

HEARING OFFICER'S REPORT

Regarding: Proposed Amendments to the State of Delaware
Regulation No. 1113: Open Burning

Lisa A. Vest
Hearing Officer

March 13, 2007

I. Background:

A public hearing was held on Wednesday, January 31, 2007 in the DNREC auditorium located at 89 Kings Highway in Dover, Delaware, to receive public comment on proposed amendments to the State of Delaware's Regulation No. 1113, i.e., the Open Burning Regulation. This regulation revision is primarily proposed to: (1) expand the open burning ban window from June 1st through August 31st in the current regulation, to May 1st through September 30th; (2) expand the burning ban from only New Castle and Kent counties to statewide; and (3) clarify the prohibitions in the existing regulation and their interaction with other applicable laws and regulations.

On April 15, 2004, the United States Environmental Protection Agency designated Delaware's Sussex County as non-attainment for meeting the 8-hour national ambient air quality standard for ozone. The Department's proposed revisions now intend to include Sussex County in the Ozone Season Open Burning Ban. Due to the expansion of the burning ban statewide, the format of the entire regulation required significant changes since the prohibitions attributable to certain areas would no longer exist. As a result, the approach taken to the amendment by the Department was to delete the existing regulation in its entirety and propose an adoption of a new version at this time. Except for the expansions detailed above, the intent of the proposed changes made are to clarify the implementation of the regulation, based

on experience of Departmental staff, and are not intended to be more stringent than the existent regulation.

Numerous members of the public were present at this public hearing on January 31, 2007, including, but certainly not limited to, Michael Valenti, Assistant Forestry Administrator for the Delaware Forest Service, Burt Messick of the Sussex County Farm Bureau, numerous private citizens, and Alan Muller, Executive Director of Green Delaware. Questions and comments from those in attendance at the hearing, along with the Department's responses to the same, were fully addressed by the Department's Response Document dated March 6, 2007, which will be discussed within this Report later below. Proper notice of the hearing was provided as required by law.

II. Summary of Record:

A. Department Presentation:

Valerie Gray, Program Manager for the Planning Branch of the Department's Division of Air and Waste Management – Air Quality Management Section (hereinafter referred to as "AQM"), gave a brief verbal presentation to the public at the hearing on January 31, 2007 concerning this proposed regulation. She explained to those in attendance that night that it is AQM's responsibility to identify, develop and implement strategies to control emissions in a way that continuously improves the ambient air quality of the State while protecting the public health, safety and welfare. Part of this responsibility is to develop

regulations that will reduce the risk to the public caused by the emissions of pollutants from sources in Delaware.

Ms. Gray explained that Delaware is currently not in compliance with the National Ambient Air Quality Standards for ground-level ozone and fine particulate matter. Because of Delaware's non-attainment status for these standards, the Department has revised the current regulation to control air emissions from open burning activities statewide during the ozone season. The open burning activities that are affected by the current ozone season open burning ban are from agricultural, silvicultural, and demolitions by fire companies conducting training exercises. All of these activities contribute to the formation of ground-level ozone and fine particulate matter. The current regulation bans these activities only in Kent and New Castle County during the ozone season.

In May of 2004, the United States Environmental Protection Agency (hereinafter referred to as the "USEPA") designated Sussex County with the same non-attainment status for ozone as Kent and New Castle Counties. As a result, the entire State of Delaware was designated as non-attainment for the ozone standard. These proposed revisions incorporate Sussex County into a statewide ozone season open burning ban, as well as expand the time frame for the peak ozone season (from June through August) to include the months of May and September. The

six monitoring stations located across the State have recorded exceedances in both May and September for all three counties.

In a further attempt to assist the public in understanding the proposed revisions to this regulation, Ms. Gray pointed out that the Department had prepared a handout entitled “Summary of More Substantive Revisions”, which was available for everyone to receive at the public hearing. To serve as a summary of these revisions, and for the Secretary’s review, the same is attached hereto as Exhibit “A”, and expressly incorporated into this Hearing Officer’s Report. Other proposed changes to this regulation noted by Ms. Gray during her presentation included clarifying revisions related to what is allowable burning; the provisions related to agricultural and silvicultural operations; the inclusion of language on the federal requirement to provide both DNREC and USEPA Region 3 notification of a demolition activity by intentional burning as conducted as part of a firefighting training exercise; the provisions for obtaining approvals prior to commencing open burning activity; and providing additional clarity on the exemptions.

Ms. Gray noted that AQM held public workshops in August of 2006 in each county of the State of Delaware in order to notify the public of the draft regulation and to obtain comments and thoughts from the public on the same. A hard copy of the Department’s presentation offered at the aforementioned workshops was also available for the public to receive at this public hearing, and for the Secretary’s review, the same

is attached hereto as Exhibit “B” and expressly incorporated into this Hearing Officer’s report at this time¹. The Department then offered into the record 56 exhibits in support of this proposed promulgation, which included a detailed list of each of the documents presented by the Department. For purposes of clarity, and for the Secretary’s review, the DNREC list of Exhibits as identified by Ms. Gray at the time of the public hearing are attached hereto as Exhibit “C”, and is expressly incorporated into this Hearing Officer’s report at this time. The Hearing Officer accepted the Department’s exhibits, housed in a large white three-ring binder, into the formal record at the time of the public hearing as well, and the same are being forwarded to the Secretary along with this Report for his review.

Of particular note among these exhibits, and highlighted by Ms. Gray during her verbal presentation at the hearing, was Exhibit No. 46, a copy of the Regulatory Flexibility Act. Ms. Gray stated that the Department does not believe that there are to be any onerous reportings, and that the revisions as proposed should be applied to all Delaware citizens equally in order to create a sufficient reduction toward Delaware’s progress to achieving the NAAQS attainment for ozone and particulate matter.

¹ Note: The hard copy of the Department’s workshop presentation was also included in their exhibits formally entered into the record at the time of the public hearing on January 31, 2007, as Exhibit #43. However, it is being attached to this Report as well to aid in the Secretary’s review of the record and to promote a thorough understanding the same.

Other notable exhibits mentioned by Ms. Gray at the hearing was Exhibit No. 44, a letter submitted via e-mail to the Department on September 15, 2006, by E. Austin Short, III, State Forester, on behalf of the Delaware Forest Service, which comments on the Department's proposed revisions to the Open Burning Regulation, specifically, the inclusion of Sussex County in the ozone season open burning ban. Also Exhibit No. 55, received by Ms. Gray on January 30, 2007, from Amelia Wright, Vice-President of the Delaware Forestry Association, supporting the position presented by the Delaware Forest Service. Again, these documents are included within the Department's exhibit binder referenced above.

B. Public Comment/Departmental Response:

At that time, the Hearing Officer opened the public hearing floor to anyone present who wished to offer their comments or questions to the Department regarding this proposed promulgation. Subsequent to the close of the hearing record for comments, AQM prepared a detailed and extensive Response Document, dated March 6, 2007, and received by this Hearing Officer on March 7, 2007. This Response Document addressed all written and oral comments received by AQM on the proposed Regulation No. 1113, "Open Burning", both prior to and during the public hearing of January 31, 2007.

AQM's Response Document encompasses the full range of comment contained in the record, including those from the public as well as from various agencies such as the Delaware Forest Service and the Sussex County Farm Bureau. Each comment was meticulously organized according to its source, followed by a thorough and rational discussion of the issue based on the record. In addition, AQM offered its recommendation as to how each of these issues should be resolved. In most instances, no changes were warranted, in AQM's view, but in a couple of situations minor amendments to the proposed regulation were made to reflect existing realities or to provide further clarity as to the wording of the proposed revision(s). None of these changes were deemed sufficient to require another hearing.

After reviewing AQM's Response Document of March 6, 2007, it is my view that AQM has done an excellent job of identifying all of the relevant issues and discussing them in a thorough and balanced manner which accurately reflects the information in the record. Rather than repeat them all herein, the Secretary may get an in-depth understanding of this record by reading AQM's Response Document, attached hereto as Exhibit "D" and expressly incorporated into this Hearing Officer's report for that purpose. Additionally, attached hereto as Exhibit "E" is a copy of the revised regulation (now reflecting the changes made in light of the public comments received as noted above) to be submitted to the Delaware Register of Regulations by the Department, should the

Secretary decide to formally promulgate this regulation. Again, this attachment is expressly incorporated into this Hearing Officer's report at this time.

III. Conclusions and Recommended Findings:

On the basis of the record developed in this matter, it appears that AQM has provided a sound basis for the proposed Regulation No. 1113, also known as the "Open Burning" Regulation. The Department has provided reasoned responses to the various comments they have received, and has worked well in concert with the public and various agencies in an attempt to develop these regulations as thoroughly and consistently as possible. Upon review of AQM's responses to the public comments made in this matter, it appears as though the Department's responses on these issues were rational and even-handed, and that the final draft of these proposed regulations is reasonable and consistent with the record developed in this case.

Of course, not everyone will agree with the final regulation, and there is always the possibility of appeal, regardless of how well the Department has done its work. Nevertheless, this agency's obligation is not to eliminate all controversy, but rather to base its promulgation action upon substantial evidence and sound reasoning found in the record developed during the public hearing process. I am satisfied that, in this particular process, the Department has done just that. Therefore, I recommend that the Department's proposed Regulation No. 1113 be

promulgated in final form, in accordance with the customary and established rule-making procedure required by law, and that the conclusions in AQM's Response Document be adopted as specific findings to support the Secretary's Order.

I also recommend the following additional findings:

1. Proper notice of the hearing was provided as required by law.
2. Sussex County, Delaware, has recorded 8-hour ozone standard exceedances since 1997. Moreover, Sussex County has yet to record three (3) successive years without an 8-hour ozone exceedance.
3. The Clean Air Act (CAA), Section 110, requires states with areas that fail to meet the National Ambient Air Quality Standards (NAAQS) to develop a State Implementation Plan (SIP), describing how the state will attain and maintain the NAAQS. SIPs must include a description of control strategies or measures to control pollution. The Ozone SIP submittal is due USEPA in June 2007, and the attainment demonstration deadline is 2010. While the Department respects the opinion of various citizens and/or agencies, it believes the inclusion of Sussex County in the Ozone Season Burning Ban will aide the State of Delaware in attaining compliance with the Ozone National Ambient Air Quality Standard.
4. The Response Document from AQM dated March 6, 2007 provided to this Hearing Officer provides a thorough, accurate and

