

# **Regulatory Flexibility Analysis and Impact Statement Form**

## **For Proposed New and Amended Regulations Affecting Small Businesses or Individuals**

### **Introduction**

Beginning January 1, 2016, agencies submitting proposed new or amended regulations that affect small businesses or individuals are required, under the new Regulatory Transparency and Accountability Acts of 2015 (see 80 Del. Laws, c. 112 and 113), to submit a Regulatory Flexibility Analysis (RFA) and a Regulatory Impact Statement (RIS) with the proposed regulation to the Registrar of Regulations (see **29 Del.C. Ch. 104**).

This RFA and RIS form is intended to benefit the small businesses and individuals impacted by proposed regulations by ensuring a reasonable level of consistency in the formatting of RFAs and RISs across different agencies and regulations.

State agencies proposing new or amended regulations that are substantially likely to impose additional costs or burdens on small businesses<sup>1</sup> or individuals<sup>2</sup> must submit a Regulatory Flexibility Analysis (RFA) **and** a Regulatory Impact Statement (RIS) to the Registrar of Regulations, with the proposed regulation. For agencies proposing amendments to existing regulations, the promulgating agency shall only be required to complete the RFA and RIS for the proposed amended portion of the existing regulation, and not for the entire existing regulation.

### **What is a Regulatory Flexibility Analysis (RFA)?**

In each RFA, an agency must consider, where applicable, lawful, feasible and desirable, specific methods of reducing the burdens of the regulation on individuals and/or small businesses, including: (1) establishing less stringent requirements and deadlines; (2) establishing performance standards to replace design standards; (3) exempting individuals and small businesses from all or part of the regulation; and (4) examining other ways to accomplish the regulation's purpose, while minimizing the impact upon individuals and/or small businesses.

### **What is a Regulatory Impact Statement (RIS)?**

Among other things, each RIS must (1) describe the purpose of the regulation; (2) identify the individuals and/or small businesses subject to it; (3) provide an estimate of the potential costs of compliance; and (4) describe any less intrusive or less costly alternative methods of achieving the purpose of the regulation. In addition, the Act further enhances transparency by requiring the Registrar of Regulations to transmit regulatory impact statements to the appropriate standing committee of the General Assembly.

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<sup>1</sup>"Small business" means any not-for-profit enterprise, sheltered workshop or business enterprise which is engaged in any phase of manufacturing, agricultural production or personal service, regardless of the form of its organization, when such enterprise or workshop employs fewer than 50 persons, has gross receipts of less than \$10,000,000 and is not owned, operated or controlled by another business enterprise.

<sup>2</sup>"Individual" means any natural person, including any sole proprietorship. The term "individual" does not include any natural person affected by a regulation in his/her capacity as an officer, director, or employee of an organization that is not a "small business"; e.g. the CEO of a large business.

*Agencies, Boards, and Commissions: please fill out this form when proposing new or amended regulations for the purpose of informing the public and business community. All proposed regulations, even if an exemption applies, must have this form attached when submitting to the Registrar of Regulations.*

Date \_\_\_\_\_ Agency \_\_\_\_\_ Division/Office \_\_\_\_\_

Contact Name \_\_\_\_\_

Contact Email (or mailing address for comments) \_\_\_\_\_

Regulation # \_\_\_\_\_ Title \_\_\_\_\_

## Exemptions

*Exemption A:* This proposed regulation is **not subject to Chapter 104, Title 29 of the Delaware Code**, because it will not apply to small businesses or individuals at all.

*Exemption B:* The agency, board, or commission is exempt from completing the RFA and Impact Statement due to the nature of the proposed regulation.

Choose the reason for exemption:

*B1.* This proposed regulation is not substantially likely to impose additional costs or burdens upon individuals and/or small businesses. Explain this conclusion:

*B2.* This is an emergency regulation pursuant to **29 Del.C. §10119**.

*B3.* This proposed regulation is exempt from the procedural requirements of the Administrative Procedures Act, **29 Del.C. §10113(b)**. Choose which reason:

*B3a.* Descriptions of agency organization, operations and procedures for obtaining information

*B3b.* Rules of practice and procedure used by the agency

*B3c.* Delegations of authority to subordinates

*B3d.* Nonsubstantive changes in existing regulations to alter style or form or to correct technical errors

*B3e.* Amendments to existing regulations to make them consistent with changes in basic law but which do not otherwise alter the substance of the regulations

*B3f.* Codifications of existing agency or judicial principles of decision derived from previous decisions and rulings

*B4. This proposed regulation defines standard of conduct or qualifications of individuals applying for licensure or as licensed professionals. Identify which professional license or professional qualification this would apply to:*

*B5. Regulations that are required by federal law and/or have already complied with the federal Regulatory Flexibility Act, 5 U.S.C. § 601 et seq. (If this is checked, the agency, board, or commission shall cite the federal law, regulation, directive, or guidance strictly mandating such state regulation and shall attach any applicable Federal RFA related to the regulation, if available. Attach the Federal RFA statement to this form, or provide the URL):*

*End of Exemption Section*

# Regulatory Flexibility Analysis

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State agencies, boards, and commissions proposing to adopt or amend a regulation that is substantially likely to impose additional costs or burdens upon individuals and/or small businesses shall consider, where **applicable, lawful, feasible and desirable**, the following methods of reducing the additional costs and burdens of proposed regulations **on individuals and small businesses**:

1. The establishment of less stringent compliance or reporting requirements;
2. The establishment of less stringent schedules or deadlines for compliance or reporting requirements;
3. The consolidation or simplification of compliance or reporting requirements;
4. The establishment of performance standards to replace design or operational standards required in the proposed regulation;
5. The exemption of certain individuals or small businesses from all or part of the requirements contained in the proposed regulation; and
6. Such other alternative regulatory methods that will accomplish the objectives of the proposed regulation while minimizing the adverse impact upon individuals and small businesses.

Explain whether each of the above methods would be applicable, lawful, feasible, and desirable to reduce the costs or burdens of the proposed regulation:

- 1.
- 2.
- 3.
- 4.
- 5.
- 6.

If the above RFA section does not address each of the six methods and there is not an exemption that applies, explain why the agency, board, or commission decided it was not applicable, lawful, feasible, and desirable to complete the RFA section above:

*End of Regulatory Flexibility Analysis Section*



- Provide a **good-faith estimate** of the potential cost of compliance for individuals and/or small businesses, which at minimum shall include the projected reporting, recordkeeping, and other administrative costs required to comply with the proposed regulation. Use the below space for a free-text response (*Cost Estimate Option 1*) or, use the questionnaire below to guide the response (*Cost Estimate Option 2*):

***Cost Estimate Option 1:***

	<b>Cost Estimate Option 2</b>	<b>Yes</b>	<b>No</b>	<b>Unknown</b>
1	Is this regulation being proposed to implement a state or federal program that provides funds to Delaware?			
2	If this regulation is not implemented, will individuals, businesses, or programs lose federal funding?			
3	Does this regulation implement a plan that has already been approved by the federal government, after an opportunity for public comment?			
4	Does this regulation follow industry standards and best practices?			
5	Are there potential costs in not establishing these standards?			
6	Does the regulation require capital costs (building costs, material costs, upgrades to property or structures, retrofitting of systems, etc.)?			
7	Does the regulation require additional recurring costs on small businesses or individuals?			
8	Does the regulation impose additional administrative burden for a small business or individual?			
8a	If answering yes to #8, is it ongoing reporting or one time? (Choose answer) Ongoing                  One Time                  Unknown			
8b	If answering yes to #8, generally, how much administrative effort will be required to comply with the regulation? Large Amount          Small Amount          Unknown			
9	Does the regulation require new or changed record keeping that will create new processes or change processes already in place for small businesses or individuals?			

	<i>Cost Estimate Option 2 (continued)</i>	Yes	No	Unknown
10	Would a small businesses or individual be required to hire an outside professional to comply with the proposed regulation (such as an attorney, accountant, tax advisor, environmental consultant, engineering firm, etc.)?			
10a	If answering yes to #10, estimate how many hours an outside professional may be needed to assist			
10b	If answering yes to #10, will a small business or individual be required to retain the services of the outside professional on an ongoing basis?			
11	Does the regulation require small businesses to purchase goods or services that are unusual or not commercially reasonable?			
12	Does the regulation require that small businesses exceed commercially reasonable data storage and transmission standards?			
13	Will small businesses have to hire additional employees in order to comply with the proposed regulation?			
14	Does the regulation require small businesses to cooperate with audits, inspections, or other regulatory enforcement activities?			
15	Does the regulation have the effect of creating additional licenses, taxes and/or fees for small businesses?			
16	Does the regulation require small businesses to obtain additional education to keep up to date with regulatory requirements?			
17	Please further explain any additional costs or burdens, which at a minimum shall include the projected reporting, recordkeeping, and other administrative costs required to comply with the proposed regulation.			



incorporated into the existing O<sub>3</sub> FRM, using the same calibration procedure in Appendix D of 40 CFR part 50. We are also making changes to the procedures for testing performance characteristics and determining comparability between candidate FEMs and reference methods.

For the purposes of ICR number 2313.04, the burden figures represent the burden estimate based on the requirements contained in this rule. The burden estimates are for the 3-year period from 2016 through 2018. The implementation of the PAMS changes will occur beyond the time frame of this ICR with implementation occurring in 2019. The cost estimates for the PAMS network (including revisions) will be captured in future routine updates to the Ambient Air Quality Surveillance ICR that are required every 3 years by OMB. The addition of a new FRM in 40 CFR part 50 and revisions to the O<sub>3</sub> FEM procedures for testing performance characteristics in 40 CFR part 53 does not add any additional information collection requirements.

The ICR burden estimates are associated with the changes to the O<sub>3</sub> seasons in this final rule. This information collection is estimated to involve 158 respondents for a total cost of approximately \$24,597,485 (total capital, labor, and operation and maintenance) plus a total burden of 339,930 hours for the support of all operational aspects of the entire O<sub>3</sub> monitoring network. The labor costs associated with these hours are \$20,209,966. Also included in the total are other costs of operations and maintenance of \$2,254,334 and equipment and contract costs of \$2,133,185. The actual labor cost increase to expand the O<sub>3</sub> monitoring seasons is \$2,064,707. In addition to the costs at the state, local, and tribal air quality management agencies, there is a burden to EPA of 41,418 hours and \$2,670,360. Burden is defined at 5 CFR 1320.3(b). State, local, and tribal entities are eligible for state assistance grants provided by the federal government under the CAA which can be used for related activities. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

#### 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. Rather, this rule establishes national standards for allowable concentrations of O<sub>3</sub> in ambient air as required by section 109 of the CAA. See also *American Trucking Associations v. EPA*, 175 F. 3d at 1044–45 (NAAQS do not have significant impacts upon small entities because NAAQS themselves impose no regulations upon small entities). Similarly, the revisions to 40 CFR part 58 address the requirements for states to collect information and report compliance with the NAAQS and will not impose any requirements on small entities. Similarly, the addition of a new FRM in 40 CFR part 50 and revisions to the FEM procedures for testing in 40 CFR part 53 will not impose any requirements on small entities.

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

This action does not contain an unfunded federal mandate of \$100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The revisions to the O<sub>3</sub> NAAQS impose no enforceable duty on any state, local, or tribal governments or the private sector beyond those duties already established in the CAA. The expected costs associated with the monitoring requirements are described in the EPA's ICR document, and these costs are not expected to exceed \$100 million in the aggregate for any year.

Furthermore, as indicated previously, in setting NAAQS the EPA cannot consider the economic or technological feasibility of attaining ambient air quality standards, although such factors may be considered to a degree in the development of state plans to implement the standards (see *American Trucking Associations v. EPA*, 175 F. 3d at 1043 [noting that because the EPA is precluded from considering costs of implementation in establishing NAAQS, preparation of a RIA pursuant to the UMRA would not furnish any information which the court could consider in reviewing the NAAQS]). With regard to the sections of the rule preamble discussing implementation of the revisions to the O<sub>3</sub> NAAQS, the CAA imposes the obligation for states to submit SIPs to implement the NAAQS for O<sub>3</sub>. To the extent the EPA's discussion of implementation topics in this final rule may reflect some interpretations of those requirements, those interpretations do not impose obligations beyond the duties already established in the CAA and thus do not constitute a federal mandate for purposes of UMRA. The EPA is also adopting a grandfathering provision for

certain PSD permits in this action, as described above. However, that provision does not impose any mandate on any state, local, or tribal government or the private sector, but rather provides relief from requirements that would otherwise result from the new standards. In addition, the EPA is not requiring states to revise their SIPs to include such a provision.

#### E. Executive Order 13132: Federalism

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

#### F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175. It does not have a substantial direct effect on one or more Indian tribes. This rule provides increased protection from adverse effects of ozone for the entire country, including for sensitive populations, and tribes are not obligated to adopt or implement any NAAQS. In addition, tribes are not obligated to conduct ambient monitoring for O<sub>3</sub> or to adopt the ambient monitoring requirements of 40 CFR part 58. Even if this action were determined to have tribal implications within the meaning of Executive Order 13175, it will neither impose substantial direct compliance costs on tribal governments, nor preempt tribal law. Thus, consultation under Executive Order 13175 was not required.

Nonetheless, consistent with the “EPA Policy on Consultation and Coordination with Indian Tribes”, the EPA offered government-to-government consultation on the proposed rule. No tribe requested government-to-government consultation with the EPA on this rule. In addition, the EPA conducted outreach to tribal environmental professionals, which included participation in the Tribal Air call sponsored by the National Tribal Air Association, and two other calls available to tribal environmental professionals. During the public comment period we received comments on the proposed rule from seven tribes and three tribal organizations.

#### G. Executive Order 13045: Protection of Children From Environmental Health & Safety Risks

This action is subject to Executive Order 13045 because it is an

associated health impacts, to develop emissions control strategies, and to measure progress for the air pollution program. The amendments would revise the technical requirements for SO<sub>2</sub> monitoring sites, require the siting and operation of additional SO<sub>2</sub> ambient air monitors, and the reporting of the collected ambient SO<sub>2</sub> monitoring data to EPA's Air Quality System (AQS). The ICR is estimated to involve 102 respondents for a total approximate cost of \$15,203,762 (total capital, and labor and non-labor operation and maintenance) and a total burden of 207,662 hours. The labor costs associated with these hours is \$11,130,409. Included in the \$15,203,762 total are other costs of other non-labor operations and maintenance of \$1,104,377 and equipment and contract costs of \$2,968,975. In addition to the costs at the State and local air quality management agencies, there is a burden to EPA for a total of 14,749 hours and \$1,060,621. Burden is defined at 5 CFR 1320.3(b). State, local, and Tribal entities are eligible for State assistance grants provided by the Federal government under the CAA which can be used for monitors and related activities. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

#### C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this rule on small entities, small entity is defined as: (1) A small business that is a small industrial entity as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This final rule will not impose any requirements on small entities. Rather, this rule establishes national standards for allowable concentrations of SO<sub>2</sub> in ambient air as required by section 109 of the CAA. *American Trucking Ass'n v. EPA*, 175 F.3d 1027, 1044–45 (DC Cir. 1999) (NAAQS do not have significant impacts upon small entities because NAAQS themselves impose no regulations upon small entities). Similarly, the amendments to 40 CFR Part 58 address the requirements for States to collect information and report compliance with the NAAQS and will not impose any requirements on small entities.

#### D. Unfunded Mandates Reform Act

This action is not subject to the requirements of sections 202 and 205 of the UMRA. EPA has determined that this final rule does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any one year. The revisions to the SO<sub>2</sub> NAAQS impose no enforceable duty on any State, local or Tribal governments or the private sector. The expected costs associated with the monitoring requirements are described in EPA's ICR document, but those costs are not expected to exceed \$100 million in the aggregate for any year. Furthermore, as indicated previously, in setting a NAAQS, EPA cannot consider the economic or technological feasibility of attaining ambient air quality standards. Because the CAA prohibits EPA from considering the types of estimates and assessments described in section 202 when setting the NAAQS, the UMRA does not require EPA to prepare a written statement under section 202 for the revisions to the SO<sub>2</sub> NAAQS.

With regard to implementation guidance, the CAA imposes the obligation for States to submit SIPs to implement the SO<sub>2</sub> NAAQS. In this final rule, EPA is merely providing an interpretation of those requirements. However, even if this rule did establish an independent obligation for States to submit SIPs, it is questionable whether an obligation to submit a SIP revision would constitute a Federal mandate in any case. The obligation for a State to submit a SIP that arises out of section 110 and section 191 of the CAA is not legally enforceable by a court of law, and at most is a condition for continued receipt of highway funds. Therefore, it

is possible to view an action requiring such a submittal as not creating any enforceable duty within the meaning of U.S.C. 658 for purposes of the UMRA. Even if it did, the duty could be viewed as falling within the exception for a condition of Federal assistance under U.S.C. 658.

EPA has determined that this final rule contains no regulatory requirements that might significantly or uniquely affect small governments because it imposes no enforceable duty on any small governments. Therefore, this rule is not subject to the requirements of section 203 of the UMRA.

#### E. Executive Order 13132: Federalism

This final rule 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, as specified in Executive Order 13132. The rule does not alter the relationship between the Federal government and the States regarding the establishment and implementation of air quality improvement programs as codified in the CAA. Under section 109 of the CAA, EPA is mandated to establish NAAQS; however, CAA section 116 preserves the rights of States to establish more stringent requirements if deemed necessary by a State. Furthermore, this rule does not impact CAA section 107 which establishes that the States have primary responsibility for implementation of the NAAQS. Finally, as noted in section E (above) on UMRA, this rule does not impose significant costs on State, local, or Tribal governments or the private sector. Thus, Executive Order 13132 does not apply to this rule.

#### F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by Tribal officials in the development of regulatory policies that have Tribal implications." This final rule does not have Tribal implications, as specified in Executive Order 13175. It does not have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal government and Indian Tribes, or on the distribution of power and responsibilities between the