

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

**[EPA-R03-OAR-2007-0027; FRL-     ]**

**Approval and Promulgation of Air Quality Implementation Plans; Delaware; Electric  
Generating Unit Multi-Pollutant Regulation**

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

**ACTION:** Final rule.

**SUMMARY:** EPA is approving a State Implementation Plan (SIP) revision submitted by the State of Delaware. This SIP revision establishes limits on the emissions of nitrogen oxides (NO<sub>x</sub>) and sulfur dioxide (SO<sub>2</sub>) from Delaware's large electric generating units (EGUs). EPA is approving this SIP revision in accordance with the Clean Air Act (CAA).

**EFFECTIVE DATE:** This final rule is effective on [insert date 30 days from date of publication].

**ADDRESSES:** EPA has established a docket for this action under Docket ID Number **EPA-R03-OAR-2007-0027**. All documents in the docket are listed in the [www.regulations.gov](http://www.regulations.gov) website. Although listed in the electronic docket, some information is not publicly available, i.e., 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 either electronically through [www.regulations.gov](http://www.regulations.gov) or in hard copy for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State

submittal are available at the Delaware Department of Natural Resources & Environmental Control, 89 Kings Highway, P.O. Box 1401, Dover, Delaware 19903.

**FOR FURTHER INFORMATION CONTACT:** Rose Quinto, (215) 814-2182, or by e-mail at [quinto.rose@epa.gov](mailto:quinto.rose@epa.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

On May 17, 2007 (72 FR 27787), EPA published a notice of proposed rulemaking (NPR) for the State of Delaware. The NPR proposed approval of Regulation No. 1146 – Electric Generating Unit Multi-Pollutant Regulation. The formal SIP revision was submitted by Delaware on November 16, 2006.

1.

2. **II. Summary**

Regulation No. 1146 establishes limits on the emissions of NO<sub>x</sub> and SO<sub>2</sub> from Delaware's large EGUs. The large EGUs subject to this regulation are Connective Delmarva Generating, Inc.'s Edge Moor Generating Station Units 3, 4 and 5; City of Dover's McKee Run Generating Unit 3; and NRG Energy, Inc.'s Indian Generating Station Units 1, 2, 3 and 4. Other specific requirements of Regulation No. 1146 and the rationale for EPA's proposed action are explained in the NPR and will not be restated here. On June 18, 2007, EPA received comments on its May 17, 2007 NPR. A summary of the comments submitted and EPA's response is provided in Section III of this document.

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

**Comment:** The commenter opposes the approval of Regulation No. 1146 since it may be changed or invalidated in the current pending appeals process.

**Response:** EPA disagrees with this comment. Regulation No. 1146 was appealed by three regulated entities: City of Dover's McKee Run Generating Station; NRG Energy Inc. (NRG); and Connectiv Delmarva Generating Station (Connective). The City of Dover and NRG appeals have been settled, and only Connective remains. Currently, Regulation No. 1146 is in effect and enforceable in Delaware, and at this time, all covered units, including Connectiv units are in the process of designing and installing emission control equipment to meet the requirements of Regulation No. 1146.

**Comment:** The commenter states that the SIP should not include requirements of Regulation No. 1146 that are not necessary for attaining compliance with the 8-hour ozone standard. The following are not elements of DNREC's plan to attainment of the 8-hour ozone standard: (1) annual NO<sub>x</sub> emissions caps, and (2) annual SO<sub>2</sub> emissions caps and emission rate limitations.

**Response:** EPA disagrees with the premise of this comment. The reductions associated with Regulation No. 1146, including the annual NO<sub>x</sub> caps and the annual SO<sub>2</sub> caps and emission rate limitations, will support the attainment of the 8-hour ozone and fine particulate matter (PM<sub>2.5</sub>) NAAQS. The emissions reductions also provide necessary support for the 8-hour ozone reasonable further progress plan. Meeting these goals will help clean Delaware's air. In understanding EPA's role with regard to review and approval or disapproval of rules submitted by states as SIP revisions, EPA can only take action upon the final adopted versions of a state's

regulation as submitted by that state in its SIP revision request, and must approve a SIP that meets the minimum requirements of the CAA. It is not within EPA's authority, by its rulemaking on the SIP revision or otherwise, to change or modify the text or substantive requirements of a state regulation. Therefore, EPA cannot modify Delaware's regulation as recommended in the comment.

**Comment:** The commenter states that Regulation No. 1146 overwrites the carefully-balanced provisions of the Clean Air Interstate Rule (CAIR). The units covered by Regulation No. 1146 are subject to CAIR and have already been allocated annual and ozone season NO<sub>x</sub> allowances under the CAIR Federal Implementation Plan (FIP) for Delaware. Regulation No.1146 imposes inconsistent NO<sub>x</sub> and SO<sub>2</sub> emission requirements on these same units. Requirements to comply with these additional state regulations are unnecessary and unduly burdensome for affected owners.

**Response:** EPA disagrees with this comment. Regulation No. 1146 is not intended to replace the Federal CAIR requirements and does not relieve affected sources from participating in and complying with any CAIR cap-and-trade program requirements. The recent decision by the District Court for the District of Columbia Circuit in North Carolina v. EPA, No. 05-1244 (July 11, 2008), when final, would vacate CAIR. If CAIR is eventually vacated pursuant to the Court decision, the commenter's concern will no longer exist. However, even if CAIR remains in effect, a State may establish and may be required to establish requirements, including requirements for units covered by CAIR, to address local nonattainment problems. CAIR addresses the state's section 110(a)(2)(D) obligation to eliminate significant contribution to

downwind nonattainment on the PM<sub>2.5</sub> and 8-hour ozone NAAQS. In addition to meeting their 110(a)(2)(D) obligations, states are obliged to adopt such additional SIP provisions as are necessary to address NAAQS nonattainment within their own borders. In addition, they retain authority under section 116 of the CAA to adopt regulations more stringent than federal minimum requirements. The commenter has not identified, and indeed could not identify, any requirement of CAIR that prohibits states from adopting such emission reduction requirements or emission caps. For these reasons, Regulation No. 1146, thus, is not inconsistent with CAIR and the commenter's conclusions are incorrect, because, although more stringent than CAIR, it is intended to address such local contributions to nonattainment areas. EPA therefore concludes that Regulation No. 1146 is approvable whether or not CAIR is eventually vacated.

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

EPA is approving Delaware's EGU Multi-Pollutant Regulation as a revision to Delaware SIP that was submitted on November 16, 2006 pertaining to NO<sub>x</sub> and SO<sub>2</sub>. This regulation will result in the reduction of NO<sub>x</sub> and SO<sub>2</sub> emissions from the affected sources.

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

##### **A. General Requirements**

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR

52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);

does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.);

is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.);

does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);

does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

is not an economically significant regulatory action based on health or safety risks subject

to Executive Order 13045 (62 FR 19885, April 23, 1997);

is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

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

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

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

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

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

Under section 307(b)(1) of the Clean Air Act, 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 from date of publication of this document in the Federal Register]. Filing a petition for

Reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action.

This action, pertaining to Delaware's EGU Multi-Pollutant Regulation, 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, Reporting and recordkeeping requirements, Sulfur oxides.

August 18, 2008  
Dated:

/s/  
William T. Wisniewski, Acting  
Regional Administrator,  
Region III.



40 CFR part 52 is amended as follows:

PART 52 - [AMENDED]

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 by adding entries for Regulation No. 1146 – Electric Generating Unit Multi-Pollutant Regulation at the end of the table to read as follows:

§ 52.420                      Identification of plan.

\*                              \*                              \*                              \*                              \*

(c) \* \* \*

EPA-APPROVED REGULATIONS IN THE DELAWARE SIP

State citation	Title/subject	State effective date	EPA approval date	Additional explanation
* * * * *				
<b>Regulation No. 1146</b>	<b>Electric Generating Unit (EGU) Multi-Pollutant Regulation</b>			
Section 1.0	Preamble	12/11/06	[Insert <u>Federal Register</u> publication date] [Insert page number where the document begins]	Except for provisions pertaining to mercury emissions.
Section 2.0	Applicability	12/11/06	[Insert <u>Federal Register</u> publication date] [Insert page number where the document begins]	Except for provisions pertaining to mercury emissions.
Section 3.0	Definitions	12/11/06	[Insert <u>Federal Register</u> publication date] [Insert page number where the document begins]	Except for provisions pertaining to mercury emissions.
Section 4.0	NO <sub>x</sub> Emissions Limitations	12/11/06	[Insert <u>Federal Register</u> publication date] [Insert page number where the document begins]	
Section 5.0	SO <sub>2</sub> Emissions Limitations	12/11/06	[Insert <u>Federal Register</u>	

State citation	Title/subject	State effective date	EPA approval date	Additional explanation
			publication date] [Insert page number where the document begins]	
Section 7.0	Recordkeeping and Reporting	12/11/06	[Insert <u>Federal Register</u> publication date] [Insert page number where the document begins]	Except for provisions pertaining to mercury emissions.
Section 8.0	Compliance Plan	12/11/06	[Insert <u>Federal Register</u> publication date] [Insert page number where the document begins]	Except for provisions pertaining to mercury emissions.
Section 9.0	Penalties	12/11/06	[Insert <u>Federal Register</u> publication date] [Insert page number where the document begins]	Except for provisions pertaining to mercury emissions.
Table I	Annual NO <sub>x</sub> Mass Emissions Limits	12/11/06	[Insert <u>Federal Register</u> publication date] [Insert page number where the document begins]	
Table II	Annual SO <sub>2</sub> Mass Emissions Limits	12/11/06	[Insert <u>Federal Register</u> publication	

State citation	Title/subject	State effective date	EPA approval date	Additional explanation
			date] [Insert page number where the document begins]	

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