Nature depends on you!

Any significant increase in volatile organic compound (VOC) or nitrogen oxide (NO_x) emissions (i.e., ozone precursors) from a new or modified major source is required to be “offset” by emission reductions from existing sources. Emission offset requirements apply only in non-attainment areas, and the primary reason Delaware is an ozone non-attainment area is emissions from the States of Connecticut, Illinois, Indiana, Kentucky, Maryland, Michigan, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and Wisconsin. 7 DE Admin. Code 1125 currently requires, among other things, that offsets be obtained from areas of equal to or higher non-attainment classification. However, while emission from all areas in the above referenced States are the primary reason Delaware is non-attainment, all such areas do not meet this criterion because they have not been appropriately classified as non-attainment by the EPA.

Because Delaware sources are well regulated, there is little opportunity to generate offsets from within Delaware. This lack of opportunity, coupled with the large impact of upwind emissions that are not eligible to generate offsets, has a negative impact on Delaware’s air quality and economy. Clean, new industry (which is desirable) cannot be permitted in Delaware because offsets are not available, and an opportunity to reduce the upwind emissions that significantly impact Delaware is lost. The Department’s revision to Section 2.5 of 7 DE Admin. Code 1125 will correct this by allowing Delaware to consider any area in the above mentioned states as having the same non-attainment classification as Delaware.

The likely affected public with regard to this proposed promulgation will be any new or modified major stationary source in Delaware subject to VOC or NO_x emission

offset requirements, as such entities would benefit from the proposed broad offset area. Additionally, the public would benefit from improved air quality, due to the reduction in upwind emissions.

The Department's presiding hearing officer, Lisa A. Vest, prepared a Hearing Officer's Report dated August 8, 2013 (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 I adopt the Report to the extent it is consistent with this Order. The Department's experts developed the record and drafted the proposed Amendments. I find that the Department's experts in the Division of Air Quality fully developed the record to support adoption of these Amendments. With the adoption of this Order, Delaware will be enabled to broaden the geographic area from which Delaware stationary sources may obtain required emission offsets, specifically, allowing Delaware to consider any area in the States of Connecticut, Illinois, Indiana, Kentucky, Maryland, Michigan, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and Wisconsin as having the same non-attainment classification as Delaware, thereby providing greater opportunities for clean, new industry to be permitted in Delaware.

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 the public hearing held on September 27, 2012;

3.) The Department held a public hearing on September 27, 2012 in order to consider public comment before making any final decision;

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 should be adopted as final regulation Amendments because Delaware will be able to (1) broaden the geographic area from which Delaware stationary sources may obtain required emission offsets, specifically, allowing Delaware to consider any area in the States of Connecticut, Illinois, Indiana, Kentucky, Maryland, Michigan, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and Wisconsin as having the same non-attainment classification as Delaware, thereby providing greater opportunities for clean, new industry to be permitted in Delaware; (2) provide a more broad offset area for new or modified major stationary source in Delaware subject to VOC or NO_x emission offset requirements; (3) provide the public additional health benefits from improved air quality, due to the reduction in upwind emissions; and, lastly, because (4) the amendments are well supported by documents in the record;

6.) 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.



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 2.5 ("Offsets")

DATE: August 8, 2013

I. Background:

A public hearing was held on Thursday, September 27, 2012, 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: Section 2.5 ("Offsets"). The Department proposes to revise Section 2.5 of Regulation 1125 to expand the geographical area from which Delaware stationary sources may obtain required emission offsets.

Any significant increase in volatile organic compound (VOC) or nitrogen oxide (NO_x) emissions (i.e., ozone precursors) from a new or modified major source is required to be "offset" by emission reductions from existing sources. Emission offset requirements apply only in non-attainment areas, and the primary reason Delaware is an ozone non-attainment area is emissions from the States of Connecticut, Illinois, Indiana, Kentucky, Maryland, Michigan, Missouri, New Jersey, New York, North Carolina, Ohio,

Pennsylvania, Tennessee, Virginia, West Virginia and Wisconsin. 7 DE Admin. Code 1125 currently requires, among other things, that offsets be obtained from areas of equal to or higher non-attainment classification. However, while emission from all areas in the above referenced States are the primary reason Delaware is non-attainment, all such areas do not meet this criterion because they have not been appropriately classified as non-attainment by the EPA.

Because Delaware sources are well regulated, there is little opportunity to generate offsets from within Delaware. This lack of opportunity, coupled with the large impact of upwind emissions that are not eligible to generate offsets, has a negative impact on Delaware's air quality and economy. Clean, new industry (which is desirable) cannot be permitted in Delaware because offsets are not available, and an opportunity to reduce the upwind emissions that significantly impact Delaware is lost. The Department's proposed revision to 7 DE Admin. Code 1125 will correct this by allowing Delaware to consider any area in the above mentioned states as having the same non-attainment classification as Delaware.

The likely affected public with regard to this proposed promulgation would be any new or modified major stationary source in Delaware subject to VOC or NO_x emission offset requirements, as such entities would benefit from the proposed broad offset area. Additionally, the public would benefit from improved air quality, due to the reduction in upwind emissions.

As noted above, the Department held a public hearing to receive comment on this proposed promulgation on Thursday, September 27, 2012. Comment was received by the Department concerning this matter at the time of the public hearing, and the same 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 aforementioned public hearing, Gene Pettingill, an Environmental Engineer in the Planning Branch of the Department's Division of Air Quality ("DAQ") offered the Department's fifteen (15) exhibits pertaining to these proposed amendments, and this Hearing Officer entered them into the formal hearing record developed in this matter. Those Departmental exhibits included, but was not limited to, a copy of the Start Action Notice for this promulgation (SAN2012-12), copies of the legal notices regarding the holding of this public hearing, copies of numerous documents from the EPA pertaining to recent various Federal Implementation Plans concerning Interstate Transport of Ozone, and copies of the actual proposed amendments to the aforementioned affected section of 7 DE Admin. Code 1125.

Mr. Pettingill also offered a brief summary regarding this proposed promulgation at the time of the public hearing. As noted above, the nature of the Department's proposal at this time is to expand the geographical area from which Delaware stationary sources may obtain required emission offsets. The EPA has designated all of Delaware as non-attainment for one or more of the national ambient air quality standards (NAAQS) for ozone. 7 DE Admin. Code 1125 requires any new or modified major stationary source in a non-attainment area to install lowest achievable emissions rate (LAER)

emission control technology, and to obtain emission offsets so that there is a net air quality benefit in the area where the new or modified source is constructed.

Currently, emission offsets may be obtained from within Delaware, or from a limited area outside of Delaware. As a result of implementing and enforcing state and federal regulations, Delaware sources are now well controlled, and obtaining offsets is increasingly costly and difficult. Moreover, Delaware has few, if any, remaining avenues to generate emission offsets.

On August 8, 2011, EPA issued the Cross States Air Pollution Rule (CSAPR) (76 FR 48208), which considered transport from upwind states of, among other things, ground-level ozone and a precursor, nitrogen oxides (NO_x). NO_x reacts in the atmosphere to form ground-level ozone and is transported long distances, making it difficult for a number of states (including Delaware) to meet the ground-level ozone NAAQS that Congress directed EPA to establish to protect public health. CSAPR quantified that Delaware sources contribute about 8% of Delaware's ozone air quality problems, and upwind sources contribute the remaining 92%. CSAPR underwent a series of minor corrections as a result of stakeholder comments, resulting in the issuance of 76 FR 80760 (12/27/11), 77 FR 10324 (02/21/12) and 77 FR 34830 (07/12/12).

In support of their Cross-States Air Pollution Rule (CSAPR), the EPA determined that emissions of nitrogen dioxide (NO_x), a ground-level ozone precursor, from 15 upwind states significantly impacted Delaware's ability to attain and maintain the ozone NAAQS. Portions of these 15 upwind states are designated nonattainment, but inexplicably other portions are designated attainment, for the ozone NAAQS. Given that EPA has demonstrated that emission from all areas of these 15 upwind states

significantly impact Delaware, Delaware has proposed to revise 7 DE Admin. Code 1125 to make it clear that emission offsets may be obtained from any area in the 15 states that significantly impact Delaware.

It should be noted that, when Delaware initially analyzed the CSAPR to develop this proposal, the Department believed there were just 15 states that significantly contributed to Delaware's non-attainment status. A more thorough review indicated that Connecticut was included in the EPA list as well, bringing the total states to be considered in this revision to 7 DE Admin. Code 1125 to 16. Since the intent was to base our proposal on the already published EPA data showing which upwind states significantly contributed to Delaware's non-attainment status, the addition of Connecticut is non-substantive. If promulgated, the Department's final regulation will reflect this revision, and will be submitted to EPA as a revision to the Delaware State Implementation Plan.

III. Public Comment/Department Response:

Three organizations presented written comments before the close of the comment period on October 12, 2012, and one organization presented written and verbal comments at the September 27, 2012 hearing. These comments, along with the responses provided to this Hearing Officer in the Technical Response Memorandum dated July 22, 2013 from the Department's Division of Air Quality (DAQ) are reviewed below.

Comment 1: Delaware State Chamber of Commerce; Letter, Richard Heffron to Ali Mirzakhali, dated September 24, 2012, "Proposed Amendments to Delaware 7 DE Admin. Code Regulation 1125 – Requirements for Preconstruction Review." (DNREC Public Record Exhibit 13):

The Chamber clearly supported the Department's proposed amendments to 7 DE Admin. Code 1125, and recognized that under the current situation, with well-controlled sources in Delaware, "*much of the air quality concerns in Delaware come from out of state transported pollution,*" and that "*ERC [emission reduction credit] from a broader area must be considered.*" The Chamber added "*On behalf of the 2400 members of the Delaware State Chamber of Commerce, we urge the Department to modify existing Regulation Number 1125 to accommodate the use of ERC's by Delaware sources that were generated outside of Delaware that "significantly contribute" to Delaware's air quality non-attainment status.*"

DAQ Response to Comment 1:

The Delaware State Chamber of Commerce was thanked by DAQ for their support on this issue.

Comment 2: E. I. Dupont de Nemours and Company, Engineering; Letter, Thomas S. Webster, III to Ali Mirzakhali, dated September 25, 2012, "Proposed Amendments to Delaware 7 DE Admin Code Regulation 1125 – Requirements for Preconstruction Review." (DNREC Public Record Exhibit 14):

Dupont supports the proposed amendments and says, in part, "*...is in support of the proposed amendments which will allow Emission Reduction Credits (ERCs) from 15 state areas to be utilized under Delaware's Preconstruction Review Regulations. The proposed amendments will be an important consideration in the*

future expansion plans for our operations in Delaware, as well as for other businesses.”

DAQ Response to Comment 2:

DAQ thanked Dupont for their support on this issue.

Comment 3: Delaware City Refining Company; Letter, Herman Seedorf to David Fees, dated September 27, 2012, “7 DE Admin Code 1125, Requirements for Preconstruction Review Register Notice SAN 2012-18; SAN 2012-12.” (Identified in the Public Record as DCR # 1):

As shown, DCRC supports this proposal. They say in part, “The proposed revisions to Regulation 1125 will not only allow for greater flexibility for businesses, it supports emissions improvements in the state...Additionally, the proposed regulations require offsets to be obtained from “upwind” states that contribute to non-attainment air quality concerns in Delaware...Accordingly, the Delaware City Refining Company, LLC supports DNREC’s revision to Delaware Air Regulation 1125 to allow existing and new businesses to acquire emissions offsets required by the Clean Air Act and by Delaware Regulation as proposed and it’s submittal to US EPA as a revision to Delaware’s State Implementation Plan.”

DAQ Response to Comment 3:

DCRC was thanked by DAQ for their support on this issue.

Comment 4: Delaware City Refining Company: Verbal comments by Bob Muche as recorded in the transcript provided by Wilcox & Fetzer, starting on page 13.

In summary, Mr. Muche was concerned that PM_{2.5} offsets would be required for refinery expansions, and that such offsets will be difficult to acquire. Mr. Muche suggested that the new language did also cover emission offsets for PM_{2.5}, and if not, then it should.

DAQ Response to Comment 4:

As pointed out by DNREC's Mr. Amirikian at the hearing, this proposal was not intended to cover PM_{2.5} offsets. In crafting the proposed amendments to 7 DE Admin. Code 1125, DAQ focused entirely on NO_x for ground-level ozone offsets, as supported by EPA's CASPR modeling. DNREC has submitted to the EPA redesignation requests and maintenance plan SIPs for PM_{2.5}. Approval of these SIPs is anticipated in the fall of 2013, and once approved, Delaware will be designated attainment for PM_{2.5}, and PM_{2.5} offsets will no longer be required. Once Delaware is designated attainment, this issue will be moot.

Comment 5: U.S. Environmental Protection Agency; Letter, Kathleen Cox, to David Fees, dated October 3, 2012.

The EPA comments, in part "*According to the Clean Air Act Section 173 and codified in 40 CFR Part 51 Appendix S, Emission Offset Interpretative Ruling, the*

owner or operator of a new or modified major stationary source may comply with any offset requirement in effect under this part for increased emissions of any air pollutant only by obtaining emission reductions of such air pollutant from the same source or other sources in the same nonattainment area, except that the State may allow the owner or operator of a source to obtain such emission reductions in another nonattainment area if:

- the other area has an equal or higher nonattainment classification than the area in which the source is located; and*
- emissions from such other area contribute to a violation of the national ambient air quality standard in the nonattainment area in which the source is located.*

The Environmental Protection Agency (EPA) Region III could not approve, as currently proposed, revisions to Section 2 of 7 DE Admin. Code 1125 if submitted as a revision to the State Implementation Plan (SIP). It is outside of the authority of Delaware to broadly designate the nonattainment classification of any state in order to use offsets created in those states; offsets can only be used in an area of equal or higher nonattainment classification than the area where the emissions reductions offsets are created.”

DAQ Response to Comment 5:

First, Delaware agrees with the EPA that it is outside of the authority of Delaware to broadly designate the nonattainment classification of any state. The intent of the Department’s proposed revision to 7 DE Admin. Code 1125 is not to classify or change the nonattainment classification of any state. Delaware has reviewed its proposed

language and believes it is very clear as written, and that no change to the proposed language is needed.

Second, Delaware does not agree with the EPA inference that it must adopt provisions identical to those of 40 CFR Part 51, Appendix S. This is because the requirements of 40 CFR 51.165, Requirements for Preparation, Adoption, and Submittal of Implementation Plans, Permit Requirements, allow a state to develop other procedures for locating offsetting emissions if the procedures are at least as stringent as the federal rule. 40 CFR 51.165, paragraph(a)(3)(ii)(F) requires Delaware to provide, “*Procedures relating to the permissible location of offsetting emissions shall be followed which are at least as stringent as those set out in 40 CFR Part 51 Appendix S section IV.D.*” Appendix S section IV (D) says “*The owner or operator of a new or modified major stationary source may comply with any offset requirement in effect under this Ruling for increased emissions of any air pollutant only by obtaining emissions reductions of such air pollutant from the same source or other sources in the same nonattainment area, except that the reviewing authority may allow the owner or operator of a source to obtain such emissions reductions in another nonattainment area if the conditions in IV.D.1 and 2 are met.*”

1. The other area has an equal or higher nonattainment classification than the area in which the source is located.

2. Emissions from such other area contribute to a violation of the national ambient air quality standard in the nonattainment area in which the source is located.

Similarly, the CAA, 42 USC § 7416, provides, “...*nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 7411 or section 7412 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.*” This indicates that Delaware may establish requirements different than the 40 CFR Part 51 Appendix S requirements, so long as Delaware’s requirements are at least as stringent.

The EPA has no published guidance on procedures for demonstrating that state specific provisions are at least as stringent as model federal provisions. However, it expressed the purpose of its interpretive ruling in the introduction to 40 CFR Part 51, Appendix S which states: “*These conditions are designed to insure that the new source’s emissions will be controlled to the greatest degree possible; that more than equivalent offsetting emission reductions (emission offsets) will be obtained from existing sources; and that there will be progress toward achievement of the NAAQS.*” Delaware believes that a demonstration that the implementation of a state provision results in an air quality benefit over a model federal provision that is designed to ensure new source emissions are controlled to the greatest degree possible, that more than equivalent offsetting emissions reductions will be obtained and that there will be more progress toward achievement of the NAAQS, provides a reasonable basis to conclude that the state provision is at least as stringent as the federal provision. Delaware has undertaken great

efforts to reduced its instate NOx and VOC emissions in order to make progress toward achieving the ground level ozone NAAQS. Its SIP controls range from its largest sources (electric generating units) to almost insignificant sources in an attempt to aggregate any potential benefits. At this point, all Delaware sources are well controlled and there are practically no offsets that can be achieved in state. Consequently, Delaware has undertaken this amendment to its offsetting regulation to provide for allowable offsets that will allow for growth that will ensure new source emissions are controlled to the greatest degree possible, that more than equivalent offsetting emissions reductions will be obtained and that will actually allow for additional progress toward achievement of the NAAQS in its rule. DAQ believes that this rule is at least as stringent as the federal rule because it will achieve more of those benefits than the federal rule.

To demonstrate the air quality benefit attributable to the requirement of 40 CFR Part 51 Appendix S with that of the proposed revision to 7 DE Admin. Code 1125, paragraphs 2.5.5 and 2.5.6, consider the effects of construction of a new, 249 TPY NOx emitting source:

40 CFR Part 51 Appendix S. The construction of a new, 249 TPY NOx source in Seaford, Delaware would trigger review under 7 DE Admin. Code 1125. 7 DE Admin. Code 1125 requires the installation of emission controls that meet Lowest Achievable Emission Rate (LAER) technology. The installation of LAER technology in this example reduces the emissions from 249 TPY down to 100 TPY. The 100 TPY source still triggers review under 7 DE Admin. Code 1125 so, in addition to LAER technology, emission offsets must be obtained. Delaware sources are well

controlled, and the cost of NOx offsets exceeds \$10,000 per ton. This is deemed too costly by the source, so instead of constructing in Seaford the source is constructed across the Chesapeake Bay in a county designated attainment in Virginia. For example, construction in any one of such counties on or near the Chesapeake Bay, but not in the Ozone Transport Region, such as Northumberland, Richmond or Lancaster counties would be in an attainment area with a 250 TPY major source threshold. The result is a 249 TPY source that does not trigger new source review in Virginia, is constructed, and based on EPA CSAPR modeling, this new 249 TPY NOx source will negatively impact Delaware's air quality.

Proposed 7 DE Admin. Code 1125. The construction of a new, 249 TPY NOx source in Seaford, Delaware would trigger review under 7 DE Admin. Code 1125. 7 DE Admin. Code 1125 requires the installation of emission controls that meet Lowest Achievable Emission Rate (LAER) technology. The installation of LAER technology in this example would reduce the emissions from 249 TPY down to 100 TPY. The 100 TPY source still triggers review under 7 DE Admin. Code 1125, so in addition to LAER technology, emission offsets must be obtained. The cost of NOx offsets in West Virginia is currently \$500 per ton. This is deemed cost effective by the source, so the source secures the offsets from West Virginia and constructs in Delaware. The result is a well-controlled 100 TPY source is constructed in Delaware, and the air quality is improved

because the upwind emissions that are causing high ozone concentration in Delaware have been reduced by 115 TPY.

In the above example, proposed 7 DE Admin. Code 1125 is more stringent because it results in an air quality benefit over 40 CFR Part 51 (i.e., emissions that impact Delaware increase by 249 TPY, versus decrease by 15 TPY). Further analysis on the level of control and the reduction of emissions that significantly impact Delaware:

- Regarding the Control level of a New/Modified Source:
 - Under proposed 7 DE Admin. Code 1125, for every possible case, any new source constructed in Delaware will have the best possible controls (i.e., LAER).
 - Under 40 CFR Part 51 requirements a source planning to construct in Delaware could be pushed from Delaware to another area with lesser control requirements (as illustrated in the example above); and less control would be achieved.
 - The requirements are neutral for any source not constructing in Delaware that did not plan to construct in Delaware.

Regarding the control level of a new/modified source, proposed 7 DE Admin. Code 1125 is more stringent than 40 CFR Part 51.

- Regarding upwind emissions that are causing Delaware's unhealthy ozone concentrations:

- The new source obtains offsets from within Delaware. Under this case there is no difference between 40 CFR Part 51 and proposed 7 DE Admin. Code 1125.
- The new source obtained offsets from an upwind nonattainment area in any of the states listed in proposed 7 DE Admin. Code 1125. Under this case there is no difference between 40 CFR Part 51 and proposed 7 DE Admin. Code 1125.
- All of Delaware is marginal nonattainment, so the case where an upwind area has a lower nonattainment classification than the corresponding areas in Delaware does not exist.
- The new source obtained offsets from an upwind attainment area in any of the states listed in proposed 7 DE Admin. Code 1125. In this case 7 DE Admin. Code 1125 is more stringent (i.e., gets more air quality benefit) because reductions have occurred in an upwind state that significantly impacts Delaware. Under 40 CFR Part 51 these reductions would not occur.

Looking at the purpose of the federal rule, Delaware can offer no scenario where the requirements of the proposed revisions to 7 DE Admin. Code 1125 would offer less air quality benefit/be less stringent than Appendix S. Indeed, Delaware has limited the area where offsets can be obtained to only those areas EPA has found to significantly contribute (i.e., contribute by more than 1% of the ozone

NAAQS) to the unhealthy ozone concentration in Delaware's air. Thus, any offsets for Delaware emissions are only allowed in areas that EPA has found directly and significantly contribute to and cause Delaware's nonattainment problem (or meet the existing federal criteria). It is clearly beneficial to air quality to provide incentive to reduce upwind emissions that are causing downwind ozone problems than it is to not do so. Indeed, this may be one of the few remaining strategies Delaware has available to it to further reduce the emissions that cause Delaware's nonattainment problem. Indeed, Delaware believes the only way proposed changes to 7 DE Admin. Code 1125 can be viewed as less stringent than 40 CFR Part 51 Appendix S is if the science behind ozone and ozone transport that has been developed over the past 20 years is disregarded and the fact that the allowed offsets will directly reduce the pollution that is causing Delaware's nonattainment is disregarded.

The proposed revisions to 7 DE Admin. Code 1125 are more stringent than those of 40 CFR Part 51, Appendix S. Since they are more stringent, Delaware does not agree with the EPA comment that the EPA could not approve, as currently proposed, revisions to Section 2 of 7 DE Admin. Code 1125 if submitted as a revision to the SIP.

Based on the above discussion, DAQ finds no reason to further revise or modify the proposal to revise Section 2.5 of 7 DE Admin. Code 1125 as discussed at the September 27, 2012 public hearing. The DAQ recommends that the revisions to Section 2.5 of 7 DE Admin. Code 1125 be promulgated as proposed.

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. Additionally, the Division of Air Quality's Technical Response Memorandum of July 22, 2013, which identified each comment received by the Department in this matter, and addressed the same with a thorough and balanced discussion which accurately reflects the information contained within the record developed during this promulgation, is also attached herein as Appendix "B", 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 amendments. It should also be noted that the Department has reviewed this proposed promulgation 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.

IV. 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 1125, Requirements for Preconstruction Review: Section 2.5 ("Offsets"). I also recommend the adoption of the proposed regulatory amendments, based upon the reasoning as set forth by the Department's Division 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 on September 27, 2012, 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. Subsequent to the public hearing held by the Department on September 27, 2012, and following the close of the record with regard to public comment, the Department prepared a detailed and extensive Technical Response Memorandum, dated July 22, 2013, which addressed all comments received by the Department concerning this promulgation, and provided a thorough and rational discussion of the issues based upon the record developed in this matter;
6. The aforementioned proposed amendments to Section 2.5 of 7 DE Admin. Code 1125 will enable Delaware to broaden the geographic area from which Delaware stationary sources may obtain required emission offsets,

specifically, allowing Delaware to consider any area in the States of Connecticut, Illinois, Indiana, Kentucky, Maryland, Michigan, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and Wisconsin as having the same non-attainment classification as Delaware, thereby providing greater opportunities for clean, new industry to be permitted in Delaware;

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 these regulations, as published in the September 1, 2012 *Delaware Register of Regulations* 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, 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 amendments as final to the *Delaware Register of Regulations* for publication in its next available issue, and shall provide written notice to the persons affected by the Order.


LISA A. VEST
Public Hearing Officer

APPENDIX “A”

Phone: (302) 744-4700

Fax: (302) 739-6659

***Please Note: Due to the size of the proposed regulation, it is not being published here. A copy of the regulation is available at:**

4459 Lead Based Paints Hazards

**DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL
CONTROL**

DIVISION OF AIR QUALITY

Statutory Authority: 7 Delaware Code, Chapter 60; (7 Del.C., Ch. 60)

7 DE Admin. Code 1125

REGISTER NOTICE SAN 2012-18; SAN 2012-12

1. TITLE OF THE REGULATION:

7 DE Admin. Code 1125, *Requirements for Preconstruction Review*

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

The Department proposes to revise Section 1.9, Definitions of 7 DE Admin. Code 1125, to include in the definition for "Greenhouse Gases (GHG)" that, prior to July 21, 2014, biogenic carbon dioxide (CO₂) emissions be excluded from consideration. This proposed change mirrors the federal rule at 76 FR 43490 (July 20, 2011) temporarily deferring for a period of three years the application of Prevention of Significant Deterioration (PSD) permitting requirements for CO₂ emissions from bioenergy and other biogenic stationary sources such as landfills.

The Department also proposes to revise Section 2 of 7 DE Admin. Code 1125 to increase the availability of emission offsets. Under the new source review permitting program (7 DE Admin. Code 1125) for stationary sources located in non-attainment areas, a proposed new or modified source exceeding established emission thresholds of ground-level ozone precursors must meet requirements that include the requirement to obtain emission "offsets" in an amount greater than the projected source emissions. Since Delaware sources are now well-controlled, the availability of offsets is costly and limited. The purpose of this revision is to expand the area where offsets can be obtained to an area that encompasses the 15 states that significantly contribute to Delaware's ozone nonattainment problem.

The Department will submit these changes to the Environmental Protection Agency as a revision to the State Implementation Plan (SIP).

3. POSSIBLE TERMS OF THE AGENCY ACTION:

None.

4. STATUTORY BASIS OR LEGAL AUTHORITY TO ACT:

7 Delaware Code, Chapter 60

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

None.

6. NOTICE OF PUBLIC COMMENT:

The Department will hold a public hearing on these proposed amendments on Thursday, September 27, 2012, starting at 6:00 pm in the Richardson and Robbins Building auditorium, located at 89 King's Highway in Dover. Interested persons may submit comments in writing to David Fees, Division of Air Quality, 655 S. Bay Road, Suite

5N, Dover, DE and/or statements and testimony may be presented either orally or in writing at the public hearing.

7. PREPARED BY:

David Fees (302-739-9402)

August 6, 2012

1125 Requirements for Preconstruction Review

08/11/12 xx/xx/xx

1.0 General Provisions

- 1.1 Requirements of this regulation are in addition to any other requirements of the State of Delaware Regulations Governing the Control of Air Pollution.
- 1.2 Any stationary source which will impact an attainment area or an unclassifiable area as designated by the U.S. Environmental Protection Agency (EPA) pursuant to Section 107 of the Clean Air Act Amendments of 1990 (CAA), is subject to the provisions of 3.0 of this regulation, Prevention of Significant Deterioration (PSD).
- 1.3 Any stationary source which will impact a non-attainment area as designated by the EPA pursuant to Section 107 of the CAA is subject to 2.0 of this regulation, Emission Offset Provisions (EOP).
- 1.4 A source may be subject to PSD for one pollutant and to EOP for another pollutant, or may affect both attainment or unclassifiable areas and a non-attainment area for the same pollutant.
- 1.5 Any emission limitation represented by Lowest Achievable Emission Rate (LAER) may be imposed by the Department pursuant to regulations adopted under 2.0 of this regulation herein notwithstanding any emission limit specified elsewhere in 7 DE Admin. Code 1100 Regulations Governing the Control of Air Pollution.
- 1.6 Any emission limitation represented by Best Available Control Technology (BACT) may be imposed by the Department pursuant to regulations adopted under 3.0 of this regulation herein notwithstanding any emission limit specified elsewhere in 7 DE Admin. Code 1100, Regulations Governing the Control of Air Pollution.
- 1.7 No stationary source shall be constructed unless the applicant can substantiate to the Department that the source will comply with any applicable emission limit or New Source Performance Standard or Emission Standard for a Hazardous Air Pollutant as set forth in 7 DE Admin. Code 1100 Regulations Governing the Control of Air Pollution.
- 1.8 Any stationary source that implements, for the purpose of gaining relief from 3.0 of this regulation, by any physical or operational limitation on the capacity of the source to emit a pollutant, including (but not limited to) air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design and the limitation or the effect it would have on emissions is enforceable, not withstanding any emission limit specified elsewhere in 7 DE Admin. Code 1100 Regulations Governing the Control of Air Pollution. If a source petitions the Department for relief from any resulting limitation described above, the source is subject to review under 2.0 and 3.0 of this regulation as though construction had not yet commenced on the source or modification.
- 1.9 Definitions - For the purposes of this regulation

“Actual Emissions” means the actual rate of emissions of a pollutant from an emission unit, as determined in accordance with the three subparagraphs below.

 - In general, actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of normal source operation. The Department shall allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period.

- The Department may presume that source-specific allowable emissions for the unit are equivalent to the actual emissions of the unit.
- For any emissions unit, which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

“Allowable Emissions” means the emissions rate of a stationary source calculated using the maximum rated capacity of the source (unless the source is subject to enforceable limits, which restrict the operating rate, or hours of operation, or both) and the most stringent of the following:

The applicable standards

- as set forth in 7 DE Admin. Code 1120 and 1121;
- Other applicable Delaware State Implementation Plan emissions limitations, including those with a future compliance date; or
- The emissions rate specified as an enforceable permit condition, including those with a future compliance date.

“Baseline Area” means any intrastate area (and every part thereof) designated as attainment or unclassifiable in which the major source or major modification establishing the minor source baseline date would construct or would have an air quality impact of the pollutant for which the baseline date is established, as follows: equal to or greater than one $\mu\text{g}/\text{m}^3$ (annual average) for SO_2 , NO_2 , or PM_{10} ; or equal to or greater than 0.3 $\mu\text{g}/\text{m}^3$ (annual average) for $\text{PM}_{2.5}$.

- Area redesignations cannot intersect or be smaller than the area of impact of any major stationary source or major modification which:
 - Establishes a minor source baseline date, or
 - Is subject to this regulation.

“Baseline Concentration” means that ambient concentration level which exists in the baseline area at the time of the applicable minor source baseline date. A baseline concentration is determined for each pollutant for which a minor source baseline date is established and shall include:

- The actual emissions representative of sources in existence on the applicable minor source baseline date, except as listed under Exceptions below.
- The allowable emissions of major stationary sources which commenced construction before the major source baseline date; but were not in operation by the applicable minor source baseline date.

Exceptions: The following will not be included in the baseline concentration and will affect the applicable maximum allowable increase or increases:

- Actual emissions from any major stationary source on which construction commenced after the major source baseline date; and
- Actual emissions increases and decreases at any stationary source occurring after the baseline date.

“Begin Actual Construction” means, in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying underground pipework and construction of permanent storage structures. With respect to a change in method of operations, this term refers to those on-site activities other than preparatory activities which mark the initiation of the change.

“Best Available Control Technology (BACT)” means an emissions limitation (including a visible emission standard) based on the maximum degree of reduction for each pollutant subject to regulation under CAA which would be emitted from any proposed major stationary source or major modification which the Department, on a case-by-case basis, takes into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for

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control of such pollutant. In no event shall application of best available control technology result in emissions of any pollutant which would exceed the emissions allowed by any applicable standard under 7 DE Admin. Code 1120 and 1121. If the Department determines that technological or economic limitations on the application of measurement methodology to a particular emissions unit would make the imposition of an emissions standard infeasible, a design, equipment, work practice, operational standard, or combination thereof, may be prescribed instead to satisfy the requirement for the application of best available control technology. Such standard shall, to the degree possible, set forth the emissions reduction achievable by implementation of such design, equipment, work practice or operation, and shall provide for compliance by means which achieve equivalent results.

“Building, Structure, Facility, or Installation” means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same “Major Group” (i.e., which have the same first two digit code) as described in the Standard Industrial Classification Manual, 1972, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101-0066 and 003-005-00176-0, respectively). For purposes of 2.0 of this regulation for VOC and NO_x pollutant-emitting activities, this definition shall apply only to the “Building, Structure or Facility”.

“Commence” as applied to construction of a major stationary source or major modification means that the owner or operator has all necessary preconstruction approvals or permits and either has:

- Begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or
- Entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.

“Complete” means, in reference to an application for a permit, that the application contains all of the information necessary for processing the application.

“Condensable Particulate Matter” means material that is vapor phase at stack conditions, but condenses and/or reacts upon cooling and dilution in the ambient air to form solid or liquid PM immediately after discharge from the stack. Note that all condensable PM is assumed to be in the PM_{2.5} size fraction.

“Construction” means any physical change or change in the method of operation (including fabrication, erection, installation, demolition or modification of an emissions unit) which would result in a change in actual emissions.

“Direct Particulate Matter” means particles that enter the atmosphere as a direct emission from a stack or an open source. Direct PM comprises two components: filterable PM and condensable PM. These two PM components have no upper particle size limit.

“Direct PM_{2.5}” means combined filterable PM_{2.5} and condensable PM with an aerodynamic diameter less than or equal to 2.5 micrometers. These solid particles are emitted directly from an air emissions source or activity, or are the gaseous emissions or liquid droplets from an air emissions source or activity that condense to form PM at ambient temperatures. Direct PM_{2.5} emissions include elemental carbon, directly emitted organic carbon, directly emitted sulfate, directly emitted nitrate, and other inorganic particles (including but not limited to crustal material, metals, and sea salt).

“Emissions Unit” means any part of a stationary source which emits or would have the potential to emit any pollutant subject to regulation under the CAA.

“Enforceable” means any standard, requirement, limitation or condition established by an applicable federal or state regulation or specified in a permit issued or order entered thereunder, or contained in a SIP approved by the Administrator of the U.S. Environmental Protection Agency (EPA), and which can be enforced by the Department and the Administrator of the EPA.

"Filterable PM" means particles that are emitted directly by a source as a solid or liquid at stack or release conditions and captured on the filter of a stack test train.

"Fugitive Emissions" means those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.

"Fixed capital cost" means the capital needed to provide all the depreciable components.

"Greenhouse Gases (GHG)" means an air pollutant composed of an aggregate group of six greenhouse gases; carbon dioxide (CO₂), nitrous oxide (N₂O), methane (CH₄), hydrofluorocarbons (HFC), perfluorocarbons (PFC), and sulfur hexafluoride (SF₆). For the purposes of this regulation, the term CO₂equivalent emissions (CO₂e) shall represent an amount of GHG emitted, and shall be computed as follows;

- Multiply the mass amount of emissions (tpy), for each of the six greenhouse gases in the pollutant GHG by the gases associated global warming potential as shown in Table 1-1 of this regulation. For the purposes of this computation, prior to July 21, 2014, the mass of the greenhouse gas carbon dioxide shall not include carbon dioxide emissions resulting from the combustion or decomposition of non-fossilized and biodegradable organic material originating from plants, animals, or micro-organisms (including products, residues and waste from agriculture, forestry and related industries as well as the non-fossilized and biodegradable organic fractions of industrial and municipal wastes, including gases and liquids recovered from the decomposition of non-fossilized and biodegradable organic material).
- Sum the resultant value for each gas to compute a tpy CO₂e

(Break in Continuity Within Section)

02/11/2012

2.0 Emission Offset Provisions (EOP)

- 2.1 Applicability - The provisions of 2.0 of this regulation shall apply to any person responsible for any proposed new major stationary source or any proposed major modification.
- 2.2 For purposes of 2.0 of this regulation, "major stationary source" means:
 - 2.2.1 Any stationary source of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any pollutant subject to regulation under the Clean Air Act, except for either volatile organic compound or nitrogen oxides, or
 - 2.2.2 Any stationary source of air pollutants which emits, or has the potential to emit, either volatile organic compounds, or nitrogen oxides, in the following amounts:
 - 2.2.2.1 For areas in ozone attainment, ozone marginal, or ozone moderate nonattainment areas and located in the ozone transport region - 50 tons per year volatile organic compounds or 100 tons per year of oxides of nitrogen, or
 - 2.2.2.2 For serious ozone nonattainment areas - 50 tons per year of either volatile organic compounds or oxides of nitrogen, or
 - 2.2.2.3 For severe ozone nonattainment areas - 25 tons per year of either volatile organic compounds or oxides of nitrogen, or
 - 2.2.2.4 For extreme ozone nonattainment areas - 10 tons per year of either volatile organic compounds or oxides of nitrogen.
 - 2.2.3 Any physical change that would occur at a stationary source not qualifying under 2.2.1 or 2.2.2 of this regulation as a major stationary source, if the change would constitute a major stationary source by itself, or
 - 2.2.4 A major stationary source that is major for either volatile organic compounds or nitrogen oxides shall be considered major for ozone, and "installation" means an identifiable piece of process, combustion or incineration equipment.
 - 2.2.5 Nitrogen oxides and SO₂ shall be considered as precursors, and are considered nonattainment pollutants in any PM_{2.5} nonattainment area.

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- 2.3 For the purposes of 2.4 and 2.5 of this regulation, emission units located in areas designated as attainment or marginal nonattainment areas that are located within the ozone transport region shall be considered located in a moderate ozone nonattainment area.
- 2.4 Conditions for Approval - No person subject to the provisions of 2.1 of this regulation shall install a major stationary source of volatile organic compounds or of nitrogen oxides, PM_{2.5}, or sulfur oxides or make a major modification to a source which will cause or contribute to any violation of the national ambient air quality standards for ozone or PM_{2.5} within an area of non-attainment for that pollutant unless the following conditions are met:
- 2.4.1 The new major source or the major modification is controlled by the application of lowest achievable emission rate (LAER) control technology.
- 2.4.2 All existing sources in the State owned or controlled by the owner of the proposed new or modified source are in compliance with the applicable local, State and federal regulations or are in compliance with a consent order specifying a schedule and timetable for compliance.
- 2.4.3 The new or modified source must satisfy the following offset requirements:
- 2.4.3.1 The ratio of total actual emissions reductions of volatile organic compounds or nitrogen oxides to total allowable increased emissions of volatile organic compounds or nitrogen oxides shall be:
- 2.4.3.1.1 For moderate ozone nonattainment areas, 1.15 to 1, or
- 2.4.3.1.2 For serious ozone nonattainment areas, 1.2 to 1, or
- 2.4.3.1.3 For severe ozone nonattainment areas, 1.3 to 1, or
- 2.4.3.1.4 For extreme ozone nonattainment areas, 1.5 to 1.
- 2.4.3.2 All offsets shall be federally enforceable at the time of application to construct and shall be in effect by the time the new or modified source commences operation.
- 2.4.3.3 The ratio of total actual emissions reductions of sulfur dioxide, nitrogen oxides or PM_{2.5} to total allowable increased emissions shall be 1:1.
- 2.4.4 The application for construction permit pursuant to 7 DE Admin. Code 1102 shall include an analysis of alternative sites, sizes, production processes and environmental control techniques for such proposed source which demonstrates that benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification.
- 2.4.5 Public participation for the construction permit shall be pursuant to 12.3 or 12.4 and 12.5 of 7 DE Admin. Code 1102.
- 2.5 Criteria for Emission Reductions Used as Offsets
- 2.5.1 All emission reductions claimed as offset credits shall be real, surplus, permanent, quantifiable, and federally enforceable;
- 2.5.2 The baseline for determining credit for emissions reductions shall be the lower of actual or allowable emissions. The offset credit shall only be allowed for emission reductions made below the baseline;
- 2.5.3 Emission reductions claimed as offsets shall have occurred on or after January 1, 1991;
- 2.5.4 Credit for an emission reduction may be claimed for use as an offset to the extent that the Department has not relied on it in issuing any permit under this regulation and has not relied on it for demonstration of attainment or reasonable further progress;
- 2.5.5 Emission reductions shall not be used as offsets in an area with a higher nonattainment classification than the one in which they were generated. For the purpose of 2.5.5, because the following states significantly contribute to non-attainment, or interfere with maintenance, of the ozone National Ambient Air Quality Standard in Delaware, the Department may consider any area in the following states as having the same nonattainment classification as the area of Delaware where the offsets are used: Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and Wisconsin.

- 2.5.6 Emission reductions claimed as offsets by a source must be generated from within the same nonattainment area or from any other area that contributes to a violation of the ozone National Ambient Air Quality Standard in the nonattainment area which the source is located which shall specifically include any area in the States of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia, and Wisconsin.
- 2.5.7 The Department may allow the offset requirement in 2.5 of this regulation for direct PM_{2.5} emissions or precursors of PM_{2.5} (sulfur dioxide or NO_x) to be satisfied by offsetting reductions in direct PM_{2.5} emissions or emissions of sulfur dioxide or NO_x using a ratio approved by the Department for the nonattainment area after public review and comment. Prior to making a final determination on the interpollutant trading ratios for a nonattainment area, the Department shall submit the interpollutant trading ratios and supporting information to the EPA for concurrence.
- 2.6 Emission reductions generated in a state other than Delaware and which are placed in the emissions bank established pursuant to 7 DE Admin. Code 1134 may be used as offsets provided they are federally enforceable and meet, at a minimum, all the provisions of 7 DE Admin. Code 1134 and 2.5.5, and 2.5.6 of this regulation.

16 DE Reg. 214 (08/01/12)

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

1125 Requirements for Preconstruction Review

DIVISION OF FISH AND WILDLIFE

Statutory Authority: 7 Delaware Code, Chapter 60; (7 Del.C., Ch. 60)

REGISTER NOTICE

#2012-09

1. TITLE OF THE REGULATIONS:

3300 Non Tidal Finfish

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

The proposed actions are intended to: formally define designated trout ponds; prohibit the harvest of trout in designated trout ponds prior to the scheduled pond trout season; authorize the taking of northern and blotched snakehead (invasive species) by bow and arrow and spear; and, make a number of minor editorial corrections to the non-tidal regulations.

Division regulations close fishing in stocked freshwater trout streams two weeks prior to the opening of trout season. This allows stocked trout to acclimate to their surroundings; become well dispersed; and, simplifies enforcement of the freshwater trout regulations. However, stocked trout ponds were not included in the definition of the trout streams and, therefore, similar closures to fishing prior to the opening of trout season cannot be adequately enforced. The Division has received numerous complaints from the angling public regarding stocked trout harvest prior to the season opening. The proposed amendments to §§3301 and 3304 seek to expressly define Newton and Tidbury Ponds as designated trout ponds, and establish closed and open seasons of same.

The Division is also proposing to amend §3303 to allow the take of northern and blotched snakehead by hook and line; bow and arrow and spear in non-tidal waters. These species are non-native invasives which have the potential to cause ecological harm. Bow fishing is an effective harvesting technique that may diminish their numbers and slow or prevent their spread. Similar language exists for carp.

Other proposed amendments are editorial in nature. These changes are intended to clarify awkwardly worded language (§3304 (4.0)) and make the non-tidal regulatory language consistent with the Delaware Administrative Code Drafting and Style Manual (September 2009 edition). They are not intended to change the meaning or intent.

APPENDIX “B”

MEMORANDUM



To: Lisa Vest

Through: Ali Mirzakhali

From: Ron Amirikian
Gene Pettingill

Subject: Technical Response Memorandum - September 27, 2012 Public Hearing on Revisions to 7 DE Admin. Code 1125, Requirements for Preconstruction Review - Offsets

Date: July 22, 2013

This memorandum provides a response to comments received concerning a proposal to revise Section 2.5 of 7 DE Admin. Code 1125 “*Requirements for Preconstruction Review*,” as discussed at a public hearing held on September 27, 2012. The nature of the proposal was to expand the geographic area from which Delaware stationary sources may obtain required emission offsets. In brief:

- The EPA has designated all of Delaware as non-attainment for one or more of the national ambient air quality standards (NAAQS) for ozone.
- 7 DE Admin. Code 1125 requires any new or modified major stationary source in a non-attainment area to install lowest achievable emission rate (LAER) emission control technology and to obtain emission offsets so that there is a net air quality benefit in the area where the new or modified source is constructed.
- Currently, emission offsets may be obtained from within Delaware or from a limited area outside of Delaware. As a result of implementing and enforcing state and federal regulations, Delaware sources are now well-controlled and obtaining offsets is increasingly costly and difficult. Moreover, Delaware has few, if any, remaining avenues to generate emission offsets.
- In support of their Cross-States Air Pollution Rule (CSAPR), the EPA determined that emissions of nitrogen dioxide (NO_x), a ground-level ozone precursor, from 15 upwind states significantly impacted Delaware’s ability to attain and maintain the ozone NAAQS. Portions of these 15 upwind states are designated nonattainment, but inexplicably other portions are designated attainment, for the ozone NAAQS.
- Given that EPA has demonstrated that emission from all areas of these 15 upwind states significantly impact Delaware, Delaware has proposed to revise 7 DE Admin. Code 1125 to make it clear that emission offsets may be obtained from any area in the 15 states that significantly impact Delaware.

Three organizations presented written comments before the close of the comment period on October 12, 2012, and one organization presented written and verbal comments at the September 27, 2012 hearing. These comments and Division of Air Quality (DAQ) responses are reviewed below.

Comment 1: Delaware State Chamber of Commerce; Letter, Richard Heffron to Ali Mirzakhali, dated September 24, 2012, "Proposed Amendments to Delaware 7 DE Admin. Code Regulation 1125 – Requirements for Preconstruction Review." DNREC Public Record Exhibit 13.

The Chamber clearly supported these amendments and recognized that under the current situation, with well-controlled sources in Delaware, "*much of the air quality concerns in Delaware come from out of state transported pollution,*" and that "*ERC [emission reduction credit] from a broader area must be considered.*" The Chamber added "*On behalf of the 2400 members of the Delaware State Chamber of Commerce, we urge the Department to modify existing Regulation Number 1125 to accommodate the use of ERC's by Delaware sources that were generated outside of Delaware that 'significantly contribute' to Delaware's air quality non-attainment status.*"

DAQ Response to Comment 1: We thank the Delaware State Chamber of Commerce for their support on this issue.

Comment 2: E. I. Dupont de Nemours and Company, Engineering; Letter, Thomas S. Webster, III to Ali Mirzakhali, dated September 25, 2012, "Proposed Amendments to Delaware 7 DE Admin Code Regulation 1125 – Requirements for Preconstruction Review." DNREC Public Record Exhibit 14.

Dupont supports the proposed amendments and says, in part, "*...is in support of the proposed amendments which will allow Emission Reduction Credits (ERCs) from 15 state areas to be utilized under Delaware's Preconstruction Review Regulations. The proposed amendments will be an important consideration in the future expansion plans for our operations in Delaware, as well as for other businesses.*"

DAQ Response to Comment 2: We thank Dupont for their support on this issue.

Comment 3: Delaware City Refining Company; Letter, Herman Seedorf to David Fees, dated September 27, 2012, "7 DE Admin Code 1125, Requirements for Preconstruction Review Register Notice SAN 2012-18; SAN 2012-12." Identified in the Public Record as DCR # 1.

As shown, DCRC supports this proposal. They say in part, "*The proposed revisions to Regulation 1125 will not only allow for greater flexibility for businesses, it supports emissions improvements in the state...Additionally, the proposed regulations require*

offsets to be obtained from “upwind” states that contribute to non-attainment air quality concerns in Delaware...Accordingly, the Delaware City Refining Company, LLC supports DNREC’s revision to Delaware Air Regulation 1125 to allow existing and new businesses to acquire emissions offsets required by the Clean Air Act and by Delaware Regulation as proposed and it’s submittal to US EPA as a revision to Delaware’s State Implementation Plan.”

DAQ Response to Comment 3: We thank DCRC for their support on this issue.

Comment 4: Delaware City Refining Company: Verbal comments by Bob Muche as recorded in the transcript provided by Wilcox & Fetzer starting on page 13.

In summary, Mr. Muche was concerned that PM_{2.5} offsets would be required for refinery expansions and that such offsets will be difficult to acquire. Mr. Muche suggested that the new language did also cover emission offsets for PM_{2.5}, and if not then it should.

DAQ Response to Comment 4: As pointed out by DNREC’s Mr. Amirikian at the hearing, this proposal was not intended to cover PM_{2.5} offsets. We focused entirely on NOx for ground-level ozone offsets as supported by EPA’s CASPR modeling.

DNREC has submitted to the EPA redesignation requests and maintenance plan SIPs for PM_{2.5}. Approval of these SIPs is anticipated in the fall of 2013, and once approved Delaware will be designated attainment for PM_{2.5} and PM_{2.5} offsets will no longer be required. Once Delaware is designated attainment this issue will be moot.

Comment 5: U.S. Environmental Protection Agency; Letter, Kathleen Cox, to David Fees, dated October 3, 2012.

The EPA comments, in part “According to the Clean Air Act Section 173 and codified in 40 CFR Part 51 Appendix S, Emission Offset Interpretative Ruling, the owner or operator of a new or modified major stationary source may comply with any offset requirement in effect under this part for increased emissions of any air pollutant only by obtaining emission reductions of such air pollutant from the same source or other sources in the same nonattainment area, except that the State may allow the owner or operator of a source to obtain such emission reductions in another nonattainment area if:

- the other area has an equal or higher nonattainment classification than the area in which the source is located; and*
- emissions from such other area contribute to a violation of the national ambient air quality standard in the nonattainment area in which the source is located.*

The Environmental Protection Agency (EPA) Region III could not approve, as currently proposed, revisions to Section 2 of 7 DE Admin. Code 1125 if submitted as a revision to

the State Implementation Plan (SIP). It is outside of the authority of Delaware to broadly designate the nonattainment classification of any state in order to use offsets created in those states; offsets can only be used in an area of equal or higher nonattainment classification than the area where the emissions reductions offsets are created.”

DAQ Response to Comment 5:

First, Delaware agrees with the EPA that it is outside of the authority of Delaware to broadly designate the nonattainment classification of any state. The intent of this revision to 7 DE Admin. Code 1125 is not to classify or change the nonattainment classification of any state. Delaware has reviewed its proposed language and believes it is very clear as written and that no change to the proposed language is needed.

Second, Delaware does not agree with the EPA inference that it must adopt provisions identical to those of 40 CFR Part 51, Appendix S. This is because the requirements of 40 CFR 51.165, Requirements for Preparation, Adoption, and Submittal of Implementation Plans, Permit Requirements, allow a state to develop other procedures for locating offsetting emissions if the procedures are at least as stringent as the federal rule. 40 CFR 51.165, paragraph(a)(3)(ii)(F) requires Delaware to provide, “*Procedures relating to the permissible location of offsetting emissions shall be followed which are at least as stringent as those set out in 40 CFR Part 51 Appendix S section IV.D.*” Appendix S section IV (D) says “*The owner or operator of a new or modified major stationary source may comply with any offset requirement in effect under this Ruling for increased emissions of any air pollutant only by obtaining emissions reductions of such air pollutant from the same source or other sources in the same nonattainment area, except that the reviewing authority may allow the owner or operator of a source to obtain such emissions reductions in another nonattainment area if the conditions in IV.D.1 and 2 are met.*

1. The other area has an equal or higher nonattainment classification than the area in which the source is located.

2. Emissions from such other area contribute to a violation of the national ambient air quality standard in the nonattainment area in which the source is located.

Similarly, the CAA, 42 USC § 7416, provides, “*...nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 7411 or section 7412 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.*” This indicates that Delaware may establish requirements different than the 40 CFR Part 51 Appendix S requirements, so long as Delaware’s requirements are at least as stringent.

The EPA has no published guidance on procedures for demonstrating that state specific provisions are at least as stringent as model federal provisions. However, it expressed the purpose of its interpretive ruling in the introduction to 40 CFR Part 51, Appendix S which states: *“These conditions are designed to insure that the new source’s emissions will be controlled to the greatest degree possible; that more than equivalent offsetting emission reductions (emission offsets) will be obtained from existing sources; and that there will be progress toward achievement of the NAAQS.”* Delaware believes that a demonstration that the implementation of a state provision results in an air quality benefit over a model federal provision that is designed to ensure new source emissions are controlled to the greatest degree possible, that more than equivalent offsetting emissions reductions will be obtained and that there will be more progress toward achievement of the NAAQS, provides a reasonable basis to conclude that the state provision is at least as stringent as the federal provision. Delaware has undertaken great efforts to reduced its instate NOx and VOC emissions in order to make progress toward achieving the ground level ozone NAAQS. Its SIP controls range from its largest sources (electric generating units) to almost insignificant sources in an attempt to aggregate any potential benefits. At this point, all Delaware sources are well controlled and there are practically no offsets that can be achieved in state. Consequently, Delaware has undertaken this amendment to its offsetting regulation to provide for allowable offsets that will allow for growth that will ensure new source emissions are controlled to the greatest degree possible, that more than equivalent offsetting emissions reductions will be obtained and that will actually allow for additional progress toward achievement of the NAAQS in its rule. This rule is at least as stringent as the federal rule because it will achieve more of those benefits than the federal rule. To demonstrate the air quality benefit attributable to the requirement of 40 CFR Part 51 Appendix S with that of the proposed revision to 7 DE Admin. Code 1125, paragraphs 2.5.5 and 2.5.6, consider the effects of construction of a new, 249 TPY NOx emitting source:

40 CFR Part 51 Appendix S. The construction of a new, 249 TPY NOx source in Seaford, Delaware would trigger review under 7 DE Admin. Code 1125. 7 DE Admin. Code 1125 requires the installation of emission controls that meet Lowest Achievable Emission Rate (LAER) technology. The installation of LAER technology in this example reduces the emissions from 249 TPY down to 100 TPY. The 100 TPY source still triggers review under 7 DE Admin. Code 1125 so, in addition to LAER technology, emission offsets must be obtained. Delaware sources are well controlled, and the cost of NOx offsets exceeds \$10,000 per ton. This is deemed too costly by the source, so instead of constructing in Seaford the source is constructed across the Chesapeake Bay in a county designated attainment in Virginia. For example, construction in any one of such counties on or near the Chesapeake Bay, but not in the Ozone Transport Region, such as Northumberland, Richmond or Lancaster counties would be in an attainment area with a 250 TPY major source threshold. The result is a 249 TPY source that does not trigger new source review in Virginia, is constructed, and based on EPA CSAPR modeling, this new 249 TPY NOx source will negatively impact Delaware’s air quality.

Proposed 7 DE Admin. Code 1125. The construction of a new, 249 TPY NOx source in Seaford, Delaware would trigger review under 7 DE Admin. Code 1125. 7 DE Admin. Code 1125 requires the installation of emission controls that meet Lowest Achievable Emission Rate (LAER) technology. The installation of LAER technology in this example would reduce the emissions from 249 TPY down to 100 TPY. The 100 TPY source still triggers review under 7 DE Admin. Code 1125, so in addition to LAER technology, emission offsets must be obtained. The cost of NOx offsets in West Virginia is currently \$500 per ton. This is deemed cost effective by the source, so the source secures the offsets from West Virginia and constructs in Delaware. The result is a well-controlled 100 TPY source is constructed in Delaware, and the air quality is improved because the upwind emissions that are causing high ozone concentration in Delaware have been reduced by 115 TPY.

In this example, proposed 7 DE Admin. Code 1125 is more stringent because it results in an air quality benefit over 40 CFR Part 51 (i.e., emissions that impact Delaware increase by 249 TPY, versus decrease by 15 TPY). Further analysis on the level of control and the reduction of emissions that significantly impact Delaware:

- Regarding the Control level of a New/Modified Source.
 - Under proposed 7 DE Admin. Code 1125, for every possible case, any new source constructed in Delaware will have the best possible controls (i.e., LAER).
 - Under 40 CFR Part 51 requirements a source planning to construct in Delaware could be pushed from Delaware to another area with lesser control requirements (as illustrated in the example above); and less control would be achieved.
 - The requirements are neutral for any source not constructing in Delaware that did not plan to construct in Delaware.

Regarding the control level of a new/modified source, proposed 7 DE Admin. Code 1125 is more stringent than 40 CFR Part 51.

- Regarding upwind emissions that are causing Delaware's unhealthy ozone concentrations.
 - The new source obtains offsets from within Delaware. Under this case there is no difference between 40 CFR Part 51 and proposed 7 DE Admin. Code 1125.
 - The new source obtained offsets from an upwind nonattainment area in any of the states listed in proposed 7 DE Admin. Code 1125. Under this case there is no difference between 40 CFR Part 51 and proposed 7 DE Admin. Code 1125.
 - All of Delaware is marginal nonattainment, so the case where an upwind area has a lower nonattainment classification than the corresponding areas in Delaware does not exist.

- The new source obtained offsets from an upwind attainment area in any of the states listed in proposed 7 DE Admin. Code 1125. In this case 7 DE Admin. Code 1125 is more stringent (i.e., gets more air quality benefit) because reductions have occurred in an upwind state that significantly impacts Delaware. Under 40 CFR Part 51 these reductions would not occur.

Looking at the purpose of the federal rule, Delaware can offer no scenario where the requirements of the proposed revisions to 7 DE Admin. Code 1125 would offer less air quality benefit/be less stringent than Appendix S. Indeed, Delaware has limited the area where offsets can be obtained to only those areas EPA has found to significantly contribute (i.e., contribute by more than 1% of the ozone NAAQS) to the unhealthy ozone concentration in Delaware's air. Thus, any offsets for Delaware emissions are only allowed in areas that EPA has found directly and significantly contribute to and cause Delaware's nonattainment problem (or meet the existing federal criteria). It is clearly beneficial to air quality to provide incentive to reduce upwind emissions that are causing downwind ozone problems than it is to not do so. Indeed, this may be one of the few remaining strategies Delaware has available to it to further reduce the emissions that cause Delaware's nonattainment problem. Indeed, Delaware believes the only way proposed changes to 7 DE Admin. Code 1125 can be viewed as less stringent than 40 CFR Part 51 Appendix S is if the science behind ozone and ozone transport that has been developed over the past 20 years is disregarded and the fact that the allowed offsets will directly reduce the pollution that is causing Delaware's nonattainment is disregarded.

The proposed revisions to 7 DE Admin. Code 1125 are more stringent than those of 40 CFR Part 51, Appendix S. Since they are more stringent, Delaware does not agree with the EPA comment that the EPA could not approve, as currently proposed, revisions to Section 2 of 7 DE Admin. Code 1125 if submitted as a revision to the SIP.

Based on the above discussion, DAQ finds no reason to further revise or modify the proposal to revise Section 2.5 of 7 DE Admin. Code 1125 as discussed at the September 27, 2012 public hearing. The DAQ recommends that the revisions to 1125 be promulgated as proposed.

