



6560-50-P

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

**[EPA-R03-OAR-2019-0663; FRL-10007-98-Region 3]**

**Approval and Promulgation of Air Quality Implementation Plans; Delaware; Infrastructure Requirements for the 2015 Ozone Standard and Revisions to Modeling Requirements**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is approving two state implementation plan (SIP) submissions submitted by the State of Delaware. The first submission addresses the basic program elements, including, but not limited to, regulatory structure, monitoring, modeling, legal authority, and adequate resources necessary to assure attainment and maintenance of the National Ambient Air Quality Standards (NAAQS). This type of SIP submission is referred to as an infrastructure SIP submission. Delaware made this submission in order to address the infrastructure requirements for the 2015 ozone NAAQS. EPA is approving Delaware's infrastructure SIP submission in accordance with the requirements of Clean Air Act (CAA) section 110(a). EPA is also approving a second submission from Delaware which updates a reference to the current version of EPA's modeling guidance.

**DATES:** This final rule is effective on **[insert date 30 days after date of publication in the Federal Register]**.

**ADDRESSES:** EPA has established a docket for this action under Docket ID Number EPA-R03-OAR-2019-0663. All documents in the docket are listed on the <https://www.regulations.gov> website. Although listed in the index, some information is not publicly available, e.g., confidential business information (CBI) or other information whose

disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available through <https://www.regulations.gov>, or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

**FOR FURTHER INFORMATION CONTACT:** Joseph Schulingkamp, Planning & Implementation Branch (3AD30), Air & Radiation Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. The telephone number is (215) 814-2021. Mr. Schulingkamp can also be reached via electronic mail at [schulingkamp.joseph@epa.gov](mailto:schulingkamp.joseph@epa.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

On February 10, 2020 (85 FR 7494), EPA published a notice of proposed rulemaking (NPRM) for the State of Delaware. In the NPRM, EPA proposed approval of two SIP submissions submitted on behalf of the State of Delaware by the Delaware Department of Natural Resources (DNREC).

DRNEC submitted the first SIP submission on October 11, 2018 to address the infrastructure SIP requirements of CAA section 110(a)(2) for the 2015 ozone NAAQS. This submission addressed the following elements of CAA section 110(a)(2): (A), (B), (C), (D)(i)(I), (D)(i)(II), (E), (F), (G), (H), (J), (K), (L), and (M). On November 4, 2019, DNREC submitted a letter identifying outdated references in its October 11, 2018 submission and committing to submit a future SIP revision in order to address the deficiency. With this letter, Delaware requested that EPA conditionally approve the State's submission with respect to CAA section

110(a)(2)(K), based on the commitment to submit a future SIP revision to update a State regulation to reflect current requirements with respect to modeling.

On December 16, 2019, however, DNREC submitted a second SIP submission to amend Title 7 of the Delaware Administrative Code (DE Admin. Code), Regulation 1125, *Requirements for Preconstruction Review* in the current EPA-approved SIP for Delaware. The State intended this submission to meet the commitment described in the State’s November 4, 2019 letter as previously described. This second submission revises a section of Regulation 1125 to incorporate by reference the most recent revision to EPA’s Guideline on Air Quality Models into State regulation. Specifically, the revision changes Delaware’s regulation that references the “Guideline on Air Quality Models” as published by EPA’s Office of Air Quality Planning and Standards in July 1986 and supplemented in July 1987 to the “Guideline on Air Quality Models (40 CFR Part 51, Appendix W, July 1, 2019 ed).” Because Delaware has submitted the intended SIP revision outlined in the State’s November 4, 2019 letter, EPA considered CAA section 110(a)(2)(K) of Delaware’s October 11, 2018 SIP submission for full approval instead of the November 4, 2019 request for conditional approval.

## **II. EPA Analysis**

EPA has analyzed Delaware’s October 11, 2018 infrastructure SIP submission for the 2015 ozone NAAQS and has determined that it meets the applicable requirements of CAA section 110(a)(2). EPA also reviewed Delaware’s revisions to 7 DE Admin. Code 1125 and concludes that the revised references to 40 CFR part 51, Appendix W, as published in the July 2019 edition of the CFR, are the correct modeling guidelines to use for implementation of CAA programs. A detailed summary of EPA’s review and rationale for approving Delaware’s submissions may be found in the technical support document (TSD) for the proposed rulemaking

action which is available online at [www.regulations.gov](http://www.regulations.gov), docket number EPA-R03-OAR-2019-0663. Other specific requirements and background information, as well as the rationale for EPA's proposed action, are explained in the NPRM and will not be restated here.

### **III. Response to Comments**

EPA received four sets of comments in response to the NPRM that are available in the docket for this action. Summaries of the significant adverse comments and EPA's responses are provided below.

*Comment 1:* The first commenter stated that EPA should disapprove Delaware's infrastructure SIP submission because, "it is substantially higher than the 2012 federal levels EPA established for that smog-forming pollutant." The commenter continued by mentioning a "1,000-pound-per-square-mile rule" which, the commenter stated, Delaware and New Jersey have already implemented while other states have not but are now in the process of complying.

*Response 1:* EPA disagrees with the comment. The commenter did not provide any additional information beyond general assertions; the commenter did not identify any specific infrastructure element. The commenter suggests Delaware has substantially higher smog-forming pollutants than "2012 federal levels," but EPA notes that the Agency did not set any "federal levels" in the 2012 calendar year for any smog-forming pollutants such as oxides of nitrogen (NO<sub>x</sub>) or volatile organic compounds (VOCs). Furthermore, EPA notes the purpose of an infrastructure SIP is to ensure the state has addressed the basic program elements, including, but not limited to, regulatory structure, monitoring, modeling, legal authority, and adequate resources necessary to assure attainment and maintenance of the NAAQS; an infrastructure SIP submission is not required to address the nonattainment plan SIP submission requirements of

section 110(a)(2)(I) for attainment of the NAAQS in question.<sup>1</sup> To the extent that Delaware has designated nonattainment areas for this NAAQS, the State will address and EPA will evaluate those requirements in a separate action. With respect to a “1,000-pound-per-square-mile rule,” EPA is unaware of any such rule implemented by any of the states named by the commenter, nor was EPA able to identify the commenter’s concerns with EPA’s proposed approval of Delaware’s infrastructure submission as it relates to any such rule.

*Comment 2:* The second commenter suggested that EPA should disapprove Delaware’s infrastructure SIP submission, “because of its findings that either EPA hasn’t considered this issue fully or that it is not sufficiently vigilant in its enforcement of its regulations.” The commenter also stated that EPA should disapprove the infrastructure SIP submission out of concern that the State will not be able to sustain its planned measures to reduce ozone during the next two decades. The commenter also referenced four reasonably available control technology (RACT) programs in the states of Delaware, New Jersey, New York, and the Commonwealth of Pennsylvania, and suggested that EPA should disapprove Delaware’s infrastructure SIP submission, “until all four states have RACT programs that are approved.”

*Response 2:* EPA disagrees with the commenter’s statement that, “EPA hasn’t considered this issue fully or that it is not sufficiently vigilant in its enforcement of its regulations.” In the TSD for this rulemaking action, EPA determined that the State of Delaware is currently operating a program to provide for the enforcement of emission limits and other control measures, means, or techniques as may be necessary or appropriate to meet the applicable requirements of the CAA. Delaware’s SIP submission references several State laws and regulations which allow the State to exercise its programmatic authority to utilize

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<sup>1</sup> See Guidance on Infrastructure State Implementation Plan (SIP) Elements under Clear Air Act Section 110(a)(1) and 110(a)(2),” Memorandum from Stephen D. Page, September 13, 2013.

enforcement powers, and to impose criminal, civil, and administrative penalties to sources in the State that violate applicable SIP emission limits or control measures.

EPA further disagrees that the Agency should disapprove Delaware's submission based on the assertion that the State may not be able to sustain its ozone reductions for the next two decades. In terms of the SIP submissions before EPA in this rulemaking action, the commenter did not identify any specific infrastructure SIP deficiencies which would prevent the State from meeting its obligations. Although the commenter does not identify any specific CAA requirements, EPA believes the commenter is referring to the maintenance plan requirements under CAA section 175A which is analogous to the commenter's phrasing "...to sustain ozone reductions for the next two decades." CAA section 175A requires any state requesting a redesignation of a nonattainment area to submit a revision to provide for the maintenance of the NAAQS for at least 10 years. A state is also required under CAA section 175A(b) to submit a second revision to provide for the maintenance of the NAAQS for an additional 10 years after the expiration of the first 10-year period; thus, ensuring maintenance of the NAAQS for a total of 20 years. The latter maintenance plan requirements under section 175A are not applicable in the context of an infrastructure SIP submission.

EPA also disagrees that it should disapprove Delaware's infrastructure submission because it has not yet approved RACT submissions for the 2015 ozone NAAQS for the States of Delaware, New Jersey, New York, and the Commonwealth of Pennsylvania. These RACT requirements are not relevant to the applicable infrastructure SIP submission requirements of CAA section 110(a)(1) and 110(a)(2), but rather to the requirements in CAA sections 110(a)(2)(I), 182 and 184. These sections establish requirements for nonattainment area SIP submission and the states included in the Ozone Transport Region (OTR).

As explained in the response to Comment 1 of this preamble, the purpose of an infrastructure SIP is not to meet nonattainment plan requirements for the NAAQS, but to ensure that a state's SIP includes basic program elements necessary to assure attainment, maintenance, and enforcement of the NAAQS. The requirements of CAA sections 110(a)(2)(I), 175A, 182, and 184 all relate to states' attainment planning requirements if they have designated nonattainment areas for the NAAQS in question. SIP submissions to meet these requirements are due by different statutorily prescribed deadlines under subparts 2 through 5 under part D. Because the CAA directs states to submit these nonattainment plan SIP submissions on a separate schedule, EPA does not interpret the CAA to require states to address these requirements in the infrastructure SIP submission due three years after promulgation or revision of a NAAQS.

*Comment 3:* The third commenter questioned EPA's proposed approval of Delaware's infrastructure SIP submission with respect to section 110(a)(2)(K) pertaining to modeling requirements, including the revision to Regulation 1125. The commenter asserted EPA has already approved an infrastructure SIP submission from the State of New Mexico in which that State had language similar to that of the State of Delaware, and thus suggested that EPA is being inconsistent in its approach to this infrastructure SIP element. The comment further asserted that EPA must explain why Delaware's pre-existing regulation was different from the New Mexico regulation, or else "recall the approval of New Mexico's SIP action and force the state to fix the problem." The comment also suggested that EPA cannot require Delaware to revise its regulations with respect to modeling authority and requirements to meet CAA section 110(a)(2)(K) "while allowing New Mexico to skirt federal regulations."

*Response 3:* EPA disagrees with the commenter. First, as EPA stated in the NPRM and

the TSD for this rulemaking action, Delaware is correctly addressing the requirements of section 110(a)(2)(K) in this action. The State correctly addressed the deficiency initially identified by EPA and submitted a separate SIP revision to change the reference in Regulation 1125 to refer clearly to the Guideline on Air Quality Models in 40 CFR part 51, appendix W. Delaware initially identified an existing state regulation to meet the requirements of 110(a)(2)(K) that explicitly referenced an outdated version of EPA’s Guideline on Air Quality Models. Upon further investigation, EPA determined, and Delaware agreed, that the State regulation did not authorize the State to use the most recent version of EPA’s Guideline on Air Quality Models. Delaware made the necessary changes to the State regulation. EPA proposed approval of Delaware’s revision to Regulation 1125 because the revision is consistent with CAA section 110(a)(2)(K) and allows the State to comply and use the correct modeling guidelines found in 40 CFR part 51, appendix W.

Second, EPA disagrees with the commenter’s assertion that the Agency is allowing states to “skirt federal regulations” or that the Agency must “recall the approval of New Mexico’s SIP action and force the state to fix the problem.” EPA assumes the commenter is referring to the final rulemaking notice (FRN) published on September 18, 2019, relating to New Mexico’s 2015 ozone NAAQS infrastructure SIP.<sup>2</sup> In the New Mexico FRN, EPA responded to similar comments regarding the appropriateness of the Agency’s proposed approval of CAA section 110(a)(2)(K) and explained why the Agency believed the wording of the New Mexico regulation was sufficient in the response to comments section. In that action, upon evaluation of the authority provided by the regulation in question, EPA and the State agreed that New Mexico’s regulations submitted to meet the relevant CAA requirements provide the State with the

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<sup>2</sup> See 84 FR 49057, September 18, 2019; “Air Plan Approval; New Mexico; Infrastructure for the 2015 Ozone National Ambient Air Quality Standards and Repeal of State Regulations for Total Suspended Particulate”

authority and the requirement to use the latest version of EPA's Guideline on Air Quality Models, also known as Appendix W, and is not restricting the State to use the version referenced in the State's regulation.

Finally, EPA is not acting on any New Mexico SIP submission in this action, thus how New Mexico's SIP meets CAA section 110(a)(2)(K) is not relevant to the approval of Delaware's Regulation 1125 or the Delaware infrastructure SIP submission for the 2015 ozone NAAQS with respect to CAA section 110(a)(2)(K). Further, the New Mexico action's public comment period closed on May 20, 2019 and the FRN was published on September 18, 2019 (84 FR 49057, September 18, 2019); there is no basis to reopen that action at this time, nor does the commenter provide any such basis.

*Comment 4:* The fourth commenter asked why EPA was approving Delaware's modeling regulation change. The commenter claimed Delaware's ozone air quality has remained substantially unchanged from 2005 through 2012 even though ozone levels fell in other states. The comment referenced an "Ozone Science Program's (OSP) review of the Virginia program and other states' EPA-issued Ground Level Ozone Standards (GLOS)," but did not elaborate this review's conclusions. The comment claims that EPA approved Delaware's proposed rule change based on flawed science and because of political and regulatory considerations. The comment concludes by claiming, "As a result of EPA's disregard for its own standards, Delaware's ozone standards remain virtually unchanged from 2012 until 2022."

*Response 4:* EPA disagrees with the comment. EPA proposed approval of Delaware's Regulation 1125 because the revision corrects a deficiency where the State regulation referenced a specific document authored and published by EPA in 1986 and supplemented in 1987. This document was replaced by 40 CFR part 51, appendix W and was most recently updated in the

Federal Register on January 17, 2017 at, 82 FR 5203. Based on this information, DNREC correctly revised Regulation 1125 and submitted it to EPA for approval into the SIP, which EPA subsequently proposed approval in the NPRM. The commenter's assertions that the proposed approval of this regulation is "based on flawed science and because of political and regulatory considerations" is incorrect and the commenter did not provide any additional information to support these claims.

As a factual matter, EPA also disagrees with the assertions that Delaware's air quality has remained unchanged for 10 years. Since 2007, design values<sup>3</sup> in Delaware have consistently trended downward and the most recent data shows only three out of the seven State monitors are showing violations of the 2015 ozone NAAQS based on 2018 design values.<sup>4</sup> EPA reiterates that the purpose of an infrastructure SIP is not to demonstrate attainment of the NAAQS, but to ensure that a state's SIP has addressed basic program elements necessary to assure attainment, maintenance, and enforcement of the NAAQS. Therefore, the status of Delaware's air quality is not relevant to whether EPA should approve the revisions to Regulation 1125 or the State's infrastructure SIP submission.

#### **IV. Final Action**

EPA is approving Delaware's October 11, 2018 infrastructure SIP submission for the 2015 ozone NAAQS because it provides the basic program elements specified in CAA section 110(a)(2)(A), (B), (C), (D), (E), (F), (G), (H), (J), (K), (L), and (M) necessary to implement, maintain, and enforce the 2015 ozone NAAQS. This rulemaking action does not include action on CAA section 110(a)(2)(I) which pertains to the nonattainment planning requirements of part

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<sup>3</sup> A "design value" is a statistical metric that describes the air quality status of a given location relative to the level of the NAAQS.

<sup>4</sup> See <https://www.epa.gov/air-trends/air-quality-design-values#report>

D, title I of the CAA, because this element is not required to be submitted by the 3-year submission deadline of section 110(a)(1) of the CAA and will be addressed in a separate process. EPA is also approving Delaware's December 16, 2019 SIP submission which updates 7 DE Admin. Code 1125 in order to incorporate by reference the correct modeling guidelines contained in 40 CFR part 51, appendix W. EPA's approval of the infrastructure SIP submission with respect to section 110(a)(2)(K) is based on this revision to Delaware's SIP.

## **V. Incorporation by Reference**

In this document, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of section 3.10 of 7 DE Admin. Code, Regulation 1125, effective January 11, 2020. EPA has made, and will continue to make, these materials generally available through <https://www.regulations.gov> and at the EPA Region III Office (please contact the person identified in the **For Further Information Contact** section of this preamble for more information). Therefore, these materials have been approved by EPA for inclusion in the SIP, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.<sup>5</sup>

## **VI. Statutory and Executive Order Reviews**

### *A. General Requirements*

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided

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<sup>5</sup> 62 FR 27968 (May 22, 1997).

that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866.
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

#### *B. Submission to Congress and the Comptroller General*

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

#### *C. Petitions for Judicial Review*

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[Insert date 60 days after date of publication in the Federal Register]**. Filing a petition for reconsideration by the

Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action, pertaining to Delaware's section 110(a)(2) infrastructure requirements for the 2015 ozone NAAQS and revisions to Regulation 1125, may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

### **List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Ozone, Volatile organic compounds.

Dated: April 13, 2020

Cosmo Servidio,  
Regional Administrator,  
Region III.

40 CFR part 52 is amended as follows:

### **PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS**

1. The authority citation for part 52 continues to read as follows:

**Authority:** 42 U.S.C. 7401 *et seq.*

#### **Subpart I—Delaware**

2. Amend § 52.420:

a. In the table in paragraph (c), under “1125 Requirements for Preconstruction Review” by revising the entry for “Section 3.0”; and

b. In the table in paragraph (e) by adding the entry “Section 110(a)(2) Infrastructure

Requirements for the 2015 Ozone NAAQS” at the end of the table.

The revision and addition read as follows:

**§ 52.420 Identification of plan.**

\* \* \* \* \*

(c) \* \* \*

**EPA-APPROVED REGULATIONS AND STATUTES IN THE DELAWARE SIP**

<b>State regulation (7 DNREC 1100)</b>	<b>Title/subject</b>	<b>State effective date</b>	<b>EPA approval date</b>	<b>Additional explanation</b>
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<b>1125 Requirements for Preconstruction Review</b>				
* * *	* * *	* * *	* * *	* * *
Section 3.0	Prevention of Significant Deterioration of Air Quality	1/11/20	[insert date of publication in the Federal Register], [insert Federal Register citation]	Docket #: 2019-0663. Revised 3.10.1 and 3.10.2. Note: Previous Section 3.0 approval October 2, 2012.
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<b>Name of non-regulatory SIP revision</b>	<b>Applicable geographic area</b>	<b>State submittal date</b>	<b>EPA approval date</b>	<b>Additional explanation</b>
* * * * *	* * *	* * *	* * *	* * *
Section 110(a)(2) Infrastructure Requirements for the 2015 Ozone NAAQS	Statewide	10/11/18	[insert date of publication in the Federal Register], [insert Federal Register citation]	Docket #: 2019-0663. This action addresses CAA section 110(a)(2)(A), (B), (C), (D), (E), (F), (G), (H), (J), (K),

<b>Name of non-regulatory SIP revision</b>	<b>Applicable geographic area</b>	<b>State submittal date</b>	<b>EPA approval date</b>	<b>Additional explanation</b>
				(L), and (M)

[FR Doc. 2020-08241 Filed: 4/30/2020 8:45 am; Publication Date: 5/1/2020]