

Department of Energy & Environment
Response to Comments on Proposed Rulemakings: “Air Quality Permit Fees and Synthetic Minor Permitting Program” and “Chapters 1 and 2 of the Air Quality Regulations”

On February 27, 2017, the Department of Energy & Environment (DOEE) published two notices of proposed rulemaking to amend the District’s regulations on air quality, 64 DCR 001138 (“Air Quality Permit Fees and Synthetic Minor Permitting Program”) and 64 DCR 001168 (“Chapters 1 and 2 of the Air Quality Regulations”). DOEE received comments from six commenters (District of Columbia Water and Sewer Authority (DC Water), U.S. Environmental Protection Agency (EPA), Sierra Club, American Coatings Association (ACA), Consumer Specialty Products Association (CSPA), and Roof Coatings Manufacturers Association (RCMA)) on the notice titled, “Chapters 1 & 2 of the Air Quality Regulations” and comments from three commenters (DC Water, EPA, and Sierra Club) on the notice titled, “Air Quality Permit Fees and Synthetic Minor Permitting Program.” Below is a summary of the comments received and DOEE’s Response.

DC Water Comments on “Air Quality Permit Fees and Synthetic Minor Permitting Program”

Comment I. DC Water commented in support of DOEE proposal to add a synthetic minor program under 20 DCMR §§ 200 and 200.7. As this comment is favorable to the proposed rulemaking it does not warrant any changes to the final.

Comment II. DC Water also commented in support of the proposed 20 DCMR 200.8(i), which distinguishes source category permit applications from individual applications. DC Water supports the clarification the individual permit applications do not need to undergo public comment. As this comment is favorable to the proposed rulemaking it does not warrant any changes to the final.

EPA Comments on “Chapters 1 and 2 of the Air Quality Regulations”

Comment I. There is a typographical error in the amended definition heading of “oxygenated gasoline control area” under the proposed 20 DCMR § 199. EPA believes that DOEE is amending the definition of “standard industrial classification code” instead. DOEE agrees that this is a typographical error and has made the requested change on page 25 of the final rulemaking.

EPA Comments on “Air Quality Permit Fees and Synthetic Minor Permitting Program”

Comment II. There is a typographical error in 20 DCMR § 200.8. The subsection states that DOEE may establish a source category permit in accordance with paragraphs “(a)

through (h) of this subsection.” However, the proposed subsection adds a paragraph (i), so EPA recommended amending it to read “(a) through (i) of this subsection.” DOEE agrees that this is a typographical error and has made the requested change in the final rulemaking.

Comment III. EPA requested that DOEE clarify the intent of 20 DCMR § 303.6(a)(2)(D) because it is concerned that it may be construed as an unnecessary exemption for sources with general permits. DOEE amended § 303.6(a)(2)(D) to clarify that it is referencing the “general permit” provided for under 20 DCMR § 302.4, not the general permits provided for under 20 DCMR § 200.

EPA Comments on the State Implementation Plan (SIP) Amendments

Comment IV. EPA noted that not all sections of Chapter 1 are included in the District’s SIP, and so DOEE should clarify which sections it intends to submit as SIP amendments. The District clarifies that it will be submitting 20 DCMR §§ 100, 101, 102, 104, 105, 106, 107, and 199 as SIP amendments, as these are the sections currently in the District’s SIP.

Sierra Club Comments on Both Proposals

Comment I. The Proposals Undermine Public Participation in the Department’s Decisionmaking Process. DOEE disagrees with the commenter that “[b]y failing to provide a detailed written explanation of its rationale for these regulatory changes, the Department’s proposed rulemakings fall far short of what is needed to assure adequate and meaningful public participation” and “undermines judicial review.”

Unlike the Federal Administrative Procedure Act, the D.C. Administrative Procedure Act (“DCAPA”) does not require the inclusion of a statement of reasons in a Notice of Proposed Rulemaking (“NPR”). *Compare* 5 U.S.C. § 553 (statement of reasons required); *with* D.C. Official Code § 2-505 (statement of reasons requirement omitted.). The DCAPA notice provision only explicitly requires an agency to (1) publish the proposed rule in the DCR in order to give interested persons notice of the intended action; (2) provide an opportunity to comment, orally or in writing, for at least 30 days; and (3) cite to the legal authority under which the rule is being proposed. D.C. Official Code § 2-505. D.C. courts have determined that the DCAPA’s absence of the purpose statement requirement is a clear indication of a deliberate policy choice that the D.C. Council did not intend to require such a purpose statement in an NPR. *D.C. Hosp. Asso. v. Barry*, 498 A.2d 217, 219 (D.C. 1985). Instead, an NPR purpose statement is necessary only if explicitly required in the agency statute or regulations. *Id.* In this case, the Air Pollution Control Act of 1984 does not require a statement of reasons for air quality rulemakings.

DOEE has complied with the requirements of the DCAPA in both proposed rulemakings. DOEE published the notices in the DCR and provided two ways to submit comments. The NPRs cited to DOEE's legal authority to create the amendments. Sierra Club had knowledge of, an opportunity to, and did submit comments on the regulations. In fact, DOEE extended the comment period by 30 days at the request of the Sierra Club, and made every effort to answer Sierra Club's questions about the proposed rulemaking during the public comment period.

Sierra Club Comments on "Air Quality Permit Fees and Synthetic Minor Permitting Program"

Comment II.A. The Proposed Synthetic Minor Program is Incomplete and Arbitrary.

DOEE agrees in part with this comment. Specifically, while it has long been a policy that emission limits established in permits must be enforceable as a practical matter, the commenter is correct in noting that the proposed language does not clearly state that this is a requirement. As such, in response to this comment, the phrase "in a manner that is enforceable as a practical matter" has been added to both sections 200.6 and 200.7. Additionally, a definition of "enforceable as a practical matter" has been added to 20 DCMR § 199 as follows:

"Enforceable as a practical matter – for an emission limitation or for other standards (design standards, equipment standards, work practices, operational standards, pollution prevention techniques) in a permit for a source means that the permit's provisions specify:

- (a) A limitation or standard and the emissions units or activities at the source subject to the limitation or standard;
- (b) The time period for the limitation (e.g., hourly, daily, monthly, and/or annual limits such as rolling annual limits); and
- (c) The method to determine compliance, including appropriate monitoring, record keeping, reporting, and testing."

This definition is consistent with a similar definition found in 40 CFR § 49.167.

It should be noted that any permit issued pursuant to 20 DCMR Chapter 2 is federally enforceable, except when a limit is specifically listed as District-enforceable only. To ensure that all synthetic minor limits are federally enforceable, sections 200.6 and 200.7 have also been revised to add the statement that: "Such a limit must not be designated as enforceable only by the District."

DOEE disagrees with the commenter's assertion that the proposed language would not place limits on the source's "potential to emit." The requirements that the source would avoid by obtaining a synthetic minor limit generally apply based on the source's potential to emit. Therefore, the only way to limit the applicability of those requirements is to limit the source's potential to emit. In circumstances in which regulatory applicability is based on actual emissions, a permit limit that allows a source to avoid applicability of that regulation would necessarily limit the source's ability to emit actual emissions, which is, in essence, a limit on the source's potential to emit. While the regulation does not directly specify that the limit is a limit on the source's potential to emit, this is an inherent requirement and does not need to be specified.

Regarding the commenter's concern that the District's Chapter 2 permitting program (including the proposed synthetic minor permitting program) does not set forth specific requirements for the actual content of the synthetic minor permit as is done in 20 DCMR § 302 for the Title V program, DOEE has determined that this level of specificity is not necessary to implement an effective permitting program. 20 DCMR § 201 specifies the circumstances under which a permit may be issued. 20 DCMR § 201 requires the following findings to be made prior to issuing a permit:

- (c) That the applicant has satisfied the applicable requirements for the requested permit established pursuant to this subtitle;
- (d) That the operation of the source... will not result in the contravention of any provision of the Federal Clean Air Act or the regulations promulgated under the Act; and
- (e) That the operation of the source will not result in the violation of any provision of this subtitle [20 DCMR § 201.1];

In order to comply with the above requirements, DOEE must specify all applicable requirements in the permits. As noted above, DOEE has clarified that the synthetic minor limitations must be federally enforceable and enforceable as a practical matter.

Regarding the comment that the "proposal does not even describe the particular process by which a source would apply for and obtain coverage under a synthetic minor program," DOEE disagrees with this characterization. The process is the same as that established for obtaining other permits pursuant to 20 DCMR § 200. A "synthetic minor permit" is merely a standard permit issued pursuant to 20 DCMR Chapter 2 with the addition of one or more synthetic minor limitations. In accordance with the requirements of 20 DCMR § 200, the applicant must submit the information the Department needs to evaluate the application pursuant to the requirements of 20 DCMR § 201. 20 DCMR § 210 specifies the public notice procedures for permit issuance.

Contrary to the commenter's statement that case-by-case determinations are not acceptable, DOEE needs to evaluate each synthetic minor proposal on a case-by-case basis to determine if it complies with the requirements of 20 DCMR § 201. Each individual project may require a different set of conditions that must be applied to effectively limit the source's potential to emit below the major source threshold.

Finally, DOEE disagrees with the comment that a synthetic minor limit allows a source to circumvent the Clean Air Act's requirements. The Clean Air Act and its implementing regulations establish thresholds of applicability. It has long been established practice that, if a source has a federally enforceable limit on its potential to emit that limits emissions below the applicability threshold of a regulation, then that regulation does not apply. (*See* EPA's "True Minor Source and Synthetic Minor Source Permits", available at

<https://www.epa.gov/tribal-air/true-minor-source-and-synthetic-minor-source-permits>.)

Establishing such limits is not circumventing the requirements of the Clean Air Act, but rather working within bounds of what is allowed within the Act. The District is one of few, if any, jurisdictions that has not already adopted a synthetic minor program.

Comment II.B. The Proposed Synthetic Minor Program Threatens the Health of District Residents With Unregulated Hazardous Air Pollutants. As noted in the comment, there are comparatively few sources in the District that would have the potential to emit greater than 10 tons per year of a single hazardous air pollutant (HAP) or 25 tons per year of all HAPs in aggregate.

Typically, when synthetic minor restrictions are put in place to minimize specific HAPs, the restrictions take the form of throughput limits, fuel usage limits, or operating hour limits that have the co-benefit of reducing any other HAPs emitted at levels lower than the major source threshold by a similar percentage to the percentage by which the triggering HAP is reduced. As such, in these circumstances, the synthetic minor limit also reduces the emission rates of these secondary HAPs.

While in very rare circumstances, some type of control device may be installed to reduce emissions of a single HAP that will not affect other HAP emission rates, DOEE is not aware of any such circumstances that have occurred in the past in the District.

However, while these explanations show that it is unlikely that a synthetic minor program would have a negative effect on lower emission rate HAPs, they are ultimately irrelevant from a programmatic standpoint. The federal Clean Air Act (CAA), as amended, established the major source thresholds for HAPs discussed above. The National Emission Standards for Hazardous Air Pollutants (NESHAP) program was established to set standards for the common sources of HAPs. The federal NESHAPs address both major sources and area sources of HAPs. Maximum Achievable Control Technologies (MACT) for major sources and Generally Available Control

Technologies (GACT) for area sources have been established for the various source categories. Under Section 112(f) of the CAA, as amended, residual risk analyses must also be performed by EPA to address risk remaining after control technologies have been applied.

This tiered approach ensures that even area sources that are significant contributors of individual HAPs are regulated. As such, the claim that the establishment of a synthetic minor program would threaten the health of District residents with unregulated HAPs is incorrect. In the example provided in the comment related to the U.S. Capitol Power Plant, the limit placed on potential to emit allowed the facility to avoid the requirements of 40 CFR 63, Subpart DDDDD, National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters. However, by reducing their potential emissions to avoid applicability of that rule, the Plant became subject to 40 CFR 63, Subpart JJJJJ, National Emission Standards for Hazardous Air Pollutants for Industrial, Commercial, and Institutional Boilers Area Sources. As such, they are not “unregulated,” rather they must meet alternate standards tailored to smaller HAP sources.

Even had there been no area source standard, the District has the authority, and the responsibility, to regulate any emissions found to be “inimical to the public health and welfare” pursuant to 20 DCMR 201, General Requirements for Permit Issuance. While the proposed regulation allows the District to establish a synthetic minor limit, the District is not obligated to do so. Rather, in the rare circumstances when it is determined that such a limit would have a result that was “inimical to the public health and welfare,” the District could not establish such a limit as it would be inconsistent with the requirements of 20 DCMR 201. Furthermore, should the public disagree with the Department’s analysis, all such permits are subject to public review, and the public would have the opportunity to bring such an issue to the attention of AQD during that review period.

Based on this analysis, the District has determined that no changes to the proposed rulemaking are appropriate in response to this comment.

Comment II.C. The Proposed Notice-and-Comment Opportunity Requirements for Draft Permits Are Inadequate. DOEE does not agree that this section needs to be amended. No substantive amendments were proposed to this section of the public notice requirements as a part of this rulemaking action. DOEE has only proposed to break up the current § 210.3 into two separate subsections to conform to the District Office of Documents and Administrative Issuances (ODAI) formatting guidelines. Section 210.4 was last amended in 2012 (59 DCR 13044 (November 16, 2012)); it was modeled off of EPA’s Review of New Sources and Modifications in Indian Country; Final Rule (76 Fed. Reg. 38748, July 1, 2011) and therefore meets federal public notice requirements and has already been incorporated into the District’s state implementation plan (SIP).

Comment II.D. The Source-Category Permit Provisions Improperly Exclude Public Participation. DOEE began implementing its source category permit program in 2012 (59 DCR 13044 (November 16, 2012)) and is not proposing any substantive changes with this rulemaking action. While DOEE did add a paragraph to 20 DCMR § 200.8 to clarify the individual applications for coverage under the permit are not subject to public notice and comment, this does not reflect a departure from the current regulatory requirements. The source category permit requirements have always stated that the public notice requirements apply to the proposed issuance of a source category permit, and that the approval for individual coverage under the permit does not require further action by DOEE. DOEE is clarifying this process. DOEE does not agree that it is appropriate to reconsider the source category permit program at this time.

As stated in the 2012 Notice of Proposed Rulemaking, source category permits “benefit both permit applicants and [DOEE] by reducing the processing time of permits and improving the consistency of requirements established for each source within each covered source category.” The public can comment on the permit when it is being developed; once finalized, individual sources may apply for coverage under the permit without a separate comment period because the source category permit already includes all of the applicable requirements. As standard practice, DOEE reviews all source category permit applications to ensure that they qualify for a source category permit. DOEE can, and does, deny coverage when a source does not qualify for the permit. Once issued, DOEE ensures compliance with the terms of the permit through inspection. DOEE also has authority to revoke coverage under the source category permit if it later determines that the source does not qualify for the permit, or is unable to comply with the permit terms. 20 DCMR § 202. Source category permits are quite common in other jurisdictions, including the District’s neighboring states of Maryland and Virginia, though they are typically referred to as “general permits.”

Comment II.E. The Proposed Changes to Section 303’s Judicial Review Provisions are Unclear. DOEE agrees that this provision is unclear. It has modified the final rule to clarify that review of Chapter 3 permitting decisions may be obtained administratively from the Office of Administrative Hearings (OAH), as specified by the Air Pollution Control Act of 1984, as amended (D.C. Official Code § 8-101.05h). Orders from OAH may be appealed to the D.C. Court of Appeals. D.C. Official Code § 2-1831.16(e).

Sierra Club Comments on “Chapters 1 and 2 of the Air Quality Regulations”

Comment III.A. The Department’s Proposal Violates the Clean Air Act and EPA’s SIP Call and Policy. DOEE disagrees with the commenter’s assessment that the proposal disregards the SSM SIP Call that it purports to respond to. Under the SSM SIP Call, EPA found that the provisions in § 107.3 were substantially inadequate because it gave DOEE unbounded discretion

to exempt sources from federal requirements. The commenter states that the proposed amendments to § 107.3 (codified under subsection 102 in the proposed rulemaking) continue to give DOEE this unbounded discretion. However, the commenter neglects to note that the proposed rulemaking adds an explicit limitation to DOEE's discretion under §§ 102.4(d) and 102.6(c). As proposed, DOEE may not allow any source to operate without required pollution control equipment or to remove pollution control equipment if it would "result in the violation of any federally enforceable emissions limitation or requirement." Contrary to the commenter's allegation, this limit on DOEE's discretion would restrict it from exempting the source from any requirement under the District's federally enforceable SIP or from "unilaterally changing the requirements of the SIP."

The commenter also objected to the requirement in § 102.6(d) that a source permitted under Chapter 2 or 3 submit an application for a permit amendment at the same time as, or prior to, its request to remove a control device or practice. The commenter objected on the basis that the source was only required to submit an application, not receive a permit amendment, prior to implementing the requested change. DOEE partially accepts the commenter's recommendation on this section. DOEE has added language to § 102.6(d) to clarify that a permitted source must obtain a permit amendment prior to removing any control device or practice. However, it may shut down the control device or practice pending issuance of the permit amendment, provided that it receives approval pursuant to § 102.6.

DOEE also agrees with the commenter and has clarified that the term "federal mandate" under § 103.3 of the Variance provisions means "federally enforceable emissions limitation or requirement."

Comment III.B. DOEE Failed to Correct Provisions of the SIP in Section 606 Identified by EPA as Substantially Inadequate to Meet Clean Air Act Requirements. DOEE is not proposing to address the deficiencies identified by the SSM SIP Call under 20 DCMR § 606 as a part of this rulemaking. The main purpose of this rulemaking is to update the air quality regulations in accordance with the Air Quality Amendment Act of 2013 (D.C. Law 20-135; 61 DCR 6767 (July 3, 2014)). DOEE proposed to address the deficiencies identified by the SSM SIP Call under 20 DCMR § 107, as it was already planning to open this section up for amendments. DOEE intends to address the provisions of 20 DCMR § 606 through a separate administrative action.

American Coatings Association (ACA) Comments on "Chapters 1 and 2 of the Air Quality Regulations"

Comment I. ACA Concerns with ASTM D6886 and South Coast Air Quality Management District (SCAQMD) Method 313. ACA raised numerous concerns about SCAQMD Method 313. Based on the comments raised by ACA and other coatings associations (see below), as well as follow-up discussions with SCAQMD, DOEE has concluded that, because the method is not

final at this time, the reference to the method will be removed from the definition of “volatile organic compound (VOC)” in the final rulemaking, as requested.

ACA also raised a concern about ASTM D6886. Specifically, ACA expressed concern about the high injection port temperatures tending to “breakdown, decompose, or ‘disassociate’ larger compounds (including resins, preservatives, and other raw materials) resulting in higher VOC contents.” The method specifically identifies this concern and indicates that “[i]f it can be shown that a material is a decomposition product, or is the result of a reaction with the extraction solvent, the results for that compound should be discounted from the volatile[s] measured by Test Method D6886” (See <https://www.astm.org/Standards/D6886.htm>, “NOTE 7” under “Significance and Use”). While DOEE recognizes that this can be a limitation to the method, it does not mean that the method is invalid. In fact, the method addresses a significant limitation to EPA Reference Method 24 related to low VOC materials. As such, DOEE will retain the inclusion of ASTM D6886 in the final regulation. DOEE will, however, entertain justifications provided by any regulated entity pursuant to “NOTE 7” of the method discussed above, should such entity believe that the method is inaccurate for a specific application. DOEE also has the authority, pursuant to 20 DCMR § 502.3 to “require or approve modifications to testing and measurement procedures and methods”. As such, alternative methods (such as SCAQMD Method 313) or modifications to ASTM D6886 could be required or approved, should they be appropriate in a given circumstance.

ACA also indicated that, should these two test methods be adopted over ACA’s objections, they should be adopted in a limited fashion to apply only to the District’s Architectural and Industrial Maintenance Coatings (AIM) rule. DOEE has clarified in the regulation that ASTM D6886 is only being adopted where it will be used “within the scope of the method”. DOEE does not see a basis to specifically limit its use to only AIM rule compliance when the method may be appropriate for other applications and, therefore, the District will not limit applicability of ASTM D6886 to AIM rule-related applications only.

Roof Coatings Manufacturers Association (RCMA) Comments on “Chapters 1 and 2 of the Air Quality Regulations”

Comment I. RCMA expressed several technical concerns about SCAQMD Method 313. As noted in the response to the ACA concerns addressed above, DOEE is removing references to SCAQMD Method 313 from the regulation. RCMA also asked that DOEE provide a guidance document addressing the potential for differences in results between SCAQMD Method 313 and ASTM D6886. Because SCAQMD Method 313 is not being added to the regulation at this time, DOEE has determined that it is premature to take this action. Should DOEE determine, pursuant to 20 DCMR § 502.3 that SCAQMD Method 313 is appropriate for an individual situation, or

should a future rulemaking action incorporate the use of SCAQMD Method 313, the need for such a guidance document will be further evaluated at that time.

Consumer Specialty Products Association (CSPA) Comments on “Chapters 1 and 2 of the Air Quality Regulations”

Comment I. CSPA supports the Department’s proposal to amend the current definition of “volatile organic compound” to update the cross reference to the U.S. Environmental Protection Agency (EPA) definition set forth at 40 C.F.R. § 51.100(s). DOEE thanks CSPA for the positive comment and intends to retain this aspect of the proposed rule in the final rule.

Comment II. CSPA Urges the Department to list the California Air Resources Board (CARB) Method 310 as an appropriate test method for determining compliance with VOC limits. DOEE has not proposed the use of CARB Method 310 and it has not been subject to notice and comment requirements, so it will not include it in the rule at this time. However, pursuant to 20 DCMR § 502.3, DOEE is able to accept methods not listed in the regulations, if justified. Such methods are evaluated on a case-by-case basis. If an organization wishes to use CARB Method 310 for a given purpose, a request to do so can be submitted for review.

Comment III. CSPA supports the American Coatings Association’s request that the Department delete any reference to SCAQMD Laboratory Method 313 and ASTM D6886 in Chapters 1 & 2 of the Air Quality Regulations. See the above response to ACA’s comments. With regard to CSPA’s specific concern that “ASTM D6886 is a test method ‘... for the determination of the weight percent of individual volatile organic compounds in waterborne air-dry coatings,’” and thus “these two test methods have very limited application to the broad range of other products regulated by the DC Air Quality Regulations,” DOEE agrees that this method is not for use in all circumstances. While the District is adopting this regulation as an “appropriate method for determining compliance with VOC emission limits,” this does not mean that the District is indicating that it is the only method or that it is the appropriate method in all circumstances. DOEE will only accept its use within the scope of the method, just as it does with all other methods listed within the air quality regulations, unless a specific justification has been made and accepted pursuant to 20 DCMR § 502.3 that the method is also applicable in another specific situation. To clarify this, DOEE is adding language to the definition to specifically state the standard may be used only “within the scope of the method.”