



STATE OF DELAWARE  
DEPARTMENT OF NATURAL RESOURCES  
AND ENVIRONMENTAL CONTROL

OFFICE OF THE  
SECRETARY

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December 8, 2008

Mr. Donald S. Welsh (3RA00)  
Regional Administrator  
U. S. Environmental Protection Agency  
Region III  
1650 Arch Street  
Philadelphia, PA 19103-2029

Dear Mr. Welsh:

I am writing in response to your November 18, 2008 letter regarding Delaware's June 13, 2007 State Implementation Plan (SIP) for demonstrating attainment of the 8-hour National Ambient Air Quality Standard (NAAQS) for ozone. Your letter indicated EPA intends to propose disapproval of our SIP unless Delaware makes a request to reclassify the Philadelphia nonattainment area to a higher classification. You asked for our response by December 8, 2008, under threat of EPA action. Accordingly, we are respectfully declining your invitation to "bump up" our nonattainment classification and are hereby notifying you of our intent to file a petition under Section 126 of the Clean Air Act (CAA).

Your letter is surprising, given our earlier belief that EPA and the states agreed that it would be prudent to allow 2009 data to be examined to assess the effectiveness of control measures Delaware and other states have put in place. Your proposed rejection of Delaware's SIP is unwarranted scientifically and procedurally.

First, with regard to EPA's unwarranted rejection of Delaware's June 13, 2007 SIP, our submittal provided modeling and other analyses that clearly indicates the area will achieve ozone levels consistent with the level of the ozone standard by the end of the 2009 ozone season. EPA either does not have an adequate technical understanding of the Delaware SIP or is simply ignoring the facts. Furthermore, EPA's evaluation is not consistent with the CAA.

- CAA 181(b)(3) (i.e., voluntary reclassification provisions) applies when a state is not able to put together a SIP that demonstrates attainment in the required year based on modeling and other analysis. EPA uses 2007-2008 monitoring data, and based on this data, has judged that the SIP does not demonstrate attainment will be reached in 2009, that EPA has no choice but to disapprove the SIP, and that a voluntary reclassification is our only alternative to a SIP disapproval. EPA comes to this conclusion by

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predicting that the 2009 levels necessary to bring the 2007-2009 design values below 85 ppb are not realistically achievable. However, following the CAA and EPA's own guidance, Delaware's attainment demonstration is based on the modeling and analysis of projected 2009 emission levels, and not on predicted 2007-2009 design values. While it would have been desirable for all control measures to be adopted and in place by 2007 thus causing the 2007-2009 design values to be below 85 ppb, in reality several significant control measures, including Delaware's power plant requirements, become effective beginning in 2009. Regardless, the adequacy of an attainment demonstration is not judged against predicted 2007-2009 design values, but rather against modeling and weight-of-evidence analysis of projected 2009 emission levels. Delaware has submitted a SIP that demonstrates attainment based on modeling and weight of evidence analysis, so there is no need for Delaware to request a voluntary reclassification at this time.

- CAA 181(a)(5) (i.e., one-year extension provisions) applies when actual monitoring data indicates an area has design values that are consistent with attainment in the required year, but where the 3-year design values do not reach attainment. EPA has predicted that 2009 design values for ozone in the NAA will not be below the level necessary to meet the requirements for a one-year extension. However, the determination under CAA 181(a)(5) must be based on actual 2009 monitoring data, and EPA's use of predicted 2009 values is not logical, and is inconsistent with the CAA. While nobody knows with certainty whether these one-year extensions will be needed, or if we qualify for them, until 2009, the Delaware SIP does demonstrate that 2009 design values will be below 85 ppb. In addition, I believe there is a very good possibility that they will be below 85 ppb, given 2007 and 2008 monitoring data and given control measures yet to be implemented, both within and outside the area. Moreover, this belief is not only true for 2009, but also for 2010, 2011, and beyond. CAA 181(a)(5) is an important provision of the CAA that should not be ignored or rendered meaningless.
- In addition, we are concerned about the timing of your letter, given that more than 1 ½ years have passed since our SIP submittal, and that the 2009 ozone season begins in only five (5) months. After the 2009 ozone season, actual monitoring data will tell us if we are on track to attain (i.e., either all 2007-2009 design values are less than 85 ppb, or the requirements of CAA 181(a)(5) are met), or if a reclassification is warranted. If reclassification is warranted, EPA would have authority under CAA 181(b)(2)(A) (i.e., mandatory reclassification) after the 2009 ozone season. Delaware's SIP demonstrates attainment, and the CAA covers both the case where actual monitoring data indicates attainment is reached and the case where it is not reached. There is no rationale to deviate from these requirements.

Second, if Delaware continues to endure air quality that fails to attain the NAAQS, it is demonstrably unfair and illegal to blame the continued problem solely on Delaware without taking action in upwind states. We are dismayed, therefore, that your letter entirely fails to mention the most significant issue affecting Delaware's air quality – transport of pollution from upwind sources. Regrettably, the air coming into Delaware and the Philadelphia area does not meet the standard. We have tried every available option, save one, to get the EPA to address this

issue. I cannot put into words our frustration and disappointment, after so many years of our pleas to EPA being virtually ignored, to see that EPA did not mention the transport issue in its letter. Instead, EPA added insult to injury by choosing this vehicle to remind us to make sure that we do not delay the implementation of Reasonably Available Control Technology (RACT) and other controls in Delaware because the CAA requires us to attain the ozone standard as expeditiously as practicable.

- Delaware provided EPA comments and testified to a Senate Committee in November 2005 that explained why CAIR was not sufficient to mitigate transport, and suggested actions EPA could take. My staff and I also worked through the OTC to explain why CAIR was not sufficient to mitigate transport and asked EPA to strengthen it. Despite our comments and those of many states impacted by transport, EPA finalized CAIR, which was vacated by the court because it was not sufficient to mitigate transport.
- Delaware recommended that EPA establish large ozone non-attainment boundaries, which would have required upwind states to address this non-attainment issue. EPA rejected our recommendation and included Delaware in the Philadelphia area, which does not encompass all of the sources that are significantly contributing to the problem. Despite this, we have done all that we can do, and believe it is enough for us to bring 2009 ozone levels to below 85 ppb and attain the standard. However, in the event that we do not attain it will be because of EPA's failure to mitigate transport. If this occurs, another impact of EPA's rejection of Delaware's boundary recommendation may be that Delaware is not adequately protected by CAA 182(j)(2) (i.e., sanctions relief provisions).
- Delaware has implemented controls on its sources, including power plant controls, and has satisfied 110(a)(2)(d) of the CAA. The states downwind are not significantly impacted by Delaware sources, yet the upwind states are left to pollute our air and affect the health of Delaware citizens. Delaware has probably done more to clean up its sources of ozone precursors than any other state, and your letter completely ignores transport, and instead asks us to make sure we implement "all RACT and other control measures needed to attain...."

Among the air pollution controls Delaware has implemented (including promulgating rules and implementing with vigorous enforcement)

1. Architectural and Industrial Maintenance (AIM) Coatings: reduced VOC content of numerous coatings beyond federal requirements.
2. Mobile Equipment: established coating equipment standards to reduce VOC emissions.
3. Gas Cans: required that gas cans meet certain performance and permeability standards to reduce VOC emissions.
4. Degreasing: reduced degreaser vapor pressure and put in place equipment standards and work practices to reduce VOC emissions.
5. Control of NO<sub>x</sub> Emissions from Large Boilers: reduced NO<sub>x</sub> emissions from boilers larger than 100 mmbtu/hr that weren't well controlled through other programs.

6. Anti-Idling: reduced VOC, NO<sub>x</sub>, SO<sub>x</sub>, and DPM emissions from heavy duty vehicles by reducing allowable idling time.
7. Open Burning: put in place strict open burning ban during the ozone season.
8. Minor NSR: reduced criteria pollutant and air toxic emissions by subjecting new minor stationary sources to top-down BACT requirements.
9. OTC NO<sub>x</sub> Budget Program: participated in a regional NO<sub>x</sub> Cap and Trade program to reduce NO<sub>x</sub> emissions from power plants (program later replaced by the NO<sub>x</sub> SIP Call).
10. Adopted several regulations to reinforce EPA-adopted heavy-duty diesel rules.
11. Peaking Units: reduced peak ozone day NO<sub>x</sub> emissions from combustion turbines used as electrical peaking units.
12. Refinery Boilers: reduced NO<sub>x</sub> emissions from large refinery boilers.
13. Non-Refinery Boilers: reduced NO<sub>x</sub> emissions from large non-refinery boilers.
14. Utilities Multi-P: reduced NO<sub>x</sub>, SO<sub>x</sub>, and Hg emissions from Delaware's coal and residual oil fired electric utilities.
15. Lightering: reduced VOC emissions from crude oil lightering operations in the Delaware Bay.

I think the record is clear that Delaware has done its share in cleaning up the air.

This leaves Delaware no choice but to file a petition under CAA 126 (i.e., interstate pollution abatement) to compel EPA to address what is really causing our ozone problem – interstate transport. We will also be prepared to pursue legal remedies should EPA proceed to finalize a disapproval of our SIP. Delaware has done all it can do to attain (and I believe we very well may attain in 2009, but if we do not it is the fault of EPA, which has failed to address adequately interstate transport. I urge EPA to spend its resources responding to Delaware's 126 petition, and address transport adequately, rather than pursuing an unwarranted disapproval of Delaware's ozone SIP.

If you have any questions or desire to meet and discuss these important issues in person, please do not hesitate to contact me or James D. Werner, Director of our Division of Air and Waste Management, or Ali Mirzakhilili, Administrator, Air Quality Management Section of DNREC.

Sincerely,



John A. Hughes  
Secretary

cc: Bob Myers, EPA, Assistant Administrator  
Judy Katz, EPA, Region III  
David Small, Deputy Secretary, DNREC  
James D. Werner, Director, Division of Air and Waste Management  
Ali Mirzakhilili, Administrator, Air Quality Management Section