



## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R03-OAR-2023-0206; FRL-11037-01-R3]

#### **Air Plan Disapproval; Delaware; Removal of Excess Emissions Provisions**

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

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to disapprove certain portions of a state implementation plan (SIP) revision submitted by the State of Delaware, through the Delaware Department of Natural Resources and Environmental Control (DNREC), on November 22, 2016. The revision was submitted by Delaware in response to a national finding of substantial inadequacy and SIP call published on June 12, 2015, which included certain provisions in the Delaware SIP related to excess emissions during startup, shutdown, and malfunction (SSM) events. EPA is proposing disapproval of certain portions of the SIP revision and proposing to determine that such SIP revision does not correct the remaining deficiencies in Delaware's SIP identified in the June 12, 2015, SIP call in accordance with the requirements for SIP provisions under the Clean Air Act (CAA or Act). This action addresses the remaining deficiencies identified in EPA's June 2015 SIP call that have not yet been addressed by prior EPA actions on Delaware's November 2016 SIP submission.

**DATES:** Written comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R03-OAR-2023-0206 at [www.regulations.gov](https://www.regulations.gov), or via email to [gordon.mike@epa.gov](mailto:gordon.mike@epa.gov). For comments submitted at [Regulations.gov](https://www.Regulations.gov), follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from [Regulations.gov](https://www.Regulations.gov). For either manner of submission, EPA may publish any comment received to its public docket. Do not submit electronically any

information you consider to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit [www.epa.gov/dockets/commenting-epa-dockets](http://www.epa.gov/dockets/commenting-epa-dockets).

**FOR FURTHER INFORMATION CONTACT:** Mallory Moser, Planning & Implementation Branch (3AD30), Air & Radiation Division, U.S. Environmental Protection Agency, Region III, Four Penn Center, 1600 John F. Kennedy Boulevard, Philadelphia, Pennsylvania 19103. The telephone number is (215) 814-2030. Ms. Moser can also be reached via electronic mail at [moser.mallory@epa.gov](mailto:moser.mallory@epa.gov).

**SUPPLEMENTARY INFORMATION:** On November 22, 2016, DNREC submitted a revision to its SIP in response to a national finding of substantial inadequacy and SIP call published on June 12, 2015, which included certain provisions in the Delaware SIP related to excess emissions during SSM events.

## **I. Background**

### *A. EPA's 2015 SSM SIP Action*

On February 22, 2013, EPA issued a *Federal Register* notice of proposed rulemaking outlining EPA's policy at the time with respect to SIP provisions related to periods of SSM. EPA analyzed specific SSM SIP provisions and explained how each one

either did or did not comply with the CAA with regard to excess emission events.<sup>1</sup> For each SIP provision that EPA determined to be inconsistent with the CAA, EPA proposed to find that the existing SIP provision was substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call under CAA section 110(k)(5). On September 17, 2014, EPA issued a document supplementing and revising what the Agency had previously proposed on February 22, 2013, in light of a D.C. Circuit decision that determined the CAA precludes authority of the EPA to create affirmative defense provisions applicable to private civil suits. EPA outlined its updated policy that affirmative defense SIP provisions are not consistent with CAA requirements. EPA proposed in the supplemental proposal document to apply its revised interpretation of the CAA to specific affirmative defense SIP provisions and proposed SIP calls for those provisions where appropriate.<sup>2</sup>

On June 12, 2015, pursuant to CAA section 110(k)(5), EPA finalized “State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA’s SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction,” hereafter referred to as the “2015 SSM SIP Action.”<sup>3</sup> The 2015 SSM SIP Action clarified, restated, and updated EPA’s interpretation that SSM exemption and affirmative defense SIP provisions are inconsistent with CAA requirements. The 2015 SSM SIP Action found that certain SIP provisions in 36 states were substantially inadequate to meet CAA requirements and issued a SIP call to those states to submit SIP revisions to address the inadequacies. EPA established an 18-month deadline by which the affected states had to submit such SIP revisions. States were required to submit corrective revisions to their SIPs in response to the SIP calls by November 22, 2016.

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<sup>1</sup> State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction, 78 FR 12460 (February 22, 2013).

<sup>2</sup> 79 FR 55920 (September 17, 2014).

<sup>3</sup> 80 FR 33840 (June 12, 2015).

EPA issued a Memorandum in October 2020 (2020 Memorandum), which stated that certain provisions governing SSM periods in SIPs could be viewed as consistent with CAA requirements.<sup>4</sup> Importantly, the 2020 Memorandum stated that it “did not alter in any way the determinations made in the 2015 SSM SIP Action that identified specific state SIP provisions that were substantially inadequate to meet the requirements of the Act.”

Accordingly, the 2020 Memorandum had no direct impact on the SIP call issued to Delaware in 2015. The 2020 Memorandum did, however, indicate EPA’s intent at the time to review SIP calls that were issued in the 2015 SSM SIP Action to determine whether EPA should maintain, modify, or withdraw particular SIP calls through future agency actions.

On September 30, 2021, EPA’s Deputy Administrator withdrew the 2020 Memorandum and announced EPA’s return to the policy articulated in the 2015 SSM SIP Action (2021 Memorandum).<sup>5</sup> As articulated in the 2021 Memorandum, SIP provisions that contain exemptions or affirmative defense provisions are not consistent with CAA requirements and, therefore, generally are not approvable if contained in a SIP submission. This policy approach is intended to ensure that all communities and populations, including overburdened communities, receive the full health and environmental protections provided by the CAA.<sup>6</sup> The 2021 Memorandum also retracted the prior statement from the 2020 Memorandum of EPA’s plans to review and potentially modify or withdraw particular SIP calls. That statement no longer reflects EPA’s intent. EPA intends to implement the principles laid out in the 2015 SSM SIP Action as the agency takes action on SIP submissions, including this SIP submittal provided in response to the 2015 SIP call.

#### *B. Delaware’s Provisions Related to Excess Emissions*

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<sup>4</sup> October 9, 2020, memorandum “Inclusion of Provisions Governing Periods of Startup, Shutdown, and Malfunctions in State Implementation Plans,” from Andrew R. Wheeler, Administrator.

<sup>5</sup> September 30, 2021, memorandum “Withdrawal of the October 9, 2020, Memorandum Addressing Startup, Shutdown, and Malfunctions in State Implementation Plans and Implementation of the Prior Policy,” from Janet McCabe, Deputy Administrator.

<sup>6</sup> 80 FR 33840 at 33985.

With regard to the Delaware SIP, EPA's 2015 SSM SIP Action determined that the following regulations were substantially inadequate to meet CAA requirements: Title 7 of Delaware's Administrative Code (7 DE Admin. Code) 1104 Section (§) 1.5, 7 DE Admin. Code 1105 §1.7, 7 DE Admin. Code 1108 §1.2, 7 DE Admin. Code 1109 §1.4, 7 DE Admin. Code 1114 §1.3, 7 DE Admin. Code 1124 §1.4 and 7 DE Admin. Code 1142 §2.3.1.6.<sup>7</sup> These provisions provide a state official with the discretion, through the permitting process, to exempt sources from otherwise applicable SIP emission limitations or to set alternative limitations for periods of startup and shutdown. The rationale underlying EPA's determination that these provisions were substantially inadequate to meet CAA requirements, and therefore to issue a SIP call to Delaware to remedy the provisions, is detailed in the 2015 SSM SIP Action and the 2013 proposed SSM SIP Action.<sup>8</sup>

Delaware submitted a SIP revision on November 22, 2016, in response to the SIP call issued in the 2015 SSM SIP Action. In addition to addressing deficiencies identified in 7 DE Admin. Code 1104, 1105, 1109 and 1114, Delaware's submission noted that the deficiency highlighted in 7 DE Admin. Code 1108 §1.2 was corrected by a previous SIP revision, which was submitted to EPA on July 10, 2013. A final rulemaking which acted on this 2013 submission and remedied 7 DE Admin. Code 1108 §1.2 published in the *Federal Register* on July 11, 2022.<sup>9</sup> Delaware's submission also requested that EPA revise the Delaware SIP by removing 7 DE Admin. Code 1124 §1.4 and 7 DE Admin. Code 1142 §2.3.1.6 in their entirety, thereby removing these provisions, and their deficiencies, from the Delaware SIP. A final rulemaking which remedied 7 DE Admin. Code 1124 §1.4 and 7 DE Admin. Code 1142 §2.3.1.6 published in the *Federal Register* on February 14, 2023.<sup>10</sup>

Lastly, Delaware's submission requested that EPA revise the SIP to address the

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<sup>7</sup> See *Id.* at 33973.

<sup>8</sup> See *Id.* and 78 FR 12460 at 12495.

<sup>9</sup> 87 FR 41074.

<sup>10</sup> 88 FR 9399.

deficiencies identified in the following regulations: 7 DE Admin. Code 1104 §1.5, 7 DE Admin. Code 1105 §1.7, 7 DE Admin. Code 1109 §1.4, and 7 DE Admin. Code 1114 §1.3. Through this proposed rulemaking, EPA will be acting on these remaining provisions that were identified as deficient in the 2015 SSM SIP Action.

## **II. Summary of SIP Revision and EPA Analysis**

EPA has identified several significant concerns with Delaware's revisions to 7 DE Admin. Code 1104 §1.5, 7 DE Admin. Code 1105 §1.7, 7 DE Admin. Code 1109 §1.4, and 7 DE Admin. Code 1114 §1.3, which suggest that those parts of the 2016 SIP submission cannot be approved. Delaware's revisions to these sections in the SIP submission and EPA's corresponding analysis are summarized below. An underline/strikeout version of each regulation, showing the changes to the regulations or the changes requested to the Delaware SIP, is included in the docket for this rulemaking.<sup>11</sup>

### *A. Summary and Analysis of Revisions to 7 DE Admin. Code 1104 § 1.5 and 7 DE Admin. Code 1105 § 1.7*

The 2015 SSM SIP Action cited 7 DE Admin. Code 1104 (Particulate Emissions from Fuel Burning Equipment) §1.5 because it provides a potential exemption from the emission limit in 7 DE Admin. Code 1104 §2.1. The emission limit in 7 DE Admin. Code 1104 §2.1 currently contained in the EPA-approved SIP says, "no person shall cause or allow the emission of particulate matter in excess of 0.3 pound per million British Thermal Units (lb/MMBTU) heat input, maximum two-hour average." Section 1.5 creates a potential exemption to this limit during start-up or shutdown events by stating, "The provisions of this Regulation shall not apply to the start-up and shutdown of equipment which operates continuously or in an extended steady state when emissions from such equipment during start-up and shutdown are governed by an operation permit issued pursuant to the provisions of 2.0 of 7 DE Admin. Code 1102."

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<sup>11</sup> The revisions can be found on pages 4-7 of the PDF, which corresponds to pages 1-4 of Delaware's submitted document entitled "Revision to Satisfy EPA's State Implementation Plan (SIP) Call Related to Air Emissions During Equipment Start-up and Shutdown," which is in the docket for this action.

Delaware's SIP submission asked EPA to remove §1.5 and §2.1 of 7 DE Admin. Code 1104 from the EPA-approved Delaware SIP, but these provisions would remain in the Delaware regulations. In addition, Delaware revised 7 DE Admin. Code 1104 by adding a new section, §2.2, which states, "[n]o person shall cause or allow the emission of particulate matter in excess of 0.3 pound per million BTU heat input, maximum 30-day rolling average, from any fuel burning equipment." The SIP submission asked EPA to approve this new §2.2 into the Delaware SIP. While Delaware requested to remove §1.5, which contains the potential emission limit exemption during start-up and shutdown, from the EPA-approved SIP, the State also increased the two-hour averaging time found in §2.1 to 30 days while keeping the same 0.3 lb/MMBTU limit. Thus, the EPA-approved SIP would have a 0.3 lb/MMBTU 30-day rolling average limit, as set forth in the new §2.2, while Delaware's regulations would have both a limit of 0.3 lb/MMBTU two-hour average in §2.1, which could be changed for startup and shutdown purposes via §1.5, and a 0.3 lb/MMBTU 30-day rolling average limit in §2.2 that could not be changed via §1.5.

The 2015 SSM SIP Action also highlighted 7 DE Admin. Code 1105 (Particulate Emissions from Industrial Process Operations) §1.7 because it provides a potential exemption from the emission limit in 7 DE Admin. Code 1105 §2.1. The emission limit in 7 DE Admin. Code 1105 §2.1 currently contained in the EPA-approved SIP says, "No person shall cause or allow particulate emissions into the atmosphere from any source not provided for in subsequent sections of this Regulation in excess of 0.2 grains per standard cubic foot." Section 1.7 creates a potential exemption to this limit by stating, "The provisions of this Regulation shall not apply to the start-up and shutdown of equipment which operates continuously or in an extended steady state when emissions from such equipment during start-up and shutdown are governed by an operation permit issued pursuant to the provisions of 2.0 of 7 DE Admin. Code 1102." Delaware revised 7 DE Admin. Code 1105 by adding a new section, §2.2, which added an emission limit of 0.2 grains per standard cubic foot on a 30-day rolling average basis. Delaware's SIP

submission asked EPA to remove §1.7 and §2.1 from the EPA-approved SIP, but these provisions would remain in the Delaware regulations. Delaware's submission also asked EPA to approve the new §2.2 into the SIP. Again, although Delaware requested to remove §1.7, which contained the exemption identified in the 2015 SSM SIP Action, the State also asked EPA to approve into the SIP a newly created limit in §2.2 which adds an averaging period of 30 days to the existing 0.2 grains per cubic foot limit. Delaware does not explain how these differing emission limits in §2.1 and §2.2 would be reconciled.

Delaware explained that the increases in averaging times provide the opportunity for any source subject to these limits to compensate for higher emission rates during startup or shutdown events by emitting at lower rates during normal operations, so long as continuous compliance is demonstrated on a 30-day rolling average basis.

However, Delaware's increases in the averaging times for the particulate emission limits found in 7 DE Admin. Code 1104 and 1105 were not supported by a sufficient analysis explaining why these changes meet the requirements of section 110(l) of the CAA. The 2015 SSM SIP Action did not provide an opportunity for averaging times to be increased with no explanation or analysis of how the increased averaging time would or would not affect the national ambient air quality standards (NAAQS). In response to a comment regarding opacity, EPA noted in the 2015 SSM SIP Action that the removal of impermissible SSM exemptions should not be perceived as an opportunity to provide new de facto exemptions for these emissions by manipulation of the averaging time and the numerical level of existing opacity emission limitations.<sup>12</sup> This reasoning is not exclusive to opacity limitations, and also applies to the SIP-approved particulate limit 30-day rolling averaging times that Delaware has added to 7 De Admin. Code 1104 and 1105. During Delaware's public comment period on these regulatory changes, EPA submitted comments raising this and other concerns.<sup>13</sup> EPA noted that Delaware

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<sup>12</sup> 80 FR 33840 at 33921 (June 12, 2015).

<sup>13</sup> See EPA Comment #1 and EPA Comment #2 of Appendix B in State Submittal document.

did not address whether changes to the averaging period might affect the emissions of any criteria pollutant and recommended a more robust explanation and analysis be provided to support Delaware's conclusion in order to meet the requirements of section 110(l) of the CAA. The State responded to EPA's comments during the state regulatory comment period with minimal data to assert that the long-term average of emissions would be slightly lower with the implementation of the revised limit. The State also explained these limits were originally intended to protect the total suspended particulate (TSP) NAAQS. However, the particulate matter (PM) NAAQS replaced the TSP standard.<sup>14</sup> Therefore, these limits still play a role in protecting the existing PM NAAQS. Although Delaware is currently attaining the PM standards,<sup>15</sup> the State did not explain how this 30-day rolling average longer-term limit is still protective of the short-term NAAQS, such as the 24-hour PM standard. Delaware's response to EPA's comments did not adequately explain how the increased averaging time of the 30-day rolling average limits, without decreasing the limit itself, would be protective of the PM NAAQS, and instead noted, with minimal explanation, that this would not result in any increase in emissions on a tons per year basis. Delaware explained this using two scenarios. In the first scenario, Delaware referred to the emissions limits and startup/shut down exemptions that are currently SIP-approved. Delaware stated that if all steady-state hours of operation emit exactly at, or very near, the emissions limit, and emissions during startup/shut down events are exempt, then the long-term average of emissions would be slightly higher than the emission limit. In scenario two, they noted with the new 30-day rolling average limits and no exemptions for start-up or shut down events, emissions occurring during SSM events would have to be offset by emissions lower than the 30-day average emission limit during non-SSM operation. Delaware asserted, without any further explanation, that this would result in the long-term average of emissions to be no more than the 30-day average emission limit. Delaware explained, with

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<sup>14</sup> The PM<sub>2.5</sub> 24-hour standard is 35 micrograms per cubic meter ( $\mu\text{g}/\text{m}^3$ ). The PM<sub>2.5</sub> annual standard is 12.0  $\mu\text{g}/\text{m}^3$ . The PM<sub>10</sub> 24-hour standard is 150  $\mu\text{g}/\text{m}^3$ . See 40 CFR 50.6 and 50.7.

<sup>15</sup> See 40 CFR 81.308.

respect to annual emissions, the emissions calculation in scenario two is less than the emissions in scenario one. Therefore, Delaware believes this change is SIP strengthening.

EPA does not agree that the evaluation of the impacts of changing the averaging period for an emissions limit enacted to ensure the NAAQS is attained and protected can be limited only to consideration of emissions on an annual basis. The potential short-term effect of a sharp increase in particulate emissions during a startup or shutdown event on a shorter-term NAAQS limit, such as the PM<sub>10</sub> 24-hour standard, need to be examined and explained. Therefore, EPA does not consider the State's explanation of why the longer 30-day averaging period with the same emission limit are adequate to ensure continued attainment of the NAAQS. EPA's comments and Delaware's response can be found in the docket for this action.

Under CAA section 110(l), EPA cannot approve a plan revision "if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 7501 of [title 42]), or any other applicable requirement of this chapter."<sup>16</sup> The nature of the technical demonstration needed under section 110(l) to support approval of a SIP revision depends on the facts and circumstances of the SIP revision at issue. Based on the information available to EPA, EPA concluded that approval of these longer-term limits for a shorter-term NAAQS would not be consistent with the requirements of section 110(l). For EPA's analysis to address CAA section 110(l), EPA requested information from the State, but the State did not respond with the appropriate information. At a minimum, Delaware should have explained how this change would not impact maintenance of the PM NAAQS, as well as explain how this change meets the applicable legal requirements of the CAA, including both sections 110(l) and 193, as EPA suggested in their comments during Delaware's public comment period. Additionally, the submittal lacks an explanation of the maximum daily emissions that could occur with the new averaging time. There is also no information regarding the likely

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<sup>16</sup> A more detailed discussion of 110(l) can be found in the SO<sub>2</sub> air plan disapproval for Missouri at 87 FR 40759, 40760 (July 8, 2022).

frequency of startup and shutdown events, the likely magnitude of emissions during these events, and how many such events it would take in a 30-day period to exceed the new 30-day average. This information is relevant because it could be that one large startup or shutdown event with significant PM emissions could cause an exceedance of the PM NAAQS at a monitor. More frequent SSM events under a 30-day averaging period can cause the short-term emissions to increase, with a deleterious effect on shorter-term NAAQS. There is no explanation of how the NAAQS will continue to be protected with the new, longer averaging period.

Replacement SIP provisions should have averaging periods that are logically related to the NAAQS at issue. The 2015 SSM SIP Action notes, “For example, if a state chooses to modify averaging times in an emission limitation to account for higher emissions during startup and shutdown, the state would need to consider and demonstrate to the EPA how the variability of emissions over that averaging period might affect attainment and maintenance of a NAAQS with a short averaging period (e.g., how a 30-day averaging period for emissions can ensure attainment of an 8-hour NAAQS).” (80 FR 33840, 33947 (June 12, 2015)). Delaware has not explained how the 30-day average is reasonably related to the 24-hour PM NAAQS. The 2015 SSM SIP Action also notes that in some cases, extension of the averaging period and elevation of the numerical limitations may in fact be appropriate. In other cases, however, it may instead be appropriate to reduce the existing numerical opacity limitations, given improvements in control technology since the original imposition of the limits.<sup>17</sup> In either scenario, the appropriate analysis and justification is needed, such as specific calculations, including emissions distributions for sources in the state, backed up by operating data, that shows an extension of the averaging period would not violate the NAAQS. EPA has explained, for the sulfur dioxide (SO<sub>2</sub>) NAAQS, how an increase in the averaging period for SO<sub>2</sub> emission limits beyond the 8-hour standard used for the SO<sub>2</sub> NAAQS could be protective of the eight-hour SO<sub>2</sub> NAAQS. EPA’s 2014 SO<sub>2</sub> Nonattainment Guidance recommends that the emission limits be expressed as

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<sup>17</sup> 80 FR 33840 at 33912 (June 12, 2015).

short-term averages, but also describes the option to use emission limits with longer averaging times of up to 30 days so long as the state meets various suggested criteria.<sup>18</sup> The guidance recommends that—should states and sources utilize longer averaging times—the longer-term average limit should be set at an adjusted level that reflects a stringency comparable to the 1-hour average limit at the critical emission value (CEV) shown to provide for attainment that the plan otherwise would have set.<sup>19</sup> To preserve comparable stringency, it would be expected that adjusting the level would result in a lowering of the emission rate if lengthening the averaging time. In cases where longer-term average limits are appropriate, EPA envisions that both the short-term and longer-term limits in practice would require similar emission control levels and would commonly result in similar emission patterns.<sup>20</sup> Therefore, a longer averaging time can be appropriate to protect a shorter-term NAAQS but would require an in-depth analysis of what adjusted downward level would provide a comparable stringency. Delaware did not lower their emissions limit when increasing the averaging time, nor did they provide an in-depth analysis explaining how the same emission limit with a 30-day rolling averaging period is comparable in stringency to the same emission limit with a shorter, 3-hour averaging period previously found in their EPA-approved SIP.

To support their adoption of a 30-day averaging period, Delaware’s response to comments cited page 2 of EPA’s 1984 guidance memo, entitled “Averaging Times for Compliance with VOC Emission Limits - SIP Revision Policy,”<sup>21</sup> which states “Averaging periods must be as short as practicable and in no case longer than 30 days.” However, in the same memo, EPA specifically states that a demonstration must be made to show the use of long-term averaging will not jeopardize the NAAQS.<sup>22</sup> Though this guidance is geared towards volatile organic compounds (VOCs), the idea that retention of the same limit with a longer-term

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<sup>18</sup> Guidance for 1-hour Sulfur Dioxide (SO<sub>2</sub>) Nonattainment Area State Implementation Plans (SIP) Submissions, pp. 22 to 39.

<sup>19</sup> *Id.* at 26.

<sup>20</sup> *Id.* at 29.

<sup>21</sup> See the Averaging Times for Compliance with VOC Emission Limits - SIP Revision Policy Memorandum

<sup>22</sup> *Id.* at 2.

averaging period requires some demonstration explaining how the longer-term averaging time would not affect the NAAQS is applicable to the PM NAAQS too.

It is also important to recognize the broadness of the source categories for these two regulations - fuel burning equipment and industrial process operations. Given the broadness of these categories, significant consideration should be given to how a 30-day averaging period would even apply to the sources falling in these categories, especially the smaller source categories that do not operate regularly, such as emergency generators. The State's submittal also lacks an explanation of the type and number of Delaware sources which might be subject to these two regulations, and how the change in averaging time might affect their emissions and thus affect the NAAQS. Additional explanation is required to explain how the revisions would impact the sources subject to these regulations, and how these impacts would be unlikely to affect the NAAQS.

Lastly, Delaware noted that the emission limits that were highlighted in the 2015 SSM SIP Action would remain in the Delaware state regulations. Therefore, these short-term limits, along with the exemptions, are still applicable as a matter of state law only. According to Delaware, because the short-term limits are still effective at the state level, there is no change in the status quo of emissions, and this means air quality may remain unaffected. However, this is still problematic for several reasons. First, EPA cannot rely on state-only provisions when evaluating SIP submissions for compliance with CAA requirements. Presumably, Delaware asked that these emission limits be placed into the SIP because they were necessary to attain or maintain the NAAQS, and as discussed above, the effect on the NAAQS of replacing these shorter-term average SIP limits with longer-term averaging limits on attainment or maintenance of the NAAQS is not adequately explained. Second, removing the shorter-term emission limits from the EPA-approved SIP but keeping them in the state regulation, while also keeping the possibility for a state issued startup or shutdown exemption from these limits, creates the possibility that the current status quo of PM emissions may not be maintained. And, because the

shorter-term emission limit is no longer in the SIP, neither EPA nor citizens can enforce the shorter-term limit under CAA sections 113 and 304. In effect, Delaware could grant an exemption to emission limits which might be necessary to attain or maintain the NAAQS without going through the SIP revision process required by the CAA.

The concerns stated above suggest that the revisions to 7 DE Admin. Code 1104, Particulate Emissions from Fuel Burning Equipment, and 7 DE Admin. Code 1105, Particulate Emissions from Industrial Process Operations, cannot be approved. Further justification and information from the State is required to explain that these changes would not be inconsistent with CAA section 110(l), as well as explain how this change meets the applicable legal requirements of the CAA, including CAA section 193.

*B. Summary and Analysis of Revisions to 7 DE Admin. Code 1109 § 1.4 and 7 DE Admin. Code 1114 § 1.3*

The 2015 SSM SIP Action included 7 DE Admin. Code 1109 (Emissions of Sulfur Compounds From Industrial Operations) §1.4 because it provides a potential exemption from the emission limitations during startup and shutdown when the emissions during startup and shutdown are governed by an operation permit issued pursuant to §2.0 of 7 DE Admin. Code 1102. Delaware's SIP revision requests that the EPA remove 7 DE Admin. Code 1109 in its entirety from the Delaware SIP but retains this regulation, including the startup and shutdown exemption, at the state level. Delaware asserts that existing Federal requirements, such as the New Source Performance Standards (NSPS) adopted pursuant to CAA section 111, are adequate to ensure Delaware's maintenance of the sulfur-related NAAQS,<sup>23</sup> which Delaware is currently attaining.<sup>24</sup> Delaware believes that removal of this regulation from the SIP, but retention of the regulation at the state level, will not result in any increase in emissions on a ton per year basis, and that this revision comports with the EPA's interpretation of the CAA and is consistent with

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<sup>23</sup> The SO<sub>2</sub> 1-hour standard is 75 ppb. See 40 CFR 50.17

<sup>24</sup> See 40 CFR 81.308

the EPA's approach for attainment and maintenance of all NAAQS.

The 2015 SSM SIP Action included 7 DE Admin. Code 1114 (Visible Emissions), §1.3, because it provides a similar exemption from the visible emission (VE) limits during startup and shutdown when such emissions are governed by an operation permit issued pursuant to §2.0 of 7 DE Admin. Code 1102. Delaware's SIP revision requests that the EPA remove 7 DE Admin. Code 1114 in its entirety from the Delaware SIP but retains this regulation, including the exemption, in the state regulations. The State asserts that existing Federal requirements, such as the New Source Performance Standards (NSPS), regulate visible emissions from certain sources, while two other Delaware SIP regulations that regulate fine particulate matter and fine particulate matter precursors (7 DE Admin. Code 1108 and 1146) when combined with the NSPS, are adequate to ensure Delaware's attainment and maintenance of any particulate-related NAAQS. In addition, Delaware argues that there is no quantifiable relationship between visible emissions and fine particulate matter emissions. Delaware believes that removal of this regulation from the SIP will not result in any increase in emissions on a ton per year basis, and that because this revision removes from the SIP a provision allowing for excess emissions, the change therefore comports with the EPA's interpretation of the CAA and is consistent with the EPA's approach for attainment and maintenance of all NAAQS. Delaware's response provides no other explanation regarding how the revisions comply with the CAA.

To address CAA section 110(l), EPA believes it needs more information and analysis from the State to support EPA's approval of the removal of these two regulations from the Delaware SIP while keeping the regulations at the state level. Section 110(l) prohibits approval of a SIP revision if it would interfere with attainment or any other applicable requirement. Delaware's SIP revision merely states that the removal of this regulation from the SIP will not result in any increase in emissions on a ton per year basis but provides no further explanation or any technical demonstration to support this assertion, and EPA does not have information available that would support this conclusion. To support an approval decision that would be

consistent with section 110(l), Delaware should have provided information demonstrating that these changes would not impact maintenance of the NAAQS, as well as explain how this change meets the applicable legal requirements of the CAA, including section 193. During the state public comment period on this SIP revision, EPA submitted comments to Delaware raising these concerns.<sup>25</sup> EPA's comments and Delaware's response can be found in the docket for this action.

Despite EPA's comments, Delaware's SIP revision did not include an analysis to address CAA section 110(l). Instead, in regard to 7 DE Admin. Code 1109, the State responded that the sources' reliance on the NSPS is enough to protect the NAAQS. Specifically, Delaware noted there are two facilities in the state currently subject to 7 DE Admin Code 1109 -- the Chemours Red Lion sulfuric acid plant and the Delaware City Refinery -- and that each facility is subject to a more stringent NSPS. The Chemours Red Lion sulfuric acid plant is subject to 40 CFR part 60, subpart H, and the Delaware City Refinery is subject to 40 CFR part 60, subpart J. However, both subparts H and J allow for periods of excess emissions. The provisions at 40 CFR part 60, subpart A, General Provisions, are applicable to sources subject to 40 CFR part 60, subparts H and J. Subpart A of 40 CFR part 60 contains exemptions in both 40 CFR 60.8(c) and 60.11(c). The provisions at 40 CFR 60.11(c) note "The opacity standards set forth in this part shall apply at all times except during periods of startup, shutdown, malfunction, and as otherwise provided in the applicable standard." While 40 CFR 60.8(c), states "Operations during periods of startup, shutdown, and malfunction shall not constitute representative conditions for the purpose of a performance test nor shall emissions in excess of the level of the applicable emission limit during periods of startup, shutdown, and malfunction be considered a violation of the applicable emission limit unless otherwise specified in the applicable standard." Reliance on these NSPS, which include excess emission exemptions, is problematic in some cases for multiple reasons.

EPA acknowledges that many of the existing NSPS still contain exemptions from emission limitations during periods of SSM. The exemptions in these EPA regulations, however,

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<sup>25</sup> See EPA Comment #3 and EPA Comment #4 of Appendix B in State Submittal document.

predate the 2008 issuance of the D.C. Circuit decision in *Sierra Club v. Johnson*, in which the court held that emission limitations must be continuous and thus cannot contain exemptions for emissions during SSM events.<sup>26</sup> Since the 2008 *Sierra Club* decision, EPA has been working to remove or revise these SSM provisions as NSPS are reviewed.<sup>27</sup> Thus, some NSPS have been revised to address the 2008 *Sierra Club* decision, but some have not, and Delaware's sources may be subject to not-yet-updated standards. Despite the fact that EPA has not completed its work removing SSM provisions from every NSPS, the Agency is not willing to approve the removal of SIP approved regulations containing potential startup and shutdown exemptions, on the basis that affected sources would instead be subject to NSPS that also contain SSM exemptions.

Regarding 7 DE Admin Code 1114, the State responded to EPA's comment by noting that there is no discernable relationship between opacity and fine particulate matter emissions, and therefore this regulation cannot be relied on to prevent a source from impacting the NAAQS. EPA assumes Delaware meant that PM<sub>2.5</sub> cannot be seen as visible emissions because PM<sub>2.5</sub> is formed after leaving the stack or other source from the precursor emissions of nitrogen oxides (NO<sub>x</sub>), VOCs, SO<sub>2</sub>, and ammonia. However, PM<sub>10</sub> can be seen as visible emissions, and the observation of unusual levels of visible emissions could be an indication of a malfunction in the source itself or a pollution control device which may result in increased emissions of one or more of PM<sub>2.5</sub> precursors. Thus, Delaware's existing opacity limits may be a warning sign of potential increases in the precursor pollutants contributing to PM<sub>2.5</sub>, and therefore may play a role in preventing PM<sub>2.5</sub> NAAQS exceedances.

Delaware also cites to two other SIP approved regulations, 7 DE Admin. Code 1108 Sulfur Dioxide Emissions from Fuel Burning Equipment, and 7 DE Admin. Code 1146 EGU Multi-Pollutant Regulation, as being adequate to protect the PM NAAQS, along with

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<sup>26</sup> 551 F.3d 1019 (D.C. Cir. 2008).

<sup>27</sup> 80 FR 33840 at 33890-91 (June 12, 2015)

unidentified NSPS, but does not adequately explain how these regulations or the NSPS control emissions of PM<sub>2.5</sub> precursors during VE events. In addition, the State still did not provide an explanation of the number and type of Delaware sources subject to 7 DE Admin. Code 1114, how removing this regulation from the Delaware SIP but retaining it as a state regulation with the potential startup and shutdown exemption would affect their emissions and thus affect the NAAQS, and how the Delaware SIP would remain protective of the NAAQS. Further justification is required to explain that this change will not impact attainment and maintenance of the NAAQS, as well as explain how this change meets the applicable legal requirements of the CAA, including CAA section 193.

Lastly, Delaware noted that these regulations that were highlighted in the 2015 SSM SIP Action (1109 and 1114) would be retained at the state level. These state regulations allow Delaware to issue case-by-case permits via 7 DE Admin. Code 1102 to address emissions during startup and shutdown events. Therefore, Delaware would be relying on their own permits to regulate emissions during startup and shutdown events to protect the NAAQS during these periods. Because these regulations (1109 and 1114) provide a potential exemption from the emission limitations during startup and shutdown when the emissions during startup and shutdown are governed by a section 1102 operation permit, but would no longer be in the SIP, neither EPA nor citizens would be able to enforce this alternative limit for startup or shutdown under CAA sections 113 and 304. In effect, Delaware could grant an exemption to formerly federally enforceable emission limits which might be necessary to attain or maintain the NAAQS without justifying these revisions by going through the SIP revision process required by the CAA.

The concerns stated above suggest that the revisions to the Delaware SIP requesting removal of 7 DE Admin. Code 1109, Emissions of Sulfur Compounds From Industrial Operations, and 7 DE Admin. Code 1114, Visible Emissions, from the SIP cannot be approved.

### **III. Proposed Action**

EPA's review of this material indicates Delaware did not provide adequate justification to support the revisions to Delaware's SIP pertaining to 7 DE Admin. Code 1104, 1105, 1109 and 1114 requested in their 2016 SIP submission. Further justification is required to explain that these changes will not impact maintenance of the PM and SO<sub>2</sub> NAAQS. EPA is proposing to disapprove the portion of Delaware's November 22, 2016, SIP submission addressing 7 DE Admin. Code 1104 §1.5, 7 DE Admin. Code 1105 §1.7, 7 DE Admin. Code 1109 §1.4, and 7 DE Admin. Code 1114 §1.3. EPA is not reopening the 2015 SSM SIP Action and is only taking comment on the issues discussed in this document. These comments will be considered before taking final action.

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

Additional information about these statutes and Executive Orders can be found at [www.epa.gov/laws-regulations/laws-and-executive-orders](http://www.epa.gov/laws-regulations/laws-and-executive-orders).

##### *A. Executive Order 12866: Regulatory Planning and Review and Executive Order*

##### *13563: Improving Regulation and Regulatory Review*

This action is not a "significant regulatory action" as defined by Executive Order 12866 and was therefore not submitted to the Office of Management and Budget for review.

##### *B. Paperwork Reduction Act (PRA)*

This proposed action does not impose an information collection burden under the PRA because it does not contain any information collection activities.

##### *C. Regulatory Flexibility Act (RFA)*

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action merely proposes to disapprove a SIP submission as not meeting the CAA.

##### *D. Unfunded Mandates Reform Act (UMRA)*

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector.

*E. Executive Order 13132: Federalism*

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

*F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments*

This action does not have tribal implications as specified in Executive Order 13175. This action does not apply on any Indian reservation land, any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction, or non-reservation areas of Indian country. Thus, Executive Order 13175 does not apply to this action.

*G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks*

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive Order. This action is not subject to Executive Order 13045 because it merely proposes to disapprove a SIP submission as not meeting the CAA.

*H. Executive Order 13211, Actions that Significantly Affect Energy Supply, Distribution or Use*

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

*I. National Technology Transfer and Advancement Act*

This rulemaking does not involve technical standards.

*J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*

Executive Order 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, February 16, 1994) directs Federal agencies to identify and address “disproportionately high and adverse human health or environmental effects” of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. EPA defines environmental justice (EJ) as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.” EPA further defines the term fair treatment to mean that “no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies.”

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to review state choices, and approve those choices if they meet the minimum criteria of the Act. Accordingly, this proposed action disapproves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law.

The air agency did not evaluate environmental justice considerations as part of its SIP submittal; the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. EPA did not perform an EJ analysis and did not consider EJ in this action. Due to the nature of the action being taken here, this action is expected to have a neutral to positive impact on the air quality of the affected area. Consideration of EJ is not required as part of this action, and there is no information in the record inconsistent with the stated goal of E.O. 12898 of achieving environmental justice for people of color, low-income populations, and Indigenous peoples. This action merely proposes to disapprove a SIP submission as not meeting the CAA.

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

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Adam Ortiz,  
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Region III.

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