

DEPARTMENT OF ENERGY AND ENVIRONMENT

NOTICE OF FINAL RULEMAKING

The Director of the Department of Energy and Environment (“DOEE”), pursuant to the authority set forth in Sections 5 and 6 of the District of Columbia Air Pollution Control Act of 1984 (the “Act”), effective March 15, 1985 (D.C. Law 5-165; D.C. Official Code §§ 8-101.05 and 8-101.06); Section 107(4) of the District Department of the Environment Establishment Act of 2005, effective February 15, 2006 (D.C. Law 16-51; D.C. Official Code § 8-151.07(4)); and Mayor’s Order 2006-61, dated June 14, 2006; hereby gives notice of the adoption of the following amendments to §§ 903 (Odorous and Other Nuisance Air Pollutants) and 999 (Definitions and Abbreviations) of Chapter 9 (Air Quality – Motor Vehicular Pollutants, Lead, Odors, and Nuisance Pollutants) of Title 20 (Environment) of the District of Columbia Municipal Regulations (“DCMR”). These rules were adopted as final on May 8, 2023 and will be effective upon publication of this notice in the *District of Columbia Register*.

Summary of Final Rulemaking

The Act authorizes the DOEE to “[a]dopt standards governing emission of nuisance air pollutants likely to injure public health or welfare or interfere with reasonable enjoyment of life and property.” D.C. Official Code § 8-101.05(b)(1)(F). Moreover, regulations adopted as part of Section 3 of the Act prohibit emitting odorous or other air pollutants likely to injure public health or interfere with the reasonable enjoyment of life or property. (20 DCMR § 903; 32 DCR 647). The amendments made by this rulemaking strengthen DOEE’s ability to enforce this nuisance-odor prohibition through the use of community complaints for enforcement and by requiring stationary sources known to emit nuisance odors to adopt a DOEE approved Odor Control Plan (OCP). For those sources that must adopt an OCP, DOEE may enforce compliance with its provisions. If a source continues to emit nuisance odors despite compliance with the OCP, DOEE has the authority to require the source to update the plan in order to abate the nuisance.

The rulemaking requires an OCP in three (3) circumstances:

1. If the source falls into one of six (6) source categories that are the most frequent sources of odor complaints, which are (1) cannabis production operations; (2) certain types of painting operations, including autobody paint booths; (3) trash transfer stations; (4) asphalt processing plants; (5) wastewater treatment facilities; and (6) commercial solid fuel-fired cooking operations;
2. When DOEE identifies a nuisance odor from a source that is detectable when one (1) volume of odorous air has been diluted with two (2) or more volumes of odor-free air (two (2) dilutions to threshold (D/T)); and
3. When DOEE receives odor complaints about a source from three (3) or more separate households or businesses within a thirty (30) day period, and a DOEE investigation verifies the suspected source of the odor and the affected parties.

Discussion of Public Comment

A Notice of Proposed Rulemaking was published in the *District of Columbia Register* on December 31, 2021, at 68 DCR 014195, and a thirty (30) day public comment period was provided. In response, DOEE received five comment letters. DOEE discusses the comments that address specific germane recommendations in this final rulemaking; a more thorough discussion of comments is available on the Department's website.

A commenter expressed concerns with subjecting wastewater collection systems to this rulemaking and proposed to allow for exemptions of such systems. In addition, the commenter stated there should be a distinction made between wastewater collection systems and other parts of the wastewater treatment process. However, DOEE believes that the intent of the Act is that all emissions of odorous air pollutants should be regulated. DOEE intends to apply the regulation equally across facilities in the District. Therefore, DOEE did not include the requested exception in this final rulemaking.

A commenter also proposed changing the limits that trigger the need for an OCP, requesting the trigger be increased from two (2) D/T to seven (7) D/T. However, under Section 3 of the Act, emissions of odorous air pollutants "in any quantity and of any characteristic... [are] prohibited." (20 DCMR § 903.) The lowest threshold that the olfactometer can read is two (2) D/T. The commenter asked DOEE to clarify for whom the two (2) D/T trigger applied. The two (2) D/T standard will be the measure used to determine when an owner will be required to develop an OCP if they do not already have an OCP. The Department moved the proposed text of § 903.3 to § 903.2, and the proposed text of § 903.2 to § 903.3 in this final rulemaking to clarify when the two (2) D/T standard applies. In addition, the Department has included the following language (bolded here) in the new § 903.3: "The Department may require an owner or operator of a stationary source of odorous air pollutants, **not currently operating under an OCP required under 903.2**, to submit an OCP to the Department if: ..." to clarify to what regulated entities this requirement will apply.

Another commenter had concerns that the two (2) D/T limit was too high and that the limit should be zero. The olfactometer cannot read below two (2) D/T. Therefore, this is the lowest measurement that DOEE can use for enforcement purposes, and DOEE made no change to this limit in this final rulemaking.

A commenter requested four hundred fifty (450) days for submission of an OCP, instead of DOEE's proposed sixty (60) days. DOEE believes more time may be needed to develop an OCP at large facilities, though the proposed four hundred fifty (450)-day submittal period does not appropriately balance the impact on the regulated community with the wellbeing of residents. DOEE provides an exception to the normal sixty (60)-day submission timeframe in § 903.4(b), which provides that a submitter may have the "amount of time needed by the source to develop the OCP." Further, DOEE has extended the time for submission of an OCP to ninety (90) days for existing sources in this final rulemaking.

A commenter expressed concern that requiring cessation of operations under § 903.7(b) may sometimes impact public health and other necessary facility functions. DOEE revised § 903.7(b)

in the final rulemaking to allow essential services to continue. The change to the final rulemaking, however, does not eliminate DOEE's authority to engage in other enforcement actions against the operator or operations.

A commenter requested seven (7) business days to report deviations from an OCP because one (1) business day was not sufficient time. DOEE believes that a seven (7) business day notification period does not adequately balance the impact on the regulated community with the wellbeing of residents appropriately, but has changed the timeframe in the final rulemaking to allow for three (3) business days to report a deviation from the OCP.

A commenter stated that there is no need for businesses to produce odors, and that DOEE should discourage business from using practices or processes that produce odors. DOEE does not have authority to determine whether sources that may produce odors are allowed to operate in the District. The commenter stated that afterburners or carbon filters should not be permitted as techniques to reduce odor due to other potential environmental effects. The source itself is required to determine how it will ameliorate the nuisance odors based on their facilities' needs and to propose effective measures to eliminate or ameliorate the odors in an OCP that must be submitted to DOEE. DOEE will then determine whether the OCP will effectively eliminate or reduce nuisance odors. DOEE will also monitor whether the source complies with the OCP, and take enforcement action as necessary.

Commenters expressed concerns that fines may not be sufficient under this program. DOEE finds the schedule of fines appropriate to achieve the outcomes required under § 903.1. DOEE will update the references in the schedule of fines that result from the finalization of this rulemaking in a separate regulatory action.

A commenter claimed DOEE's proposed criteria at § 903.2(a) may not result in actionable odor levels being recorded. Further, the commenter stated that the burden for reporting by community members as proposed at § 903.2(b) may be insurmountable. DOEE created a mechanism that is intended to allow the affected community to report problems as simply as could be done without creating so-called "false positives" for odor reports. The commenter also suggested adding chemical manufacturing facilities, construction and paving companies, and stationary sources that attract or house high concentrations of vehicles that produce motor exhaust to the specific additional sources listed in § 903.3. Further research would be necessary to determine whether there is a widespread preponderance of odors at chemical manufacturing facilities and they should be required to submit an OCP. DOEE finds adding construction and paving companies to the list to be unreasonably broad and thus has not included this category in the final rulemaking. Similarly, stationary sources that attract or house high concentrations of vehicles that produce motor exhaust could encompass numerous sources for which an OCP is not appropriate since they are likely to be owned and operated by a party not under the control of the source of emissions. DOEE did not include this potential source in the final rulemaking.

DOEE based the list of types of sources that must submit an OCP on the history of complaints of nuisance odors that it regularly receives, and by basing the list on this existing data, DOEE finds that it will achieve the statutory goals while not placing unnecessary regulatory hurdles on business that are unlikely to create nuisance odors.

A commenter expressed concern about the potential for odors to be emitted by a source after it ceased operation but was not yet decommissioned. DOEE believes this to be a valid concern and that it has authority to address this issue. Thus, DOEE is clarifying in Section 903.8 of this final rulemaking that the OCP will extend into the decommissioning process and that a source may need to obtain a revised OCP to eliminate or ameliorate odors occurring during the cessation of operations.

Another commenter urged DOEE to act swiftly to promulgate analogous regulations for abating odorous air pollutants from mobile sources. It should be noted that, while the OCP program does not cover mobile sources, § 903.1 itself is applicable to all sources, including mobile sources.

A commenter expressed concern that the rulemaking did not directly address how complaints should be submitted to DOEE. Some options include: a written complaint in the DC311 smart phone app, calling DC311, or submitting a written letter or email to DOEE. DOEE will provide a designated area for odor complaint submissions in the DC311 system and would generally prefer submissions through that system to ease tracking and follow up with complaints, as well as to allow the community at large to be able to see the complaints in the open data portal.

The commenter requested that the final rule reduce the time between when an odor is identified and when an OCP is in place. DOEE does not find it appropriate to set a specific timeframe in regulation because some sources may require the installation of control devices in order to eliminate odors, which may add time to OCP implementation, while others may require less extensive solutions that require less time. DOEE intends for implementation of an OCP to occur expeditiously. Therefore, DOEE has included language in Section 903.5 of the final regulation to ensure that implementation is as expeditious as possible, specifically requiring that implementation commence following approval from DOEE, while incorporating the compliance time needed for the design, ordering, contracting, installation, and start-up of control equipment or process changes.

The commenter also expressed concern that this rulemaking does not require sources to immediately cease operations if the odor is coming from a pollutant that is dangerous to human health and its belief that 20 DCMR § 106.3 was not sufficient to address the issue. 20 DCMR § 106.3 states:

“If the Department determines that a hazardous condition exists that may endanger the public health or safety of the citizens or environment within the District of Columbia due to noncompliance with federal or District air quality laws or regulations, the Department may issue a cease and desist order, which requires a violator to cease operations and implement corrective actions immediately to contain the hazardous condition...”

DOEE believes that 20 DCMR § 106.3 is adequate to address the issue raised by the commenter.

More detailed analysis of comments is available within <https://doee.dc.gov/air>.

DOEE also made an additional, non-substantive change to the rulemaking; since no amendments are being made to the existing text of subsection 903.1, the final rulemaking does not include that subsection.

Chapter 9, AIR QUALITY – MOTOR VEHICULAR POLLUTANTS, LEAD, ODORS, AND NUISANCE POLLUTANTS, of Title 20, ENVIRONMENT, of the DMCR is amended as follows:

Section 903, ODOROUS OR OTHER NUISANCE AIR POLLUTANTS, is amended as follows:

New subsections 903.2 through 903.13 are added to read as follows:

903.2 Any stationary source that falls within the following categories regulated by the District of Columbia Air Pollution Control Act of 1984 (the “Act”), effective March 15, 1985 (D.C. Law 5-165; D.C. Official Code § 8-101.05) shall submit an Odor Control Plan (OCP):

- (a) Cultivation and dispensing of medical marijuana, as described in Section 7 of the Legalization of Marijuana for Medical Treatment Initiative of 1999, effective July 27, 2010 (D.C. Law 18-210; D.C. Official Code § 7-1671.06), and any other marijuana cultivation, processing, or dispensing operation licensed under District law;
- (b) Painting operations subject to the requirements of 20 DCMR §§ 718 and 1409;
- (c) Trash transfer stations;
- (d) Asphalt processing plants;
- (e) Wastewater treatment facilities and systems; and
- (f) Commercial solid fuel-fired cooking operations.

903.3 The Department may, through the issuance of an administrative order, require an owner or operator of a stationary source of odorous air pollutants, not required to operate under an OCP by § 903.2, to submit an OCP to the Department if:

- (a) The source emits odorous air pollutants that are detected by a trained inspector using a field olfactometer when one (1) volume of odorous air has been diluted with two (2) or more volumes of odor-free air, as measured at a location or locations where it is likely odorous air pollutants will be detected given the prevailing atmospheric conditions; or

- (b) The Department receives three (3) or more complaints about the source from distinct addresses within the District, which includes distinct units, apartments, or suites at a single street address, within a thirty (30) day period; provided, that:
 - (1) Each complainant submits a written statement, or a report to DC311, containing the following information:
 - (A) The complainant's name, address, and business, if applicable;
 - (B) The date, time, duration, and description of the odor that the complainant detected; and
 - (C) The suspected source of the odor; and
 - (2) The Department confirms that the odor identified in the complaints is coming from the suspected source.
- 903.4
 - (a) An owner or operator of a stationary source shall submit an OCP meeting the requirements of § 903.5 by the following deadlines:
 - (1) Within sixty (60) days of the issuance of an administrative order pursuant to § 903.3; or
 - (2) For a source that falls within the regulated categories described in § 903.2:
 - (A) Within ninety (90) days of August 4, 2023, if the source was constructed before that date; or
 - (B) At least sixty (60) days before commencing construction if the source is to be constructed after August 4, 2023, or with the source's permit application under 20 DCMR §§ 200.1 or 200.2, whichever is sooner.
 - (b) The Department may order submission of an OCP in a period other than the time periods defined in § 903.4 (a) on a case-by-case basis, upon consideration of the following factors:
 - (1) The severity of the odor;
 - (2) The number of distinct complainants;
 - (3) The frequency of complaints; and
 - (4) The amount of time needed by the source to develop the OCP.

903.5 An OCP shall contain requirements sufficient to control nuisance odors and shall include, to the extent applicable, the following information:

- (a) Source information:
 - (1) Name of source;
 - (2) Name, phone number, and email address (if available) of source's owner or operator and point of contact;
 - (3) Source physical address;
 - (4) Source mailing address (if different from physical address);
 - (5) Source type;
 - (6) Source hours of operation;
 - (7) Description of source operations; and
 - (8) Emergency contact information;
- (b) The following information about any odor generated by the source:
 - (1) Floor plan, specifying the locations of odor-emitting activity and emissions;
 - (2) Specific odor-emitting activity; and
 - (3) Phases (timing, length, etc.) of odor-emitting activity;
- (c) A description of the proposed odor mitigation procedures and practices, which must either be based on industry-specific best control technologies and best management practices or be otherwise sufficient to effectively prevent nuisance odors for all odor sources, and which must include the following:
 - (1) Administrative controls:
 - (A) Maintenance, testing, and audit procedures to ensure that control equipment is functioning properly and the OCP is being adhered to;
 - (B) Staff training;

- (C) Recordkeeping procedures and forms; and
 - (D) Any other work practices necessary to prevent nuisance odors;
- (2) A proposal concerning engineering controls, reviewed by a professional engineer licensed with the Department of Licensing and Consumer Protection and certified by the professional engineer to be sufficient to effectively mitigate odors for all odor sources, to address the following:
- (A) Engineering controls shall include each of the following components:
 - (i) System design;
 - (ii) Operational processes; and
 - (iii) Maintenance plan; or
 - (B) If the owner or operator of a source determines that engineering controls are not necessary to effectively mitigate odors for all or specific odor sources, the owner or operator shall submit that determination to the Department as part of its OCP;
- (d) A timeline for implementation of odor mitigation practices that takes into account the compliance time needed for the design, ordering, contracting, installation, and start-up of control equipment or process changes, commencing upon notice from the Department that it has approved the OCP; and
- (e) A description of the source's procedures for receiving, responding to, and tracking complaints.
- 903.6 The Department shall review the OCP and determine whether it meets the requirements of § 903.5:
- (a) If the Department determines that the OCP meets the requirements of § 903.5, it shall approve the OCP and notify the source's owner or operator of the approval; or
 - (b) If the Department determines that the OCP does not meet the requirements of § 903.5, it shall disapprove the OCP and notify the source owner or operator in accordance with § 903.7.

- 903.7 If the Department notifies a source's owner or operator that it has disapproved the OCP for that source, the Department shall provide a written description of the reason(s) for the disapproval and the owner or operator shall:
- (a) Submit modifications to the source's OCP to address the deficiencies within a period established by the Department; and
 - (b) Upon issuance of an order under § 106, which DOEE shall not issue for activities it determines to be essential for health and safety, cease nuisance-causing odor-emitting activities.
- 903.8 If the Department notifies a source's owner or operator that it has approved the OCP for that source, the owner or operator shall:
- (b) Implement its OCP per the timeline it has provided under § 903.5(d); and
 - (b) Comply with the OCP, including any approved amendments, until the source has been decommissioned or otherwise ceases operations.
- 903.9 When a modification is made to a source, or to a process at the source, that has the potential to affect the nature or degree of odor or the control of odor, the owner or operator of the source must submit an update to its OCP within thirty (30) days of the modification. If the modification is subject to the requirements of 20 DCMR § 200, the owner shall submit an updated OCP as part of the source's permit application pursuant to that section.
- 903.10 Any owner or operator of a source that seeks a variance from the requirements of this section shall comply with the procedures under 20 DCMR § 103.
- 903.11 The owner or operator shall provide all records maintained pursuant to § 903.5(c)(1)(C) to the Department upon request.
- 903.12 The owner or operator shall report all deviations from the OCP to the Department within three (3) business days of the deviation;
- 903.13 Compliance with this section shall be determined as follows:
- (a) Compliance with the OCP shall be an affirmative defense to violations of § 903.1 for which the owner or operator shall bear the burden of proof. However, in the event that the Department determines the OCP is inadequate to prevent violations of § 903.1, the Department may require the owner or operator to modify the OCP in accordance with the procedures under § 903.7.
 - (b) Violation of standards set forth in this section that occur as a result of unavoidable malfunction, despite the conscientious employment of control

practices, shall be an affirmative defense for which the owner or operator shall bear the burden of proof. A malfunction shall not be considered unavoidable if the owner or operator could have taken, but did not take, appropriate steps to eliminate the malfunction within a reasonable time, as determined by the Department.

Section 999, DEFINITIONS AND ABBREVIATIONS, is amended as follows:

Section 999.1 is amended by adding the following definitions in alphabetical order within the existing list of definitions:

Administrative controls – written procedural mechanisms used for odor mitigation.

Deviation – the failure to comply with any of the administrative or engineering controls in the source’s Odor Control Plan.

Engineering controls – physical mechanisms used for odor mitigation, such as the installation of process equipment or the physical modification of a source’s process or process equipment.

Wastewater treatment facility – publicly owned treatment works as defined in 40 C.F.R. § 63.1595, sewer lift-stations, wastewater pumping stations, and equipment for on-site treatment of wastewater.

Section 999.2 is amended by adding the following abbreviation:

OCP – Odor Control Plan