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**6560-50-P**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

**[EPA-R03-OAR-2013-0816; FRL-9953-90-Region 3]**

**Delaware; Disapproval of Air Quality Implementation Plan for Nonattainment New Source Review; Emissions Offset Provisions**

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

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is disapproving a State Implementation Plan (SIP) revision submitted by the Delaware Department of Natural Resources and Environmental Control (DNREC) for the State of Delaware on October 15, 2013. EPA is disapproving this action because the submittal does not satisfy the requirements of the Clean Air Act (CAA) or the federal implementing regulations, which establish the criteria under which the owner or operator of a new or modified major stationary source must obtain the required emission offsets from the same source or other sources in the same nonattainment area with limited exceptions under Delaware's nonattainment new source review (NSR) preconstruction permitting program. In addition, EPA is finalizing disapproval of the SIP revision because Delaware exercises authorities that are reserved for EPA under section 107 of the CAA. EPA is disapproving this revision to DNREC's SIP in accordance with the requirements of the CAA.

**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-2013-0816. All documents in the docket are listed on the <http://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 <http://www.regulations.gov>, or please contact the person identified in the “For Further Information Contact” section for additional availability information.

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## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

On May 26, 2015 (80 FR 30015), EPA published a notice of proposed rulemaking (NPR) for the State of Delaware. At the request of a commenter, EPA published a notice reopening the comment period for the NPR on July 15, 2015 (80 FR 41449), which allowed the public to comment on the May 26, 2015 NPR until August 14, 2015. In the NPR, EPA proposed disapproval of DNREC’s SIP revision because the submittal does not satisfy the requirements of CAA sections 172(c)(5) and 173(c)(1) or the federal implementing regulations in 40 CFR 51.165 and in 40 CFR part 51, appendix S,<sup>1</sup> which establish the criteria under which the owner or operator of a new or modified major stationary source must obtain the required emission offsets

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<sup>1</sup> 40 CFR 51.165(a)(3)(ii)(F) requires that “[p]rocedures relating to the permissible location of offsetting emissions shall be followed which are at least as stringent as those set out in 40 CFR part 51 appendix S section IV.D.”

“from the same source or other sources in the same nonattainment area” with limited exceptions, for Delaware’s nonattainment NSR preconstruction permitting program. In addition, EPA proposed disapproval of the SIP revision because Delaware exercises authorities that are reserved for EPA under section 107 of the CAA. The formal SIP revision was submitted by Delaware on October 15, 2013.

## **II. Summary of SIP Revision**

The SIP revision consists of changes to 7 DE Admin. Code 1125 (herein referred to as 7 DNREC 1125 or Regulation 1125), Requirements for Preconstruction Review, sections 2.5.5 and 2.5.6, Emission Offset Provisions. First, Delaware’s revised regulation enables sources in Delaware seeking NSR permits to obtain emission offsets from sources located in other areas, including areas outside of the State of Delaware, irrespective of the areas’ nonattainment status as compared to Delaware's nonattainment status for the same national ambient air quality standard (NAAQS). Second, the revised regulation also permits sources seeking NSR permits in Delaware to obtain emissions offsets from areas without a determination that the other areas “contribute to a violation” of the NAAQS in Delaware where a source seeking a NSR permit would be located, as required in CAA section 173 and its implementing regulations. The language in section 2.5.6 in 7 DNREC 1125 provides that sources can obtain emission offsets “in the nonattainment area which the source is located which shall specifically include any area in the States of Connecticut, Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and Wisconsin.”

Finally, the revised regulation language allows “the Department” to determine the areas in which

owners or operators can acquire emission offsets, regardless of the attainment status of those areas. Specifically, Delaware proposed language for the SIP that “the Department may consider any area in the following states as having the same nonattainment classification as the area of Delaware where the offsets are used: Connecticut, Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and Wisconsin.”

Other specific requirements of 7 DNREC 1125, Requirements for Preconstruction Review, sections 2.5.5 and 2.5.6, Emission Offset Provisions and the rationale for EPA’s disapproval are explained in the NPR and will not be restated here. *See* 80 FR 30015 (May 26, 2015). EPA received three sets of comments on the NPR. A summary of the comments and EPA’s responses are provided in Section III of this document.

### **III. Public Comments and EPA Responses**

During the reopened public comment period for the May 26, 2015 proposed rule, EPA received three sets of comments, which are summarized and addressed here. The comments were submitted by DNREC (herein referred to as Delaware), the New Jersey Department of Environmental Protection (herein referred to as New Jersey), and the Delaware State Chamber of Commerce (DSCC).

**Comment 1:** Generally, Delaware and New Jersey noted that unhealthy levels of ground-level ozone continue to impact their states years after the passage of the CAA and after they have implemented several rounds of voluntary and required emissions reduction strategies. The States allege ground-level ozone and precursor emissions are pervasive and readily transported.

Delaware and New Jersey stated that they cannot attain the 75 parts per billion (ppb) ozone NAAQS due to emissions from other states' pollution and not their own, as they have done all they can to control large and small sources throughout their States.

**Response 1:** EPA appreciates Delaware's and New Jersey's interest in addressing interstate transport of ozone pollution and other air quality concerns through implementation of the CAA requirements. While it is not relevant to the approvability of Delaware's revisions to 7 DNREC 1125, sections 2.5.5 and 2.5.6, EPA recognizes both Delaware and New Jersey have implemented various regulations to address the ozone NAAQS in their respective States. Delaware's and New Jersey's commitment, as well as other states' commitments, has had a beneficial impact on the air quality in areas designated nonattainment for the 2008 ozone NAAQS including the Philadelphia-Wilmington-Atlantic City Area, the PA-NJ-MD-DE Area (Philadelphia Area) and the Seaford, DE Area, for example. Currently, the Philadelphia Area is meeting the 2008 ozone NAAQS of 75 ppb with preliminary 2013-2015 air quality monitoring (AQM) data showing a design value of 75 ppb.<sup>2</sup> Additionally, on May 4, 2016, EPA made a final determination that the Seaford, DE marginal nonattainment area attained the 2008 ozone NAAQS by the applicable attainment date of July 20, 2015, with a design value of 74 ppb, pursuant to section 181(b)(2)(A) of the CAA and 40 CFR 51.1103. *See* 81 FR 26701.

**Comment 2:** Delaware discussed efforts they have made to "prod EPA" into addressing interstate transport through a petition under CAA section 126 and a joint state petition asking EPA to enlarge the Ozone Transport Region (OTR) under CAA section 176A. Delaware stated

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<sup>2</sup> The 2008 ozone NAAQS is an 8-hour ozone standard that was set at 75 ppb. *See* 73 FR 16436 (March 27, 2008).

that EPA has failed to respond to those petitions despite statutory deadlines.

**Response 2:** EPA acknowledges that Delaware previously submitted a CAA section 126 petition seeking emissions reductions from large electric generating units in a number of upwind states in order to reduce the contributions from their emissions to fine particulate matter (PM<sub>2.5</sub>) and ozone problems in Delaware. Additionally, EPA acknowledges that a number of states, including Delaware, submitted a petition under CAA section 176A requesting that the EPA add additional states to the OTR that was established under section 184 of the CAA. EPA is reviewing the petitions separately and is not acting on those petitions in this action. Delaware's comments are not germane to EPA's disapproval of the Delaware October 15, 2013 SIP revision and as such no further response is provided.

**Comment 3:** Generally, Delaware and New Jersey noted their extensive efforts to regulate sources in their respective states in order to attain the NAAQS. As a result, commenters expressed concerns about economic burdens imposed on their citizens, business, and industry locating in both Delaware and New Jersey. More specifically, Delaware asserted that it is more expensive for industry to locate in its State versus nearby locations which EPA has classified as "attainment/unclassifiable" despite evidence showing that those areas cause and contribute to Delaware's nonattainment status. The DSCC also noted it will become more expensive for new industry to locate within or to expand within Delaware compared to locating or expanding business in other areas that are attainment/unclassifiable especially as Delaware is small and its sources are well controlled.

**Response 3:** EPA appreciates the commenters' continued efforts to regulate sources in their

States to meet NAAQS, as well as their concerns with respect to economic burdens on citizens, business, and industry; however, this comment is not germane to EPA's current action disapproving Delaware's October 15, 2013 SIP revision. EPA evaluated Delaware's October 15, 2013 SIP revision submittal in accordance with requirements for NSR permitting programs in CAA sections 172 and 173 and in 40 CFR 51.165 and found the SIP revision submittal did not meet those requirements as discussed in the NPR. EPA notes that the NAAQS for each criteria air pollutant are established to provide protection for the nation's public health and the environment. Additionally, EPA's NSR program was specifically designed to allow for responsible economic growth while at the same time allowing states to achieve and maintain the NAAQS. As the comments are not germane to the reasons for EPA's disapproval of this SIP, no further response is provided.

**Comment 4:** Delaware discussed design values at some Delaware air quality monitors and stated that based in part upon EPA data, a large group of upwind states create the pollution that is causing Delaware's nonattainment and that those states should reduce their emissions in order for Delaware to attain and maintain the NAAQS.

**Response 4:** As noted in a previous response to comment, Delaware currently has areas attaining the 2008 ozone NAAQS, which would indicate that emissions reductions have occurred and have had a beneficial impact on Delaware's air quality.<sup>3</sup> Nonetheless, EPA readily acknowledges the role interstate transport of precursors to ozone pollution plays in the efforts of

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<sup>3</sup> Currently, the Philadelphia Area (which includes portions of Delaware) is meeting the 2008 ozone NAAQS of 75 ppb with preliminary 2013-2015 AQM data showing a design value of 75 ppb. Additionally, on May 4, 2016, EPA made a final determination that the Seaford, DE Marginal nonattainment area attained the 2008 ozone NAAQS by the applicable attainment date of July 20, 2105 with a design value of 74 ppb. 81 FR 26701.

downwind areas to attain and maintain the NAAQS. To that end, EPA has taken a number of steps to ensure implementation of CAA section 110(a)(2)(D), or the “good neighbor” provision, which addresses interstate pollution, including the NO<sub>x</sub> (oxides of nitrogen) SIP Call, the Clean Air Interstate Rule (CAIR), and the Cross-State Air Pollution Rule (CSAPR). Most recently, EPA promulgated an update to CSAPR specifically to address interstate pollution with respect to the 2008 ozone NAAQS with tightened NO<sub>x</sub> budgets designed to achieve emission reductions in upwind states before the moderate area attainment date of July 2018. *See* Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, Final Rule, (signed September 7, 2016, publication pending)<sup>4</sup>; Proposed Rule, 80 FR 46271 (August 8, 2015); and Notice of Data Availability (NODA), 80 FR 75706 (December 3, 2015). As noted above, however, comments regarding the interstate transport obligations of other states are not germane to EPA’s current action disapproving Delaware’s October 15, 2013 SIP revision.

**Comment 5:** Delaware noted that EPA went against the State’s designation recommendations and adopted smaller 2008 ozone nonattainment areas that include parts of Delaware but not certain upwind states, which triggered various provisions of the CAA in part D of title I, including the applicability of nonattainment NSR permitting, in each of the three counties in Delaware.

**Response 5:** As noted in our May 26, 2015 NPR, pursuant to section 107 of the CAA, New Castle and Sussex Counties, Delaware were designated by EPA for the 2008 ozone NAAQS as

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<sup>4</sup> Available at <https://www3.epa.gov/airmarkets/CSAPRU/Cross-State%20Air%20Pollution%20Rule%20Update%20for%20the%202008%20Ozone%20NAAQS%202060%20AS05%20FRM.pdf>.

“marginal” nonattainment under 40 CFR part 81, while Kent County was designated as “unclassifiable/attainment.” *See* 77 FR 30088 (May 21, 2012). New Castle County is a portion of the Philadelphia Area for the 2008 ozone NAAQS. Upon designation, a nonattainment area for ozone is required to meet the plan submission requirements under section 182 of the CAA (in subpart 2 of part D of title I of the CAA) for its nonattainment area classification (marginal, moderate, serious, severe, or extreme) as well as the general SIP planning requirements in sections 172 and 173 of subpart 1 of part D of title I. The State of Delaware is also part of the OTR, as established in CAA section 184(a). Therefore, at a minimum, the entire State of Delaware is required to meet the plan submission requirements for a moderate nonattainment area classification as specified in CAA sections 182(b) and 184(b), regardless of the attainment classification for areas in the State. Moderate area classification plan requirements include the emissions offset provisions within section 173 of the CAA and within its implementing regulations. Delaware’s comment regarding the size of the nonattainment area is irrelevant to whether Delaware’s regulations for NSR emissions offsets meet CAA requirements. The time for Delaware to challenge EPA’s ozone designations for the 2008 ozone NAAQS has passed. As explained in the NPR, Delaware’s revisions to 7 DNREC 1125, sections 2.5.5 and 2.5.6 on their face do not meet CAA requirements, and, thus, no further response is provided.

**Comment 6:** Delaware asserted that EPA did not consider its October 15, 2013 SIP revision submittal because EPA did not refer to any of it in the proposed disapproval. Delaware also stated its arguments in the comments were largely repeating information presented in the October 15, 2013 SIP submittal. Delaware stated NSR was its only tool to achieve further reductions of ozone within the state as Delaware has no ability to regulate sources in other states.

**Response 6:** EPA does not agree with Delaware’s characterization that EPA did not consider or evaluate the October 15, 2013 SIP revision submittal before publishing a NPR proposing disapproval of revisions to 7 DNREC 1125, Requirements for Preconstruction Review, sections 2.5.5 and 2.5.6, Emission Offset Provisions. While EPA did not cite to specific language or provisions within the October 15, 2013 SIP submission in the May 26, 2015 NPR, nothing in the CAA nor its implementing regulations requires EPA to cite to the SIP submittal when acting to approve or disapprove pursuant to section 110 of the CAA. *See* 80 FR 30015. EPA reviewed and evaluated all information submitted by Delaware to EPA in the October 15, 2013 SIP submittal and compared that information and the regulations to the requirements of the CAA and its implementing regulations. As discussed in the NPR, EPA found that 7 DNREC 1125, sections 2.5.5 and 2.5.6 do not meet the clear requirements of CAA sections 172(c)(5) and 173(c)(1) nor the federal implementing regulations in 40 CFR 51.165 and part 51, appendix S, section IV.D for offsets to come from areas with the same or higher attainment classifications and from areas that contribute to nonattainment in the area in which a source is locating.<sup>5</sup> Additionally, as noted in the NPR, EPA proposed to disapprove the Delaware SIP revision because Delaware’s regulations attempt to exercise authorities that are reserved solely for EPA in CAA section 107 by treating certain upwind areas as ozone nonattainment areas regardless of EPA’s classification of those areas for attainment of the ozone NAAQS. EPA is required to fully consider a SIP revision submittal upon making a decision to approve or disapprove a SIP submittal revision. Here, EPA considered Delaware’s submission but found the regulations

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<sup>5</sup> 40 CFR 51.165(a)(3)(ii)(F) requires that “[p]rocedures relating to the permissible location of offsetting emissions shall be followed which are at least as stringent as those set out in 40 CFR part 51 appendix S section IV.D.”

clearly inconsistent with CAA requirements in part D of title I of the CAA for offset provisions. Regarding Delaware's comment about needing NSR to reach attainment, the CAA provides many tools to assist states with attaining and maintaining the NAAQS. EPA appreciates Delaware's in-state implementation efforts, and EPA will continue to work with other states to address interstate transport of emissions through SIPs and other federal programs.

**Comment 7:** Delaware asserted that EPA erroneously concluded that Delaware's revised regulation does not comply with the requirements in CAA sections 172(c)(5) and 173(c)(1) and the implementing regulations in 40 CFR 51.165 and part 51, appendix S. Delaware stated that CAA section 116 allows states to adopt rules that are not exactly the same as the federal regulations, as long as they are not less stringent. Delaware argues its regulations in 7 DNREC 1125, sections 2.5.5 and 2.5.6 are more stringent than EPA's requirements in CAA 172 and 173 and in the implementing regulations based on emission reductions, environmental outcomes, and environmentally beneficial economic growth. Delaware further asserted the actual application of its regulations for offsets results in greater reductions of criteria pollution than would be the case if EPA's rules were applied.

In agreement with Delaware's stringency assertions, New Jersey stated that EPA has no published guidance on procedures for demonstrating that state-specific provisions are at least as stringent as federal provisions. New Jersey asserts that a demonstration that the implementation of state provisions results in air quality benefit over a federal provision that is designed to ensure new source emissions are controlled, that more offsetting emissions reductions will be obtained, and that there will be more progress towards achievement of the NAAQS is a reasonable basis to

conclude that the state provision is at least as stringent as the federal provisions.

**Response 7:** EPA disagrees that Delaware has established regulations in 7 DNREC 1125, sections 2.5.5 and 2.5.6 that are more stringent than the federal requirements for offsets in CAA section 173 and 40 CFR 51.165 based on the alleged greater emission reductions potential offered by Delaware's revisions. While EPA may not have specific guidance on procedures for demonstrating that state-specific provisions are at least as stringent as federal provisions, neither Delaware nor New Jersey provided a compelling argument as to why the changes in Delaware's emission offset provisions are more beneficial to air quality and more stringent. In summary, Delaware provided an example from applying the current federally required (SIP) offset requirements of a theoretical source which could locate in Delaware, where lowest achievable emission rate (LAER) applies, which would need to acquire emission offsets from local emitters at a high cost because offsets are scarce. Delaware posits that such a source might thus choose to locate instead in an attainment area in another state, which would presumptively not otherwise require LAER (and presumptively not require similar emission reductions as Delaware does) to avoid buying offsets and would then potentially contribute its emissions to Delaware's nonattainment. Under that scenario, Delaware foresees higher emission of ozone precursors to impact the State. Delaware claimed that under its revised regulation (7 DNREC 1125, sections 2.5.5 and 2.5.6) such a source could still locate in Delaware, apply LAER resulting in lower emissions, and could obtain emission offsets from West Virginia at a much lower cost because emission offsets are more affordable per ton in some upwind states and Delaware asserts that EPA's 1997 ozone NAAQS modeling demonstrates that West Virginia emissions contribute to Delaware's nonattainment. Delaware relies on this example to support its argument that its

revised regulation for offsets could produce greater reduction in ozone precursors and correspondingly be more stringent than federal requirements (because such a hypothetical source would apply LAER as well as buying offsets if locating in Delaware with this revised regulation versus locating outside Delaware and neither installing LAER nor purchasing offsets if federal rules for offsets were applied). While EPA acknowledges that Delaware's hypothetical example could plausibly result in the emissions reductions Delaware claims, Delaware has not provided any evidence, argument, or facts to support the contention that its revised regulation 7 DNREC 1125, as presently written, would consistently result in greater reductions impacting Delaware. It is equally plausible such sources could locate in Delaware and purchase offsets within Delaware providing greater reductions reducing ozone within Delaware as Delaware sources do impact the State most directly. *See* 80 FR 46271 (EPA's NODA). Delaware has not provided any evidence that its expanded offset program would always yield greater ozone reduction within the State versus reductions achieved from applying the federal offset requirements. While emissions reductions from offsets obtained from upwind sources pursuant to Delaware's revised regulation 7 DNREC 1125 may be equivalent in raw tons to offsets obtained within Delaware, Delaware provided no evidence that emission reductions from an upwind state would provide greater ozone reducing benefits within Delaware especially if offsets are obtained from upwind states a great distance from Delaware such as Wisconsin (a state included within the revised regulation).

EPA is required by CAA section 110(k) and (l) to evaluate proposed SIP revisions for compliance with the CAA and its implementing regulations. While states may adopt regulations that differ from federal requirements as long as they are as stringent per CAA section 116, Delaware made no such demonstration that its regulations are as stringent as EPA's requirements

nor provide any greater ozone reducing benefit. In addition, Delaware's regulations at 7 DNREC 1125, sections 2.5.5 and 2.5.6 do not meet and are not equivalent to federal requirements for offsets. As discussed in detail in the NPR, Delaware's submittal does not on its face comport with the requirements of CAA sections 172(c)(5) and 173(c)(1) and the implementing regulations in 40 CFR 51.165 and part 51, appendix S. Delaware's regulations allow the acquisition of offsets from areas that may not be of the same or higher nonattainment status and may not be from areas found to contribute to a violation of the 2008 ozone NAAQS in Delaware.

**Comment 8:** Delaware stated its regulations allow the State to determine that offsets can be acquired in areas that EPA has previously determined significantly contribute to Delaware's nonattainment in modeling for CSAPR for the 1997 ozone standard, thus allowing economically-beneficial growth and additional reductions to out-of-state impacts on Delaware's air quality. Delaware asserted EPA's regulations for offsets deter environmentally beneficial economic growth in Delaware and result in more emissions impacts on Delaware.

**Response 8:** As stated previously in response to a prior comment, EPA's NSR program was designed to allow for responsible economic growth while at the same time allowing states to achieve and maintain the NAAQS. As stated in the NPR, Delaware's October 15, 2013 SIP revision seeks to expand the geographical area in which owners and operators of new or modified major stationary sources may obtain emissions offsets, regardless of the area's attainment classification for the ozone NAAQS and without specific requirements that the area "contribute to violation" of the ozone NAAQS in the area in which a new or modified source is locating or located. The contribution data calculated to support the promulgation of CSAPR

evaluated whether emissions from an entire state, and from all source categories, would contribute to projected nonattainment in downwind states, but the air quality modeling did not separately evaluate contribution from nonattainment areas in upwind states to downwind air quality problems. Thus, regardless of the levels of contribution calculated from other states to air quality in Delaware, the State's regulations do not satisfy the minimum statutory criteria for demonstrating that emissions offsets (1) are obtained from another nonattainment area of equal or higher classification than the area in which the source is located, and (2) that emissions from such other nonattainment area contribute to a violation of the NAAQS in the nonattainment area where the new or modified source is locating or located. Moreover, contrary to Delaware's assertions, its regulations allow acquisition of offsets from more states than just states that Delaware contends contribute to ozone nonattainment in Delaware for the 1997 or 2008 ozone NAAQS based on modeling conducted to support CSAPR. Even if some of the states Delaware identified as contributing to its nonattainment for prior ozone NAAQS, Delaware's regulations allow acquisition of offsets from those states without requiring that the areas in which offsets may be attained in those states to have the same or higher attainment classification. In addition, the CSAPR modeling Delaware cites in its comments was conducted in 2011 and does not consider subsequent changes in emissions or contributions from sources in upwind states. As the modeling is not based on current emissions or contribution levels from other states, it cannot be used to meet the requirement for showing contribution to nonattainment in Delaware at the time a source would be seeking offsets for a NSR permit required under 7 DNREC 1125. EPA is disapproving this SIP revision for two reasons: (1) Delaware's emissions offset provision language does not comport with the specific requirements under CAA sections 172(c)(5) and

173(c)(1) or the federal implementing regulations in 40 CFR 51.165 and appendix S; and, (2) Delaware lacks legal authority to designate an area as nonattainment under CAA section 107(c) and (d). As stated previously, the economic impacts are not relevant to whether Delaware's regulations meet CAA requirements, and, thus, EPA provides no further response to that issue.

**Comment 9:** Delaware asserted that EPA incorrectly concluded that Delaware's SIP revision submittal did not include any information supporting Delaware's determination that emissions in the area specified in the regulation "contribute to a violation" for the 2008 ozone NAAQS. CAA section 173(c)(1) requires that all emissions offsets must come from an area which contributes to a violation of the NAAQS where the source seeking a permit is located. Delaware pointed to EPA modeling that supported the CSAPR for the 1997 ozone NAAQS of 80 ppb and in its evaluation asserted that there are minimal differences between the 1997 and 2008 ozone NAAQS modeling. Delaware claimed it evaluated EPA's 1997 modeling based on a threshold of 0.75 ppb, which is 1 percent of the 2008 ozone NAAQS. The State notes that the level of the ozone NAAQS standards have no bearing on the actual location of emissions and the movement of the air, concluding that the 1997 modeling is pertinent and reliable.

**Response 9:** EPA disagrees with Delaware's hybrid use of EPA's CSAPR modeling conducted to evaluate interstate transport for the 1997 ozone NAAQS to support its revised rule language in 7 DNREC 1125 sections 2.5.5 and 2.5.6. As discussed earlier, the CSAPR modeling for evaluating interstate transport with respect to the 1997 standard does not consider present-day, current emission levels or contributions from sources throughout the country. Moreover, the CSAPR modeling was also not completed for a source-specific situation where, among other

things, a source needs to show that the particular emission offsets it is obtaining contribute to a violation of the NAAQS in the nonattainment area where the major new or modified source is currently seeking to locate. Thus, Delaware cannot rely on this older modeling which used emissions data prior to 2011 to support a “contribution” argument for a source seeking to use offsets for a NSR permit in the future. Finally, even if the CSAPR modeling data was a relevant metric by which to evaluate contribution for purposes of obtaining offsets, as noted above, the Delaware regulations do not constrain sources to only acquiring offsets from those states identified as impacting Delaware in the modeling analysis or otherwise comply with the statutory requirement that such offsets be obtained from an area with the same or higher attainment classification.

Accordingly, Delaware’s reliance on EPA’s CSAPR modeling is insufficient to support approval of its offset regulations, as the State does not take into account the complexities that a full modeling analysis requires to make the demonstration required by the statute; does not consider present day emissions and contributions from states where a potential new source may seek offsets; and, does not meet the CAA requirements for an owner or operator of a source requiring emission offsets as discussed in the NPR and previous response to comments.

**Comment 10:** Delaware believes EPA erroneously concluded that Delaware is trying to exercise authorities reserved for EPA under CAA section 107(c) and (d) by treating certain areas as ozone nonattainment areas regardless of EPA’s classification of those states for attainment of the ozone NAAQS and is therefore disapproving the SIP revision because it’s not in accordance with provisions of the CAA. Delaware asserted that EPA misinterpreted its actions because

CAA section 107(c) and (d) are provisions in which EPA designates an area as nonattainment (in doing so imposing substantive nonattainment requirements on that area) and Delaware's revisions to its offset regulation do not impose any such planning requirements on any other state. According to Delaware, its regulations only identify "other areas as areas where Delaware sources can obtain emissions offsets, and which is the area that Delaware demonstrated is more stringent than the minimum area defined in the underlying federal requirements."

**Response 10:** As noted in the NPR, EPA disagrees with Delaware's attempt to treat entire states as an area of equal or higher nonattainment classification for the ozone NAAQS, regardless of their designation by EPA under CAA section 107, in an effort to allow sources to obtain emission offsets from those states. Delaware's SIP revision submittal of 7 DNREC 1125 sections 2.5.5 and 2.5.6 does not meet the requirements in CAA section 173(c), 40 CFR 51.165(a)(3)(ii)(F) and appendix S, section IV.D.1, because the identified sections allow emissions offsets to be used from areas not designated by EPA pursuant to CAA section 107 as an area of equal or higher nonattainment classification for any ozone NAAQS and do not address contribution requirements in the CAA and its implementing regulations. In an attempt to broaden where sources can obtain emissions offsets, Delaware essentially created a large multi-state area in which sources locating in Delaware can automatically obtain emission offsets, without fully evaluating the impacts on air quality. This action circumvents the basic requirements of CAA section 173(c), 40 CFR 51.165(a)(3)(ii)(F) and appendix S, section IV.D.1. The use of emissions offsets under a state's NSR permit program should be evaluated on a case-by-case basis whereby the major new or modified source ensures that offsets obtained from one source, in a nonattainment area of equal or higher nonattainment classification, are actually

contributing to a violation of the NAAQS in the nonattainment area where the major new or modified source is locating. Delaware's attempts to treat more states as nonattainment areas equal to Delaware's attainment classifications regardless of how EPA has designated these other states is not in accordance with the requirements of the CAA and the federal implementing regulations, as EPA stated previously. Delaware cannot avoid this improper exercise of designation authority under CAA 107 merely by saying its regulation treating areas as nonattainment does not impose SIP planning obligations on these other states. Thus, EPA disagrees with Delaware's argument it did not usurp authority under CAA 107 because Delaware's regulation attempts to exercise authorities that are reserved solely for EPA in CAA section 107 by treating certain upwind areas as ozone "nonattainment areas" to meet the requirement of "equal or higher nonattainment classification" for emission offset purposes regardless of EPA's classification of those areas for attainment of the ozone NAAQS.

**Comment 11:** Delaware asserted that the state areas specified in its revised regulation (7 DNREC 1125) are the primary cause of its ozone problem and there is no substantive difference between the areas indicated by Delaware and the areas EPA has designated as marginal nonattainment for ozone as those areas still contribute to Delaware's ozone issues. As an example, Delaware stated that EPA designated Queen Anne's County, Maryland, as "attainment/unclassifiable" rather than "moderate nonattainment" even though reductions in ozone precursors in that area would assist Delaware with attaining the NAAQS, because the area is directly upwind of Sussex County, Delaware. Delaware also stated that the only purpose of emission offsets is to reduce pollution that impacts the nonattainment area and that there is no practical reason not to accept reductions in these areas that directly impact and cause Delaware's

nonattainment problem with ozone.

**Response 11:** EPA appreciates Delaware’s interest in regulating sources in other states in order to meet the ozone NAAQS, so long as it is done in accordance with the CAA; however, this comment is not relevant to EPA’s current action disapproving Delaware’s October 15, 2013 SIP revision. CAA section 173(c) specifies offset requirements for owners and operators of new or modified major stationary sources. Specifically, section 173(c)(1) requires that: “the owner or operator of a new or modified major source may comply with any offset requirement in effect under this part for increased emissions of any air pollutant *only* by obtaining emission reductions of such air pollutant from the same source or other sources in the *same nonattainment area*, except that the State may allow the owner or operator of a source to obtain such emission reductions in another nonattainment area *if* (A) the other area has *an equal or higher nonattainment classification* than the area in which the source is located *and* (B) emissions from such other area *contribute* to a violation of the national ambient air quality standard in the nonattainment area in which the source is located (emphasis added).”

The CAA clearly establishes two separate criteria to permit a source to obtain offsets in “another nonattainment area.” Delaware’s example of Queen Anne’s County, Maryland, is inconsistent with the CAA as the County is not even “another nonattainment area”, much less a nonattainment area that “has *an equal or higher nonattainment classification* than the area in which the source is located.” Delaware and other states can allow owners and operators to obtain emissions offsets from any other nonattainment area, so long as the applicable CAA requirements are met. Delaware cannot authorize owners and operators of a source in the State

to obtain emission offsets from any area where Delaware decides it would attain some emissions reduction benefit as it is in direct conflict with the clear requirements in the CAA.

**Comment 12:** Delaware questioned EPA's legal rationale that a disapproval of Delaware's SIP submission would not trigger a federal implementation plan (FIP) obligation. Delaware amended its Regulation 1125, effective September 11, 2013, by replacing Regulation 1125 section 2.5.5 and adding a sentence to section 2.5.6 to effectuate the modification to the offset provision. As the prior regulation which EPA had approved for the SIP is no longer in place, Delaware stated it did not understand EPA's legal rationale to not issue a FIP.

**Response 12:** As previously noted in the NPR, under CAA section 179(a)(2), final disapproval pursuant to CAA section 110(k) of a submission that addresses a requirement of a part D plan (CAA sections 171-193), starts a sanction clock. Under CAA section 110(c)(1)(A), EPA also has an obligation to promulgate a FIP where EPA finds the SIP does not meet CAA criteria under CAA section 110(k)(1). Delaware's SIP revision addresses a part D Plan requirement for a NSR permitting program, but Delaware presently has a fully-approved NSR permit program in the approved Delaware SIP. *See* 77 FR 60053 (October 2, 2012). Even though Delaware's underlying State regulation is now different, the approved Delaware SIP contained in 40 CFR 52.420 still contains the previously-approved NSR program and will continue to do so until EPA approves a SIP revision either replacing the program or removing it without replacement (neither of which has occurred). Thus, at this time, there is no deficiency in Delaware's SIP with regards to NSR permitting, and Delaware's approved SIP continues to meet CAA NSR criteria. Therefore, as a result of this final action to disapprove Delaware's October 15, 2013 SIP

revision, no sanctions under CAA section 179 will be triggered, and EPA has no obligation to promulgate a FIP under CAA section 110(c). As stated in the NPR, EPA expects Delaware to implement the EPA-approved NSR permitting program contained in the SIP, including the offsets requirements in the previously-approved version of Regulation 1125, and to revise its State provisions at section 2.0 of Regulation 1125 accordingly to address CAA 173(c)(1), 40 CFR 51.165, and part 51, appendix S, section IV.D for offsets.<sup>6</sup>

**Comment 13:** Multiple comments were made in support of Delaware’s proposed SIP revision, urging EPA to approve Delaware’s SIP revision submittal, noting that it would encourage upwind states to reduce their emissions and help states attain and maintain the federal 75 ppb ozone NAAQS.

**Response 13:** EPA appreciates the commenter’s support for Delaware and the interest in improving air quality by reducing emissions from upwind states; however, all states are required to have regulations in place that meet the specific requirements of the CAA and federal implementing regulations, as noted in our responses to comments and in the NPR. EPA is disapproving Delaware’s October 15, 2013 SIP revision submittal because it does not meet the requirements of the CAA and federal implementing regulations. Those requirements will not be restated here. *See* 80 FR 30015. While EPA appreciates Delaware’s interest in securing upwind emission reductions, such concerns are not relevant to our review of Delaware’s regulations regarding acquisition of offsets.

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<sup>6</sup> EPA approved Regulation 1125 for the Delaware SIP on October 2, 2012 (77 FR 60053) including the emission offset requirements that address requirements in CAA 173(c)(1), 40 CFR 51.165, and part 51, appendix S, section IV.D. The State effective date of this version of Regulation 1125 was February 11, 2012, and it is this version of Regulation 1125 that EPA expects Delaware to implement.

**Comment 14:** New Jersey asserted that expanding the geographical area for offsets is good for air quality as it encourages reductions in upwind emissions. New Jersey further noted that federal requirements for offsets encourage a transported pollution burden on downwind states to get worse and that new or modified major sources in New Jersey and Delaware are required to install controls that represent LAER technology and seek offsets from limited areas while sources in upwind states would not be held accountable for their pollution transported to downwind states. New Jersey asserted that EPA should allow sources to obtain offsets from upwind states that trigger nonattainment and the offset requirements in downwind states based on if the upwind state significantly contributes to the downwind nonattainment, giving New Jersey and Delaware a broader geographic area from which to obtain emissions offsets, while removing emissions offsets from being used by sources located in upwind states, making more offsets available for economic growth in New Jersey and Delaware.

**Response 14:** EPA appreciates New Jersey's comments and its interest in securing upwind reductions in ozone precursors as well as reductions in ozone precursors within New Jersey and Delaware. EPA has explained in the NPR and in prior responses to comment why Delaware's regulations for offsets do not meet federal NSR requirements in the CAA and its implementing regulations. While upwind reductions and additional availability of offsets within Delaware are important concerns, they are not relevant criteria for whether Delaware's regulations address CAA NSR requirements. Thus, EPA provides no further response to these comments.

**Comment 15:** New Jersey commented that current air monitoring data shows that New Jersey and Delaware are in nonattainment and/or have maintenance issues with the 75 ppb ozone

NAAQS and New Jersey also has one site in the northern New Jersey multi-state nonattainment area that cannot attain the 84 ppb ozone NAAQS; therefore, New Jersey states it is imperative that downwind states be able to reduce the amount of offsets available in upwind states.

**Response 15:** EPA appreciates New Jersey's concern with attaining and maintaining old and new ozone NAAQS and has recently promulgated the CSAPR Update Rule specifically to address interstate transport with respect to the 2008 ozone NAAQS with tightened ozone-season NO<sub>x</sub> budgets designed to achieve emission reductions in upwind states. In response to New Jersey's concern with attaining and maintaining the ozone standards since publication of the NPR on May 26, 2015, we note that the Philadelphia Area is meeting the 2008 ozone NAAQS of 75 ppb with preliminary 2013-2015 AQM data showing a design value of 75 ppb. Additionally, on May 4, 2016, EPA made a final determination that the Seaford, DE marginal nonattainment area attained the 2008 ozone NAAQS by the applicable attainment date of July 20, 2015 with a design value of 74 ppb. *See* 81 FR 26701. EPA is working with the states to address transport of ozone pollution so downwind states can attain and maintain the ozone NAAQS.

**Comment 16:** DSCC referenced EPA's recently promulgated CSAPR, effective January 1, 2015, noting that Delaware is not considered an upwind contributor to downwind states, and, thus, is not even subject to CSAPR.

**Response 16:** EPA thanks DSCC for its comment with respect to CSAPR applicability. While DSCC's characterization of CSAPR applicability in Delaware may be accurate, this comment is not relevant to EPA's disapproval of Delaware's October 15, 2013 SIP revision submittal revising 7 DNREC 1125, sections 2.5.5 and 2.5.6. It is noted that while emission sources in

Delaware are not subject to the requirements of CSAPR, the State of Delaware is expected to experience improved air quality as a result of its full implementation.

**Comment 17:** DSCC commented that, in 2008, EPA designated portions of Delaware as marginal nonattainment for ground-level ozone, which triggers nonattainment provisions of the CAA. DSCC claims Delaware is left with a requirement to attain, but no ability to regulate the out-of-state sources that cause its nonattainment problems.

**Response 17:** EPA agrees with DSCC's comment that in 2008 EPA designated portions of Delaware as marginal nonattainment for ozone, specifically as noted in the NPR disapproving Delaware's October 15, 2013 SIP submittal revising 7 DNREC 1125, sections 2.5.5 and 2.5.6 and again in these responses to comment. While EPA appreciates DSCC's concerns, such concerns are not relevant to our disapproval of Delaware's regulations regarding acquisition of offsets. Transport of ozone precursors from one state to another is being addressed by states and EPA under other provisions of the CAA.

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

Pursuant to CAA section 110(k)(3), EPA is disapproving Delaware's October 15, 2013 SIP revision consisting of revisions to DNREC's regulations related to nonattainment NSR preconstruction permit program requirements for emission offsets in the State of Delaware. Specifically, Delaware's revised Regulation 1125 which Delaware submitted as a SIP revision sought to expand the geographical area in which owners and operators of new or modified major stationary sources may obtain emissions offsets, regardless of the area's attainment classification for the ozone NAAQS and without specific requirements that the area "contribute to violation"

of the ozone NAAQS in the area in which a new or modified source is locating or located. EPA is disapproving this SIP revision for two reasons: (1) Delaware's proposed emissions offset provision language does not comport with the specific requirements under CAA sections 172(c)(5) and 173(c)(1) or the federal implementing regulations in 40 CFR 51.165 and appendix S; and, (2) Delaware lacks legal authority to designate an area as nonattainment under CAA section 107(c) and (d).

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

Additional information about these statutes and Executive Orders can be found at <http://www2.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 and was therefore not submitted to the Office of Management and Budget (OMB) for review.

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

This action does not impose an information collection burden under the PRA because this action does not impose additional requirements beyond those imposed by state law.

### **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 will not impose any requirements on small entities beyond those imposed by state law.

#### **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. This action does not impose additional requirements beyond those imposed by state law. Accordingly, no additional costs to state, local, or tribal governments, or to the private sector, will result from this action.

#### **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: Coordination With Indian Tribal Governments**

This action does not have tribal implications, as specified in Executive Order 13175, because the SIP EPA is disapproving would not apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction, and will not impose substantial direct costs on tribal governments or preempt tribal law. 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 does

not impose additional requirements beyond those imposed by state law.

**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 (NTTAA)**

Section 12(d) of the NTTAA directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. The EPA believes that this action is not subject to the requirements of section 12(d) of the NTTAA because application of those requirements would be inconsistent with the CAA.

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

The EPA lacks the discretionary authority to address environmental justice in this rulemaking.

**K. Congressional Review Act (CRA)**

This action is subject to the CRA, and the EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

## **L. 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 disapproval of the Air Quality Management portion of Delaware's Administrative Code, which revises the regulations related to nonattainment NSR preconstruction permit program requirements for emission offsets 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: September 30, 2016.

Shawn M. Garvin,  
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. In § 52.420, the table in paragraph (c) is amended under the heading “1125 Requirements for Preconstruction Review” by revising the entry for “Section 2.0” to 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>          |
|---|--|-----------------------------|--|--|
| * * *   | * * *  | * * *                       | * * *  | * * *                                  |
| <b>1125 Requirements for Preconstruction Review</b> |  |                             |  |  |
| * * * * *   |  |                             |  |  |
| Section 2.0   | Emission Offset Provisions (EOP) including sections 1.0 through 3.16.4 | 2/11/12                     | 10/2/12, 77 FR 60053                                     | Added Section 2.2.5, 2.4.3.3 and 2.5.7 |
|   | Sections 2.5.5 and 2.5.6   | 9/11/2013                   | [Insert date of Federal Register publication]<br>[Insert | Disapproval. See 40 CFR 52.433(a)      |

| State regulation (7 DNREC 1100) | Title/subject | State effective date | EPA approval date                 | Additional explanation |
|---------------------------------|---------------|----------------------|-----------------------------------|------------------------|
|                                 |               |                      | <u>Federal Register citation]</u> |                        |
| *                               | *             | *                    | *                                 | *                      |

\* \* \* \* \*

3. Add § 52.433 to read as follows:

**§ 52.433 Nonattainment new source review.**

(a) *Disapproval.* EPA is disapproving Delaware’s October 15, 2013 submittal of revisions to 7 DNREC 1125, sections 2.5.5 and 2.5.6 because it does not meet Clean Air Act (CAA) requirements which establish the criteria under which the owner or operator of a new or modified major stationary source must obtain the required emission offsets for the nonattainment new source review (NSR) preconstruction permitting program and because Delaware exercises authorities that are reserved for EPA under section 107 of the CAA. Delaware’s Federally-approved nonattainment NSR preconstruction program in 7 DNREC 1125, sections 1.0 through 3.16.4, effective in Delaware on February 11, 2012, was fully-approved by EPA on October 2, 2012 and continues to apply.

(b) [Reserved]

[FR Doc. 2016-24657 Filed: 10/19/2016 8:45 am; Publication Date: 10/20/2016]