

Delaware Register of Regulations

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Pages 1481 - 1664



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Pursuant to 29 Del.C. Chapter 11, Subchapter III, this issue of the Register contains all documents required to be published, and received on or before March 15, 1998.

INFORMATION ABOUT THE DELAWARE REGISTER OF REGULATIONS

DELAWARE REGISTER OF REGULATIONS

The Delaware Register of Regulations is an official State publication established by authority of 69 Del. Laws, c. 107 and is published on the first of each month throughout the year.

The Delaware Register will publish any regulations that are proposed to be adopted, amended or repealed and any emergency regulations promulgated.

The Register will also publish some or all of the following information:

- Governor's Executive Orders
- Governor's Appointments
- Attorney General's Opinions in full text
- Agency Hearing and Meeting Notices
- Other documents considered to be in the public interest.

CITATION TO THE DELAWARE REGISTER

The Delaware Register of Regulations is cited by volume, issue, page number and date. An example would be:

1:1 **Del. R.** 35 - 37 (July 1, 1997) refers to Volume 1, Issue 1, pages 35 - 37 of the Delaware Register issued on July 1, 1997.

SUBSCRIPTION INFORMATION

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CITIZEN PARTICIPATION IN THE REGULATORY PROCESS

Delaware citizens and other interested parties may participate in the process by which administrative regulations are adopted, amended or repealed, and may initiate the process by which the validity and applicability of regulations is determined.

Under 29 **Del.C.** §10115 whenever an agency proposes to formulate, adopt, amend or repeal a regulation, it shall file notice and full text of such proposals, together with copies of the existing regulation being adopted, amended or repealed, with the Registrar for publication in the Register of Regulations pursuant to §1134 of this title. The notice shall describe the nature of the proceedings including a brief synopsis of the subject, substance, issues, possible terms of the agency action, a reference to the legal authority of the agency to act, and reference to any other regulations that may be impacted or affected by the proposal, and shall state the manner in which persons may present their views; if in writing, of the place to which and the final date by which such views may be submitted; or if at a public hearing, the date, time and place of the hearing. If a public hearing is to be held, such public hearing shall not be scheduled less than 20 days following publication of notice of the proposal in the Register of Regulations. If a public hearing will be held on the proposal, notice of the time, date, place and a summary of the nature of the proposal shall also be published in at least 2 Delaware newspapers of general circulation; The notice shall also be mailed to all persons who have made timely written requests of the agency for advance notice of its regulation-making proceedings.

The opportunity for public comment shall be held open for a minimum of 30 days after the proposal is published in the Register of Regulations.

INFORMATION ABOUT THE DELAWARE REGISTER OF REGULATIONS

At the conclusion of all hearings and after receipt within the time allowed of all written materials, upon all the testimonial and written evidence and information submitted, together with summaries of the evidence and information by subordinates, the agency shall determine whether a regulation should be adopted, amended or repealed and shall issue its conclusion in an order which shall include: (1) A brief summary of the evidence and information submitted; (2) A brief summary of its findings of fact with respect to the evidence and information, except where a rule of procedure is being adopted or amended; (3) A decision to adopt, amend or repeal a regulation or to take no action and the decision shall be supported by its findings on the evidence and information received; (4) The exact text and citation of such regulation adopted, amended or repealed; (5) The effective date of the order; (6) Any other findings or conclusions required by the law under which the agency has authority to act; and (7) The signature of at least a quorum of the agency members.

The effective date of an order which adopts, amends or repeals a regulation shall be not less than 10 days from the date the order adopting, amending or repealing a regulation has been published in its final form in the Register of Regulations, unless such adoption, amendment or repeal qualifies as an emergency under §10119.

Any person aggrieved by and claiming the unlawfulness of any regulation may bring an action in the Court for declaratory relief.

No action of an agency with respect to the making or consideration of a proposed adoption, amendment or repeal of a regulation shall be subject to review until final agency action on the proposal has been taken.

When any regulation is the subject of an enforcement action in the Court, the lawfulness of such regulation may be reviewed by the Court as a defense in the action.

Except as provided in the preceding section, no judicial review of a regulation is available unless a complaint therefor is filed in the Court within 30 days of the day the agency order with respect to the regulation was published in the Register of Regulations.

CLOSING DATES AND ISSUE DATES FOR THE DELAWARE REGISTER OF REGULATIONS

ISSUE DATE	CLOSING DATE	CLOSING TIME
MAY 1	APRIL 15	4:30 P.M.
JUNE 1	MAY 15	4:30 P.M.
JULY 1	JUNE 15	4:30 P.M.
AUGUST 1	JULY 1	4:30 P.M.
SEPTEMBER 1	AUGUST 1	4:30 P.M.

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Regulation No. 5.1101.etal.0008, Instructions for calculation of Employment Tax Credits	1:3 Del.R.	233	(Prop.)
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Regulation No. 5.1101etal.0009, Instructions for preparation of Franchise Tax for Resulting Branches in this state of out-of-state banks	1:3 Del.R.	235	(Prop.)
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	1:5 Del.R.	496	(Final)
Regulation No. 5.131.0002, Procedures Governing the Creation & Existence of an Interim Bank	1:5 Del.R.	592	(Prop.)
Regulation No. 5.2111(b).0005, Report of Delaware Loan Volume	1:7 Del.R.	812	(Prop.)
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Regulation No. 5.2111/2210/2906.0006, Report of Delaware Assests	1:7 Del.R.	815	(Prop.)
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Symbol Key

Roman type indicates the text existing prior to the regulation being promulgated. Underlined text indicates new text. Language which is ~~stricken~~ through indicates text being deleted.

Proposed Regulations

Under 29 **Del.C.** §10115 whenever an agency proposes to formulate, adopt, amend or repeal a regulation, it shall file notice and full text of such proposals, together with copies of the existing regulation being adopted, amended or repealed, with the Registrar for publication in the Register of Regulations pursuant to §1134 of this title. The notice shall describe the nature of the proceedings including a brief synopsis of the subject, substance, issues, possible terms of the agency action, a reference to the legal authority of the agency to act, and reference to any other regulations that may be impacted or affected by the proposal, and shall state the manner in which persons may present their views; if in writing, of the place to which and the final date by which such views may be submitted; or if at a public hearing, the date, time and place of the hearing. If a public hearing is to be held, such public hearing shall not be scheduled less than 20 days following publication of notice of the proposal in the Register of Regulations. If a public hearing will be held on the proposal, notice of the time, date, place and a summary of the nature of the proposal shall also be published in at least 2 Delaware newspapers of general circulation; The notice shall also be mailed to all persons who have made timely written requests of the agency for advance notice of its regulation-making proceedings.

**DEPARTMENT OF
ADMINISTRATIVE SERVICES**

DIVISION OF PROFESSIONAL REGULATION

BOARD OF EXAMINERS IN OPTOMETRY

Statutory Authority: 24 Delaware Code,
Section 2104(a)(1) (24 **Del.C.** 2104(a)(1))

NOTICE - PUBLIC HEARING

The Delaware Board of Examiners in Optometry proposes to revise its rules and regulations in accordance with 24 **Del. C.**, section 2104.

A public hearing will be held on Thursday, May 7, 1998 at 6:30 p.m. in the Cannon Building, Conference Room A, 861 Silver Lake Boulevard, Dover, Delaware.

Anyone desiring a copy of the proposed rules and regulations may obtain same from the Board Office, Division of Professional Regulation, Cannon Building, Suite 203, P.O. Box 1401, Dover, Delaware 19903. Written comments should be submitted to the Board Office at the above address on or before May 7, 1998. Those individuals wishing to make oral comments at the

public hearing are requested to notify the Board Office at (302)739-4522, ext. 203.

**DELAWARE STATE BOARD OF EXAMINERS IN
OPTOMETRY
RULES AND REGULATIONS**

- SECTION 1. Definitions
- SECTION 2. Qualifications and Examinations
- SECTION 3. Internship
- SECTION 4. Reciprocity
- SECTION 5. Use of Diagnostic Drugs
- SECTION 6. Use of Therapeutic Drugs
- SECTION 7. Minimum Standards of Practice
- SECTION 8. Ethics
- SECTION 9. Hearings
- SECTION 10. Continuing Education Requirements
- SECTION 11. Therapeutic Certification
- SECTION 12. Unprofessional Conduct

SECTION 1. DEFINITIONS

A. Premises:

For purposes of 24 **Del.C.** Section 2118(b) and these regulations, the phrase "on the same premises" shall be

defined as:

being within the immediate physical boundaries of the office of the licensed supervising practitioner.

The "office" of the licensed supervising practitioner shall not include space, within a building or structure owned or leased by the licensed supervising practitioner, in which the licensed supervising practitioner does not engage in the practice of medicine, osteopathy, ophthalmology or optometry.

B. Supervision:

For purposes of 24 **Del.C.** Section 2118(b) and these regulations, the term "supervision" shall be defined as:

the physical presence of the licensed practitioner at some time during the fitting for the purpose of evaluating and verifying the contact lens fit and the patient's ocular health.

C. Duly licensed:

For purposes of 24 **Del.C.** Section 2106(a) and these regulations, the term "duly licensed" shall be defined as:

a person who satisfies the applicable requirements under 24 **Del.C.** Section 2107, 2108, 2110 and 2111 (or alternatively Section 2109 and 2111), and who has been issued a license in good standing in accordance with Section 2112. A person holding a valid temporary license shall not be deemed to be duly licensed for purposes of Chapter 21, Title 24 and these regulations, and may only engage in the practice of optometry as outlined in Section 2110 and Section 3 of these regulations.

D. Dispensing:

The practice of optometry shall include the dispensing of contact lenses. "Dispensing" shall be defined as:

"Contact lens dispensing" means the fabrication, ordering, mechanical adjustment, dispensing, sale and delivery to the consumer of contact lenses. Contact lenses must be dispensed in accordance with a written contact lens prescription from a licensed physician or optometrist which includes lens curvature, diameter, power, material, manufacturer and an expiration date not to exceed one year, together with appropriate instructions for the care and handling of the lenses. The term does not include the taking of any measurements of the

eye or the cornea and evaluating the physical fit of the contact lenses.

SECTION 2. QUALIFICATIONS AND EXAMINATIONS

2.01 Every candidate for registration must meet the following qualifications:

A. Have received a degree of "Doctor of Optometry" from a legally incorporated and accredited optometric college or school which has been approved by the appropriate accrediting body of the American Optometric Association.

B. Pass the substantive and clinical examinations required by 2.02 of these regulations.

C. Complete the internship required by 24 **Del.C.** Section 2110 and Section 3 of these regulations. An individual is duly licensed after completing the internship requirement as well as all the other requirements in Section 2107 of this Statute. (For reciprocal applicants, see Section 4 of these regulations)

D. All applicants for therapeutic licensure must be CPR certified for both children and adults. All therapeutic optometrists must keep their CPR certification for both children and adults current.

E. Has not engaged in conduct that would constitute grounds for disciplinary action, and has no unresolved disciplinary proceedings pending in this or any other jurisdiction. It shall be the responsibility of the candidate to submit to the Board a certified statement of good standing from each jurisdiction where he/she is currently or has been previously licensed.

2.02 Every candidate shall pass, at a score determined by the National Board of Examiners in Optometry, the substantive and clinical portions of the examination given by the National Board of Examiners in Optometry. The clinical examination given by the National Board of Examiners in Optometry may be taken as part of the National Board Examination or as a separate clinical skills and/or TMOD examination given by the National Board of Examiners in Optometry as the State Board shall designate.

SECTION 3. INTERNSHIP

3.01 An internship is a course of study in which applicants receive part of their clinical training in a private practice setting under the supervision of a licensed optometrist or ophthalmologist. An active, licensed Optometrist or Ophthalmologist may act as a supervisor. Any applicant's participation in such an internship program must be approved by the Board and is subject to

the following terms and conditions:

A. A letter from the practitioner with whom the applicant will be interning stating the goals, duties and the number of hours he/she will be working. If the applicant is not doing his/her internship with a therapeutically certified optometrist or ophthalmologist, he/she must also complete an additional one hundred (100) hours of clinical internship with a therapeutically certified Optometrist, Medical doctor or Osteopathic physician.

B. Each applicant who will be participating in the internship program, must provide the name and address of the supervisor and the dates of the internship for approval by the Board before the internship may begin.

C. A letter must be received by the Board from the supervisor verifying the completion of the internship.

D. For purposes of this Section and 29 **Del. C.** section 2110, the term "duration" shall be defined as "a period of no less than six (6) months and no greater than the period ending on the date of the next Board meeting following the end of the six (6) month period." No intern may practice on a temporary license beyond the duration of the internship.

3.02 Subject to the approval requirements stated above, a candidate's internship requirements may be satisfied while the candidate is a member of the Armed Forces if he/she:

A. Functions as a fully credentialed therapeutically certified optometric practitioner; and (for purposes of this Section equivalent to the Air Force regulations).

B. Performs his optometric duties on a full-time basis in a completely equipped eye clinic.

3.03 Full-time: minimum of 35 hours per week.

3.04 All supervisors must supervise the interns on a one-to-one basis whenever an applicant performs a task which constitutes the practice of optometry. No supervisor may be a supervisor for more than one intern at a time. Only one intern shall be permitted in any practice for any period of time.

3.05 All acts which constitute the practice of optometry under 24 **Del.C.** Section 2101(a) may be performed by the intern only under the following conditions:

A. The supervisor shall be on the premises and immediately available for supervision at all times;

B. All intern evaluations of any patient shall be reviewed by the supervisor prior to final determination of the patient's case before the patient leaves the premises; and

C. A supervisor shall at all times effectively supervise and direct the intern.

3.06 A violation of any of the conditions enumerated in this rule may be grounds for the Board to revoke their approval of an internship program. The Board may also revoke its approval of an internship program if it determines that either the supervising optometrist or the intern has engaged in any conduct described by 24 **Del.C.** Section 2113(a). Furthermore, any violation of the terms of this rule by a supervising optometrist who is a licensed optometrist shall be considered unprofessional conduct and a violation of 24 **Del.C.** Section 2113(a)(7).

SECTION 4. RECIPROCITY (ENDORSEMENT)

A. The Board shall waive the internship requirement for an applicant holding a valid license to practice optometry, issued by another jurisdiction, and who has practiced for a minimum of five years in such other jurisdiction with standards of licensure which are equal to or greater than those of 24 **Del.C.**, Chapter 21 and grant a license by reciprocity to such applicant. The applicant shall contact the National Practitioner Data Bank requesting that verification be sent to the Board regarding his/her licensure status. In addition, the applicant shall contact each jurisdiction where he/she currently is licensed, or has been previously licensed, or otherwise authorized to practice optometry, and request that a certified statement be provided to the Board stating whether or not there are disciplinary proceedings or unresolved complaints pending against the applicant. In the event there is a disciplinary proceeding or unresolved complaint pending, the applicant shall not be licensed until the proceeding or complaint has been resolved. In addition, the applicant shall include, as part of the application, copies of state licensing and/or practice statutes and regulations pertaining to the practice of Optometry for the jurisdiction through which he/she is seeking reciprocity.

B. Applicants from jurisdictions which have the same basic qualifications for licensure as this State, but do not have essentially comparable or higher standards to qualify for 'therapeutic' licensing, shall be required to meet the conditions of subsections (a) and (b), 24 **Del.C.** Section 2108.

C. "Standards" as used in this Section are defined in Sections 6 & 7 of these regulations.

SECTION 5. USE OF DIAGNOSTIC DRUGS

5.01 Licensees who have been duly authorized by the Board may, for diagnostic purposes only, make use of the following classes of topical ophthalmic drugs: (1) anesthetics, (2) mydriatics, (3) cycloplegics, and (4) miotics; provided, however, that any such authorization by the Board shall not be construed as authorizing any

licensee to dispense or issue a prescription for diagnostic drugs.

5.02 Authorization by the Board under this regulation shall be evidenced by an appropriate designation on the certificate of registration and license.

5.03 The provisions of Section 5.01 shall not preclude a licensee from using: ancillary diagnostic agents including, but not limited to dyes, schirmer strips, etc.

SECTION 6. USE OF THERAPEUTIC DRUGS

6.01 Therapeutically certified optometrist may use and/or prescribe the following pharmaceutical agents for the treatment of ocular diseases and conditions:

- A. Topical and oral administration:
 - (a) Antihistamines and decongestants
 - (b) Antiglaucoma
 - (c) Analgesics (non-controlled)
 - (d) Antibiotics
- B. Topical administration only:
 - (a) Autonomics
 - (b) Anesthetics
 - (c) Anti-infectives, including antivirals and antiparasitics
 - (d) Anti-inflammatories

6.02 Authorization by the Board under this regulation shall be evidenced by an appropriate designation on the certificate of registration and license.

SECTION 7. MINIMUM STANDARDS OF PRACTICE

- A. Equipment
 - (a) Acuity chart
 - (b) Ophthalmoscope
 - (1) Direct
 - (2) Indirect
 - (c) Keratometer
 - (d) Biomicroscope
 - (e) Tonometer
 - (f) Gonioscope
 - (g) Access to Visual Field
 - (h) Access to Retinal Camera
 - (i) Phoropter
- B. Examination and Treatment
 - 1. General Examination:
 - (a) Case history
 - (b) Acuity measure
 - (c) Internal tissue health evaluation
 - (d) External tissue health evaluation
 - (e) Refraction
 - (f) Tonometry
 - (g) Visual fields (in appropriate cases)

- (h) Retinal photos (in appropriate cases)
 - (i) Treatment, recommendations and directions to the patients, including prescriptions
 - (j) Name of attending optometrist
 - 2. During a contact lens examination:
 - (a) Assessment of corneal curvature
 - (b) Acuity through the lens
 - (c) Directions for the care and handling of lenses and an explanation of the implications of contact lenses with regard to eye health and vision
 - (d) Name of attending optometrist
 - (e) Assessment of contact lens fit
 - 3. During a follow-up contact lens examination:
 - (a) Assessment of fit of lens
 - (b) Acuity through the lens
 - (c) Name of attending optometrist
 - (d) Ocular health assessment
- C. A complete record of examinations and treatment shall be kept in a current manner.

SECTION 8. ETHICS

8.01 It shall be the ideal, the resolve and the duty of all licensees to:

- A. Keep the visual welfare of the patient uppermost at all times.
- B. Promote in every possible way, better care of the visual needs of mankind.
- C. Enhance continuously their educational and technical proficiency to the end that their patients shall receive the benefits of all acknowledged improvements in vision and eye care.
- D. See that no person shall lack for visual care, regardless of his financial status.
- E. Advise the patient whenever consultation with an optometric colleague or reference for other professional care seems advisable.
- F. Hold in professional confidence all information concerning a patient and use such data only for the benefit of the patient.
- G. Conduct themselves as exemplary citizens.
- H. Maintain their offices and their practices in keeping with current professional standards of care.
- I. Promote and maintain cordial and unselfish relations with members of their own profession and other professionals for the exchange of information to the advantage of mankind.
- J. Maintain adequate records on each patient for a period of not less than five years from the date of the most recent service rendered.

8.02

- A. A licensee must honor a patient's request to forward the patient's complete prescription and ophthalmic

or contact lens specification to another licensed physician of medicine, osteopath, optometrist, or a nationally registered contact lens technician working under the direct supervision of an optometrist, ophthalmologist or osteopathic physician, if all financial obligations to the licensee have been satisfied. It shall be the obligation of a licensee to tender to a patient upon request his/her final prescription for ophthalmic lenses or contact lens(es) specification, if all financial obligations to the licensee have been satisfied. For purposes of this section, a final prescription or specification results when a patient is released to routine follow-up care. No licensee shall be required to tender a contact lens prescription beyond one (1) year from the date the contact lens(es) were dispensed.

8.03 It shall be considered unlawful for a licensee to delegate to a lay individual, whether an employee or not, any act or duty which would require, on the part of such individual, professional judgment. The fitting of contact lenses, tonometry, refraction, treatment of eye disease, low vision and vision therapy, etc. shall not be so delegated unless under the direct supervision of the licensee.

8.04 No licensee shall do anything inconsistent with the professional standards of the optometric and allied health professions.

8.05 No licensee shall use unethical, misleading or unprofessional advertising methods, including, but not limited to: baiting patients to purchase materials in exchange for free or reduced fees for professional services.

8.06 No licensee when using the doctor title shall qualify it in any other way than by use of the word "optometrist". He/she may, however, when not using the prefix, use after his/her name the "O.D." degree designation, consistent with other provisions of 24 **Del.C.**, Chapter 21.

8.07 No licensee shall practice in or on premises where any materials, other than those necessary to render his professional services, are dispensed to the public.

8.08 No licensee shall locate in a merchandising store or practice his profession among the public as the agent, employee or servant of, or in conjunction with either directly or indirectly, any merchandising firm, corporation, lay firm or unlicensed individual.

8.09 No licensee shall practice his profession in conjunction with, or as an agent or employee of an ophthalmic merchandising business (commonly known as

"opticians") either directly or indirectly in any manner. Nor shall any licensee use any name other than the name recorded in the files of the State Board for his optometric registration and licensure.

8.10 Corporations, except those allowed under Chapter 6 of Title 8 of the Delaware Code, lay firms and unlicensed individuals are prohibited from the practice of optometry directly or indirectly and from employing, either directly or indirectly, registered and licensed optometrists to examine the eyes of their patients. Licensees so employed will be considered guilty of unprofessional conduct, and in violation of 24 **Del.C.** Sections 2113(a)(3) and (6).

8.11 No licensee shall hold himself forth in such a way as to carry the slightest intimation of having superior qualifications or being superior to other optometrists, unless he is qualified by a specialty board approved by the State Board.

8.12 No licensee holding an official position in any optometric organization shall use such position for advertising purposes or for self-aggrandizement.

8.13 Since the law states that a certificate must be displayed in every office where the profession of optometry is practiced, and since no certificate for branch offices has previously been issued, the State Board shall issue branch office certificates with the words "Branch Office" thereon emblazoned under the registry number, with the certificate being a duplicate of that originally issued.

8.14 A violation of any of the provisions of these regulations will be considered to be unprofessional conduct.

SECTION 9. HEARINGS

9.01 All complaints shall be referred to the Division of Professional Regulation for investigation and a contact person from the Board will be appointed at the next meeting.

9.02 Hearings are conducted in accordance with the Administrative Procedures Act.

SECTION 10. CONTINUING EDUCATION REQUIREMENTS

All persons licensed to practice Optometry in the State of Delaware shall be required to acquire 12 hours of continuing education every two years. All therapeutic

licensed optometrists shall be required to acquire an additional 12 hours of therapeutics and management of ocular disease and keep their CPR certification for both children and adults current. No practice management courses will be accepted.

10.01 These continuing optometric education requirements are necessary for licensure every two years.

10.02 Licensees will be required to comply before May 1 of odd numbered years.

10.03 It shall be the responsibility of the candidate for relicensure to submit to the appropriate State of Delaware agency evidence of his/her compliance with these requirements. The appropriate state agency shall notify the candidate at least 30 days in advance of the need to renew his/her license, and shall request that the candidate submit evidence of compliance with the continuing education requirements stated herein, along with other fees and documents required. Failure to be notified by such agency shall not relieve licensee from this obligation.

10.04

A. Non-therapeutic - Of the 12 hours biennial requirement for non-therapeutic licensees, a maximum of 2 hours may be fulfilled by self-reported study.

B. Therapeutic - Of the 24 hours biennial requirement for therapeutic licensees, a maximum of 4 hours may be fulfilled by self-reported study.

C. Self-reported study may include:

- a. Reading of Optometric journals
- b. Optometric tape journals
- c. Optometric audiovisual material
- d. Other materials given prior approval by

the Board.

Proof of completion from the sponsoring agency is required for credit.

10.05 Any new licensee shall be required to complete continuing education equivalent to one hour for each month between the date of licensure and the biennial renewal date. The first twelve (12) hours of pro-rated continuing education must be in the treatment and management of ocular disease.

10.06 Continuing Education courses given by the following organizations will receive credit.

Meetings of (Scientific Session Portion Only)

- a. American Optometric Association
- b. Delaware Optometric Association
- c. American Academy of Optometry

d. Recognized state regional or national optometric societies

e. Schools and colleges of Optometry

f. Meetings of other organizations as may be approved by the Board.

g. COPE approved courses (with the exception of Practice Management courses)

10.07 Failure to Comply

When the State Board of Examiners in Optometry deems someone to be deficient in continuing education requirements, the license will be revoked. In the event that any optometrist licensed in this State fails to meet continuing education requirements, his or her license shall be revoked, except when proven hardship makes compliance impossible. The Board shall reinstate such license upon presentation of satisfactory evidence of successful completion of continuing education requirements and upon payment of all fees due.

10.08 Licensure--Renewal

A. All licenses are renewed biennially (every 2 years). A licensee may have his/her license renewed by submitting a renewal application to the Board by the renewal date and upon payment of the renewal fee prescribed by the Division of Professional Regulation along with evidence of completion of continuing education requirements. The failure of the Board to give, or the failure of the licensee to receive, notice of the expiration date of a license shall not prevent the license from becoming invalid after its expiration date.

B. Any licensee who fails to renew his/her license by the renewal date may still renew his/her license during the one (1) year period immediately following the renewal date provided the licensee pay a late fee in addition to the prescribed renewal fee.

C. Any licensee who intends not to renew his/her license because he/she retired from practice or has ceased practice in the State of Delaware, shall so indicate such reason(s) on the renewal application. Failure to do so will result in the Board taking mandatory action to revoke the license.

Exemptions

An exemption may be granted to any optometrist who can demonstrate to the Board an acceptable cause as to why he/she should be relieved of this obligation. Exemptions will be granted only in unusual or extraordinary circumstances. Licensees must petition the Board for exemptions. Should the Board deny the request, the licensee must complete the requirements. Examples of circumstances for which the Board might grant

exemptions include prolonged illness, extended absence from the country, etc.

SECTION 11. THERAPEUTIC CERTIFICATION

11.01 The examination identified in 24 **Del.C.** Section 2108(b) is the national examination administered by the National Board of Examiners in Optometry (formerly the International Association of Boards of Examiners in Optometry) for treatment and management of ocular disease. A copy of the certificate representing passage of the examination must be submitted with the application for therapeutic licensure.

11.02 All applicants for therapeutic licensure must be CPR certified for both children and adults. All optometrists must keep their CPR certification for both children and adults current.

11.03 For applicants currently licensed in Delaware, 40 hours of treatment and management of ocular disease training may be accumulated with a therapeutically certified optometrist, a medical doctor, or an osteopathic doctor. Proof of 40 hours of treatment and management of ocular disease training must be submitted by letter. If an applicant's supervisor is a therapeutically certified optometrist in a state other than Delaware, proof of similar licensing requirements in the other state must be submitted.

11.04 Applicants must have completed their forty (40) hours of clinical experience within twenty-four (24) months of their initial application for therapeutic licensure.

11.05 The same reciprocity rules apply for therapeutic licensing as for other optometry licensing.

11.06 All newly licensed optometrists shall be required to be therapeutically certified. Their six month internship should be done with a therapeutically certified optometrist, M.D. or D.O. However, if a therapeutically certified optometrist, M.D. or D.O. is not available, the intern may do an internship with a non-therapeutically certified optometrist provided, the intern complete an additional 100 hours of clinical experience in the treatment and management of ocular disease, supervised by a therapeutically certified optometrist, M.D. or D.O. during their internship.

11.07 For applicants not currently licensed in Delaware (Refer to Reciprocity).

SECTION 12. UNPROFESSIONAL CONDUCT

A violation of any of the provisions of these regulations will be considered to be unprofessional conduct.

DEPARTMENT OF ADMINISTRATIVE SERVICES DIVISION OF PROFESSIONAL REGULATION BOARD OF FUNERAL SERVICES

Statutory Authority: 24 Delaware Code,
Section 3105(a)(1) (24 **Del.C.** 3105(a)(1))

The Board of Funeral Services, pursuant to the authority of Title 24, Delaware Code, subsection 3105 (a) (1) proposes to revise the current Rules and Regulations.

A Public Hearing will be held on the proposed revisions to the Rules and Regulations on Wednesday, May 20, 1998, at 10:00 a.m. at the Cannon Building, 861 Silver Lake Boulevard, Public Service Commission Hearing Room, first floor, Dover, DE 19903. The Board will receive and consider input in writing from interested persons on the proposed revisions to the Rules and Regulations. Final date to submit written comments shall be at the above scheduled public hearing. Anyone wishing to obtain a copy of the proposed revisions or to make comments at the public hearing should notify Gayle Melvin at the above address or by calling (302) 739-4522 Ext. 211. A copy of the proposed rules and regulations is also published in the Delaware Register of Regulation published April 1, 1998.

EXISTING RULES & REGULATIONS OF THE DELAWARE BOARD OF FUNERAL SERVICES

A revision of the Rules & Regulations governing the State Board of Funeral Services of the State of Delaware, adopted and promulgated this 6th day of December, 1989 at Wilmington, Delaware. These Rules and Regulations are hereby adopted pursuant to 24 Del.C. Sec. 3105(a)(1) and the Administrative Procedures Act, 29 Del. C. Sec. 10115. These regulations supersede and replace any previous adopted rules, regulations or bylaws by the then existing State Board of Funeral Service Practitioners (the State Board of Funeral Services hereinafter replace this Board in accordance with Senate Substitute No. 1, Senate Bill No. 116 signed by the Governor on April 12, 1988).

Duties of the Officers

1. The President shall preside at all meetings, call meetings, sign certificates with other Board members or other forms that may be required of him or her by law.
2. In the absence of the President, the Secretary shall preside at the meetings and call meetings when the President is absent. However, the signatory duties of the President may not be transferred to the Secretary.
3. In accordance with 29 Del.C. Sec. 8810, the Division of Professional Regulation shall maintain and keep all records of licensed funeral directors in the State of Delaware issuing a number and date to each license.
4. The Division shall also cause to be collected all fees including license application fees, renewal fees or any other fee required to be filed or paid in accordance with the provisions of 24 Del.C. ch. 31, et seq.
5. In accordance with the Freedom of Information Act, 29 Del.C. Sec. 1004(c) the Secretary shall publish an agenda of all meetings which shall include the time, dates and places of said meetings and an agenda. The Board shall also give public notice of the regular meetings and its intent to hold an executive session closed to the public at least seven days in advance. However, the agenda may be subject to change to include additional items not on the agenda including executive sessions closed to the public which arise at the time of the Board's meeting.
6. The Division of Professional Regulation shall insure that accurate and detailed minutes of all business to come before the Board at all Board meetings be transcribed in accordance with 29 Del.C. Sec. 8810 and 24 Del.C. sec. 3104(d).

**RULES AND REGULATIONS - LICENSURE
REQUIREMENTS**

Rule 1.0 Requirements for licensing of those applying for a Funeral Director's License in the State of Delaware. The qualifications of applicants for licensure as funeral director are contained in 24 Del.C. Sec. 3106(a) (1-5).

Rule 1.1 Applicants who fail to pass the written examination required by 24 Del.C. Sec. 3105(a) (3) ("State Test") shall be entitled to sit for the examination within the next ensuing year without an additional application fee. However, the application must be re-filed and updated. However, should an applicant fail the examination as required by 24 Del.C. Sec. 3105(a) (3) for

a second time, the applicant shall be required to-reapply and pay an additional application fee for the third examination.

Rule 1.3 An applicant for licensure shall meet all the educational requirements contained in 24 Del.C. Sec. 3106(a)(1) prior to applying for a Funeral Director's License.

Rule 1.4 The Board may accept a high school degree from an accredited high school or a G.E.D. Degree certificate from a school approved by the Board. For purposes of academic training from an accredited college or university, a year of academic training shall consist of at least thirty (30) semester hours successfully completed by the applicant. The applicant shall provide the Board a copy of his/her college transcript indicating the same.

Rule 1.5 Two years of academic training shall consist of at least sixty (60) semester hours successfully completed by the applicant at an accredited college or university.

Rule 1.6 If an applicant has attended a school or college fully accredited by the American Board of Funeral Services or its successor, and has received a certificate of satisfactory completion in a one year program, the applicant shall be required to complete (60) semester credit hours at an accredited college or university.

Rule 1.7 If an applicant has attended a school or college fully accredited by the American Board of Funeral Services or its successor and has received an Associate in Art degree in Funeral Services, the applicant shall have successfully completed at least sixty (60) semester credit hours to be eligible for license under 24 Del. C. Sec. 3106(a) (1). In addition, the applicant shall receive academic training at an accredited college or university and successfully completed at least thirty (30) semester credit hours to be eligible for licensure as a funeral director in accordance with the requirements contained within 24 Del.C. Sec. 3106.

Rule 1.8 As required by 24 Del.C. sec. 3107, the Board, upon request of an applicant, administer an examination based solely upon the laws of Delaware governing its profession. An applicant for licensure, prior to applying for the Boards' test based upon solely the laws of Delaware ("State" test) shall first sit for and successfully complete the test required by 24 Del.C. Sec. 3105 (a) (3), the written examination prepared by a national professional organization recognized by the American Board of Funeral Services Education by a passing score determined by the organization preparing

the test recognized by the American Board of Funeral Services Education.

Rule 1.9 As required by 24 Del.C. sec. 3106 (a) (3), an applicant shall satisfactorily complete an internship of one year's duration under the auspices of a licensed Delaware funeral service practitioner. In that regard, an application for an examination as required by Del.C. Sec. 3105(a)(3) shall be accompanied by a notarized statement from the Funeral Service Practitioner under whom the applicant ("intern" as defined by 24 Del.C. sec. 3101 (8)) served his internship.

The notarized statement shall attest to the best of his/her knowledge the applicant is fully qualified to become a licensed funeral director; that the applicant is honest and of good character; that the applicant has no habits or qualities that may reflect unfavorably on the profession as a whole; and the applicant has served the internship well and faithfully as required by 24 Del.C. sec. 3106 (a) (3). An applicant at the conclusion of his/her internship shall submit to the Board before licensure satisfactory evidence of the completion of twenty-five (25) embalming reports and four completed quarterly work reports.

Rule 1.0 The State test shall consist of fifty (50) questions pertaining to the laws of the State of Delaware governing the profession. An applicant shall be deemed to have successfully passed the "state test" with a minimum grade of 75%.

Federal Trade Commission Regulations

Rule 2.0 A licensed funeral director in the State of Delaware shall comply with all Federal Trade Commission Regulations governing the pricing of funeral services and merchandise and the method of payment for funeral services as defined under 24 Del.C. sec. 3101 (4). Upon the issuance of a funeral director's license, a licensed funeral director represents that he/she is familiar with all Federal Trade Commission rules and regulations and shall abide by the same. A license may be subject to discipline pursuant to 24 Del.C. Ch. 31, et seq. if these rules or regulations have been violated by the licensee.

Establishment Permits

Rule 3.0 The requirements for the issuance of a funeral establishment permit are contained in 24 Del.C. Sec. 3121. In accordance with 24 Del.C. Sec. 3121(l) the funeral establishment shall be conducting funeral services from a building that is appropriate as defined in 24 Del.C. sec.3101(5). In said building, all preparation rooms shall have the capacity to be locked when not in use. All

morgue's storage areas, closets and lockers that contain embalming chemicals, syringes, needles and surgical supplies shall be kept locked and all licensed funeral directors shall exercise full control over these supplies.

Rule 3.1 Any newly acquired funeral establishment provided a permit in accordance with the requirements of 24 Del.C. Sec. 3121 shall, in addition to conforming with all safety requirements of the State Department of Health and Social Services, provide the following:

1(a). A room for the preparation and embalming of human remains;

1(b). Said preparation room shall contain embalming equipment and supplies.

Rule 3.2 Funeral Establishment Permit: Circumstances for termination and continuation.

The statutory requirements for the issuance of a funeral establishment permit are contained in 24 Del.C. Sec. 3121.

To be exempt from the provisions of 24 Del.C. Sec. 3121 in obtaining an establishment permit as stated in sec. 3121(2), the funeral establishment shall have been maintained, operated and conducted on a continuous basis prior to September 6, 1972 until the present date. Further, only the record owner of the funeral establishment shall be entitled to obtain said exemption. No assignment of the exemption rights contained in 24 Del.C. Sec. 3121(2) is permitted and no other licensed funeral director may apply for or be assigned said rights.

Rule 3.3 If a licensed funeral director relocates or otherwise moves a funeral establishment that has been granted an exemption pursuant to the provisions of 24 Del.C. Sec. 3121(2) from its original location, the exemption allowed under sec. 3121(2) shall immediately become null and void. For purposes of this section the terms "move" or "relocate" is defined as to place such establishment outside the original building's location at its exact address of record unless the building where the funeral establishment permit is contained is renovated.

Rule 4.0 Any licensed funeral director may obtain a duplicate funeral directors certificate upon proof of satisfactory evidence to the Board that the original has been lost or destroyed and a payment of a fee of five dollars (\$5.00).

Suspension, Revocation, or lapse of Funeral Director's License

Rule 5.0 During any period a licensed funeral director's license has lapsed, been revoked or suspended by the Board in accordance with 24 Del.C. Sec. 3110 or

sec. 3115, no other licensed funeral director in the State of Delaware may register death certificates or secure burial permits for the licensee whose license has been revoked, suspended or has lapsed. Nor shall the licensee whose license has lapsed, been revoked or suspended by the Board, be able to register death certificates or secure burial permits. The Board may notify the Board of Health, the Department of Health and Social Services, the Medical Examiner's Office or other appropriate state or federal agency that said funeral director is prohibited from practicing funeral services as defined by Chapter 31 of Title 24.

Cash Advance

Rule 6.0 A licensed funeral director in the State of Delaware is prohibited from billing or causing to be billed any item that is referred to as a "cash advance" item unless the net amount paid for such item is for funeral services in the same amount as is billed by the funeral director.

(The effective date of these regulations is the 6th day of December, 1989 in accordance with 29 Del.C. Sec. 10118(b).)

The following rules are adopted by the Board as a supplement to the Rules and Regulations governing the State Board of Funeral Services, previously adopted and promulgated on the 6th day of December, 1989 pursuant to Del.C. Sec. 3105(a)(1) and the Administrative Procedures Act, 29 Del.C. Sec. 10115.

Rule 7.0 In order for an applicant to apply for internship of one year's duration under the auspices of a licensed Delaware Funeral Services Practitioner pursuant to 24 Del.C. Sec. 3106(a)(3), the applicant shall have certified that he or she has graduated from an accredited high school or its equivalent, and completed at least two years of academic training from an accredited college or university. The applicant shall certify that he or she has completed one year of academic training in funeral services from a school or college fully accredited by the American Board of Funeral Services Education or its successor and also have satisfactorily completed an examination pursuant to 24 Del.C. Sec. 3105(a)(3) of Title 24.

Rule 8.0 The passing score for an applicant who takes the State test required by 24 Del.C. Sec. 3107 based upon the laws of Delaware governing the profession shall be 70%.

Rule 9.0. The State test administered pursuant to 24 Del.C. Sec. 3107 shall include an examination of all the

rules and regulations promulgated by the Board as they have the force and effect of laws and implement and clarify Title 24, Chapter 31.

Effective Date:

Signed this 27th day of March, 1991 these rules shall be in effect 30 days from the date which the Board of Funeral Services executes this order in accordance with 29 Del.C. Sec. 10118(b).

(The above rules take effect on April 27, 1991.)

DELAWARE BOARD OF FUNERAL SERVICES CODE OF ETHICS

The following is adopted as the code of ethics for all funeral service licensees in the State of Delaware.

1. As funeral directors, we herewith fully acknowledge our individual and collective obligation to the public, especially to those we serve, our mutual responsibilities for the proper welfare of the funeral services profession.
2. To the public we pledge; vigilant support of public health laws; proper legal regulations for the members of our profession; devotion to high moral and service standards; conduct befitting good citizens; honesty in all offerings of service and merchandise to the public, and all business transactions.
3. To those we serve we pledge; confidential business and professional relationships; cooperation with the customs, laws, religions and creeds; observance of all respect due to the deceased; high standards of confidence and dignity in conduct of all services; truthful representation of all services and merchandise.
4. To our profession we pledge; support of high educational standards and proper licensing law; encouragement of scientific research; adherence to sound business practices; adoption of improved technique; observance of all the rules of fair competition and maintenance of favorable personnel relations.

Discipline of Licensees

The State Board of Funeral Services shall be the governing body of all licensed funeral directors in the State of Delaware. All licensed funeral directors shall be subject to and governed by these rules and regulations, the Code of Ethics and 24 Del.C. Chapter 31 of the Delaware Code. As provided in 24 Del.C. Sec. 3115, the Board may impose any of the sanctions, partially singly, or in

combination thereof contained in 24 Del.C. Sec. 3115(a)(1-6) if a licensee violates any of the above rules or regulations, Code of Ethics, or any provision of Chapter 31 of Title 24 of the Delaware Code.

Effective Date:

The effective date of these regulations is the 6th day of December, 1989 in accordance with 29 Del.C. Sec. 10118(b).

CONTINUING EDUCATION REGULATIONS

I. AUTHORITY

This rule is promulgated under the authority of 24 Del.C. Sec. 3105 which grants the Board of Funeral Services (hereinafter "the Board") authority to provide for rules for continuing funeral services education.

II. PURPOSE

Commencing August 1st of every even numbered year beginning with 1992, a licensee shall submit proof of completion of all continuing education requirements before the license renewal is granted. The purpose of continuing education is to assist the funeral director in becoming more effective and competent in meeting the needs of the consumer.

III. APPLICABILITY

1. Each contact hour (at least fifty minutes), or clock hour is equivalent to 1.0 CE credit hour.
2. Every licensed funeral director in active practice shall complete at least 10 hours/credits of approved continuing education (hereinafter "CE") during the two year licensure period prior to the time of license renewal. Licensees who earn more than the required amount of CE credit hours during a given licensure period may carry over no more than 50% of the total CE credit hours required for the next licensure period.
3. Correspondence course work or individual study courses will be considered upon request for approval of the Board and assessment of credit hours. (See Continuing Education Program Approval).
4. CE credit hours may be earned in any or all of the five recommended areas of study. (See Continuing Education Program Approval).
5. Any or all CE credit hours may be acquired through

participation in individual study programs or correspondence course work.

6. when a Delaware licensee on inactive status files a written application to return to active practice with the Board, the licensee shall submit proof of having completed the required CE credit hours for the period just prior to the request to return to active practice.

7. Upon application for renewal of license, a funeral director licensee shall submit to the Board proof of completing the required number of CE credit hours 30 days before license expiration. The licensee shall submit proof in the form of official certificate of attendance, provided by the program sponsor/provider or transcripts from an educational institution or foundation. (See Verification of Continuing Education).

IV. WAIVER OF THE CE REQUIREMENTS

1. The Board has the power to waive any part of the entire CE requirements for good cause if the licensee files a written request with the Board. For example, exemptions to the CE requirement may be granted due to health or military service. Application for exemption shall be made in writing to the Board by the applicant for renewal. The Board shall decide the merits of each individual case at a regularly scheduled meeting.
2. Other exemptions include the following;
 - (i) Newly licensed funeral directors, including those newly licensed by reciprocity, are exempt during the time from initial licensure until the commencement of the first full licensure period.

V. CONTINUING EDUCATION PROGRAM APPROVAL

1. Eligible program providers or sponsors include but are not limited to, educational institutions, government agencies, professional or trade association and foundations and private firms.
 - (i) Sources of CE credits include but are not limited to the following;
 - a. Programs sponsored by national funeral service organizations.
 - b. Programs sponsored by state associations.
 - c. Programs sponsored by local associations.
 - d. Programs provided by suppliers.
 - e. Home study courses with tests.
 - f. Conducting programs by licensee. A licensee may earn double CE credits for preparation and presentation time upon submission to the committee the

licensee's outline or notes plus a notarized letter stating the hours spent preparing and presenting the program.

g. College courses:

1. One college credit hour = 5 CE credit hours.
2. Recommended areas of study.

The recommended areas include but are not limited to the following:

- a. After care/Grief counseling.
- b. Professional conduct, business ethics or legal aspects relating to practice in the profession.
- c. Business management concepts relating to delivery of goods and services to the consumer.
- d. Technical/practical aspects of the profession.
- e. Public relations.

3. Correspondence course work, individual study programs, and all other previously unapproved programs, must be submitted to the Board of Funeral Services for approval by the program sponsor or licensee.

4. Application for CE Program Approval shall include:

- a. Date and location.
- b. Description of program subject, material and content.
- c. Program schedule of time segments in subject content areas for which approval of, and determination of credit is required.
- d. Name of instructors.
- e. Name and position of person making request for program approval.

5. Requests for CE program approval shall be submitted to the Board with the program information submitted to the licensee. Application for approval may be made after the program, however, if the program is not approved the applicant will be notified and no credit given.

6. Annually and/or upon request, the Board shall mail a current list of previously approved programs to all licensees.

7. Each CE program given by Delaware State or local associations shall be made available to ALL licensees regardless of membership or affiliation to any organization or association.

VI. CERTIFICATION OF CONTINUING EDUCATION

VERIFICATION AND REPORTING

1. The program provider/sponsor has sole responsibility for the accurate monitoring of program attendance. Certificates of attendance shall be supplied by the program provider/sponsor and be distributed only at the completion of the program.

2. verification of completion of correspondence course work or an individual study program may be made with a student transcript or other Board approved method. In either case, the licensee assumes the responsibility of program provider/sponsor and must apply for program approval from the Board (See Continuing Education Program Approval).

3. The funeral director licensee shall maintain all certificates of attendance for CE programs for the entire licensure period prior to application for license renewal, at which time all certificates shall be submitted to the Board for review 30 days prior to license expiration.

4. Upon written request by a licensee the Board shall mail to all licensees CE forms to assist them in reporting CE credits to the Board.

5. All applications for renewal shall be audited by the Board to determine whether or not the recommended requirements of continuing education have been met by the licensee.

6. If a licensee is found to be non-compliant in continuing education, the Board shall refer to previously established disciplinary actions based on the State of Delaware's licensing regulations.

7. Programs approved for continuing education credit by another state funeral board other than Delaware shall be automatically approved for all Delaware licensees upon written application and verification of CE credits by the applicable state board.

VII. CONTINUING EDUCATION STANDING COMMITTEE

1. The Board of Funeral Services shall appoint a standing committee known as the Continuing Education Committee. The committee shall consist of the following who shall elect a chairperson.

- a. One (1) Board member (non-licensed).
- b. One (1) non-Board member who shall be a licensed funeral director who is owner/operator of a funeral establishment.
- c. One (1) non-Board member who shall be a

licensed funeral director who does not own or operate a funeral establishment.

2. Membership on this committee shall be on a rotating basis, with each member serving a three year term and not be eligible for consecutive reappointment. The initial appointments shall be a one, two and three years respectively and shall be staggered. The Board members shall continue to serve until a new member is appointed.

3. The "Continuing Education Committee" shall oversee matters pertaining to continuing education and make recommendations to the Board with regard to approval of submitted programs for CE by licensees. The Board shall have final approval on all matters.

(These rules revised by the Board effective July 6, 1990.)

**PROPOSED RULES AND REGULATIONS OF THE
DELAWARE BOARD OF FUNERAL SERVICES**

Draft - May 20, 1998

A revision of the Rules and Regulations governing the State Board of Funeral Services of the State of Delaware, adopted and promulgated this 20th day of May, 1998 at Dover, Delaware. These Rules and Regulations are hereby adopted pursuant to 24 Del. C. Section 3105 (a)(1) and the Administrative Procedures Act, 29 Del. C. Section 10115. These regulations supersede and replace any previous adopted rules, regulations or bylaws by the State Board of Funeral Services.

Duties of the Officers

1. The President shall preside at all meetings, call meetings, sign certificates with other Board members or other forms that may be required by him or her by law.

2. In the absence of the President, the Secretary shall preside at the meetings and call meetings when the President is absent. However, the signatory duties of the President may not be transferred to the Secretary.

3. In accordance with 29 Del. C. Section 8807, the Division of Professional Regulation shall maintain and keep all records of licensed funeral directors in the State of Delaware issuing a number and date to each license.

4. The Division shall also cause to be collected all fees including license application fees, renewal fees or any

other fee required to be filed for paid in accordance with the provisions of 24 Del. C. ch. 31, et seq.

5. In accordance with the Freedom of Information Act, 29 Del. C. Section 10004 (c) the Division of Professional Regulation shall publish an agenda of all meetings which shall include the time, dates and places of said meetings and an agenda. The Board shall also give public notice of the regular meetings and its intent to hold an executive session closed to the public at least seven days in advance. However, the agenda may be subject to change to include additional items not on the agenda including executive sessions closed to the public which arise at the time of the Board's meeting.

6. The Division of Professional Regulation shall insure that accurate and detailed minutes of all business to come before the Board at all Board meetings be transcribed in accordance with 29 Del. C. Section 8807 and 24 Del. C. Section 3104 (d).

**RULES AND REGULATIONS - LICENSURE
REQUIREMENTS**

Rule 1.0

Requirements for licensing of those applying for a Funeral Director's License in the State of Delaware. The qualifications of applicants for licensure as funeral director are contained in 24 Del. C. Section 3106 (a) (1-5) and 24 Del. C. Section 3108.

Rule 1.2

A year of academic training shall consist of at least thirty (30) semester hours successfully completed by the applicant at an accredited college or university. Two years of academic training shall consist of at least sixty (60) semester hours successfully completed by the applicant at an accredited college or university. The applicant shall request that a copy of an official transcript be sent to the Board.

Rule 1.3

If an applicant has attended a school or college fully accredited by the American Board of Funeral Service Education or its successor, and has received a certificate of satisfactory completion in a one year program, the applicant shall be required to complete an additional (60) semester credit hours at an accredited college or university.

Rule 1.4

An applicant who has attended a school or college fully accredited by the American Board of Funeral Service Education "ABFSE" or its successor and who, after attending such ABFSE accredited school or college, has received an Associate degree in Funeral Services, wherein such "degree" required the successful completion of at least sixty (60) semester credit hours, shall in addition thereto to such ABFSE accredited Associate's Degree, receive and complete academic training at an accredited college or university and successfully completed at least thirty (30) additional semester credit hours to be eligible for licensure as a funeral director in accordance with the requirements contained within 24 Del. C. Section 3106.

Rule 1.5

In order for an applicant to apply for internship of one year's duration under the auspices of a licensed Delaware Funeral Services practitioner pursuant to 24 Del. C. Section 3106 (a)(3), the applicant shall have certified that he or she has graduated from an accredited high school or its equivalent, and completed at least two years of academic training from an accredited college or university. In addition, the applicant shall certify that he or she has completed one year of academic training in funeral services from a school or college fully accredited by the American Board of Funeral Service Education or its successor.

Rule 1.6

As required by 24 Del. C. Section 3107, the Division, upon request of an eligible applicant, shall administer a State examination based solely upon the laws and regulations of Delaware and other jurisdictions which impact on, relate to and govern its profession. An applicant for full licensure whether via initial or reciprocal licensure; prior to applying for the Division's test based upon the law and regulations of Delaware and other jurisdictions which impact on Delaware licensees ("State" examination) shall first sit for and successfully complete the national examination required by 24 Del. C. Section (a)(3), the written examination prepared by a national professional organization recognized by the American Board of Funeral Services Education by a passing score determined by the organization preparing the test recognized by the American Board of Funeral Services Education. The national examination may be taken before or during the internship.

Rule 1.7

As required by 24 Del. C. Section 3106 (a)(3), an applicant other than one seeking licensure via reciprocity shall satisfactorily complete an internship of one year's duration in a licensed Delaware funeral establishment under the auspices of a licensed Delaware funeral service practitioner. An applicant must successfully complete the required total of ninety (90) semester hours of academic training (as required by Rules 1.2 through 1.4) prior to beginning the internship. An application to sit for the State examination as required by 24 Del. C. Section 3107 shall be accompanied by a notarized statement from the Funeral Service Practitioner under whom the applicant "intern" as defined by 24 Del. C. Section 3103 (8) served his internship. The notarized statement shall attest that the applicant has concluded his/her internship and submitted to the Board satisfactory evidence of the completion of twenty-five (25) embalming reports and four (4) completed quarterly work reports.

Rule 1.8

The State examination required by 24 Del. C. Section 3107 shall consist of questions pertaining to the law and regulations of the State of Delaware and other jurisdictions which may govern, impact on, and relate to the profession including preneed funeral services contracts, consumer protection law and regulations, and laws and regulations governing crematories and cemeteries. An applicant shall be deemed to have successfully passed the "state examination" with a minimum grade of 70%.

Federal Trade Commission Regulations**Rule 2.0**

A licensed funeral director in the State of Delaware shall comply with all Federal Trade Commission Regulations governing the pricing of funeral services and merchandise and the method of payment for funeral services as defined under 24 Del. C. Section 3101 (4). Upon the issuance of a funeral director's license, a licensed funeral director represents that he/she is familiar with all Federal Trade Commission rules and regulations and shall abide by the same. A licensee may be subject to discipline pursuant to 24 Del. C. Ch.31, et seq. if these rules or regulations have been violated by the licensee.

Establishment Permits**Rule 3.0**

The requirements for the issuance, continuance, and

proper maintenance of a funeral establishment permit are contained in 24 Del. C. Section 3121. In accordance with 24 Del. C. Section 3121 (1) the funeral establishment shall be conducting funeral services from a building that is appropriate as defined in 24 Del. C. Section 3101 (5). All establishments, both newly issued and those grandfathered by Section 3121 (a)(2) shall in said building have preparation rooms which shall be locked. Licensed funeral directors shall exercise full control over preparation rooms and supplies.

Rule 3.1

All funeral establishments provided a permit in accordance with the requirements of 24 Del. C. Section 3121 shall, in addition to conforming with all safety requirements of the State Department of Health and Social Services, provide the following:

1.(a.) A room for the preparation and embalming of human remains;

1.(b.) Said preparation room shall contain embalming equipment and supplies.

Rule 3.2

Funeral Establishment Permit: Circumstances for termination and continuation.

The statutory requirements for the issuance of a funeral establishment permit are contained in 24 Del. C. Section 3121.

To be exempt from the provisions of 24 Del. C. Section 3121 (a)(2), the funeral establishment shall have been maintained, operated and conducted on a continuous basis prior to September 6, 1972 until the present date. Further, only the record owner of the funeral establishment shall be entitled to obtain said exemption. No assignment of the exemption rights contained in 24 Del. C. Section 3121 (a)(2) is permitted and no other licensed funeral director may apply for or be assigned said rights.

Rule 3.3

If a licensed funeral director relocates or otherwise moves a funeral establishment that has been granted an exemption pursuant to the provision of 24 Del. C. Section 3121 (a)(2) from its original location, the exemption allowed under Section 3121 (a)(2) shall immediately become null and void. For purposes of this section the terms "move" or "relocate" is defined as to place such establishment outside the original building's location at its exact address of record unless the building where the

funeral establishment permit is contained is renovated.

Duplicate Certificate

Rule 4.0

Any licensed funeral director may obtain a duplicate funeral director's certificate upon proof of satisfactory evidence to the Board that the original has been lost or destroyed and a payment of a fee as set by the Division of Professional Regulation.

Suspension, Revocation, or Lapse of Funeral Director's License

Rule 5.0

During any period a licensed funeral director's license has lapsed, been revoked or suspended by the Board in accordance with 24 Del. C. Section 3110 or Section 3115, no other licensed funeral director in the State of Delaware may register death certificates or secure burial permits for the licensee whose license has been revoked, suspended or has lapsed. Nor shall the licensee whose license has lapsed, been revoked or suspended by the Board, be able to register death certificates or secure burial permits. The Board may notify the Division of Public Health, the Department of Health and Social Services, the Medical Examiner's Office or other appropriate state or federal agency that said funeral director is prohibited from practicing funeral services as defined by Chapter 31 of Title 24.

Cash Advance

Rule 6.0

A licensed funeral director in the State of Delaware is prohibited from billing or causing to be billed any item that is referred to as a "cash advance" item unless the net amount paid for such item is for funeral services in the same amount as is billed by the funeral director. A cash advance item is payment made by the funeral director for the consumer to a third party including but not limited to cemetery fees, crematory fees, death certificates and florists.

(The effective date of these regulations is the 6th day of December, 1989 in accordance with 29 Del. C. Section 10118 (b).)

The following rules are adopted by the board as a supplement to the Rules and Regulations governing the State Board of Funeral Services, previously adopted and

promulgated on the 6th day of December, 1989 pursuant to Del. C. Section 3105 (a)(1) and the Administrative Procedures Act, 29 Del. C. Section 10115.

Code of Ethics

Rule 7.0

The following is adopted as the code of ethics for all funeral service licensees in the State of Delaware.

1. As funeral directors, we herewith fully acknowledge our individual and collective obligation to the public, especially to those we serve, our mutual responsibilities for the proper welfare of the funeral services profession.

2. To the public we pledge; vigilant support of public health laws; proper legal regulations for the members of our profession; devotion to high moral and service standards; conduct befitting good citizens, honesty in all offerings of service and merchandise to the public and all business transactions.

3. To those we serve we pledge; confidential business and professional relationships; cooperation with the customs, laws, religions and creeds; observance of all respect due to the deceased; high standards of confidence and dignity in conduct of all services; truthful representation of all services and merchandise.

4. To our profession we pledge; support of high educational standards and proper licensing law; encouragement of scientific research; adherence to sound business practices; adoption of improved technique; observance of all the rules of fair competition and maintenance of favorable personnel relations.

Effective Date:

The effective date of these regulations is the 20th day of May 1998 in accordance with 29 Del. C. Section 10118 (b).

Continuing Education Regulations

Rule 8.0

1. Board Authority

This rule is promulgated under the authority of 24 Del. C. Section 3105 which grants the Board of Funeral Services (hereinafter "the Board") authority to provide for rules for continuing funeral services education as a prerequisite for license renewal.

2. Requirements

1. Every licensed funeral director in active practice shall complete at least 10 hours/credits of

approved continuing education (hereinafter "CE") during the two year licensure period prior to the time of license renewal. Licensees who earn more than the required amount of CE credit hours during a given licensure period may carry over no more than 50% of the total CE credit hours required for the next licensure period.

2. When a Delaware licensee on inactive status files a written application to return to active practice with the Board, the licensee shall submit proof of having completed the required CE credit hours for the period just prior to the request to return to active practice.

3. Upon application for renewal of a license, a funeral director licensee shall submit to the Board proof of completing the required number of CE credit hours.

3. Waiver of the CE Requirement

1. The Board has the power to waive any part of the entire CE requirement for good cause if the licensee files a written request with the Board. For example, exemptions to the CE requirement may be granted due to health or military service. Application for exemption shall be made in writing to the Board by the applicant for renewal. The Board shall decide the merits of each individual case at a regularly scheduled meeting.

2. Other exemptions include the following:

a. Newly licensed funeral directors, including those newly licensed by reciprocity, are exempt during the time from initial licensure until the commencement of the first full licensure period.

4. Continuing Education Program Approval

1. Each contact hour (at least fifty minutes) is equivalent to 1.0 CE credit hour. One college credit hour is equivalent to 5 CE credit hours.

2. Eligible program providers or sponsors include but are not limited to, educational institutions, government agencies, professional or trade associations and foundations and private firms.

Sources of CE credits include but are not limited to the following:

- a. Programs sponsored by national funeral service organizations.
- b. Programs sponsored by state associations.
- c. Program provided by local associations.
- d. Programs provided by suppliers.
- e. Independent study courses for which there is an assessment of knowledge.
- f. College courses.

3. The recommended areas include but are not limited to the following:

- a. Grief counseling
- b. Professional conduct, business ethics or legal aspects relating to practice in the profession.
- c. Business management concepts relating to delivery of goods and services.
- d. Technical aspects of the profession.

- e. Public relations.
 - f. After care counseling.
4. Application for CE program approval shall include the following:
- a. Date and location.
 - b. Description of program subject, material and content.
 - c. Program schedule to time segments in subject content areas for which approval of, and determination of credit is required.
 - d. Name of instructor(s), background, expertise.
 - e. Name and position of person making request for program approval.
5. Requests for CE program approval shall be submitted to the Board on the application provided by the Board. Application for approval may be made after the program; however, if the program is not approved, the applicant will be notified and no credit given.
6. Approval of CE credits and program formats by the Committee shall be valid for a period of two years from the date of approval. Changes in any aspect of the approved program shall render the approval invalid and the presenter will be responsible for making reapplication to the Committee.
7. Upon request, the Board shall mail a current list of all previously approved programs.
6. Certification of Continuing Education - Verification and Reporting
- 1. The program provider/sponsor has sole responsibility for the accurate monitoring of program attendance. Certificates of attendance shall be supplied by the program provider/sponsor and be distributed only at the completion of the program.
 - 2. Verification of completion of a independent study program will be made with a student transcript.
 - 3. The funeral director licensee shall maintain all original certificates of attendance for CE programs for the entire licensure period. Proof shall consist of completed CE form provided by the Board and shall be filed with the Board on or before thirty (30) days prior to the expiration date of the biennial renewal period.
 - 4. Applications for renewal may be audited by the Board to determine whether or not the recommended requirements of continuing education have been met by the licensee.
 - 5. If a licensee is found to be non-compliant in continuing education, the licensee's license shall lapse at the expiration of the present licensing period. The Board shall reinstate such license within twelve (12) months of such lapse upon presentation of satisfactory evidence of successful completion of continuing education requirements and upon payment of all fees due.
 - 6. Programs approved for continuing education

credit by another state funeral board other than Delaware shall be automatically approved for all Delaware licensees upon written application and verification of CE credits by the applicable state board.

7. Continuing Education Committee

1. The Board of Funeral Services shall appoint a committee known as the Continuing Education Committee. The Committee shall consist of the following who shall elect a chairperson:

- a. One (1) Board member (non-licensed).
- b. One (1) non-Board member who shall be a licensed funeral director who is owner/operator of a funeral establishment.
- c. One (1) non-Board member who shall be a licensed funeral director who does not own or operate a funeral establishment.

2. Membership on this Committee shall be on a rotating basis, with each member serving a three year term and may be eligible for reappointment. The Committee members shall continue to serve until a new member is appointed.

3. The Continuing Education Committee shall oversee matters pertaining to continuing education and make recommendations to the Board with regard to approval of submitted programs for CE by licensees and with regard to the Board's review of audited licensees. The Board shall have final approval on all matters.

DEPARTMENT OF EDUCATION

Statutory Authority: 14 Delaware Code,
Section 122(d) (14 **Del.C.** 122(d))

**THE FOLLOWING REGULATORY CHANGES WILL BE PRESENTED
AT THE REGULARLY SCHEDULED MEETING OF THE STATE
BOARD OF EDUCATION ON THURSDAY, APRIL 16, 1998**

EDUCATIONAL IMPACT ANALYSIS PURSUANT
TO 14 DEL. C., SECTION 122(d)

EXTENDED ILLNESS

A. TYPE OF REGULATORY ACTION REQUESTED

Reauthorization of Existing Regulation

B. SYNOPSIS OF SUBJECT MATTER OF REGULATION

The regulation on Extended Illness, page A-51, section I.M.8. in the Handbook for K-12 Education states that, Absences due

to illness and temporary disability associated with pregnancy shall be treated as any other absence due to illness or temporary disability and shall be subject to the provisions of 14 Del. C., Section 2706. This regulation was adopted by the State Board in 1990 to classify absences due to pregnancy as excused absences. The regulation needs to be readopted because Superintendents decide what absences are excused and what absences are not excused. They need to know that the Department of Education defines illnesses associated with pregnancy as the same as any other legitimate illness and hence constitutes an excused absence.

C. IMPACT CRITERIA

1. Will the regulation help improve student achievement as measured against state achievement standards?

The regulation deals with health issues not curriculum issues.

2. Will the regulation help ensure that all students receive an equitable education?

The regulation deals with health issues not curriculum issues.

3. Will the regulation help to ensure that all students' health and safety are adequately protected?

The regulation addresses health and safety issues of pregnant students as to excused absences from school.

4. Will the regulation help to ensure that all students' legal rights are respected?

The regulation protects the legal rights of pregnant students.

5. Will the regulation preserve the necessary authority and flexibility of decision makers at the local board and school level?

The regulation gives direction to the schools concerning the interpretation of excused absences which the Department of Education is instructed to do through the Del. C., Chapter 27, Section 2706.

6. Will the regulation place unnecessary reporting or administrative requirements or mandates upon decision makers at the local board and school levels?

This regulation has been in place since 1990 and will not place any unnecessary reporting or administrative requirements or mandates upon the decision makers at the local board and school levels.

7. Will decision making authority and accountability for addressing the subject to be regulated be placed in the same entity?

The decision making authority and accountability

for addressing this regulation will remain in the same entity.

8. Will the regulation be consistent with and not an impediment to the implementation of other state educational policies, in particular to state educational policies addressing achievement in the core academic subjects of mathematics, science, language arts and social studies?

This regulation will not be an impediment to other state educational policies.

9. Is there a less burdensome method for addressing the purpose of the regulation?

The regulation is needed to clarify that illnesses associated with pregnancy are excused absences.

10. What is the cost to the state and local school boards of compliance with the regulation?

There is no additional cost to the state and local boards for complying with this regulation.

I.M.8. EXTENDED ILLNESS

Absences due to illness and temporary disability associated with pregnancy shall be treated as any other absence due to illness or temporary disability and shall be subject to the provisions of 14 Del. C., §2706.

(State Board Approved June 1990)

EDUCATIONAL IMPACT ANALYSIS PURSUANT TO 14 DEL. C., SECTION 122(d)

GUIDELINES FOR THE SCHOOL DISTRICTS TO COMPLY WITH THE GUN FREE SCHOOLS ACT

A. TYPE OF REGULATORY ACTION REQUESTED

Amendment to Existing Regulation

B. SYNOPSIS OF SUBJECT MATTER OF REGULATION

The Secretary seeks the consent of the State Board of Education to amend the regulation Guidelines for School Districts to Comply with the Gun Free Schools Act, page A-60, I.M.15. in the Handbook for K-12 Education. The federal Gun Free School Act requires that each state receiving funds under the Elementary and Secondary Act of 1964 have in effect a state law (in Delaware's case a State Department of Education regulation) that requires local education agencies to expel for a period of not less than one year any student who brings a weapon to school. The Department's present Gun Free Schools regulation needs to be amended in order to make some language changes and to correct the numbering system.

The language changes include changing the Department of Public Instruction to the Department of Education, substituting 14 Del. C., Chapter 41, Section 4112, Reporting School Crimes, for the HB 85 reference and changing the annual Suspension and Expulsion Report to the annual suspension and expulsion reporting system. The letters a. and b. will become 1. and 2., the present c. will be deleted, and the present d. will become 2.a. under the amended numbering system.

C. IMPACT CRITERIA

1. Will the amended regulation help improve student achievement as measured against state achievement standards?

The amended regulation deals with student safety not curriculum.

2. Will the amended regulation help ensure that all students receive an equitable education?

The amended regulation deals with student safety not curriculum.

3. Will the amended regulation help to ensure that all students' health and safety are adequately protected?

The amended regulation addresses student safety issues through stiff penalties for bringing guns to schools.

4. Will the amended regulation help to ensure that all students' legal rights are respected?

This amended regulation protects students legal rights through the protection of their safety.

5. Will the amended regulation preserve the necessary authority and flexibility of decision makers at the local board and school level?

The amended regulation preserves the necessary authority and flexibility of decision makers at the local board and school level.

6. Will the amended regulation place unnecessary reporting or administrative requirements or mandates upon decision makers at the local board and school levels?

The amended regulation does not place any unnecessary reporting or administrative requirements or mandates upon decision makers at the local board or school level.

7. Will decision making authority and accountability for addressing the subject to be regulated be placed in the same entity?

The amended regulation maintains the decision making authority and accountability in the same entity.

8. Will the regulation be consistent with and not an impediment to the implementation of other state educational policies, in particular to state educational policies addressing achievement in the core academic subjects of mathematics, science, language arts and social studies?

The amended regulation will not be an impediment to the implementation of other educational policies.

9. Is there a less burdensome method for addressing the purpose of the regulation?

The regulation is required to be in effect by the Federal Gun Free School Act.

10. What is the cost to the state and local school boards of compliance with the amended regulation?

There is no cost to the state and local boards beyond the cost of generating the suspension and expulsion reports and the amendment does not change that requirement.

GUIDELINES FOR SCHOOL DISTRICTS TO COMPLY WITH COMPLIANCE WITH GUN-FREE SCHOOLS ACT

The Gun-Free Schools Act was enacted on March 31, 1994, as part of the Goals 2000: Educate America Act. The Gun-Free Schools Act amends the current Elementary and Secondary Act of 1965 (20 USC 2701 *et seq*) ESEA.

a. 1. Each school district requesting assistance under the Elementary and Secondary Act ~~must~~ shall, according to the Federal Statute:

(+) (a) Have a written policy requiring the expulsion from school of not less than one year of any student who brings a weapon (see Section 921 of Title 18, US Code) to a school under the jurisdiction of the district. Modification to the expulsion requirement may be made on a case-by-case basis.

(2) (b) Submit by June 1 (annually) to the Department of ~~Public Instruction~~ Education an assurance that the required policy is in effect. This requirement can be met by submitting a copy of the District Code of Conduct with the requested policy included.

(3) (c) Submit to the Department of ~~Public Instruction~~ Education:

(a) (1) Description of the circumstances of each and every expulsion imposed under the policy through the reporting requirements for ~~HB-85~~ 14 Del. C., Chapter 41, Section 4112 Reporting School Crimes.

(b) (2) Annual report of all expulsions imposed under this policy through the annual ~~Suspension and Expulsion~~ suspension and expulsion reporting system.

b. 2. Each school district requesting assistance under the ESEA shall develop and submit to the Department of ~~Public Instruction by December 1, 1994~~ Education (beginning in December, 1994), for review and approval, a written policy

which includes the following at a minimum:

(a) The use of the following definition in the district policy:

The term weapon as used in the Gun-Free Act means a firearm as defined in Section 921 of Title 18, United States Code.

(1) (b) Expulsion from school of not less than one year (180 school days) for any student who brings a weapon (firearm) to a school under the jurisdiction of the district.

(2) (c) An outline of the modification process that may be used on a case-by-case basis.

(3) (d) A statement that the policy shall apply to all students; except for students with disabilities, the federal law will be followed and a determination will be made prior to any discipline or change of placement in connection with the policy as to whether or not the violation of the firearm policy was due to the student's handicapping condition.

(4) (e) A system of notification of each student and his/her parent/guardian/custodial adult at the beginning of the school year, and whenever a student enters or re-enters the school during the school year of the policy.

e. Reporting Forms

Secure appropriate reporting forms from the Department of Public Instruction Education.

d. The following definition shall apply to the district policies:

The term weapon as used in the Gun-Free Act means a firearm as defined in Section 921 of Title 18, United States Code.

(State Board Approved September, 1994)

Repeal of Regulation for Minors Consent to Diagnostic Procedures

The Secretary seeks the consent of the State Board of Education to repeal the regulation, Minors Consent to Diagnostic Procedures, page A-52, section I.M.6. in the Handbook for K-12 Education. This regulation repeats a portion of Delaware Code, Chapter 13, Section 708, that states a minor twelve years of age or older who professes to be pregnant or afflicted with contagious, infectious or communicable diseases may give consent for diagnostic, preventative or lawful therapeutic procedures, except abortion, medical or surgical care and treatment. It is not necessary for the Department of Education to further regulate what is in the Code.

I.M. 6. MINORS CONSENT TO DIAGNOSTIC PROCEDURES

Delaware Code, Chapter 12, Section 708

~~A minor twelve years of age or over who professes to be either pregnant or afflicted with contagious, infectious or communicable diseases may give written consent for diagnostic, preventative or lawful therapeutic procedures, except abortion, medical or surgical care and treatment.~~

~~The entire law is included in The School Nurse: A Guide to Responsibilities (Revised September 1991) Page 159.~~

Repeal of Regulation for Reporting Cases of Child Abuse or Neglect

The Secretary seeks the consent of the State Board of Education to repeal the regulation, Reporting Cases of Child Abuse or Neglect, pages A-51 and A-52, section I.M.9.a, b, c, and d in the Handbook for K-12 Education. This regulation repeats the portions of the Delaware Code, Title 16, Sections 902, 903, 906, and 909, that define child abuse, require reporting of child abuse by school employees, describe immunity from liability, and discuss the penalty for not reporting child abuse. It is not necessary for the Department of Education to further regulate what is in the Code.

I.M.9. REPORTING CASES OF CHILD ABUSE OR NEGLECT

~~Delaware Code, Title 16, Chapter 9 requires that suspected cases of child abuse or neglect be reported to the Division of Social Services. The Code is excerpted here. For a complete copy, see The School Nurse: Guide to Responsibilities (Revised September 1991).~~

a. ~~Section 902. Definition of Child Abuse and Neglect~~

~~For purpose of this chapter the term "child abuse and neglect" means the physical injury by other than accidental means, injury resulting in a mental or emotional condition which is a result of abuse or neglect, negligent treatment, sexual abuse, maltreatment, mistreatment, non-treatment, exploitation or abandonment of a child under the age of 18 or of an individual who appears to be mentally retarded.~~

b. ~~Section 903. Reports Required~~

~~Any physician, and any other person in the healing arts including any person licensed to render services in medicine, osteopathy, dentistry, any intern, resident, nurse, school employee, social worker, psychologist, medical examiner or any other person who knows or reasonably suspects child abuse or neglect shall make a report in~~

accordance with 904 of this chapter:

e. ~~Section 906. Immunity from Liability~~

~~Anyone participating in good faith in the making of a report pursuant to this chapter shall have immunity from any liability, civil or criminal, that might otherwise exist and such immunity shall extend to participation in any judicial proceeding resulting from such report.~~

d. ~~Section 909. Penalty~~

~~Whoever knowingly and willfully violates this chapter shall be fined not more than \$100, shall be imprisoned not more than 15 days or both.~~

**DEPARTMENT OF HEALTH &
SOCIAL SERVICES
DIVISION OF SOCIAL SERVICES**

**PUBLIC NOTICE
DIVISION OF SOCIAL SERVICES
*A BETTER CHANCE / FOOD STAMP PROGRAMS***

The Delaware Health and Social Services / Division of Social Services / *A Better Chance* and Food Stamp Programs are proposing to implement policy changes in the Division of Social Services' Manual. These regulations are contained in Public Law 104-193, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Public Law 105-33, the Balanced Budget Act of 1997, Section 702(b) of Public Law 102-367, the Job Training Reform Amendments of 1992, Section 456(e) of Public Law 102-550, Housing and Community Development Act of 1992, Section 22 of Public Law 93-531 (25 USCS 640d-22), and Division of Social Services' Manual sections 3015, 7004.3, 9030.1, and 9506.

SUMMARY OF PROPOSED REVISIONS:

- Further clarification of parental education requirements.
- Increases the threshold for initiating food stamp claims to \$125.
- Allows for food stamp allotment reduction subsequent to the demand letter and notice of adverse action being sent to a client.

- Clarifies and expands the definition of qualified aliens eligible for food stamps.

- Updates the list of food stamp income and resource exclusions required by other Federal Laws.

PROPOSED AMENDMENTS TO REGULATIONS:

3015 Parenting Education Requirements

Adults and minor parent(s) will be required to attend parenting education classes. Once the individual has attended classes the requirement will be considered completed and will not have to be repeated unless there was a change in circumstances that makes another class beneficial.

A change in circumstance resulting in an extreme amount of stress on the family could be a reason to require the caretaker to attend more than one parent education class. Examples might include a child having extreme difficulties in school, a child exhibiting "acting out" behaviors, a family in which a member is terminally ill, or a new baby in a household where the youngest child was an adolescent.

Requiring a caretaker to take more than one parent education class should not be considered a punitive measure, but one designed to help the family cope with a stressful time or event in the life of the family.

The intent of requiring the caretakers and minor parents to attend parent education classes is that participants will complete the classes they are required to attend. Not completing the classes, without good cause, can result in the imposition of an enhanced family function sanction.

7004.3 Methods of Collecting Food Stamp Claims

DSS shall collect any overissuances of food stamps issued to a household by:

- a. reducing the allotment of the household;
- b. withholding amounts from unemployment compensation from a member of the household;
- c. recovering from Federal pay or a Federal income tax refund;
- d. any other means;

unless DSS can demonstrate that all of the means listed above are not cost effective.

Criteria for initiating collection action on inadvertent household and administrative error claims

1. ARMS will initiate collection action (proper notice should have been sent prior to submittal to ARMS, except for

food stamps) against the household on all inadvertent household or administrative error claims unless the claim is collected through offset or one of the following conditions apply:

- The total amount of the claim is less than \$35, ~~\$125~~, and the claim cannot be recovered by reducing the household's allotment;
- Documentation can be provided which shows that the household cannot be located.

2. ARMS will postpone collection action on inadvertent household error claims where an overissuance is being referred for possible prosecution in Superior Court (or an administrative disqualification hearing), and it is determined collection action will prejudice the case.

Initiating Collection on Claims

The Accounting Section of ARMS will initiate collection action by providing the household a written demand letter. The demand letters, including the demand letter sent following a fair hearing decision which upheld the claim, shall inform households that:

1. Unless the household responds to the demand letter and elects a method of repayment ~~within the appropriate time specified below~~, or timely requests a fair hearing and continued benefits, its allotment will be reduced;
2. How the allotment reduction will affect the household benefits;
3. That if the household ~~timely~~ elects allotment reduction, the reduction will begin with the first allotment issued after the election, and;
4. That if the household fails to make a ~~timely~~ election, or to timely request a fair hearing and continued benefits, the reduction will begin with the first allotment issued after ~~timely notice of such election is due~~ the demand letter and notice of adverse action is sent.

Action Against Households Which Fail to Respond

Participating households which have collection actions initiated against them for repayment of an overissuance will have their allotment reduced subsequent to the demand letter and notice of adverse action being sent to the household.

9030.1 Citizens and Qualified Aliens

The following residents of the United States are eligible to participate in the Food Stamp Program without limitations based on their citizenship/alienage status:

1. Persons born in the 50 states and the District of Columbia, Puerto Rico, Guam, Virgin Islands, and the Northern Mariana Islands. Children born outside the United States are citizens if both parents are citizens;
2. Naturalized citizens;
3. Aliens who are lawfully residing in any state and are:
 - a. Veterans honorably discharged for reasons other than alienage, and who fulfills the minimum active-duty service requirements of 24 months or the period for which the person was called to active duty, including military personnel who die during active duty service,
 - b. Individuals on active duty, other than active duty for training,
 - c. Spouses and/or any unmarried dependent children of #a or #b, and or the unremarried surviving spouse of an individual who is deceased if the marriage lasted for at least one year, or was married before the end of a 15-year time span following the end of the period of military service in which the injury or disease was incurred, or married for any period of time if a child was born of the marriage or was born before the marriage;
4. Aliens residing in the U.S. before August 22, 1996, who are lawfully admitted for permanent residence and who have worked 40 qualifying quarters of coverage under Title II of the Social Security Act. Beginning January 1, 1997, any quarter in which the alien received any Federal means-tested benefits does not count as a qualifying quarter.

Note: For aliens entering the U.S. on or after August 22, 1996:

Aliens who are lawfully admitted to the U.S. for legal permanent residence on or after August 22, 1996, cannot participate in the Food Stamp Program for five years ~~even if they unless they~~ have or can be credited with 40 quarters of coverage.

5. The following aliens are eligible to participate in the Food Stamp program with a five-year time limit:
 - refugees admitted under section 207 of the Act;
 - asylees admitted and granted asylum under section 208 of the Act;
 - aliens whose deportation has been withheld under section 241(b)(3) and 243 (h) of the Act.
 - Cuban and Haitians admitted under section 501(e) of the Refugee Education Act of 1980; and
 - Amerasians admitted under Section 584 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998.

The five-year time limit begins from the date they

obtained their alien status.

6. A battered spouse or battered child eligible if a veteran or on active duty in U.S. armed forces or spouse or unmarried dependent child of veteran or person on active duty. The nonabusive parent of a battered child and a child of a battered parent may be eligible.

9506

J. Any income that is specifically excluded by any other Federal law from consideration as income for the purpose of determining eligibility for the Food Stamp Program.

The following laws provide such an exclusion:

6. P. L. 97-300, the Job Training Partnership Act (JTPA), 10/13/82. Section 142(b) provides that allowances, earnings and payments to individuals participating in programs under JTPA shall not be considered as income. Subsequently P. L. 99-198, the Food Security Act of 1985, 12/85, amended section 5(1) of the Food Stamp Act to require counting as income on-the-job training payments provided under section 204(5) of Title II of the JTPA except for dependents less than 19 years old. Section 702(b) of P.L. 102-367, the Job Training Reform Amendments of 1992, further amended the Food Stamp Act (by changing the reference) to exclude on-the-job training payments received under the Summer Youth Employment and Training Program.

14. P. L. 100-485, Section 301, the Family Support Act, 10/31/88 which amended Section 402(g)(1)(E) of the Social Security Act. The value of any child care payments made under Title IV-A of the Social Security Act, including transitional child care payments, are excluded from income. (These are entitlement payments.)

16. P. L. 101-508, Section 5801, which amended Section 402(i) of the Social Security Act, 11/5/90. "At-risk" block grant child care payments made under section 5801 are excluded from being counted as income for food stamp purposes and no deduction may be allowed for any expense covered by such payments.

17 P.L. 102-550, Housing and Community Development Act of 1992, Section 456(e) provides that payments made under the Youthbuild Program are to be treated like JTPA payments. Therefore they should be excluded from income in accordance with item 6 above.

Part B - AMERICAN INDIAN OR ALASKA NATIVE

Usually a law will authorize payments to members of a tribe or band, and the law will apply to the members enrolled in the tribe or band wherever they live. However, items 2, 3, and 4 are general laws, and they apply to all tribes. The individuals should have documentation showing the type of payment and where it originated.

2. 25 USCA 640d-22 (P.L. 93-531, section 22, dated 12/22/74) provides in part that the availability of financial assistance to any Navajo or Hopi Indian pursuant to 25 USCS § 460d-460d-31 may not be considered as income or resources or otherwise used as the basis for denying or reducing the financial assistance or other benefits to which such household or member would otherwise be entitled to under the Social Security Act or any other Federal or federally assisted program.

Any person who wishes to make written suggestions, compilations of data, testimony, briefs or other written materials concerning the proposed new regulations must submit same to the Director, Division of Social Services, P. O. Box 906, New Castle, DE, by April 30, 1998.

The action concerning the determination of whether to adopt the proposed regulations will be based upon the results of Department and Division staff analysis and the consideration of the written materials filed by other interested persons.

DEPARTMENT OF HEALTH & SOCIAL SERVICES

DIVISION OF SOCIAL SERVICES

Statutory Authority: 31 Delaware Code, Section 505 (31 Del.C. 505)

PUBLIC NOTICE

Medicaid / Medical Assistance Program

In compliance with the State's Administrative Procedures Act (APA - Title 29, Chapter 101 of the Delaware Code) and with 42CFR §447.205, and under the authority of Title 31 of the Delaware Code, Chapter 5, Section 505, the Delaware Department of Health and Social Services (DHSS) / Division of Social Services / Medicaid Program is amending its outpatient hospital provider manual to remove procedural sections from the policy portion of the manual. These will now appear in appendices.

PROPOSED REGULATIONS

1517

REVISION:

OUTPATIENT HOSPITAL PROVIDER MANUAL

Laboratory Services

CLIA Certificate of Waiver Tests

The following Clinical diagnostic laboratory tests are considered to be CLIA Certificate of Waiver tests are listed in Appendix G. These are the only HCPCS procedure codes that may be billed to the DMAP by a provider who holds a CLIA Certificate of Waiver. If there is a specific product name or manufacturer listed, a provider who holds a CLIA Certificate of Waiver may only bill if the test is done USING THE SPECIFIC PRODUCT AND MANUFACTURER AS LISTED.

	determinations		
82273 effective 1/23/96	Blood, occult; other sources, qualitative	SmithKline Gastrocult	SmithKline

~~*If one (1) or two (2) of these tests are done, the provider must bill procedure code 80002 with one (1) unit. If all three (3) of these tests are done, the provider must bill procedure code 80003 with one (1) unit.~~

CODE	DEFINITION	PRODUCT NAME	MANUFACTURER
*80002 effective 1/23/96	Glucose; quantitative	Cholestech LDX	Cholestech
*80002 effective 1/23/96	Triglycerides	Cholestech LDX	Cholestech
*80002 effective 1/1/97 (replaces G0054)	Cholesterol; total	1. Chemtraka Accumeter 2. Advanced-Care 3. Boehringer Mannheim AccuChek InstantPlus Cholesterol 4. Cholestech LDX	1. Chemtrak 2. Johnson & Johnson 3. Boehringer Mannheim 4. Cholestech
81002	Urinalysis, by dipstick or tablet reagent for bilirubin, glucose, hemoglobin, ketones, leukocytes, nitrite, pH, protein, specific gravity, urobilinogen, any number of these constituents; non-automated; without microscopy	Various	Various
81025	Urine pregnancy test, by visual color comparison methods	Various	Various
82044 effective 1/23/96	Albumin, urine; microalbumin; semiquantitative (eg, reagent strip assay)	Boehringer Mannheim Chemstrip Micral	Boehringer Mannheim
82270	Blood, occult; feces screening, 1-3 simultaneous	Various	Various

CODE	DEFINITION	PRODUCT NAME	MANUFACTURER
82950 effective 1/1/97 (replaces G0055)	Glucose; post glucose dose (includes glucose)	HemoCue-B Glucose Photometer	HemoCue
82951 effective 1/1/97 (replaces G0056)	Glucose; tolerance test (GTT), three specimens (includes glucose)	HemoCue-B Glucose Photometer	HemoCue
82952 effective 1/1/97 (replaces G0057)	Glucose; tolerance test, each additional beyond three specimens	HemoCue-B Glucose Photometer	HemoCue
82962	Glucose; blood by glucose monitoring device(s) cleared by the FDA specifically for home use	Various	Various
83026	Hemoglobin; by copper sulfate method, non automated	Various	Various
83718 effective 1/23/96	Lipoprotein, direct measurement; high density cholesterol (HDL cholesterol)	Cholestech LDX	Cholestech
83986 effective 1/23/96	pH, body fluid; except blood. Using qualitative color comparison	Various	Various
85013	Blood count; spun microhematocrit	Various	Various
85018 effective 1/1/97 (replaces Q0116)	Blood count; hemoglobin	Hemoglobin by single instrument with self-contained or component features to perform specimen/reagent interaction; providing direct measurement and readout	HemoCue

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85651	Sedimentation rate; erythrocyte; non automated	Various	Various
86588 effective 1/23/96	Streptococcus; screen; direct	Quick-Vue-In Line-One-Step Strep-A-Test	Quidel
87072 effective 1/23/96	Culture or direct bacterial identification method; each organism; by commercial kit; any source except urine	Serim-Pyloritek Test-Kit	Serim

~~NOTE: The DMAP does not cover any services relating solely to the treatment of infertility. Therefore, the following waiver test is not reimbursable by the DMAP:~~

~~84830 Ovulation tests; by visual color comparison methods for human luteinizing hormone~~

CLIA Certificate for Provider-Performed Microscopy Procedures (PPMP)

~~The following Clinical diagnostic laboratory tests are considered CLIA provider-performed microscopy procedures are listed in Appendix H. A provider who holds a CLIA Certificate for Provider-Performed Microscopy may bill the DMAP for the following procedures in addition to the Certificate of Waiver tests.~~

~~81000 Urinalysis; by dipstick or tablet reagent for bilirubin; glucose, hemoglobin, ketones, leukocytes, nitrite, pH, protein, specific gravity, urobilinogen, any number of these constituents; non-automated, with microscopy~~

~~81015 Urinalysis; microscopic only~~

~~89190 Nasal smear for eosinophils~~

~~G0026 Fecal leukocyte examination~~

~~NOTE: The DMAP considers the following provider-performed microscopy procedures to be part of the physician evaluation and management service. Therefore, the following are not separately reimbursable by DMAP:~~

~~Q0111 Wet mounts, including preparations of vaginal, cervical or skin specimen~~

~~Q0112 All potassium hydroxide (KOH) preparations~~

~~Q0113 Pinworm examinations~~

~~NOTE: The DMAP does not cover any services relating solely to the treatment of infertility. Therefore, the following provider-performed microscopy procedures are not reimbursable by DMAP:~~

~~Q0114 Fern test~~

~~Q0115 Post-coital direct, qualitative examinations of vaginal or cervical mucous~~

~~G0027 Semen analysis; presence and/or motility of sperm excluding Huhner test~~

CLIA Certificate of Registration Tests

A provider who holds a CLIA Certificate of Registration may bill the DMAP for any clinical diagnostic laboratory test for which they have received CLIA certification.

Refer to Appendix I for specific billing instructions for:

- Multiple Units of Service
- Pregnancy Tests
- Panels and Profiles
- Drug Testing
- Therapeutic Drug Assays
- Urinalysis
- Chemistry and Toxicology
- Hematology
- Immunology
- Microbiology

Multiple Units Of Service

The following restrictions apply when billing for multiple units of service:

- ~~Repetition of the same test on the same specimen must not be billed.~~
- ~~When the same test is performed on separate specimens collected on the same day from the same patient, bill for multiple units of the appropriate HCPCS procedure code. In form locator (FL) 84 of the UB92 which is used to explain unusual services or circumstances, note the times that the specimens were collected.~~

~~EXAMPLE: If a glucose is drawn at 8 AM and again at 2 PM on the same day, bill for two units of 80002. In form locator (FL) 84 of the UB92, note that the specimens were collected at 8 AM and 2 PM.~~

- ~~When different procedures are described by one HCPCS procedure code, bill for multiple units of service. In form locator (FL) 84 of the UB92 which is used to explain unusual services or circumstances, identify the procedures performed.~~

~~EXAMPLE: When both a wound culture and an eye~~

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culture are performed on the same day, bill for two units of 87070. In form locator (FL) 84 of the UB92, state that one wound culture and one eye culture were performed.

Pregnancy Tests

The following restrictions apply:

- HCPCS procedure code 81025 (Urine pregnancy test, by visual color comparison methods) should be used for pregnancy tests performed on urine samples that are reported as positive or negative by a visual color comparison.
- HCPCS procedure code 84703 (Gonadotropin, chorionic [hCG]; qualitative) should be used for pregnancy tests reported as positive or negative.
- HCPCS procedure code 84702 (Gonadotropin, chorionic [hCG]; quantitative) should be used when determining the range of values of the beta sub-unit of the chorionic gonadotropin. **DO NOT USE THIS CODE FOR ROUTINE PREGNANCY TESTS.**

Panels And Profiles (80002-G0060)

Panels or profiles are groups of laboratory tests that are performed and billed as a single unit. Providers must use the appropriate single procedure code that describes the group of tests being performed.

The individual HCPCS procedure codes for the 22 tests listed below are NOT used by DMAP:

<u>Name of Test</u>	<u>Individual HCPCS Procedure Codes Which Are Not Used</u>
Alanine aminotransferase (ALT, SGPT)	84460
Albumin	82040
Aspartate aminotransferase (AST, SGOT)	84450
Bilirubin, direct	82250, 82251
Bilirubin, total	82250, 82251
Calcium	82310
Carbon dioxide content	82374
Chloride	82435
Cholesterol	82465
Creatine kinase (CK, CPK)	82550
Creatinine	82565
Glucose (sugar)	82947
Gamma-glutamyltransferase (GGT)	82977
Lactate dehydrogenase (LD)	83615

Phosphatase, alkaline	84075
Phosphorus (inorganic phosphate)	84100
Potassium	84132
Protein, total	84155, 84160
Sodium	84295
Triglyceride	84478
Urea nitrogen (BUN)	84520
Uric acid	84550

When reporting any of these 22 tests, regardless of whether the tests are performed using manual or semi-automated methods, or on automated multichannel equipment, use the appropriate profile code 80002 - G0060 listed below:

USE THESE CODES:

80002	Automated multichannel test; 1 or 2 clinical chemistry tests
80003	Automated multichannel test; 3 clinical chemistry tests
80004	Automated multichannel test; 4 clinical chemistry tests
80005	Automated multichannel test; 5 clinical chemistry tests
80006	Automated multichannel test; 6 clinical chemistry tests
80007	Automated multichannel test; 7 clinical chemistry tests
80008	Automated multichannel test; 8 clinical chemistry tests
80009	Automated multichannel test; 9 clinical chemistry tests
80010	Automated multichannel test; 10 clinical chemistry tests
80011	Automated multichannel test; 11 clinical chemistry tests
80012	Automated multichannel test; 12 clinical chemistry tests
80016	Automated multichannel test; 13-16 clinical chemistry tests
80018	Automated multichannel test; 17-18 clinical chemistry tests
80019	Automated multichannel test; 19 clinical chemistry tests
G0058	Automated multichannel test; 20 clinical chemistry tests
G0059	Automated multichannel test; 21 clinical chemistry tests
G0060	Automated multichannel test; 22 clinical chemistry test

EXAMPLE: If a BUN and a glucose were run on the same specimen, the correct code would be one unit of 80002. If only a glucose was ordered, the correct code would still be one unit of 80002. If a glucose was run a 9 AM and again at 2 PM on the same day on different specimens, two units of 80002 would be billable.

EXAMPLE: If five of the above tests are ordered, the correct code would be one unit of 80005. Fifteen tests would be billed as one unit of 80016 while twenty-one tests would be one unit of G0059. In each case, the unit of service would be one, not the number of tests actually performed.

Drug Testing (80100-80103)

HCPCS procedure code 80100 (Drug, screen; multiple drug classes, each procedure) should be used for a qualitative drug screen that detects multiple drug classes in a single procedure. HCPCS procedure code 80101 (Drug, screen; single drug class, each drug class) should be used for a qualitative drug screen that detects a single drug class. HCPCS procedure code 80102 (Drug, confirmation, each procedure) should be used for confirmation (by a second method) of any drugs

detected in a drug screen.

HCPCS procedure code 83518 (Immunoassay for analyte other than antibody or infectious agent antigen, qualitative or semiquantitative; single step method [e.g., reagent strip]) should be used for a qualitative or semiquantitative immunoassay of an analyte other than an antibody. This includes quick screens, using low technology testing (e.g., reagent strips, dip stick, etc.).

Confirmed drugs may be quantitated using the appropriate code in the chemistry section (82000-84999) or therapeutic drug assay section (80150-80299).

Therapeutic Drug Assays (80150-80299)

Use the specific procedure code listed in the CPT book for individual quantitative assay. For non quantitative testing, use codes 80100-80103.

Urinalysis (81000-81099)

Code 81000 is described as a complete urinalysis, non-automated. Code 81001 is a complete urinalysis, automated. Neither is to be used in conjunction with the following HCPCS procedure codes: 81002, 81003, 81005, and 81015. Any stick, dip, or tablet tests performed on a single specimen are considered to be part of the 81000 or 81001 and are not eligible for separate reimbursement. In order to bill for an 81000 or an 81001, a microscopy must be performed.

Chemistry And Toxicology (82000-84999)

When billing for any specific chemistry test that is noted under the list of automated, multichannel tests, do not use the individual HCPCS procedure codes regardless of whether the tests are performed using manual methods or automated, multichannel equipment. The provider must bill using the appropriate profile code.

Hematology (85000 - 85999)

When billing codes for a complete blood count (CBC) or hemogram, identified as HCPCS procedure codes 85021, 85022, 85023, 85024, 85025, 85027, or 85031, do not bill for any code that is a component of a CBC for the same specimen. The following are the HCPCS procedure codes for components: 85007, 85008, 85013, 85014, 85018, 85041, 85048, 85585, 85590, and 85595.

Providers are reminded not to use multiple procedure codes when a single procedure code accurately describes the service rendered.

Immunology (86000 - 86999)

When there is no specific code for an immunology procedure, the code for the methodology is to be used. Certain codes can be used to describe many different tests. When two or more different tests are described by the same code and are performed on the same patient on the same day, bill on a single line using multiple units of service.

Identify the procedures performed in form locator (FL) 44 of the UB92, which is used to explain unusual services or circumstances.

Microbiology (87001 - 87999)

The following policies apply:

- A definitive culture is one in which ALL probable pathogens are isolated and identified. Commercial kits are not considered to be definitive culture methods.

EXAMPLE: When billing code 87060 (Culture, bacterial, definitive; throat or nose), the provider is expected to be able to isolate and identify Haemophilus, gram negative rods, staphylococci, pneumococci, and other probable naso-pharyngeal pathogens in addition to beta hemolytic streptococci.

- A presumptive or screening culture is one in which a single pathogen is isolated but may or may not be definitively identified.

EXAMPLE: When a throat culture is screened for the presence or absence of group A beta streptococci using a low concentration bacitracin disc, bill for one unit of 87081. Identification aids such as bacitracin and neomycin discs are considered part of the screen and should not be billed in addition to the 87081.

EXAMPLE: When a genital culture is screened for the presence or absence of Neisseria gonorrhoea (GC), bill for one unit of 87081.

- Commercial kits are self-contained microbiology systems that offer screening information on one or more probable pathogens. HCPCS procedure codes for commercial kits are found in the microbiology section of the CPT book. Cultures performed using commercial kits are not considered definitive. In form locator (FL) 44 of the UB92, which is used to explain unusual services or circumstances, identify the commercial kit used.

~~EXAMPLE: When a culture of the urethra for Neisseria gonorrhea (GC) is performed using the Isocult commercial kit for gonorrhea, bill for one unit of HCPCS procedure code 87082. In form locator (FL) 44 of the UB92, note that Isocult was the commercial kit used.~~

- ~~• Direct sensitivities are not reimbursable. A direct sensitivity is inoculated directly from the specimen at the time of the initial culture. DO NOT use HCPCS procedure codes 87181, 87184, 87186, or 87188 to describe direct sensitivities. Sensitivities will only be reimbursed after a pathogen has been isolated and set up for sensitivities.~~
- ~~• HCPCS procedure code 87088 is described as a culture, bacterial, urine; identification, in addition to quantitative or commercial kit. It is not to be used in conjunction with procedure code 87086 (Culture, bacterial, urine; quantitative, colony count) or with procedure code 87087 (Culture, bacterial, urine; commercial kit). They are considered to be part of procedure code 87088 when performed on the same specimen.~~

Comments, written suggestions, compilations of data, testimony, briefs or other written materials concerning this change must be received by mail no later than May 1, 1998, at the Medicaid Administrative Office, Lewis Bldg., Herman M. Holloway, Sr. Health & Social Services Campus, 1901 N. DuPont Hwy., New Castle, DE 19720, attention Thelma Mayer. Materials filed thereafter will not be considered except where good cause for lateness is demonstrated. Copies of all written submissions filed with the Medicaid office will be available for public inspection in the Medicaid Administrative Office at the address given above. Please call (302) 577-4880, extension 131, for an appointment if you wish to review the materials. Individuals with disabilities who wish to participate in these proceedings, or review the materials submitted, should contact the Division to discuss auxiliary aids or services needed to facilitate such review or participation. Such contact may be in person, in writing or by telephone by using the Telecommunications Relay Service, or otherwise.

**DEPARTMENT OF HEALTH &
SOCIAL SERVICES
DIVISION OF PUBLIC HEALTH
OFFICE OF HEALTH FACILITIES
LICENSING AND CERTIFICATION**

Statutory Authority: 16 Delaware Code,
Section 122 (16 Del.C. 122)

The Office of Health Facilities Licensing and Certification, Division of Public Health of the Department of Health and Social Services, will hold a public hearing to discuss proposed Delaware Regulations for Adult Day Care Facilities. These proposed regulations describe licensing requirements and procedures and general and special requirements of facilities desiring to establish, conduct or maintain an Adult Care Facility in this State. Adult Day Care Facilities Regulations apply to any program that provides health, social and related support services for four or more functionally impaired adults who reside in the community and are in need of these services as determined by a pre-admission assessment. The services are provided to adults for a period of less than 12 hours during the day.

This public hearing will be held April 21, 1998 at 9:00 AM in Room 309, Jesse S. Cooper Building, Federal and Water Streets, Dover, Delaware.

Copies of the proposed regulations are available for review by calling the following locations:

Office of Health Facilities Licensing and Certification
Three Mill Road, Suite 308
Wilmington, DE 19806
Telephone: (302) 577-6666

Office of Health Facilities Licensing and Certification
Jesse S. Cooper Building
Federal and Water Streets
Dover, DE 19901
Telephone: (302) 739-6610

Anyone wishing to present their oral comments at this hearing should contact Ms. Vanette Seals at (302) 577-6666 by April 17, 1998. Anyone wishing to submit written comments as a supplement to, or in lieu of oral testimony should submit such comments by May 4, 1998 to:

Jeffrey Beamen, Hearing Officer
Division of Public Health
PO Box 637
Dover, DE 19903

DELAWARE REGULATIONS FOR ADULT DAY CARE FACILITIES**INDEX****PAGE**

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*** PLEASE NOTE THAT THE ABOVE PAGE NUMBERS REFER TO PAGES IN THE DOCUMENT AND NOT PAGES IN THE REGISTER**

Title 16 - Health and Safety
Chapter 1, Subchapter II, Section 122

Powers and Duties of the Department of Health and Social Services

Establish standards for regulation in the operation of adult day care facilities, and grant licenses for the operation of such facilities to persons, associations or organizations which have been approved in accordance with this title and which pay the appropriate permit fee.

REGULATIONS**SECTION 68.0 PURPOSE**

The regulations for Adult Day Care Facilities apply to any program that provides health, social, and related support services as described in these regulations for four or more functionally impaired adults who reside in the community and are in need of these services as determined by a pre-admission assessment. Adult Day Care facilities do not

include programs intended exclusively or primarily to provide activities or training to the developmentally disabled or mentally ill. These services are provided to adults for a period of less than 12 hours during the day and are provided in a setting other than a participant's home or the residence of the facility operator.

SECTION 68.1 GLOSSARY OF TERMS

68.101 Activities of Daily Living - the tasks for self-care which are performed either independently or with supervision or assistance. Activities of daily living include ambulating, transferring, grooming, bathing, dressing, eating, and toileting.

68.102 Adult - any person 18 years of age or older.

68.103 Dietitian - a person currently registered by the Commission on Dietetic Registration of the American Dietetic Association and/or a Certified Dietitian/Nutritionist in the State of Delaware.

68.104 Functionally Impaired Adult - An adult who requires supervision due to cognitive or physical impairment or who cannot independently perform one or more Activities of Daily Living.

68.105 Accessible - an environment which allows an individual using a wheelchair or support appliance to enter, exit and move about freely with no assistance from another person.

68.106 Nursing Services - those procedures commonly employed in providing for the physical, emotional and rehabilitation needs of functionally impaired adults which require technical skills and knowledge beyond that which the untrained person possesses, including, but not limited to, such procedures as: irrigations; catheterization; application of dressings; supervision of special diets; objective observation of changes in participant condition as a means of determining required nursing care and the need for further medical diagnosis and treatment; special procedures contributing to rehabilitation; administration of medication and carrying out treatments prescribed by a physician or an Advanced Practice Nurse in accordance with the Rules and Regulations related to the law Regulating the Practice of Nursing in Delaware which involve a like level of complexity and skill in administration.

68.107 Nurse Aide/Nurse Assistant - an individual who provides care that does not require the judgment and skills of a licensed nurse and who meets the criteria contained in 68.12.10 B. The care may include but is not limited to the following: bathing, dressing, grooming, toileting, ambulating,

transferring and feeding, observing and reporting the general well-being for the person(s) to whom they are providing care.

68.108 Participant - an individual receiving services in an adult day care facility.

68.109 Representative - a person acting on behalf of the participant under Delaware law.

SECTION 68.2 LICENSING REQUIREMENTS AND PROCEDURES

68.201 No person shall establish, conduct or maintain in this State any adult day care facility without first obtaining a license from the Department of Health and Social Services.

A. Issuance of Licenses

1. Annual License. An annual license (12 months) may be renewed yearly if the holder is in substantial compliance with these rules and regulations.

2. Provisional License. A provisional license shall be granted for a term of ninety (90) days only, and shall be granted to a facility which is not in full compliance with these rules and regulations.

3. Restricted License. A restricted license shall be granted for a term of ninety (90) days when the facility is not in compliance with the provisions of these regulations and the violations are serious, multiple or repeated. The holder of a restricted license may not contract with new participants during the period of restriction, but the facility may remain in operation until such license is revoked, expires, becomes annual or provisional.

Restricted licenses may be issued by the Office of Health Facilities Licensing and Certification without advance notice if the Secretary or his/her designee determines that any deficiency immediately and seriously jeopardizes the health or safety of any participant. The holder of the license may appeal the issuance of the restricted license to the Secretary or his/her designee, however, the restricted license will remain in effect during the pendency of the appeal.

B. Suspension or Revocation of Licenses

The Secretary of the Department of Health and Social Services or his/her designee may suspend or revoke a license issued under this chapter on any of the following grounds:

1. Violation of any of the provisions of these rules and regulations.

2. Permitting, aiding, or abetting the commission of any illegal act in the facility.

3. Conduct or practices detrimental to the welfare of the participant.

Before any license issued under this chapter is suspended or revoked, thirty (30) days notice shall be given in writing to the holder of the license, during which

he/she may appeal for a hearing before the Secretary of the Department of Health and Social Services or his/her designee.

C. Renewal of License after Suspension or Revocation

If and when the conditions upon which the suspension or revocation of a license are based have been corrected and after a proper inspection has been made, a new license may be granted.

68.202 Separate Licenses

A. Separate licenses are required for facilities maintained in separate locations, even though operated under the same management.

B. A separate license is not required for separate buildings maintained by the same management on the same grounds.

C. A license is not transferable from person to person or from one location to another.

68.203 Inspection

Every adult day care facility for which a license has been issued under this chapter shall be periodically inspected by a representative of the Division of Public Health.

68.204 Application Process

A. All persons or entities applying for a license shall request a licensure application from the Division of Public Health, Office of Health Facilities Licensing and Certification.

B. Applicants shall submit to the Division of Public Health, Office of Health Facilities Licensing and Certification the following information:

1. the names, addresses and types of facility owned or managed by the applicant;

2. identity of:

a. each officer and director of the corporation if the entity is organized as a corporation;

b. each general partner or managing member if the entity is organized as an unincorporated entity;

c. the governing body if the entity is government operated;

d. proof of not-for-profit status if claiming tax-exempt status; and

e. any officers/directors, partners, or managing members, or members of a governing body who have a financial interest of 5 percent or more in a licensee's operation or related businesses.

3. disclosure of any officer, director, partner, employee, managing member, or member of the governing body with a felony criminal record; and

4. name of the director, who is the individual responsible for the management of the adult day care facility.

C. When a facility is classified under this law or regulation and plans to construct, extensively remodel or convert any buildings, one (1) copy of properly prepared

plans and specifications for the entire facility shall be submitted to the Division of Public Health, Office of Health Facilities Licensing and Certification. An approval, in writing, shall be obtained before such work is begun. After the work is completed, in accordance with the plans and specifications, a new license to operate shall be issued.

SECTION 68.3 GENERAL REQUIREMENTS

68.301 Participants who are acutely ill, medically unstable, bedridden or require continuous medical interventions shall not be admitted or continue to be served in the adult day care facility.

68.302 All records maintained by the adult day care facility shall at all times be open to inspection by the authorized representatives of the Division of Public Health, Office of Health Facilities Licensing and Certification.

68.303 No policies shall be adopted by the adult day care facility which are in conflict with these regulations.

68.304 The adult day care facility shall establish written policies regarding the rights and responsibilities of participants, and these policies and procedures shall be made available to authorized representatives of the Division of Public Health.

68.305 The adult day care facility shall establish policies and procedures that address the handling and documentation of incidents, accidents, medical emergencies and the prevention of wandering away from safe areas by cognitively impaired participants. Reports of these events shall be kept on file at the facility.

68.306 A grievance procedure shall be established to enable participants and their families or representatives, if any, to have their concerns addressed without fear of reprisal.

SECTION 68.4 PLANT, EQUIPMENT AND PHYSICAL ENVIRONMENT

68.401 Site Provisions

Each adult day care facility shall be located on a site which is approved in advance and considered suitable by the Department of Health and Social Services. Site must be safe, easily drained, must be suitable for disposal of sewage and furnishing a potable water supply.

68.402 The adult day care facility shall comply with all local and state building codes and ordinances as pertain to this occupancy.

68.403 Building

A. All facilities shall either be at grade level or shall be equipped with ramps or elevators to allow easy access for persons with disabilities.

B. The building shall be so constructed and maintained to prevent the entrance or existence of rodents and insects at all times. All exterior openings used for ventilation shall be effectively screened during the fly season. Screen doors shall open outward. All screening shall have at least sixteen (16) mesh per inch.

C. The roof, exterior walls, doors, sky lights and windows shall be weather tight and watertight and shall be kept in sound condition and good repair.

D. The exterior of the site shall be free from hazards and also from the accumulation of waste materials, obsolete and unnecessary articles, tin cans, rubbish, and other litter.

E. Floor and wall surfaces of bathrooms and kitchens shall be constructed and maintained to be impervious to water and to permit the floor and walls to be easily kept in a clean condition.

F. The adult day care facility must be accessible as defined at Section 68.105. The entrance and circulation areas shall meet appropriate American National Standards Institute (A.N.S.I.) standards and all applicable State and Federal standards.

G. Each adult day care facility, when located in a facility housing other services, shall have its own separate identifiable space.

H. Outdoor recreation and/or relaxation area for participants, if provided, shall be safe, secure, free of accident hazards, accessible to indoor areas and accessible to those with disabilities. Outdoor areas shall have a fence or landscaping to create a boundary which prevents participants from wandering away and shall be easily supervised. The outdoor area must be adequately staffed whenever participants are present.

68.404 Water Supply and Sewage Disposal

A. The plumbing shall meet the requirements of all municipal or county codes. Where there are no local codes, the provisions of the Department of Health and Social Services Sanitary Plumbing Code shall prevail.

B. The water supply and the sewage disposal system shall be approved by the Department of Health and Social Services and the Department of Natural Resources and Environmental Control respectively.

C. The water system shall be designed to supply adequate hot and cold water, under pressure, at all times.

D. Hot water at shower, bathing and hand washing facilities shall not exceed 110°F (43°C).

68.405 Heating, Ventilation and Air Conditioning

A. The heating equipment for all areas shall be adequate, safe, protected, and easily controlled. It shall be

capable of maintaining the temperature in each room used by participants at a minimum of 72°F (21°C). Portable heating devices shall not be used.

B. The adult day care facility shall be adequately ventilated. Air conditioning equipment shall be adequate and capable of maintaining the temperature in each room used by participants between 72°F - 82°F.

68.406 Lighting

Each room shall be suitably lighted at all times for maximum safety, comfort, sanitation and efficiency of operation particularly in areas that present safety hazards. A minimum of 30 foot candles of light shall be provided for all working and reading surfaces, and a minimum of 10 foot candles of light on all other areas. This includes hallways, stairways, storerooms and bathrooms. Careful attention shall be given to avoid glare.

68.407 Safety Equipment

A. To prevent slipping, staircases shall have stair treads and sturdy handrails.

B. Stairways, ramps and porches shall have adequate lighting and handrails.

C. Hallways shall have handrails located on both sides.

D. Floor surfaces, especially in heavy traffic areas shall be durable, yet non-abrasive and slip-resistant. Area rugs on hard finished floors shall have a non-skid backing. Carpeting shall be maintained in a clean and slip-resistant condition.

68.408 Bathrooms and Hand Washing Facilities

A. At least one (1) window or mechanical ventilation to the outside shall be provided in each bathroom. Floors shall not be slippery.

B. Bathroom design shall be accessible as defined at Section 68.105 and meet appropriate American National Standards Institute (A.N.S.I.) Standards.

C. Toilets, bathing and toileting appliances shall be equipped for use by participants with multiple disabilities.

D. There shall be at least one toilet of appropriate size for every twelve participants.

1. Each toilet shall be equipped with a toilet seat.

2. Toilet tissue shall be readily accessible at each toilet.

3. Separate toilet facilities with hand washing shall be provided for staff.

E. There shall be at least one hand washing sink for every two toilets. Hand washing facilities shall be readily accessible to participants and staff.

F. Shower and tub areas, if provided, shall be equipped with grab bars and slip-resistant surfaces.

G. Bathroom areas shall be equipped with mirrors for personal grooming. Mirrors shall be installed in such a way to minimize the danger of breakage.

H. Signaling devices shall be installed or placed in the

bathroom areas, restroom stalls, and showers, if any.

68.409 Program Area

A. When a multi-purpose room is used, it shall have sufficient space to accommodate all activities and to prevent interference with each other. There shall be sufficient space to permit privacy and confidentiality.

B. Square Footage

1. Minimum space requirements are as follows:

A. 100 square feet for each of the first five participants; and

B. 60 square feet for each of the participants thereafter.

2. Space requirements do not include office space, bathrooms, storage, examination room, or dining room (unless the dining room is also used for activities).

C. A telephone shall be available to participants to make and receive calls. Telephones shall be in an area which affords privacy during use.

D. The adult day care facility shall maintain comfortable sound levels not to exceed 60 decibels for a sustained period of time. Background noise shall be minimized and sound transmission shall be controlled. Sound transmission may be controlled by use of acoustical ceiling surfaces, partitions between activity areas, and separation of noisy rooms. Sound levels shall enhance privacy and encourage interaction when social participation is desired.

E. There shall be adequate storage space for program supplies and for participants' outer garments and possessions.

F. The dining area shall be large enough to provide table and chair space to accommodate all participants.

G. The adult day care facility shall provide a separate rest area to permit privacy for assessments and to isolate participants who become ill. A bed, cot or other appropriate lounging or reclining furniture shall be available for participants in this area.

H. Adult day care facilities which provide rehabilitation services shall have separate additional space and equipment for carrying out each type of therapy that may be provided. At a minimum, the following shall be provided:

1. Provisions for wheelchair participants;

2. Additional storage for supplies and equipment;

3. Provisions for participant privacy; and

4. Hand washing facilities within the rehabilitation area.

68.410 Furnishings

A. Furniture shall be sturdy and secure so that it cannot easily tip when used for support while walking or seating. Furniture shall be scaled so that it is easily used by persons with limited agility and shall permit feet to rest on the floor. Chairs used for dining shall have armrests or be free of armrests in accordance with each participant's physical needs

and preferences.

B. All rugs and floor coverings shall be tacked down securely. Throw rugs may not be used. All equipment and furnishings shall be in good condition and safe for usage by participants and staff. The adult day care facility shall provide:

1. One chair for each participant and staff person;
2. Adequate table space for all participants; and
3. Reclining lounge chairs, the number to be

determined by the needs and numbers of participants.

68.411 Emergency Equipment and Supplies

The adult day care facility shall provide adequate emergency equipment and supplies readily available for treating shock, burns and wounds, including:

- A. first aid kit containing sterile gauze dressings and bandages, antiseptic, tape and scissors;
- B. special equipment as needed by the participant such as suction equipment, oxygen, etc.;
- C. manual breathing bag;
- D. thermometers and
- E. sphygmomanometers and stethoscopes.

68.412 Sanitation and Housekeeping

A. All rooms and every part of the building shall be kept clean, orderly and free of offensive odors.

B. Policy manuals shall be prepared and followed which outline maintenance and cleaning procedures, safe storage of cleaning materials and pesticides and other potentially toxic materials, and safe storage and handling of soiled linen and clothing.

C. A ventilated janitor's closet shall contain a service sink and provide for the locked safe storage and use of housekeeping items.

D. Chemicals and disinfection agents shall be stored separate from participant care items and food.

68.413 Existing Facilities

Adult day care facilities that have been in operation before the adoption of these regulations and do not meet the minimum square footage, dining area and bathroom ratio requirements set forth in Section 68.4 must be brought into full compliance within a five (5) year period. All other provisions of these regulations apply upon their adoption except as otherwise expressly provided.

SECTION 68.5 FIRE SAFETY

68.501 Fire safety in adult day care facilities shall comply with the adopted rules and regulations of the State Fire Prevention Commission. Enforcement of Fire Regulations is the responsibility of the State Fire Prevention Commission. All applications for a license or renewal of a license must include, with the application, a letter certifying compliance

by the Fire Marshal having jurisdiction. Notification of noncompliance with the Rules and Regulations of the State Fire Prevention Commission shall be grounds for revocation of a license.

68.502 Staff and participants shall be trained in executing the evacuation plan. A written record of fire safety training, including content of the training and persons attending shall be maintained.

68.503 Evacuation fire drills shall be held and documented at least quarterly for all staff and participants.

SECTION 68.6 ADMISSION AGREEMENT, ASSESSMENT AND DISCHARGE

68.601 The adult day care facility shall have written admission policies which describe admission and discharge criteria.

68.602 The admission policies shall be discussed with each participant entering the program, and their representative, if any.

68.603 The adult day care facility shall only admit those individuals whose needs can be met by the facility.

68.604 All participants shall be 18 years of age or older and functionally impaired as defined at Section 68.104.

68.605 There shall be a written agreement between the participant and the adult day care program. The agreement shall:

A. specify the services to be provided by the facility, scheduled days, financial arrangements, transportation agreements, emergency procedures and conditions for dismissal or discharge and appeal;

B. be signed by the participant, if he is able, and representative, if any, and the adult day care facility;

C. be given to the participant and representative, if any, and a copy shall be kept at the facility; and

D. be reviewed and updated as necessary to reflect the change in the services or the financial arrangements.

68.606 Assessment

A. The facility shall be responsible for conducting a written assessment of an applicant within 30 days prior to admission. The assessment shall include input as required from physicians, licensed nurses, social workers, physical and occupational therapists, and other personnel with expertise as required by the participant's needs.

B. The assessment shall be completed by the adult day care facility in conjunction with the participant and representative, if any.

C. The assessment shall include at a minimum a description of the participant's:

1. physical condition, including ability to perform activities of daily living, such as ambulating, eating, toileting, and sensory limitations such as sight, hearing, and speech completed by a licensed nurse;

2. social situation, including living arrangements and the availability of family and community support and

3. mental status, including any cognitive impairment and known psychiatric, emotional, and behavioral problems.

D. The initial assessment shall be reviewed and updated on a scheduled basis, but at least annually. This reassessment shall become a permanent part of the participant's record.

E. A reassessment shall be conducted when the needs of the participant change which indicate a revision to the plan of care is needed.

68.607 Discharge

A. No participant shall be discharged from an adult day care facility except for the following:

1. When the participant's needs can no longer be met by the program of care;

2. For medical reasons;

3. For the participant's own welfare or the welfare of the other participants; or

4. For nonpayment of justified charges.

B. The participant and representative, if any, shall be informed of and participate in discharge planning. A minimum of 2 weeks notice shall be given by the adult day care facility to the participant and representative, if any. However, the notice period may be waived if the care needs of the participant undergo a sudden change which necessitates immediate transfer to a facility or program able to provide a higher level of care. If the notice provisions are waived, the facility shall be responsible for assisting in suitable placement for the participant.

C. The adult day care facility shall develop a written plan of discharge which outlines the services needed by the participant upon discharge.

SECTION 68.7 PLAN OF CARE

68.701 Prior to admission, a preliminary plan of care, based upon the initial assessment shall be developed in writing for each participant. The preliminary plan of care shall be reviewed, revised as necessary and completed within 30 days of admission.

68.702 The plan shall be developed to improve or maintain the functional capabilities of the participant. The plan shall include:

A. a description of the participant's needs;

B. the activities, programming and services in which

the person will participate in order to meet those needs; and

C. realistic goals for the participant, designated roles of the responsible parties, and if appropriate, the timeline for each goal.

68.703 The written plan of care and personal information shall be reviewed with the participant and representative, if any, and updated on a scheduled basis as needed, but at least annually. All revisions to the plan of care shall be in writing.

SECTION 68.8 SUPPORT SERVICES

68.801 Nursing assistants as defined at Section 68.107 or licensed nurses shall provide supervision and assistance in activities of daily living, such as feeding and toileting, to participants who require those services. However, volunteers under the direct supervision of a licensed nurse may provide assistance in activities of daily living for which they have been trained. Facilities that have been in operation before the adoption of these regulations shall comply with this requirement within 12 months of the adoption date of the regulations.

68.802 Rehabilitation services, including occupational therapy, physical therapy, and speech therapy, if provided, shall be ordered by the participant's physician.

68.803 Medication Management

A. Medication shall not be administered to a participant unless prescribed by the participant's physician.

B. All adult day care programs shall have an up-to-date Physicians Desk Reference (P.D.R.), U.S. Drug Information Edition or similar text which lists drug actions, interactions, and side effects.

C. All medication administered to participants shall be ordered in writing, dated and signed by the attending physician. All prescription medications shall be properly labeled in accordance with Title 24 of the Delaware Pharmacy Laws and Regulations. The label shall contain the following information:

1. The prescription number;

2. The date such drugs were originally dispensed to the participant;

3. The participant's full name;

4. The brand or established name and strength of the drug to the extent that it can be measured;

5. The physician's directions as found on the prescription;

6. The physician's name;

7. The name and address of the dispensing pharmacy or physician.

D. Medications may be self-administered or administered in accordance with the State of Delaware Nurse Practice Act. Those participants who, upon admission, are

incapable of self-administration or who become incapable of self-administration shall have their medications administered according to the Nurse Practice Act.

E. The adult day care facility shall maintain a record of all medication provided to a participant indicating time of day, type of medication, dose, route of self-administration/administration, by whom given and any reactions noted.

F. Medication Storage

If medications are administered on site, provisions for the locked storage of medications shall be provided. The key to the medication storage must be in the possession of or accessible only to personnel responsible for the distribution for self-administration/administration of medications.

1. Prescription medication not requiring refrigeration shall be kept in the original container stored in a locked cabinet or drawer, and clearly labeled for the specific participant. These medications shall be stored within the U.S.P. recommended temperature range of 59° - 86°F unless the manufacturer's labeling states otherwise.

2. Prescription medication requiring refrigeration shall be stored in a separate and secure locked container within the refrigerator. The temperature range must be maintained within U.S.P. requirements.

3. Schedule II substances/prescriptions shall be kept in separately locked, securely fixed boxes or drawers in the locked medication cabinet; hence, under two (2) locks.

Schedule II substances shall be handled in the manner outlined by the State and Federal laws and regulations. All unused Schedule II substances shall be returned to the participant or representative for disposition.

4. Internal medications shall be stored separately from external medications.

G. The adult day care facility shall ensure that prescription medication is not used by other than the participant for whom the medication was prescribed.

H. The center may maintain a supply of over-the-counter medications, such as antacids and aspirin. However, over-the-counter medications shall only be administered upon the order of the participant's physician.

I. Used needles and syringes shall not be recapped, but placed immediately after use into an approved Sharps container and disposed of properly.

68.804 Transportation Services

When transportation services are provided directly or under contract by the adult day care facility:

A. The vehicle shall be accessible and appropriate to the participants using it, considering any physical handicaps and impairments.

B. Every participant shall have a seat in the vehicle, except those participants who remain in their wheelchairs.

C. Wheelchairs shall be secured when the vehicle is in motion.

D. Each participant shall be seated while the vehicle is

in motion.

E. Vehicles shall have adequate seat belt and securement devices for ambulatory and wheelchair bound passengers.

F. Participants shall not be left unsupervised while in a vehicle.

G. Assistance by a driver or attendant shall be provided from the ground floor of the passenger's residence to the ground-floor of the day care facility.

H. The driver shall have a valid and appropriate Delaware drivers license, a safe driving record and training in first aid. The driver shall meet any state requirements for licensure or certification for the vehicle operated.

I. Each vehicle shall have a first aid kit, along with fire extinguisher and safety triangles.

J. Each driver shall have medical and emergency information in the vehicle for participants being transported.

K. All transportation vehicles shall be equipped with a device for two-way communication.

68.805 Nutrition and Food Services

A. Kitchen and Food Storage Areas

If meals are prepared by the adult day care facility the State of Delaware Regulations Governing Public Eating Places shall apply and are appended hereto.

B. The adult day care facility shall provide or make arrangements for a minimum of one meal daily which is of suitable quality and quantity for participants who are in the center for four (4) or more hours. The meal shall meet at least one-third (1/3) of an adult's current recommended dietary allowance (RDA) of the Food and Nutrition Board, National Academy of Sciences-National Research Council.

C. A morning snack shall be offered daily to participants. Those participants remaining in the facility for more than 3 hours after completion of lunch shall be offered a mid-afternoon snack. Facilities open in the evening shall serve an evening meal. Beverages shall be available to participants at all times and shall be offered periodically to promote good hydration. Snacks shall have nutritional value.

D. Food shall be stored, prepared, and served in accordance with the State of Delaware Regulations Governing Public Eating Places.

E. Food that is not prepared on-site shall be prepared in a facility which has a Delaware Public Eating Place permit.

F. Menus shall be planned and written for a minimum of a two-week cycle, if meals are prepared on-site, and approved by a dietitian.

G. The menu shall be dated for the week of service and posted in a prominent area for the availability to the participant and representative, if any.

H. A therapeutic diet shall be provided for a participant when prescribed in writing by a physician. Therapeutic diet menus shall be prepared by a dietitian.

I. A dietitian shall be available for consultation with

staff on basic and special nutritional needs and proper food handling techniques and shall provide in-service training to staff on these topics at least annually.

J. Appropriate food containers and utensils shall be available as needed for use by handicapped participants.

K. Equipment for adequate refrigeration to maintain foods at 40°F and for the heating of foods shall be provided if needed to assist in the provision of meals and snacks.

68.806 Nursing Services

Nursing services may be provided by the adult day care facility in accordance with the Delaware Nurse Practice Act and shall meet the needs of the participants.

SECTION 68.9 ACTIVITIES

68.901 Each facility licensed under these regulations shall provide appropriate programming for each participant. Programming shall take into consideration individual differences in age, health status, sensory deficits, lifestyle, ethnicity, religious affiliation, values, experiences, needs, interests, abilities, and skills by providing opportunities for a variety of types and levels of involvement.

68.902 Activities shall be planned to support the plans of care for the participants, and shall be consistent with the program statement and the admission policies.

68.903 Activities shall be planned and shall include:

- A. group activities for all participants; and
- B. personalized options for individuals with varying interests and needs.

68.904 Activity Schedule

A. A written schedule of activities shall be developed at least monthly.

B. Changes in activities shall be noted on the schedule.

C. The current month's schedule of activities shall be posted in a conspicuous place and made available to participants and their representatives, where applicable, including the name or type, date and hour of the activity.

D. The schedule of activities for the past twelve months shall be maintained by the adult day care facility.

68.905 Activities Coordinator

There shall be an Activities Coordinator who shall have either:

A. a Bachelor's Degree plus one year of experience (full-time or equivalent) in developing and conducting activities for the population to be served; or

B. an Associates Degree in a related field plus one year of appropriate experience; or

C. a high school diploma or equivalent plus two years

of experience in developing and conducting activities for the population to be served in the program.

Existing facilities shall have 12 months from the adoption of these regulations to comply with this requirement.

The Activities Coordinator need not be assigned on a full time basis.

68.906 Equipment and Supplies

A. The facility shall provide equipment to encourage active participation and group interaction and materials shall be geared to the interests and backgrounds of the participants.

B. Environmental aids and supplies for activities shall be provided as required by the participants' needs and the goals of the program.

SECTION 68.10 RIGHTS OF PARTICIPANTS

68.10.1 Each participant shall be treated as an adult, with respect and dignity.

68.10.2 Each participant shall have the right to participate in a program of services and activities which promotes positive attitudes regarding one's usefulness and capabilities.

68.10.3 Each participant shall have the right to participate in a program of services designed to encourage learning, growth and awareness of constructive ways to develop one's interests and talents.

68.10.4 Each participant shall have the right to be encouraged and supported in maintaining one's independence to the extent that conditions and circumstances permit, and to be involved in a program of services designed to promote personal independence.

68.10.5 Each participant shall have the right to self-determination within the adult day care setting, including the opportunity to:

- A. participate in developing one's plan for services;
- B. decide whether or not to participate in any given activity; and

C. be involved, to the extent possible, in program planning and operation.

68.10.6 Each participant shall have the right to privacy and confidentiality.

68.10.7 Each participant shall have the right to be protected from abuse, neglect, solicitation and harassment.

68.10.8 Each participant shall have the right to voice grievances without discrimination or reprisal.

68.10.9 Each participant shall have the right to be free from physical restraints.

68.10.10 Each participant shall have the right to be fully informed, as evidenced by the participant's written acknowledgment of these rights, and of all rules and regulations regarding participant conduct and responsibilities.

68.10.11 Each participant shall have the right to be fully informed, at the time of acceptance into the program, of services and activities available and related charges.

SECTION 68.11 STAFFING

68.11.1 There shall be at least two Adult Day Care Facility staff on duty at all times when participants are present. If separate sections are established within each facility, each separate section shall independently comply with the staffing requirements of this section. The minimum staffing requirements shall not include volunteers.

68.11.2 For facilities with more than sixteen (16) participants there shall be a minimum of one adult staff person on duty for each eight participants (1:8). Facilities may not use rounding in determining staffing requirements, i.e., for 17-24 participants at least 3 staff members would be required, for 25-32 participants at least 4 staff members, etc. As the number or acuity of participants with functional and cognitive impairments increase the staff-participant ratio shall be adjusted accordingly to meet the needs of the participants..

68.11.3 Programs serving mainly participants who are severely cognitively or severely physically impaired shall have a staff-participant ratio of at least one to four (1:4) for all severely impaired participants.

68.11.4 There shall be at least one RN or LPN on the premises at all times, when participants are present, for those agencies serving participants requiring nursing services as defined at 68.106.

68.11.5 There shall be at least one employee on the premises at all times, when participants are present, who is certified in cardiovascular pulmonary resuscitation (CPR) issued through the American Red Cross or the American Heart Association within the current year. The CPR certification must be renewed every two years for medically trained staff and every year for lay person/non-medical staff.

SECTION 68.12 PERSONNEL/ADMINISTRATIVE

68.12.1 No employee shall be less than 18 years of age and no person shall be employed who has been convicted of a crime where the victim was a person regardless of whether the

crime was a felony or a misdemeanor.

68.12.2 The facility shall have written personnel policies and procedures that adequately support sound care and services to participants.

Personnel records of each employee shall be kept current and available upon request by the Division of Public Health's representatives and shall contain sufficient information to support placement in the positions to which assigned.

68.12.3 Minimum requirements for employee physical examinations include:

A. Each person, including volunteers, who is involved in the care of participants shall have a screening test for tuberculosis as a prerequisite to employment and annually thereafter. Either a negative intradermal skin test or a chest X-ray showing no evidence of active tuberculosis shall satisfy this requirement. No person, including volunteers, found to have active tuberculosis in an infectious stage shall be permitted to give care or service to participants.

B. A report of this test shall be on file at the facility of employment.

68.12.4 Employees shall have a pre-employment physical examination maintained in individual personnel files.

68.12.5 Any individual who cannot adequately perform his/her duties or who may jeopardize the health or safety of the participants shall be relieved of his duties and removed from the center until such time as the condition is resolved. This includes infections of a temporary nature.

68.12.6 The director shall be responsible for complying with the regulations herein contained. In the absence of the director, a qualified substitute shall be authorized, in writing, to be in charge.

68.12.7 The director's responsibilities shall include, but not be limited to, the following areas:

A. the development of the content of the program offered to the participants;

B. programmatic functions, including orientation, training, and scheduling of all staff whether or not the director personally performs these functions; and

C. assignment of a sufficient number of qualified staff to meet the participant's needs for:

1. adequate nutrition;
2. health supervision and maintenance;
3. personal care;
4. socialization;
5. recreation;
6. activities and stimulation; and
7. supervision, protection, and safety.

68.12.8 The director shall have a Bachelor's Degree in health or social services or a related field, with one year supervisory experience (full-time or equivalent) in a social or health service setting, or comparable technical and human service training with demonstrated competence and experience managing in a health or human service setting.

68.12.9 Volunteers

A. All volunteers shall be under the supervision of the director or designated staff person.

B. The duties of volunteers shall be clearly defined.

C. The adult day care facility shall maintain a record of volunteer hours/activities and provide appropriate supervision of volunteers.

68.12.10 Staff Training and Development

A. Prior to assuming job responsibilities, all personnel shall receive training in:

1. their individual responsibilities in the event of fire, including the location and operation of any fire extinguisher and fire alarm box;

2. their individual responsibilities in the event of illness or injuries, including the location and use of the first aid emergency supplies;

3. their individual responsibilities in the event of any emergency;

4. infection control, body mechanics and first aid; and

5. special needs of the elderly, the cognitively impaired or persons with disabilities, including the specific needs of the participants being served.

B. Each nurse assistant employed by the adult day care facility shall have met the training and testing requirements for certification and be registered in good standing on the Delaware Nurse Aide Registry or have completed a comparable program suitable for adult day care which is recognized by a national body and approved by the Division of Public Health, Office of Health Facilities Licensing and Certification.

C. On an annual basis personnel who are primarily responsible for the direct care of the participants shall attend at least eight hours of staff development activities which shall consist of in-service training programs, workshops, or conferences related to adult day care or specific needs of participants. Documentation of training will be maintained in employees' files.

SECTION 68.13 QUALITY IMPROVEMENT

68.13.1 A. Each adult day care facility shall develop and implement a documented ongoing quality improvement program. The program shall include at a minimum:

1. An internal monitoring process that tracks

performance measures;

2. A review of the program's goals and objectives at least annually;

3. A review of the grievance/complaint process; and

4. A review of actions taken to address identified issues.

SECTION 68.14 RECORDS AND REPORTS

68.14.1 A. There shall be a separate record maintained at the adult day care facility for each participant which shall contain:

1. Admission record: Including participant's name, birth date, home address, identification numbers, such as social security, Medicaid, Medicare, date of admission, physician's name, address and telephone number, diagnosis, names, addresses and telephone numbers of family members, friends, or other designated people to be contacted in the event of illness or an emergency;

2. A written history and physical examination performed by or under the direction of a physician within 6 months prior to admission;

3. Results of a medical evaluation or screening test for tuberculosis indicating the absence of active tuberculosis in an infectious stage within 1 year prior to admission;

4. Application and enrollment forms;

5. Assessment (initial and reassessments);

6. Nutritional status assessment as needed;

7. Individual plan of care (initial and reviews)

and revisions;

8. Signed authorizations for releases of medical information and photos, as appropriate;

9. Signed authorization for participant to receive emergency medical care if necessary;

10. Ancillary reports;

11. Attendance and service records;

12. Transportation plans;

13. Where appropriate, medical information sheet; documentation of physicians' order; treatment, therapy, medication, and professional notes;

14. Progress notes, chronological and timely;

15. Discharge plan;

16. Current photograph of client; and

17. Advance directive form or a statement that none has been signed.

B. All participants' medical records shall be maintained in accordance with professional standards.

68.14.2 All program records shall be available for review by authorized representatives of the Office of Health Facilities Licensing and Certification, the Department of Health and Social Services and to legally authorized persons; otherwise

such records shall be held confidential. The consent of the participant or his/her representative if the participant is incapable of making decisions shall be obtained before any personal information is released from his/her records as authorized by these regulations or Delaware law.

68.14.3 The adult day care facility records shall be retained for a minimum of five (5) years before being destroyed.

DEPARTMENT OF HEALTH & SOCIAL SERVICES

DIVISION OF SOCIAL SERVICES

Statutory Authority: 31 Delaware Code,
Section 505 (31 Del.C. 505)

Medicaid / Medical Assistance Program

Comments, written suggestions, compilations of data, testimony, briefs or other written materials concerning this change must be received by mail no later than May 1, 1998, at the Medicaid Administrative Office, Lewis Bldg., Herman M. Holloway, Sr. Health & Social Services Campus, 1901 N. DuPont Hwy., New Castle, DE 19720, attention Thelma Mayer. Materials filed thereafter will not be considered except where good cause for lateness is demonstrated. Copies of all written submissions filed with the Medicaid office will be available for public inspection in the Medicaid Administrative Office at the address given above. Please call (302) 577-4880, extension 131, for an appointment if you wish to review the materials. Individuals with disabilities who wish to participate in these proceedings, or review the materials submitted, should contact the Division to discuss auxiliary aids or services needed to facilitate such review or participation. Such contact may be in person, in writing or by telephone by using the Telecommunications Relay Service, or otherwise.

In compliance with the State's Administrative Procedures Act (APA - Title 29, Chapter 101 of the Delaware Code) and with 42CFR §447.205, and under the authority of Title 31 of the Delaware Code, Chapter 5, Section 505, the Delaware Department of Health and Social Services (DHSS) / Division of Social Services / Medicaid Program is amending its DMAP eligibility manual to revise the definition of a budget unit to assure compliance with Federal rules. The changes are as follows:

REVISION:

DMAP 301.25

Composition of Budget Unit

The budget unit is composed of various adults who are legally/financially responsible for each other and various children (related or unrelated) for whom the adults have legal responsibility or for whom the adults have accepted parental-like responsibility.

One family and/or household may be composed of one or more budget units and an individual may belong to more than one budget unit. ~~However, the budget unit must exclude any individual who is receiving Medicaid under another program (such as SSI, AFDC, GA, Disabled Children, Waiver, Deemer). Any individual who is receiving assistance under the QMB or SLMB programs may be included or excluded from the budget unit. The eligibility worker will first include the QMB or SLMB individual in the budget unit. If the income of the QMB or SLMB individual makes another individual ineligible, we will exclude the QMB or SLMB individual and his or her income from the budget unit. The budget unit must exclude any individual who is receiving SSI. Any individual who is receiving assistance under ABC, GA, Disabled Children, HCBS, QMB, SLMB, or other Medicaid only group may be included or excluded from the budget unit. If the income of the individual who is receiving medical assistance under another eligibility group makes another individual ineligible, we will exclude the individual who is receiving assistance under another eligibility group.~~

The budget unit may be modified to exclude related individuals with income except:

- a parent is always financially responsible for the minor (under age 18) natural/adopted, non-emancipated child, or unborn child,
- a spouse is always financially responsible for a spouse,
- ~~an unmarried partner is always financially responsible for his child or unborn child and the child's or unborn child's mother. Unmarried partners who do not have children for whom they are responsible will be placed in separate budget units:~~
- unmarried partners with a mutual child (child in common) are always financially responsible for the child or unborn child. Neither partner is responsible for the other, even though both parents are responsible for their mutual child.

NOTE: The parent, spouse, or partner may be excluded from the poverty level budget unit if he or she is receiving

assistance under another Medicaid group.

Individuals to Include in the Budget Unit:

- Pregnant woman and unborn child(ren)
- The spouse
- ~~NOTE: If the income of the stepfather makes some of the stepchildren ineligible, put them in another budget unit with their natural mother.~~

If the income of the stepparent makes some of the stepchildren ineligible, do not count the stepparent income. The stepparent and his or her own children remain in the budget unit.

~~Unmarried partners if the couple have a child for whom they are responsible. An unmarried partner (who is not the parent of the child) may be excluded when his or her income makes the child or the other unmarried partner ineligible.~~

- Unmarried partners if the couple have a child for whom they have assumed parental-like responsibility. The child and the unmarried partners will first be included in the budget unit. An unmarried partner (who is not the parent of the child) must be excluded when his or her income makes the child or the other unmarried partner ineligible.
- Include both unmarried partners when determining the eligibility of a mutual child or a mutual unborn child. The pregnant woman will count as two (or more).
- Other natural or adopted children under age 18 that both parents have in common. Families have the choice of including or excluding siblings. If a sibling has income that would make the budget unit ineligible, the sibling with income is excluded. The exclusion of a sibling with income reduces the budget unit size and the income standard used to determine eligibility. The sibling with the income is ineligible and cannot be put in a separate budget unit. If a child has income, include the child with income in the budget unit, but do not count that child's income when determining the eligibility of the siblings, the parents, or other individuals in the budget unit. The child's income is counted when determining his or her own eligibility. Please note that the income of a child who is a minor parent is counted when determining the eligibility of his or her own child.

- Other related or unrelated children under age 18 (such as a niece, cousin, friend's child, minor sibling of adult). This is permissible because there is no technical requirement that the child be living in the home of a specified relative. If the children are ineligible in the big budget unit, place them in a separate budget unit. ~~If the income of an adult sibling renders the minor sibling ineligible, place the minor in a separate budget unit. Include the adult sibling who has assumed parental-like responsibility for a minor sibling in the budget unit. If the income of the adult sibling renders the minor ineligible, place the minor in a separate budget unit.~~
- The parents of a pregnant minor living together in the same home. Do not include her parents if the pregnant minor is considered emancipated. See technical eligibility for an explanation of emancipation.

Individuals to Exclude From the Budget Unit:

- ~~Individuals who are recipients of SSI, AFDC, AFDC/AU, GA or any Medicaid program. A QMB or SLMB may be included or excluded in the budget unit.~~
- Individuals who are recipients of SSI are excluded. Individuals who are recipients of ABC, GA, Medicaid only, QMB, SLMB, may be included or excluded in the budget unit.
- Parents of the father of a baby or unborn when the pregnant minor is living there with his parents. We will include the parents of the father if he is under age 18 and is applying for Medicaid.
- A stepparent, if the income of the stepparent makes the stepchildren ineligible.
- A sibling, if the income of the sibling makes the budget unit ineligible. The sibling with income may not be placed in a separate budget unit.

NOTE: If an individual is not included in the budget unit, do not include his or her income.

Individuals in Separate Budget Units:

- Siblings age 18 or over. For example, two sisters age 18 or over who live together will be in separate budget units. Related adults age 18 or over. For

example, two sisters age 18 or over who live together will be in a separate budget unit.

- ~~Unrelated adults age 18 or over. Single adults will not be budgeted together unless they have children. If an unmarried couple is living together and they have a child for whom they are responsible, they may be placed in the same budget unit. Single adults and unmarried partners will not be budgeted together unless they have children. If an unmarried couple is living together and they have a child for whom they have assumed parental-like responsibility, the child and the unmarried partners may be placed in the same budget unit.~~

NOTE: An unmarried partner (who is not the parent of the child) must be excluded when his or her income makes the child or the other unmarried partner ineligible.

- ~~Foster parents are not budgeted with the foster child. Needy foster parents are placed in a separate budget unit.~~

DEPARTMENT OF NATURAL RESOURCES & ENVIRONMENTAL CONTROL

DIVISION OF AIR & WASTE MANAGEMENT

Statutory Authority: 7 Delaware Code,
Chapter 60 (7 Del.C. Ch. 60)

1. TITLE OF THE REGULATIONS:

**REGULATION 38 - EMISSION STANDARDS FOR
HAZARDOUS AIR POLLUTANTS FOR SOURCE
CATEGORIES**

2. BRIEF SYNOPSIS OF THE SUBJECT, SUBSTANCE AND ISSUES:

The Department is proposing to, through Regulation 38, adopt by reference the National Emission Standards for Hazardous Air Pollutants for Source Categories found at 40 CFR Part 63 Subpart B Sections 63.40 through 63.44. These sections carry out the case-by-case MACT (maximum achievable control technology) determination requirements of section 112(g)(2)(B) of the Clean Air Act Amendments of 1990.

Any owner or operator planning to construct a new or to reconstruct an existing major source of hazardous air pollutants is currently required to apply for and receive a construction permit before commencing construction or reconstruction. The proposed amendment will require such owner or operator to also, when no federally-promulgated Part 63 emission limitation exists, submit an application requesting the Department to review and make a final and effective case-by-case MACT determination. The proposed amendment provides guidance and procedures for obtaining this case-by-case determination, which shall ensure that the emissions from the planned construction or reconstruction are controlled to a level that is no less stringent than the emission control which is achieved in practice by the best-controlled similar source.

3. POSSIBLE TERMS OF THE AGENCY ACTION:
None

4. STATUTORY BASIS OR LEGAL AUTHORITY TO
ACT: 7 Delaware Code, Chapter 60

5. OTHER REGULATIONS THAT MAY BE AFFECTED
BY THE PROPOSAL: None

6. NOTICE OF PUBLIC COMMENT:

The public hearing on the proposed amendment to Regulation 38 will be held on Monday, April 27, 1998, beginning at 6:00 p.m. in the Richardson and Robbins Auditorium, 89 Kings Highway, Dover, DE.

7. PREPARED BY:

James R. Snead (302) 323-4542 March 12, 1998

The Department plans to amend Regulation 38 by adding proposed Subpart B, which follows. Subpart B does not change the existing subparts of Regulation 38 and shall be placed between existing Subparts A and Q.

REGULATION 38 Amendment

EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES

3/4/98

Subpart B Requirements for Case-By-Case Control
Technology Determinations for Major Sources

The provisions of Sections 63.40 through 63.44 in
Subpart B, of Title 40, Part 63 of the Code of Federal

Regulations, as set forth in Vol. 61 of the Federal Register, page 68399 et seq, dated December 27, 1996 are hereby adopted by reference with the following changes:

(a) The opening sentence of Section 63.41 shall be replaced with the following language: "Terms used in Secs. 63.40 through 63.44 that are not defined in this section have the meaning given to them in the Act and in subpart A of this regulation."

(b) The opening of the definition of Available information found in Section 63.41 shall be replaced with the following language: "*Available information* means, for purposes of identifying control technology options for the affected source, information contained in the following information sources as of the date of issuance of the construction permit which incorporates the final and effective case-by-case MACT determination:"

(c) The following errata found in Section 63.41 as published in the Federal Register and Code of Federal Regulations shall be corrected as follows:

(i) "for" in definition (3) of Available information shall be replaced with "from";

(ii) "HAP's" in definition of Construct a major source shall be replaced with "HAP";

(iii) "*suite*" in definition of Greenfield suite shall be replaced with "*site*";

(iv) "deduction" in definition of Maximum achievable control technology (MACT) emission limitation for new sources shall be replaced with "reduction"; and

(v) "that potential" in definition of Reconstruct a major source shall be replaced with "the potential".

(d) "Administrator" in the definition of Available information found in Section 63.41 shall be replaced with "Administrator or Department".

(e) Paragraph (2)(ii)(A) in the definition of Construct a major source found in Section 63.41 shall be replaced with the following language: "The permitting authority has determined within a period of 5 years prior to the fabrication, erection, or installation of the process or production unit that the existing emission control equipment represented best available control technology (BACT) or lowest achievable emission rate (LAER) under Regulation 25 of the State of Delaware "Regulations Governing the Control of Air Pollution" for those HAP to be emitted by the process or production unit; or".

(f) Paragraph (2)(ii)(B) in the definition of Construct a major source found in Section 63.41 shall be replaced with the following language: "The permitting authority determines that the control of HAP emissions provided by the existing

equipment will be equivalent to that level of control currently achieved by other well-controlled similar sources (i.e., equivalent to the level of control that would be provided by a current BACT or LAER determination);"

(g) Paragraph (2)(iv) in the definition of Construct a major source found in Section 63.41 shall be replaced with the following language: "The permitting authority has provided notice and an opportunity for public comment concerning its determination that criteria in paragraphs (2)(i), (2)(ii), and (2)(iii) of this definition apply and concerning the continued adequacy of any prior LAER or BACT determination;"

(h) Paragraph (2)(v) in the definition of Construct a major source found in Section 63.41 shall be replaced with the following language: "If any commenter has asserted that a prior LAER or BACT determination is no longer adequate, the permitting authority has determined that the level of control required by that prior determination remains adequate; and "

(i) Paragraph (2)(vi) in the definition of Construct a major source found in Section 63.41 shall be replaced with the following language: "Any emission limitations, work practice requirements, or other terms and conditions upon which the above determinations are made by the permitting authority are applicable requirements under section 504(a) of the Act and under Section 6 of Regulation 30 of the State of Delaware "Regulations Governing the Control of Air Pollution" and either have been incorporated into any existing title V permit for the affected facility or will be incorporated into such permit upon issuance or revision."

(j) The definition of Construction permit is added to the list of definitions found in Section 63.41 with the following language: "*Construction permit* means a construction permit issued pursuant to Regulation 2 and/or 25 of the State of Delaware "Regulations Governing the Control of Air Pollution"."

(k) The opening of the definition of Control technology found in Section 63.41 shall be replaced with the following language: "*Control technology* means measures, processes, methods, systems, or techniques to limit the emission of hazardous air pollutants in a way that would --".

(l) The definition of Effective date of section 112(g)(2)(B) in a State or local jurisdiction found in Section 63.41 shall be replaced with the following language: "*Effective date of section 112(g)(2)(B) in a State or local jurisdiction* means June 29, 1998."

(m) The definition of Electric utility steam generating unit found in Section 63.41 shall be replaced with the

following language: “*Electric utility steam generating unit* means any fossil fuel fired combustion unit that serves a generator with a nameplate capacity of more than 25 megawatts that produces electricity for sale. A unit that co-generates steam and electricity and supplies more than one-third of its nameplate electric output capacity and more than 25 megawatts electric output to any utility power distribution system for sale shall be considered an electric utility steam generating unit.”

(n) The definition of HAP is added to the list of definitions found in Section 63.41 with the following language: “*HAP* means a hazardous air pollutant (i.e., any chemical listed in or pursuant to section 112(b) of the Act).”

(o) The definition of Notice of MACT Approval found in Section 63.41 shall be deleted.

(p) The definition of Permitting authority found in Section 63.41 shall be replaced with the following language: “*Permitting authority* means the Department of Natural Resources and Environmental Control as defined in Title 29, Delaware Code, Chapter 80, as amended.”

(q) The entire content of Paragraph 63.42(a) as promulgated shall be deleted and its heading shall be replaced with the following language: “(a) Reserved.”

(r) The entire content of Paragraph 63.42(b) as promulgated shall be deleted and its heading shall be replaced with the following language: “(b) Reserved.”

(s) The following errata published in the Federal Register and Code of Federal Regulations shall be corrected as follows:

(i) “owner and operator” in paragraph 63.42(c)(1) shall be replaced with “owner or operator”;

(ii) “this” in paragraph 63.42(c)(1) shall be deleted; and

(iii) “the anticipated” in paragraph 63.43(e)(2)(v) shall be replaced with “The anticipated”.

(t) Paragraph 63.42(c)(2) shall be replaced with the following language: “The permitting authority has issued a construction permit which incorporates a final and effective case-by-case determination pursuant to the provisions of Sec. 63.43; requiring the emissions from the constructed or reconstructed major source to be controlled to a level no less stringent than the maximum achievable control technology emission limitation for new sources.”

(u) Paragraph 63.43(b) shall be replaced with the following language: “When a case-by-case determination of MACT is required by Sec. 63.42(c), the owner and operator

shall obtain from the permitting authority an approved MACT determination pursuant to paragraph (c) of this section.”

(v) Paragraph 63.43(c)(1) shall be replaced with the following language: “Reserved.”

(w) Paragraph 63.43(c)(2) shall be replaced with the following language: “The owner or operator shall follow all procedures in Regulation 2 and/or 25, except that --”.

(x) Paragraph 63.43(c)(2)(i) shall be replaced with the following language: “the provisions of Section 2.2 of Regulation 2 do not apply to any owner or operator that is subject to the requirements of Secs. 63.40 through 63.44 and”.

(y) Paragraph 63.43(c)(2)(ii) shall be replaced with the following language: “in addition to the provisions of Section 11.10 of Regulation 2, the final MACT determination and the construction permit shall expire if construction or reconstruction has not commenced within 18 months of permit issuance. The owner or operator may requested and the permitting authority may grant an extension which shall not exceed an additional 12 months.”

(z) Paragraph 63.43(c)(3) shall be replaced with the following language: “When desiring alternative operating scenarios, an owner or operator may request approval of case-by-case MACT determinations for each alternative operating scenario. Approval of such determinations satisfies the requirements of section 112(g) for each such scenario.”

(aa) Paragraph 63.43(c)(4) shall be replaced with the following language: “The MACT emission limitation and requirements established in the approved construction permit shall be effective as required by paragraph (j) of this section, consistent with the principles established in paragraph (d) of this section, and supported by the information listed in paragraph (e) of this section. The owner or operator shall comply with the requirements in paragraphs (k) and (l) of this section, and with all applicable requirements in subpart A of this regulation.”

(bb) The opening to Paragraph 63.43(d) shall be replaced with the following language: “The following general principles shall govern preparation by the owner or operator of each construction permit application requesting a case-by-case MACT determination concerning construction or reconstruction of a major source, and all subsequent review of and actions taken concerning such an application by the permitting authority:”.

(cc) Paragraph 63.43(e)(1) shall be replaced with the

following language: “An application for a MACT determination shall be submitted at the same time as the construction permit application and shall specify a control technology selected by the owner or operator that, if properly operated and maintained, will meet the MACT emission limitation or standard as determined according to the principles set forth in paragraph (d) of this section. At the time of submittal, the owner or operator shall request that the permit application be processed pursuant to Section 11.2 (i) or 11.2 (j) of Regulation 2, whichever is appropriate.”

(dd) The opening to Paragraph 63.43(e)(2) shall be replaced with the following language: “In each instance where a constructed or reconstructed major source would require additional control technology or a change in control technology, the application for a MACT determination shall contain, independent of the permit application, the following information:”.

(ee) Paragraph 63.43(e)(2)(xiii) shall be replaced with the following language: “Any other relevant information required pursuant to subpart A of this regulation.”

(ff) The opening to Paragraph 63.43(e)(3) shall be replaced with the following language: “In each instance where the owner or operator contends that a constructed or reconstructed major source will be in compliance, upon startup, with case-by-case MACT under this subpart without a change in control technology, the application for a MACT determination shall contain, independent of the permit application, the following information:”.

(gg) The entire content of Paragraph 63.43(f) as promulgated shall be deleted and its heading shall be replaced with the following language: “(f) Reserved.”

(hh) The entire content of Paragraph 63.43(g) as promulgated shall be deleted and its heading shall be replaced with the following language: “(g) Reserved.”

(ii) The entire content of Paragraph 63.43(h) as promulgated shall be deleted and its heading shall be replaced with the following language: “(h) Reserved.”

(jj) Paragraph 63.43(i) shall be replaced with the following language: “The permitting authority shall send notice of any approvals pursuant to paragraph (c)(2) of this section to the Administrator through the appropriate Regional Office, and to all other State and local air pollution control agencies having jurisdiction in affected States.”

(kk) Paragraph 63.43(j) shall be replaced with the following language: “The effective date of a MACT determination shall be the date the permitting authority issues

the construction permit which incorporates the final and effective MACT determination.”

(ll) Paragraph 63.43(l)(1) shall be replaced with the following language: “An owner or operator of a constructed or reconstructed major source that is subject to a MACT determination shall comply with all requirements in the issued construction permit, including but not limited to any MACT emission limitation or MACT work practice standard, and any notification, operation and maintenance, performance testing, monitoring, reporting, and recordkeeping requirements.”

(mm) Paragraph 63.43(l)(2) shall be replaced with the following language: “An owner or operator of a constructed or reconstructed major source which has obtained a MACT determination shall be deemed to be in compliance with section 112(g)(2)(B) of the Act only to the extent that the constructed or reconstructed major source is in compliance with all requirements set forth in the issued construction permit. Any violation of such requirements by the owner or operator shall be deemed by the permitting authority and by EPA to be a violation of the prohibition on construction or reconstruction in section 112(g)(2)(B) for whatever period the owner or operator is determined to be in violation of such requirements, and shall subject the owner or operator to appropriate enforcement action under the Act.”

(nn) Paragraph 63.43(m) shall be replaced with the following language: “Within 60 days of the issuance of a construction permit, the permitting authority shall provide a copy of such permit to the Administrator, and shall provide a summary in a compatible electronic format for inclusion in the MACT data base.”

(oo) The phrase “under any of the review options available” in paragraph 63.44(a) shall be deleted.

(pp) The phrase “40 CFR part 70 or part 71, whichever is relevant,” in 63.44(b) shall be replaced with the following language: “Regulation 30”.

PROPOSED REGULATIONS

**DEPARTMENT OF NATURAL RESOURCES &
ENVIRONMENTAL CONTROL****DIVISION OF AIR & WASTE MANAGEMENT****AIR QUALITY MANAGEMENT SECTION**

Statutory Authority: 7 Delaware Code,
Chapter 60 (7 Del.C. Ch. 60)

1. TITLE OF THE REGULATIONS

Development of the Phase II Ozone Attainment Demonstration for Kent and New Castle Counties as a Revision to the State Implementation Plan

2. BRIEF SYNOPSIS OF THE SUBJECT, SUBSTANCE, AND ISSUES

Under a March 2, 1995 EPA policy memorandum from Mary D. Nichols, Assistant Administrator of Air and Radiation, states with ozone non-attainment areas were given the option of dividing their ozone attainment demonstrations into two State Implementation Plan (SIP) submissions. The Phase I submission must contain all control strategies and associated regulations to meet rate-of-progress requirements through 1999. The Phase II submission must contain photochemical dispersion modeling results and a plan to get the non-attainment area(s) into attainment by the Clean Air Act deadline (2005 for Kent and New Castle Counties). Delaware opted into this two-phase approach in May of 1995. Delaware made its Phase I submission in December of 1997. Development of the Phase II submission for Kent and New Castle Counties is now complete.

3. POSSIBLE TERMS OF THE AGENCY ACTION

N/A

4. STATUTORY BASIS OR LEGAL AUTHORITY TO ACT

7 Del. C., Chapter 60 Section 6010 Clean Air Act Amendments of 1990

5. OTHER REGULATIONS THAT MAY BE AFFECTED BY THE PROPOSAL

None

6. NOTICE OF PUBLIC COMMENT who, when, where, what and why

The public hearing will be held on Tuesday, April 21, 1998, 6:30 PM, in the Priscilla Building second floor conference room located at 156 South State Street, Dover, Delaware, 19901. The draft Plan may be inspected at the Offices of the Department of Natural Resources and Environmental Control located at 156 South State Street, Dover; 715 Grantham Lane, New Castle; or 422 North DuPont Highway, Suite 1, Georgetown. For further information, please contact Mr. Alfred Deramo in Dover at (302) 739-4791.

Statements and testimony may be presented orally or in written form before the hearing. It is requested that those interested in presenting statements register in advance by mail. Written statements may be presented prior to the hearing and should be addressed to:

Air Quality Management Section
Division of Air and Waste Management
156 South State Street
Dover, DE 19901

7. PREPARED BY: Alfred R. Deramo, Program Manager (302) 739-4791 March 9, 1998

PROPOSED REGULATIONS

1539

THE DELAWARE PHASE II ATTAINMENT DEMONSTRATION FOR THE PHILADELPHIA-WILMINGTON-TRENTON OZONE NONATTAINMENT AREA

FINAL DRAFT

Submitted By
The Delaware Department of Natural Resources
and Environmental Control
in Conjunction with
The Delaware Department of Transportation

March 13, 1998

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APPENDIX A *Ozone SIP Modeling Technical Support Documentation Summary for the New Jersey-Philadelphia CMSA Area.* Ozone Research Center, Technical ORC-TR9502, April 1995.

APPENDIX B *Alternative Metrics for Assessing the Relative Effectiveness of NO_x and VOC Emission Reductions in*

Controlling Ground-Level Ozone. Journal of Air & Waste Management Association, 47:838-850, August 1997.

APPENDIX C *Photochemical Modeling Studies for the Philadelphia CMSA--New Jersey Domain, Executive Summary and Background.* Ozone Research Center, Technical Document ORC-TSD-9701, December 1997 (Draft Version).

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ACRONYM LISTING

AIM	Architectural and Industrial Maintenance
AIRS	Aerometric Information Retrieval System
AQM	Air Quality Management Section
ATP	Anti-Tampering Program
BEA	Bureau of Economic Analysis
BEIS	Biogenic Emission Inventory System
CAAA	Clean Air Act Amendments of 1990
CMSA	Consolidated Metropolitan Statistical Area
CO	Carbon Monoxide
CTG	Control Techniques Guideline
DelDOT	Delaware Department of Transportation
DWM	Diagnostic Wind Model
EI/M	Enhanced Inspection and Maintenance
EOHSI	Environmental and Occupational Health Sciences Institute
EPA	United States Environmental Protection Agency
EPS	Emissions Preprocessor System

ERPA	Emissions Research and Policy Analysis Group
FMVCP	Federal Motor Vehicle Control Program
IIG	EPA's Interim Implementation Guidance Document
I/M	Inspection and Maintenance
km	kilometer
LEV	Low Emission Vehicle
MIXEMUP	Software for generating mixing heights
mmBTU	Million British thermal units
MOCA	Modeling Ozone Cooperative Association
MOU	Memorandum of Understanding
MW	megawatts
NAAQS	National Ambient Air Quality Standards
NLEV	National Low Emission Vehicle
NO _x	Nitrogen Oxides
NWS	National Weather Service
ORC	Ozone Research Center
OTAG	Ozone Transport Assessment Group
OTC	Ozone Transport Commission
OTR	Ozone Transport Region
RACT	Reasonably Available Control Technology
RFG	Reformulated Gasoline
ROM	Regional Oxidant Model
RPP	Rate-of-Progress Plan
RVP	Reid Vapor Pressure
SIP	State Implementation Plan
SOCMI	Synthetic Organic Chemical Manufacturing Industry
UAM	Urban Airshed Model
UAM-IV	Urban Airshed Model with Carbon Bond IV
ULEV	Ultra Low Emission Vehicle
VOC	Volatile Organic Compound

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PART I INTRODUCTION

1.1 BACKGROUND

Many of the states in the Country contain areas that do not meet the air quality standard for ground-level ozone, a primary ingredient of smog. Ground-level ozone is harmful for humans, animals and plants. Ozone, when formed at levels above the health-based standards established by the United States Environmental Protection Agency (EPA), is known to cause chest pain, coughing, throat irritation, and congestion, and may also worsen bronchitis, heart disease, emphysema, and asthma. Healthy people as well as those with respiratory problems can experience breathing problems when exposed to elevated levels of ozone. Ground-level ozone also reduces growth rates in vegetation, reduces the ability of trees and plants to fight disease, and it can damage the quality and harvest yield of crops.

Ozone is generally not directly emitted to the atmosphere, but rather it is formed in the atmosphere by a chemical reaction between volatile organic compounds (VOC), nitrogen oxides (NO_x), and to a limited extent carbon monoxide (CO). In the presence of sunlight, these gases react with oxygen in the atmosphere to form high ozone concentrations that can remain over large regions and for an extended period of time. Although much progress has been made to improve the air quality, many areas in the eastern United States have yet to attain the 1-hour National Ambient Air Quality Standard (NAAQS) for ground level ozone. Areas downwind of urban areas are also subjected to high ozone exposure because the winds carry ozone and its precursors, i.e., VOCs and NO_x. Moreover, ozone precursors that are emitted in less urbanized and rural areas are carried to downwind areas to form ozone, thus exacerbating ozone levels. Such a transport process of ozone and its precursors is significant in the "Northeast Corridor" (roughly, from Washington, D.C., to Boston), the vicinity of Lake Michigan in Midwest, and Atlanta in the Southeast. Traditional programs that primarily focus on controls in the vicinity of the ozone nonattainment area are usually not adequate. Progress within most nonattainment areas has been limited by the fact that ozone and the pollutants that form ozone can be carried significant distances by the wind. Therefore it has become apparent that, to attain the standard, it is necessary to develop control programs that reduce ozone-forming pollutants that are emitted both within the nonattainment area and many miles upwind of the nonattainment area.

1.2 REQUIREMENTS OF TITLE I OF THE CLEAN AIR ACT AMENDMENTS OF 1990 (CAAA)

The CAAA defines five nonattainment classifications for areas that exceed the NAAQS, based on the severity of the pollution problem. They are, in order of severity, "marginal," "moderate," "serious," "severe," and "extreme." Kent and New Castle Counties are the two counties for which Delaware is in nonattainment with the 1-hour ozone NAAQS, and both counties are classified as "severe." These two counties are part of a larger nonattainment area based on the Philadelphia Consolidated Metropolitan Statistical Area (CMSA). This area has been named the Philadelphia-Wilmington-Trenton nonattainment area. Figure 1 shows the counties of four states forming the Philadelphia-Wilmington-Trenton severe area classification for 1-hour ozone standard. The attainment deadline for this CMSA is November 15, 2005.

Section 182(b)(1) of the CAAA¹ mandates that states with nonattainment areas that are moderate and above, submit a State Implementation Plan (SIP) revision, which would describe a 15 percent VOC emission reduction between 1990 and 1996. The

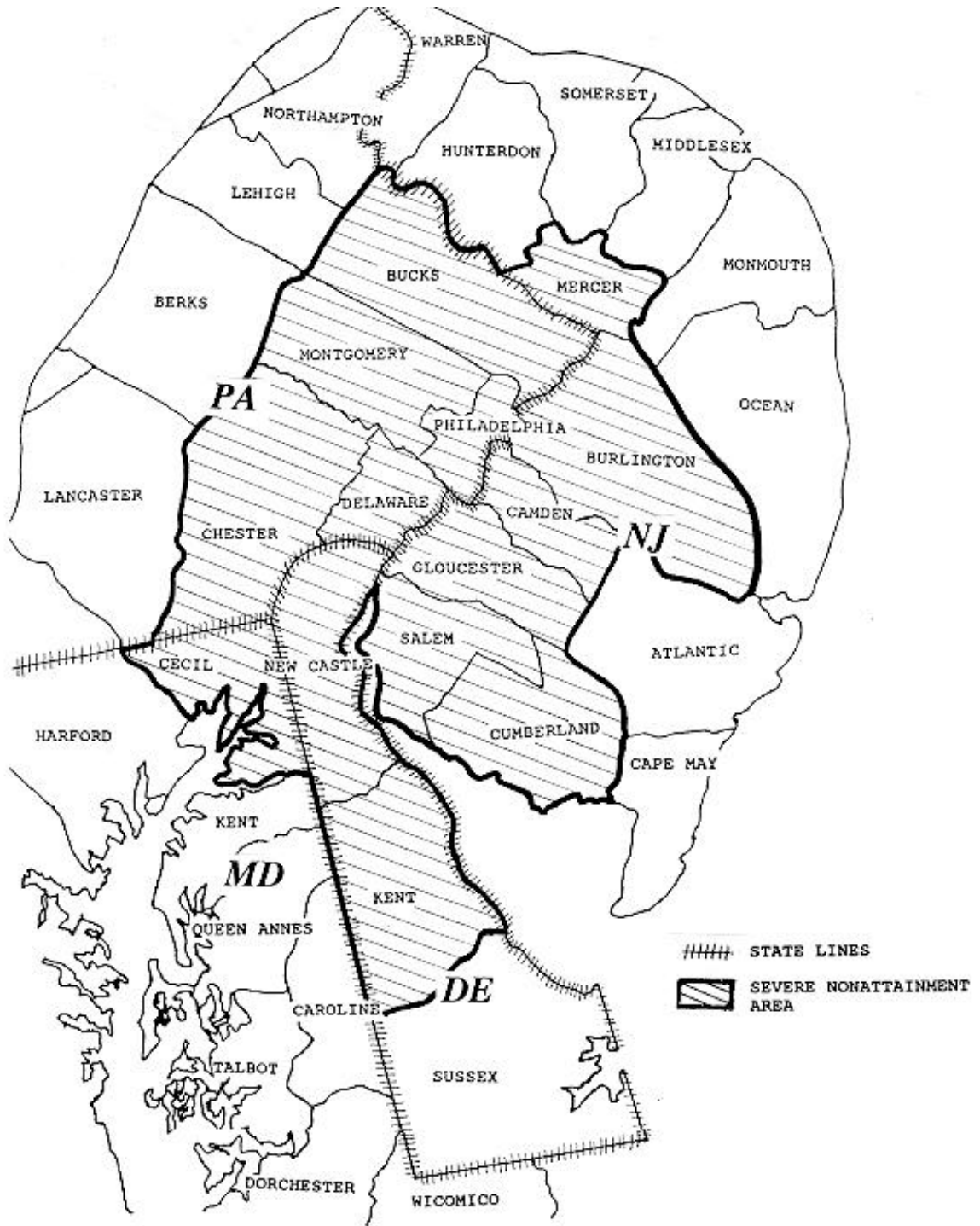


Figure 1. Philadelphia Consolidated Metropolitan Statistical Area (CMSA) Nonattainment Area

SIP revision for the 1990-1996 reductions is known as the 15 Percent Rate-of-Progress Plan (RPP). Section 182(c) of the CAAA requires serious and above ozone nonattainment areas to submit a SIP revision, which should describe how the area will achieve an actual VOC emission reduction of at least 3 percent per year averaged over each consecutive 3-year period beginning six years after the enactment of the CAAA (i.e., up to November 15, 1996) until the area's attainment date. Section 182(c)(2) of the CAAA requires the SIP for serious and above ozone nonattainment areas to provide for demonstration of attainment of the 1-hour ozone National Ambient Air Quality Standard (NAAQS) by the applicable date. All serious and above ozone nonattainment areas and multi-state moderate ozone nonattainment areas are required to submit their attainment demonstrations, based on the use of photochemical grid model such as the Urban Airshed Model (UAM). The underlying assumption of the CAAA is that the nonattainment areas achieve their attainment of the ozone NAAQS by their applicable attainment date. This could imply that additional reductions beyond the required 3 percent per year VOC emission reductions may be needed for the nonattainment areas to attain the ozone NAAQS by the applicable attainment date.

The regulatory implementation of the NAAQS requires that the annual average number of days exceeding an hourly-averaged maximum ozone concentration of 0.12 ppm over a three-year period is less than or equal to one. This form of the ozone standard allows for the occurrence of unusual meteorological events which could result in more than one exceedance in any one year during a given three-year period. For example, if ozone monitoring sites in a region have recorded maximum hourly-averaged ozone concentrations exceeding the 0.12 ppm level on three days in a given year while no exceedances were observed during the next two years, the region is considered to be in compliance with the ozone NAAQS.

The CAAA requires that, for areas where ozone levels do not comply with the NAAQS, the responsible state agencies must prepare an ozone attainment SIP. This plan should document ways and means to meet and maintain ozone NAAQS in those areas, in a time frame determined as a function of the severity of the problem. After approval by state and local governments and the EPA, the SIP is legally binding under both state and federal law.

In order to demonstrate that the SIP will enable the state to meet its ozone reduction goals, the causal relationship among emission levels, ambient air quality and meteorology must be discerned and quantified. Because of the chemical and meteorological complexity of photochemical air pollution systems, the most effective way of accomplishing this is through the application of comprehensive, three-dimensional, photochemical air quality simulation models. These models incorporate the chemical and physical mechanisms affecting ozone formation, accumulation and transport. The EPA has recommended the Urban Airshed Model with Carbon Bond IV chemistry (UAM-IV), an urban scale grid-based model that has been under continuing development and refinement for almost two decades, for photochemical modeling applications of this type. For areas such as the corridor from Washington, DC to Boston, where long range transport of ozone and precursors is significant and affects air quality in multiple urban areas, a combination of regional and urban scale modeling has been adopted by the EPA and state environmental agencies. To assess regional dynamics of ozone and its precursors, EPA recommends a lower resolution photochemical grid model the Regional Oxidant Model (ROM), version 2.2. The coarsely resolved results calculated with ROM are transferred to UAM where a locally refined simulation is calculated. These simulations are used to evaluate the effectiveness of proposed emission control strategies in reducing ozone concentrations to which the population is exposed.

1.3 THE TWO-PHASED APPROACH TO ATTAINMENT

A March 2, 1995 memorandum from Ms. Mary D. Nichols, EPA's Assistant Administrator for Air and Radiation, provides states within the Ozone Transport Region (OTR) with serious and above ozone nonattainment areas a two-phased approach for submission of the Post-1996 rate-of-progress and attainment plans.² Under Phase I, states are required to submit a plan with a set of specific control measures to show at least a 9-percent net reduction of VOC and/or NO_x emissions between 1996 and 1999. In addition, the Phase I submission should include modeling results with interim assumptions about ozone transport. Phase II is a 2-year process that assesses regional and local control strategies to show attainment and resolve transport issues of ozone and its precursors. Most areas of the Northeast, including Philadelphia Consolidated Metropolitan Statistical Area (CMSA), will be unable to attain and maintain the 1-hour ozone NAAQS without a consistent level of emissions reductions throughout midwestern, northeastern and southeastern states. In Phase II, states are supposed to submit their Post-1999 rate-of-progress plans and their attainment demonstrations. Thus the two-phased approach provides the states with more time for their planning, but provides no loosening of the rate-of-progress and attainment requirements. Delaware committed to the two-phased approach in a letter sent to the EPA on March 31, 1995.

As part of the Philadelphia-Wilmington-Trenton nonattainment area, the state of Delaware, in conjunction with Pennsylvania,

New Jersey, and Maryland, has contracted its UAM activities to the Ozone Research Center (ORC) associated with the Environmental and Occupational Health Sciences Institute (EOHSI)³ at Rutgers, the State University of New Jersey. Cooperation among technical and policy groups from each state was necessary for consistent model implementation and interpretation of results.

1.4 THE OZONE TRANSPORT ASSESSMENT GROUP (OTAG) PROCESS

In order to properly address the ozone transport issues and to assist states with ozone nonattainment areas east of Mississippi River in attaining the 1-hour ozone standard, the U.S. Environmental Protection Agency (EPA) formulated the Ozone Transport Assessment Group (OTAG). The group was charged with identifying and recommending a strategy to reduce transported ozone and its precursors within the OTAG region. The OTAG region consists of 37 easternmost states and the District of Columbia (see Figure 2.).

1.5 EPA'S INTERIM IMPLEMENTATION GUIDANCE (IIG)⁴ FOR ATTAINMENT

In July 1997, EPA promulgated a more protective NAAQS for ozone, based on an 8-hour average concentration. However, this new 8-hour standard does not become operational until the nonattainment area attains the current 1-hour standard. EPA has issued an Interim Implementation Guidance (IIG) to direct the states that have not yet attained the 1-hour NAAQS. The IIG gives some flexibility to the states in their planning process so that they could meet the RPP requirements and also demonstrate the attainment of the 1-hour ozone standard. However, the time lines for achieving rate-of-progress and attainment remain the same. The IIG states that the RPP requirements for serious and above ozone nonattainment areas will continue until the area meets the 1-hour standard. Also the IIG permits states to take credit for emissions reductions obtained from sources outside the designated nonattainment area for the post-1999 RPP requirement as long as the sources are no further from the nonattainment area than 100 km for VOC sources or 200 km for NO_x sources. However, based on its review of the public comments, EPA believes that it should expand the allowable area for NO_x substitution up to the entire state for those states in the core part of the Ozone Transport Assessment Group (OTAG) domain,⁵ i.e., the fine grid area (see Figure 3). The reductions obtained from outside the nonattainment area are subject to the same use restrictions as if they were obtained from inside the nonattainment area. Further, whereas the initial EPA proposal disallowed RPP credits from measures mandated by the CAAA and implemented by the states outside of their nonattainment areas, EPA now believes that it should allow RPP credit for such reductions of ozone precursors. The IIG changes the start date of the expanded locality-based credit for RPP from post-1999 RPP requirements to post-1996 requirements.

The March 2, 1995 Mary Nichols memo indicated that States participating in the OTAG would have until mid-1997 to submit their Phase II attainment demonstrations to EPA. Because the conclusion of the OTAG assessment was delayed, the IIG permits the States with serious and higher classified nonattainment areas to submit their Phase II attainment demonstrations in April 1998. The modeling analysis due in April 1998 should demonstrate attainment of the 1-hour ozone NAAQS by the date required in the CAAA. As a result of the findings of the OTAG study, in September, 1997 EPA issued a proposed SIP Call rule requiring significant reductions in NO_x emissions from within the OTAG region. States that are covered by EPA's proposed NO_x SIP Call can submit a modeling analysis that reflects boundary conditions that are consistent with the regional reductions required in EPA's proposed NO_x SIP Call.

The IIG requires that the April 1998 submit should contain the following five elements:

- 1) Evidence that all measures and regulations required for the nonattainment area by Subpart 2 of Title I of the CAAA to control ozone and its precursors have been adopted and implemented or are on an expeditious schedule to be adopted and implemented.
- 2) A list of control measures and regulations and/or a strategy including technology forcing controls needed to meet RPP requirements and attain the 1-hour NAAQS.
- 3) For severe and higher classified nonattainment areas, a SIP commitment to submit a plan on or before the end of 2000 which contains (a) target calculations for post-1999 RPP milestones up to the attainment date and (b) adopted regulations needed to achieve the post-1999 RPP requirements up to the attainment date and to attain the 1-hour NAAQS.
- 4) A SIP commitment and schedule to implement control programs and regulations in a timely manner to meet RPP and achieve attainment.
- 5) Evidence of a public hearing on the State submittal.

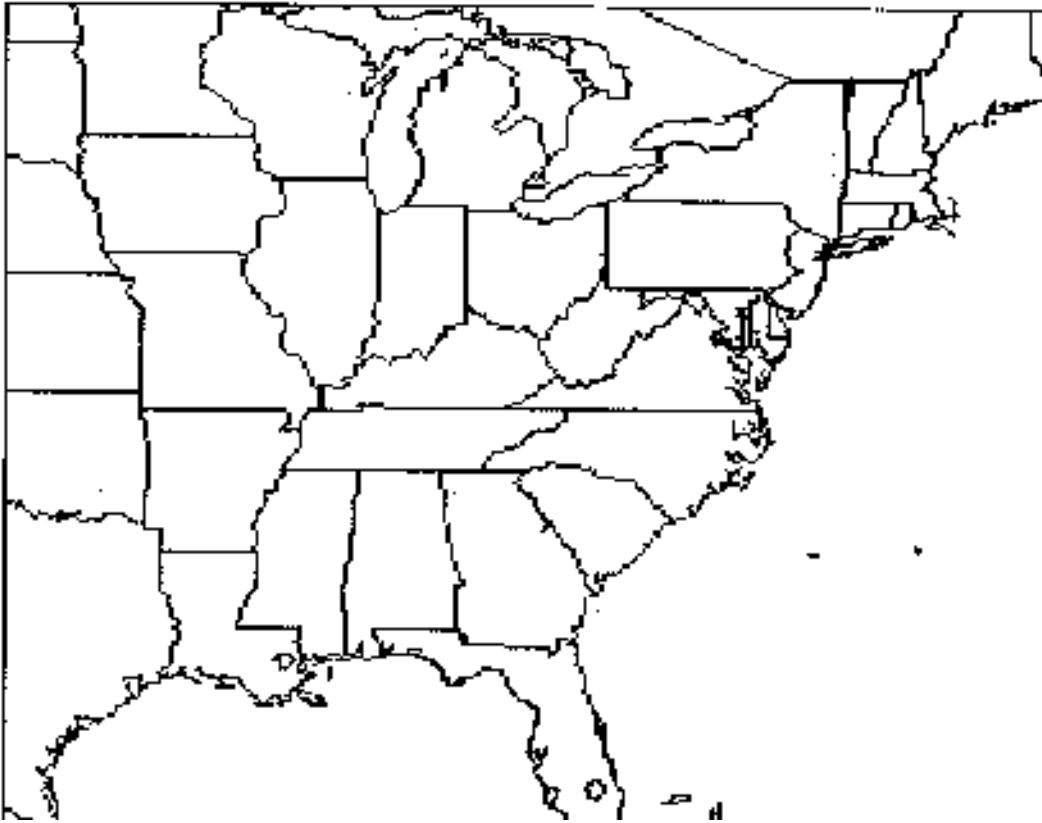


Figure 2. The OTAG Modeling Domain.

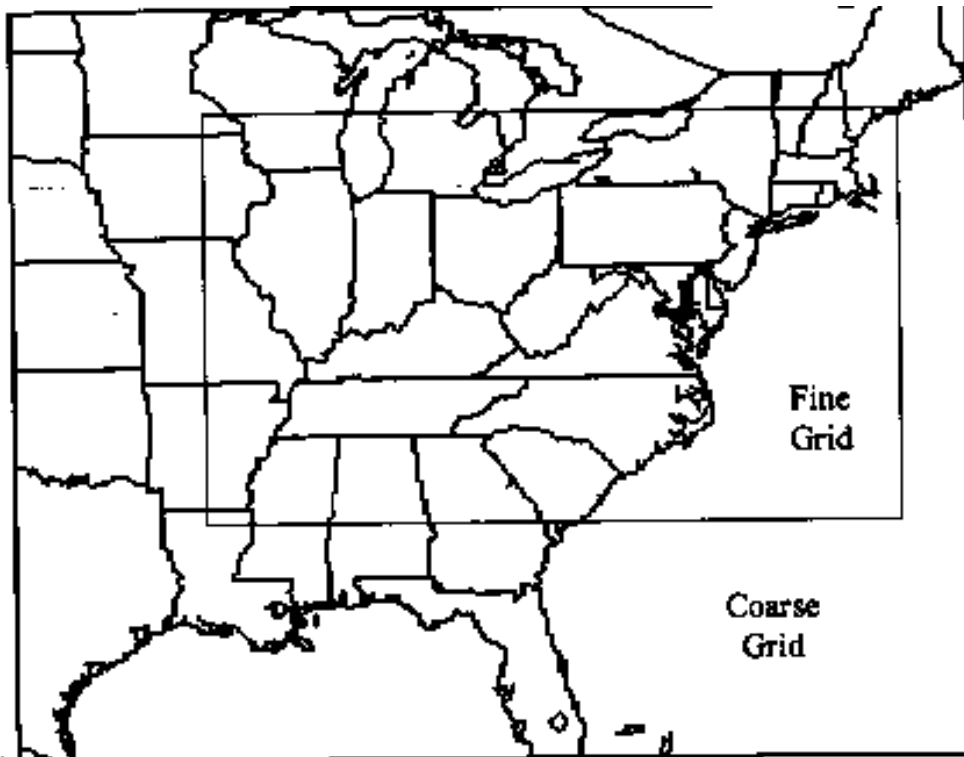


Figure 3. The OTAG Modeling Domain: Coarse/Fine Grid Map

1.6 RESPONSIBILITIES

The Agency with the primary responsibility for preparing and submitting this document is the Department of Natural Resources and Environmental Control (the Department), Division of Air and Waste Management, Air Quality Management (AQM) Section, under the Direction of Darryl D. Tyler, AQM Program Administrator. Specific responsibilities fall within Planning and Community Protection Branch of AQM, under the management of Raymond H. Malenfant. The Emissions Research and Policy Analysis (ERPA) Group under the management of Alfred R. Deramo is responsible for plan development. Dr. Fang Gao of the ERPA Group was project leader for the development of Part 2, Rate-of-Progress Requirements. Dr. Mohammed A. Mazeed was project leader for development of Part 3, Attainment Demonstration. Environmental Scientist Margaret A. Jenkins provided software, formatting, and graphic conversions for the entire document.

Data for developing on-road mobile source emissions inventories and projections used for rate-of-progress calculations and UAM modeling was supplied by the Delaware Department of Transportation (DelDOT).

**PART 2
RATE-OF-PROGRESS REQUIREMENTS**

2.1 RATE-OF-PROGRESS REQUIREMENTS

The Clean Air Act Amendments of 1990 (CAAA) require adequate rates of progress for the States toward attainment of the National Ambient Air Quality Standard (NAAQS) for the ground-level ozone (see Footnote 1). Kent and New Castle Counties in the state of Delaware have been classified as severe nonattainment areas with respect to the 1-hour ozone NAAQS, and are required to achieve a 15% reduction in VOC emissions from 1990 to 1996, and a 9% reduction of VOC and/or NO_x emissions every three years after 1996. These rate-of-progress reductions are based on the state's 1990 VOC and/or NO_x emission levels. Delaware submitted its 15 Percent Rate-of-Progress Plan to the United States Environmental Protection Agency (EPA) in February, 1995.⁶ In May of 1997, EPA issued conditional approval of Delaware's 15 Percent Rate-of-Progress Plan. The approval became effective on June 18, 1997.

For the post-1996 emission reductions and attainment demonstrations required by CAAA, EPA provides the states within the Ozone Transport Region (OTR) a two-phased approach (see Footnote 2). Briefly in Phase I, the States are required to develop a plan for the milestone year of 1999 which includes necessary control measures to achieve a 9-percent reduction of VOC and/or NO_x emissions between 1996 and 1999. In Phase II, the States are required to assess the regional and local control measures necessary to meet the rate-of-progress requirements and achieve attainment. Delaware developed its Phase I Plan (i.e., the 1999 Rate-of-Progress Plan) and submitted it to EPA in December 1997.⁷

This document addresses the Phase II requirements set forth in the EPA guidance document (See Footnote 2), and the agency's recent instructions for the Phase II plan submittal which is due in April, 1998 (see Footnote 4). Based on EPA's guidance, the State's Phase II submittal must address its remaining rate-of-progress requirements by containing a commitment to submit the Post-1999 Rate-of-Progress Plan by 2000, and a list of CAAA, Title I ozone-related control measures and regulations, including those approved by EPA, those pending EPA approval, and those currently under the State's consideration to meet the rate-of-progress requirements.

2.2 DELAWARE POST-1999 RATE-OF-PROGRESS COMMITMENT

In May of 1995, Delaware submitted to EPA a draft of its post-1996 Rate-of-Progress Plan (RPP) for the milestone years of 1999, 2002, and 2005 (hereafter referred to as the 1995 draft plan). As previously mentioned, Delaware submitted to EPA its final 1999 RPP in December, 1997. In the 1995 draft plan, Delaware conducted preliminary calculations using EPA's methods and procedures to estimate its VOC/NO_x emission targets for 2002 and 2005, and the necessary emission reductions to meet these targets. The calculation results are summarized in Table 1.

PROPOSED REGULATIONS

TABLE 1
ESTIMATES OF DELAWARE VOC AND NO_x EMISSION TARGETS
AND REDUCTIONS FOR YEARS 2002 AND 2005
(UNITS IN TONS PER DAY IN PEAK OZONE SEASON)

DESCRIPTION	YEAR 2002		YEAR 2005
	VOC	NO _x	VOC
Emission Target Levels	105.983	137.082	103.75
Current Control Projections	165.043	188.069	170.20
Control Strategy Projections	105.983	142.246	103.75
Required Emission Reductions	59.060	50.987	66.446
Expected Emission Reductions	59.060	45.823	66.446
Surplus/Shortfalls in Reductions**	0.000	-5.164	0.000

* Data are obtained from Delaware 1995 draft plan.

** A positive number indicates surplus, a negative number indicates shortfall.

At the time of preparing the 1995 draft plan, Delaware planned to implement numerous control measures and regulations, in addition to those already existing in the state, to meet the rate-of-progress requirements for VOC and/or NO_x emission reductions. Most of these control measures and regulations were implemented after the 1995 draft submittal. A list of these controls, along with their implementation dates, is presented in Table 2.

All of the control measures in Table 2 have been adopted, except for four. The regional NO_x control proposed in the 1995 draft plan was promulgated in December of 1997, as Delaware Air Pollution Control Regulation 37 (hereafter referred as Regulation 37).⁸ This regulation has an implementation date of May 1, 1999. The Low Emission Vehicle (LEV) program is still being negotiated with the automobile manufacturers. Delaware has committed to adopting a National Low Emission Vehicle (NLEV) program. The Architectural and Industrial Maintenance (AIM) Coating regulation and the Consumer and Commercial Product (CPC) regulation are also under negotiation with the manufacturers. Delaware will make use of these regulations if they are finalized before development of Delaware's final post-1999 RPP. By implementing most of the control measures and regulations in Table 2, Delaware has been able to show, in its 1999 Rate-of-Progress Plan recently submitted to EPA (See Footnote 4), that its VOC and NO_x emission targets in 1999 will be met successfully.

Based on the preliminary calculations conducted in the 1995 draft plan, Delaware projected shortfalls in the required emission reductions for 2002 and 2005 (Table 1). Therefore, in addition to all of the control measures listed in Table 2, Delaware is committing to implement as many of the following steps as necessary to eliminate the projected shortfalls.

(1) Examination and Modification of Growth Assumptions

Delaware will re-examine the growth assumptions used in the 1995 draft plan when calculating VOC and/or NO_x emissions and reductions for the final 2002 and 2005 RPP. Delaware Air Pollution Control Regulation 37 (See Footnote 6) sets NO_x emission allowances in the ozone season (i.e., May 1 through September 30) for large fossil fuel boilers or indirect heat exchangers (with a heat input capacity of 250 mmBTU/hour or greater) and electric generating units (with a generator nameplate capacity of 15 MW or greater). Since the NO_x emission allowances become effective on May 1, 1999, all growth previously assumed for the affected sources can be eliminated. For other sources, Delaware will compare the growth factors previously assumed and used for calculating emission projections, with the actual growth trends shown in the emission inventories. Based on the comparison, the projected growth factors can be modified to reflect the observed growth trends. Delaware believes that such growth modifications will lead to more realistic emission projections for 2002 and 2005.

(2) Development of Rule Effectiveness Improvement Program

In the 1995 draft plan, Delaware adopted EPA's default value of the Rule Effectiveness (i.e., 80%) to calculate the control strategy projections for 2002 and 2005. Delaware will develop an enforceable program to improve the Rule Effectiveness. Possible measures under consideration include the following: (a) for regulated sources: improvement in personnel training, record-keeping, and compliance demonstration, and (b) for implementing agency: improving inspection personnel training and record-keeping, increasing inspection frequency, and upgrading inspection level. Delaware expects, through these measures, that the Rule Effectiveness can be improved to or above 90% which will lead to further VOC/NO_x emission reductions from the regulated sources.

(3) Transfer of Emission Reduction Credits from Existing Controls in Sussex County

**TABLE 2
DELAWARE VOC AND NO_x EMISSION CONTROL MEASURES
IN 1995 DRAFT SUBMITTAL**

CONTROL MEASURE	IMPLEMENTATION DATE
POINT SOURCE CONTROLS	
REASONABLY AVAILABLE CONTROL TECHNOLOGY (RACT) IN KENT COUNTY Solvent Metal Cleaning Surface Coating of Metal Furniture Leaks from Synthetic Organic Chemical, Polymer, & Resin Manufacturing	May 31, 1995 May 31, 1995 May 31, 1995
DELAWARE RACT REGULATIONS Bulk Gasoline Marine Tank Vessel Loading Facilities Synthetic Organic Chemical Manufacturing Industry (SOCMI) Reactor Processes and Distillation Batch Processing Operations Offset Lithography Aerospace Coatings Industrial Cleaning Solvents Non-Control Techniques Guideline (CTG) RACT Delaware NO _x -RACT	December 31, 1995 April 1, 1996 April 1, 1996 April 1, 1996 April 1, 1996 November 1, 1996 May 31, 1995 May 31, 1995
REGIONAL CONTROLS Regional NO _x -MOU	May 1, 1999
FEDERAL RULES Benzene Waste Rule	Spring, 1995
OTHERS Sanitary Landfills Irreversible Process Changes	October 9, 1993 January 1, 1996
STATIONARY AREA SOURCE CONTROLS	
RACT "CATCH-UPS" IN KENT COUNTY Solvent Metal Cleaning Cutback Asphalt	May 31, 1995 May 31, 1995
DELAWARE RACT REGULATIONS Stage I vapor recovery- gasoline dispensing facilities Emulsified Asphalt Motor Vehicle Refinishing Offset Lithography Aerospace Coatings Stage II Vapor Recovery Systems	November 15, 1994 May 31, 1995 April 1, 1996 April 1, 1996 April 1, 1996 November 15, 1994
NEW RACT REGULATIONS AIM Coating Commercial/Consumer Products	To be determined To be determined
OTHER DELAWARE REGULATIONS Open Burning	February 8, 1995
OFF-ROAD MOBILE SOURCE CONTROLS	
Reformulated Gasoline New Emissions Standards for Spark Ignition Engines New Emissions Standards for Compression Ignition Engines New Emissions Standards for Marine Engines	January 1, 1995 EPA-Court Ordered EPA-Court Ordered EPA-Court Ordered
ON-ROAD MOBILE SOURCE CONTROLS	
Federal Motor Vehicles Control Program (FMVCP) and Reid Vapor Pressure (RVP) Tier I Vehicle Emissions Standards a. Basic Inspection and Maintenance (I/M) in Kent County b. Anti-Tampering Program (ATP) and Pressure Test in Kent County ATP and Pressure Test in New Castle County Reformulated Fuel LEV Program	Pre-1990 Model Year 1994 January 1, 1991 January 1, 1995 January 1, 1995 January 1, 1995 November, 1999

Delaware will transfer emission reduction credits from Sussex County (originally classified as a marginal nonattainment area) to the two severe nonattainment counties, i.e., Kent and New Castle Counties. With respect to Kent and New Castle Counties, Sussex County meets the geographical requirements for the credit transfer under the current EPA proposal, namely, not farther than 100 km for VOC sources and 200 km for NO_x sources (See Footnote 5).

(4) Expansion of List of Sources Covered by Regional NO_x Control Rules

In both Kent and New Castle Counties, there are fossil fuel boilers (or indirect heat exchangers) currently not covered by Regulation 37 because their heat input capacities are not exceeding the standard set forth in the regulation (i.e., 250 mmBTU/hour) (See Footnote 6). However, these boilers are significant NO_x emission sources. Delaware will, when necessary, add these boilers to the list of sources covered by Regulation 37 to produce further NO_x emission reductions in Kent and New Castle Counties.

(5) Development of VOC Cap/Reduce Program for Large Point Sources

This enforceable program will set certain VOC emission limits (i.e., caps) for large point sources in Kent and New Castle Counties during the ozone season (May 1 through September 30). The program is still in the early stage of consideration, and can be designed to produce varying VOC emission reductions depending on the size of the credit shortfalls in 2002 and 2005.

(6) Implementation of High-Enhanced Inspection and Maintenance Program

According to EPA, implementation of the high-enhanced Inspection and Maintenance (I/M 240) program could produce as much as 32% and 11% reductions in mobile source VOC and NO_x emissions, respectively.⁹ Delaware will implement the I/M 240 (or equivalent) program in Kent and New Castle Counties on or before 2002 or 2005, whichever is appropriate, if the program becomes necessary for achieving the adequate rates of progress.

Delaware is confident that the methods and control measures proposed above will enable the State to eliminate all rate-of-progress emission reduction shortfalls in 2002 and 2005. Delaware commits to implementing, before 2002 or 2005 whichever is appropriate, all or a portion of the above measures depending on the actual needs. Delaware will submit to EPA fully-adopted post-1999 Rate-of-Progress Plans before the end of 2000. The plans will contain (a) target calculations for the milestone years of 2002 and 2005, and (b) control measures and regulations adopted as necessary to achieve the rate-of-progress requirements for 2002 and 2005.

PART 3
ATTAINMENT DEMONSTRATION

3.1 OZONE AIR QUALITY MODELING

3.1.1 Modeling Process

The general modeling strategy is to select three historical episodes during which the ozone NAAQS was exceeded in the area and model these as base cases. The selected episodes should be representative of different meteorological regimes strongly associated with high ozone events. The modeling system, consisting of emissions models, meteorological models, as well as ROM and UAM, is tested with the base cases to assure that it accurately simulates those episodes. Finally, using the base-case meteorological regimes, projected emissions and emission control strategies are used to simulate future ozone levels. The attainment criteria require that UAM simulations based on implemented local and regional emission controls result in no exceedances of the ozone NAAQS anywhere in the modeling domain. The overall modeling process is outlined below.

i. *Episode Selection*

From the historical period of nonattainment classification (1987-1991), the multi-state UAM Technical Committee chose the following episodes for modeling: July 6-8, 1988; June 14-15, 1987; and July 18-20, 1991. During these periods, ozone monitoring devices in the Philadelphia area indicated ozone levels above the NAAQS. In addition, these days represent two meteorological regimes conducive to ozone formation in the region. The 1988 and 1991 episodes occurred under conditions of a southwesterly wind, which is typical of most high ozone episodes in the Philadelphia area. During the 1987 episode, a high

pressure system was located west of the area. Unfortunately, the ROM output necessary to establish boundary conditions for our modeling domain is not available for this episode. Therefore, the 1987 episode could not be used to analyze future control strategies.

ii. *Domain Selection*

The domain or spatial extent to be modeled includes as its core the nonattainment area. Beyond this, the domain includes enough of the surrounding area such that major upwind sources fall within the domain and emissions produced in the nonattainment area remain within the domain throughout the day. Definition of the Philadelphia UAM domain boundaries were based on trajectory analyses of the July 1988 episode, and took into account considerations of consistency and alignment with adjacent UAM modeling domains (New York and Maryland) and alignment of the regional ROM grid. The Philadelphia UAM domain includes a small part of New York State, and larger portions of each of the states included in the Philadelphia nonattainment area (Figure 4).

[insert Figure 4]

*** PLEASE CONTACT DNREC TO OBTAIN A COPY OF THIS FIGURE**

iii. *Model Input*

UAM requires surface meteorological data including ambient temperature, humidity, atmospheric pressure, solar radiation, and cloud cover. These data are routinely available from the National Weather Service (NWS) and other climatological data archives. The Philadelphia UAM domain includes 21 surface meteorological stations, and 26 more stations are located within 1° of latitude and longitude of the domain perimeter. Additionally, UAM requires hourly estimates of the atmospheric mixing height and a fully three-dimensional wind field. These two UAM inputs are modeled from upper-air temperature and wind data. The Philadelphia domain includes only one upper-air station for meteorological model input, so data from three other stations near the domain were used as well.

Emissions of ozone precursors (NO_x and VOC) from point, area and mobile sources are inventoried by state environmental agencies as part of the SIP process. The CAAA requires periodic inventories every three years beginning in 1990 until an area is redesignated to attainment. In order to model episodes occurring during non-inventory years, emissions must be backcast or forecast from existing periodic inventories. From 1990 state periodic inventories, ORC calculated emissions for the 1987, 1988, and 1991 episodes using the Emissions Preprocessor System (EPS2.0). Emissions from biogenic sources for each episode day were obtained from the ROM-UAM Interface System. EPS2.0 also includes a set of computer programs which develops, from the state inventories, temporally and spatially distributed fields of chemically speciated emissions in UAM-input format.

Finally, ROM output is necessary as input to UAM for two purposes. First, the entire three-dimensional UAM grid must be initialized with the chemical and physical condition of the atmosphere such as NO_x concentrations and temperatures. Second, for each time-step of a model run, similar information must be provided at the horizontal and top boundaries of the UAM domain. This information, identified as initial conditions and boundary conditions, is interpolated from the ROM predictions. Information in ROM's coarsely resolved grid (18.5 km horizontal resolution with 3 vertical layers) is interpolated to UAM's finer grid (5 km horizontal resolution with 5 vertical layers) with the ROM-UAM Interface System.

iv. *UAM*

Beginning with the initial values of atmospheric constituents in each cell of the three-dimensional domain, UAM first calculates the horizontal movement through the domain based upon the horizontal windfields, then emissions are injected and the vertical movement of constituents is calculated. Finally, chemical transformations of constituents, including ozone formation are calculated. This sequence of calculations is repeated for each timestep (usually about 5 minutes), each time starting with the results from the previous timestep, for the length of the episode.

In order to evaluate model performance, simulated ozone concentrations are compared with ozone measurements recorded during the actual episode at monitoring stations throughout the domain. These comparisons are made to determine how well the model reproduces spatial and temporal features of the ozone field. In addition, sensitivity tests (systematically changing model inputs such as boundary conditions or mixing heights) are performed to investigate whether the model is responding in a logical fashion. Modifications to UAM model inputs or elements of the UAM itself may be necessary to meet model performance criteria.

Once it has been determined that the UAM is performing adequately, it can be used to evaluate proposed emission control strategies. Boundary emissions simulated with ROM (based on new control strategies), as well as changes in emissions within the domain are combined with meteorological conditions from the base cases to simulate ozone concentrations. The identification and selection of control strategy scenarios is the responsibility of a coordinating committee of representatives from states sharing the UAM domain. The scenarios must be consistent with each state's SIP. Coordination with the control strategy committee responsible for ROM simulations is also imperative for reliable simulations.

3.1.2 Modeling Progress

Through the EPA, Delaware, Maryland, Pennsylvania and New Jersey have contracted with the Ozone Research Center to perform the UAM portion of the Philadelphia area's ozone attainment demonstration. The Modeling Protocol, which outlines proposed procedures for the investigation, data sources, and committee structure, was approved in September of 1992.

Following these guidelines, the ORC selected the base-case episodes and domain described above. They have acquired the air quality data, meteorological data, ROM output and 1990 state emission inventories necessary for modeling the base cases. Point and area emissions from the state inventories were forecast and backcast to the appropriate episode years. Mobile source emissions and biogenic emissions (from ROM) had already been estimated for actual episode days. ORC has performed numerous UAM runs seeking the optimal combination of domain, windfields, and mixing-heights for accurately representing ozone patterns in the Philadelphia area.

Difficulty with the domain extent arose because of the proximity of major metropolitan areas in the Northeast. Due to ROM's low spatial resolution, UAM boundary conditions based on its simulations are more diffuse than actual emissions, particularly when large point sources are involved. For example, emissions from a point source attributed to a ROM grid cell (18.5 km on a side) are eventually distributed to multiple UAM cells (5 km on a side); thus, emissions which should be allocated to one cell are spread across many cells. A solution to this problem is to expand sufficiently the UAM domain to include large point sources near its edges. With large point sources associated with New York City and Baltimore adjacent to the Philadelphia UAM domain, this entails extending the domain in all directions.

While expanding the domain improves model performance in this case, it also presents other problems, such as increased demand on computer resources. Another technical problem has to do with demonstrating attainment of the ozone NAAQS which requires that no cell in the UAM domain exceeds the standard. Specifically adding areas because of their large emissions directly confounds our ability to meet this requirement. The ORC compromise solution has been to define a modeling domain which includes the high emission areas of Maryland and New York City for improved model performance, but only consider a subset of that as the regulatory domain required to meet the standard.

Finding an acceptable combination of meteorological models has been more difficult. ORC has tested both fixed and spatially-varying mixing heights calculated with two different models, as well as windfields derived in two different manners. Each of the model combinations had strengths and weaknesses having to do with conservation of momentum across the domain boundary, resolution of small-scale features, and verifiability. No resolution has been indicated by ORC.

Another issue bearing on the meteorological inputs being generated for UAM again has to do with the close proximity of major metropolitan areas in the Northeast. The UAM domains for the Baltimore/Washington area and the New York City area both overlap with the Philadelphia domain. Various problems could arise if the area common to two domains differ significantly; therefore, consistent UAM inputs in common areas are important. A comparison between meteorological UAM inputs for the 1988 episode generated by the same procedures with the same meteorological data in the overlapping area showed significant differences in the area common to the Philadelphia and New York City domains. Modeling this same episode has been determined intractable for the Baltimore/Washington UAM domain (which includes Delaware) and has been abandoned. Again, ORC has not indicated a resolution to this issue.

Finally, ORC has tested procedures for modeling future-year cases and emission control strategies. Because projection factors for estimating future year (2005) emissions from 1990 emissions inventories were not available from the individual state agencies, ORC obtained emissions from ROM projections based on EPA's 1988 interim inventory. Three emission control cases were tested based on preliminary UAM configurations for the 1988 and 1991 base cases. Future year runs cannot be performed for the 1987 episode because appropriate ROM output is not available. To address the issues of transport, simulations were also

performed with OTAG boundary conditions and State projected emissions inventory data for 2005 for the July 1991 episode.

The model has been shown to perform adequately in predicting known monitored ozone concentrations for the CMSA from emissions and meteorological data. Modeling for expected emissions reductions in 2005 after the application of CAAA-mandated and state-specific controls show substantial reductions in the spatial extent of nonattainment in the CMSA. Consequently, reductions in peak ozone concentration, persistence and severity are observed.

3.1.3 Modeling Results Performed by ORC in 1995

In 1995, the ORC performed photochemical grid modeling to assess the impact of the CAAA controls and two OTC control strategies—strategies C and E2. The details of modeling are as follows.

i. *Models Employed in Attainment Demonstration*

Two types of models are used for the attainment demonstration of the Philadelphia CMSA. They are the Urban Airshed Model (UAM IV) currently approved by the EPA for use in SIPs, and the Regional Oxidant Model (ROM 2.2), the model approved by the EPA for regional assessment and also to provide boundary condition inputs for the UAM IV. UAM IV was employed to model the Philadelphia CMSA, whereas the ROM2.2 was used to model all of the Northeast states. The modeling of ROM 2.2 for the Northeast was completed by the EPA and a state/EPA/industrial cooperative called the Modeling Ozone Cooperative Association (MOCA). More recent models, like UAM V, can handle both local scale attainment demonstrations while still including large regional areas.

ii. *Domain Definition*

Modeling domain consisted of 52 x 59 grids,¹⁰ with each grid 5 km x 5 km in each horizontal direction, as shown in Figure 4. However, a subset of the 52 x 59 cell domain, that excludes five rows of cells at the north and four columns of cells at the east boundary of the domain was selected as the regulatory domain to focus the evaluation of the model and assessment of the effectiveness of control strategies. Figure 4 also shows the location of air quality monitoring stations in the domain. Figure 5 shows the nesting of the Philadelphia modeling domain grid within the regional ROM grid.

[insert Figure 5]

* PLEASE CONTACT DNREC TO OBTAIN A COPY OF THIS FIGURE

iii. *Episode Selection*

Ozone episodes from 1987 to 1991 were classified in five meteorological regimes, and the episodes in each regime were ranked according to their severity. Air quality data extracted from Aerometric Information Retrieval System (AIRS) were used for ranking of the episodes. Then episodes were examined and selected for modeling. Although one or more episodes from each meteorological regime should be modeled, limitations in time and resources, and availability of ROM simulations required limiting the number of episodes to be modeled to three, as listed in Table 3. All the three episodes were modeled for the base case; however ROM future base case and control strategy simulations were not available for the 1987 episode.

**TABLE 3
EPISODES SELECTED FOR MODELING**

EPISODE MODELING DATE	METEOROLOGICAL RE
7-8 July 1988	Regime I (South/Southwest Winds)
15 June 1987	Regime III (High Pressure North or V
19-20 July 1991	Regime I (South/Southwest Winds)

s *Choice of Episodes*

EPA provided guidance in two of its documents^{11,12} regarding the selection of episodes to be used for modeling purposes in an attainment demonstration. The 1991 Guidance states that the modeling be based on several episodes reflecting meteorological conditions conducive to high ozone concentrations, and it also states that consideration should be given to modeling less severe episodes. The latter choice provides a comprehensive look at the effectiveness of emission reduction strategies on less severe exceedance days. The Guidance suggests that one or more episodes during which the ozone exceedances were most “pervasive” be considered. The 1996 Guidance offers the use of rankings of the meteorological ozone forming potential performed by Cox

and Chu^{13,14} in selecting episodes to be modeled. The results of Cox and Chu's analysis for various Northeast urban areas are listed in Table 4. The numbers in the Table 2 reflect the severity of ozone forming potential for each of years between 1953 and 1993. As can be seen in the Table 4, 1988 was the worst year for the Philadelphia area representing the extreme severity of the episode; 1991 and 1993 are ranked as 3rd and 9th respectively, indicating that these two years are relatively severe years. The frequency of repetition of conditions like the 1988 episode to the Philadelphia area is predicted to be low. Based on the formula in Cox and Chu, (1996), the return time is on average once every 62 years, whereas the 1991 and 1993 conditions are expected to be more frequent, with return times of 15 and 5 years, respectively. Based on an OTAG Draft modeling report,¹⁵ the summer of 1995 would also rank high in ozone forming potential severity.

iv. *Meteorological and Air Quality Inputs*
Meteorological Data

Meteorological conditions such as wind speed, wind direction, cloud cover, solar radiation and temperature were obtained from a variety of sources, but primarily from National Weather Service (NWS) meteorological stations.

Air Quality Data

AIRS data were not only served as a basis for the selection of modeling episodes, but are also used for assessing the ability of the model to replicate an historical episode.

Boundary and Initial Conditions

Initial conditions are obtained by performing vertical and horizontal interpolation from the ROM values to derive those at all UAM cells. Boundary conditions are based on the average of the three ROM cells which are adjacent to the UAM lateral cells.

v. *Treatment of Wind Fields*

Simulations of the base case episodes were performed with both ROM-derived wind-fields and wind-fields from the diagnostic wind model (DWM). The statistical performance of UAM for these runs is presented in summary in a following section.

vi. *Treatment of Mixing Heights*

Simulations of all base case episodes were performed with both ROM-derived wind-fields and wind-fields from DWM. The statistical performance of UAM for these runs is presented in a later section.

vii. *Treatment of Mixing Heights*

Mixing height ("diffusion break") fields for each day of the episodes under consideration were obtained using the RAMMET-X and MIXEMUP codes.

viii. *Emission Inputs*

Except for Delaware which provided its backcasting projection factors, Bureau of Economic Analysis (BEA) factors were used to adjust the states 1990 base emissions to the episode years. EPS2.0 was used to develop spatially and temporally speciated ozone precursor emissions for the episode days from county-level base emissions inventories.

ix. *Base Case Performance Evaluation*

The performance of all base-case simulations for ground-level ozone predictions was evaluated using the data from the air quality monitoring stations in the domain. Results of statistical model performance satisfy the criteria outlined by the EPA. In other words, the model does an adequate job of representing the distribution of ozone levels in the domain.

x. *Future Base Cases and Control Strategies*

State specific projections were provided by Delaware in 1995, but were not yet available from other states. Therefore, the emissions projections from the base year to 2005 were based on the EPA interim inventory. Modeling was performed for three scenarios, and the control strategies modeled in each of the scenarios are as follows.

2005 CAAA Base Case

- Stationary source VOC controls expected from implementation of Titles I and III
- Stationary source NO_x controls
- Reformulated gasoline

TABLE 4
RANKS OF PREDICTED OZONE 99TH PERCENTILES FOR NORTHEAST
URBAN CITIES: BALTIMORE, BOSTON, BRIDGEPORT, HARTFORD, NEW
YORK, PHILADELPHIA, PROVIDENCE, AND WASHINGTON D.C.

YEAR	BAL	BOS	BRI	HAR	NEW	PHI	PRO	WAS	COMBINED
53	2	11	2	9	1	2	12	2	2.0
54	15	31	18	26	9	15	37	4	17.0
55	7	2	1	14	5	4	1	10	3.5
56	19	29	12	40	28	24	14	28	23.0
57	23	23	8	27	8	11	25	7	13.0
58	41	38	17	41	36	40	39	38	41.0
59	25	18	4	21	18	18	24	15	15.0
60	40	19	21	33	37	41	40	41	38.0
61	38	26	27	7	21	36	29	27	29.0
62	27	34	41	36	39	33	41	23	39.0
63	11	6	6	12	13	13	13	17	9.0
64	18	35	34	18	25	20	31	11	22.0
65	31	24	39	8	27	34	16	30	28.0
66	8	25	15	24	10	17	15	6	12.0
67	22	41	37	28	35	31	36	31	36.0
68	10	33	22	19	23	27	23	26	21.0
69	12	28	31	31	41	38	22	20	32.0
70	24	7	29	6	32	26	20	21	19.0
71	35	15	28	5	38	28	19	35	26.5
72	36	36	38	34	40	22	33	39	40.0
73	17	8	9	22	14	16	8	12	11.0
74	37	21	13	23	30	32	28	29	30.5
75	16	10	30	37	22	6	19	13	16.0
76	33	13	32	20	33	25	21	24	26.5
77	5	5	33	15	3	19	3	22	10.0
78	13	20	26	17	34	29	27	33	24.0
79	39	16	35	16	20	39	32	40	33.0
80	3	17	3	13	12	7	2	8	7.5
81	26	22	40	30	26	8	9	19	20.0
82	28	12	20	11	19	21	11	18	14.0
83	9	1	16	4	4	5	4	1	3.5
84	14	4	10	10	11	12	10	14	7.5
85	32	40	36	38	31	30	38	25	37.0
86	30	32	25	39	29	23	35	32	34.0
87	20	39	11	29	17	10	18	16	18.0
88	1	3	7	2	2	1	6	9	1.0
89	29	27	19	35	16	14	26	34	25.0
90	21	37	14	25	15	35	30	36	30.5
91	4	14	5	3	6	3	5	5	5.5
92	34	30	24	32	24	37	34	37	35.0
93	6	9	3	1	7	9	7	3	5.5

Emissions standards on non-road engines
Emissions offsets and RPP requirements

OTC control strategy E (controls in addition to above)

Phase II NO_x RACT, i.e., a limit of 0.15 lb/mmBTU NO_x emission limit for combustion sources with design capacities greater than or equal to 250 mmBTU/hr

Low Emission Vehicle (LEV) program

OTC control strategy C2 is the same as Strategy E with the exception that the additional controls were applied throughout the ozone transport region, rather than just the modeling domain.

xviii. *Modeling Results*

For the two episodes modeled of July 6-8, 1988 and July 18-20, 1991, UAM simulations were performed for the 2005 CAAA Base Case, OTC Control Strategy E and OTC Control Strategy C2. These simulations were not performed for the 1987 episode due to non-availability of boundary conditions from ROM. The first day of each episode is not shown because they represent initial conditions before the effect of emissions is quantified. The modeling results for July 7-8, 1988 are depicted in Figures 6 and 7, and the modeling results for July 19-20, 1991 are depicted in Figures 8 and 9. As can be seen in Figures 7, 8, and 9, Delaware shows attainment for the 1-hour ozone standard for the July 8, 1988 and July 19-20, 1991 episode days. From Figure 6, it is clear that only a part of the New Castle County is in nonattainment. It is to be noted here that July 6-8, 1988 episode is an atypical episode and is ranked as an extreme episode by the Cox and Chu analysis (see Table 4). Also it has to be noted here that the impact of transport from OTAG analysis is not modeled in these 1995 runs and the emissions projections for year 2005 are based on EPA's interim emissions inventory.

[Insert Figure 6]

[insert Figure 7]

[insert Figure 8]

[insert Figure 9]

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To better describe the modeled results, besides the maximum ozone prediction, two metrics, persistence and severity were introduced. These two metrics can be considered to be more directly related to population exposure of ozone. Therefore, the analysis of these two metrics helps in assessing the efficacy of the control strategies being applied. Persistence measures the number of cells in the domain having ozone concentrations greater than 120 ppb summed up for 24 hours, and severity represents the total concentrations of cells having ozone exceedance for 24 hours. The results of the UAM simulations of the modeling domain for the July 1988 and July 1991 meteorologies are listed in Table 5. As can be seen from Table 5, the 2005 CAAA Base Case control strategy reduces the ozone peak concentrations in the domain by 35 and 29 ppb for July 8, 1988 and July 20, 1991 episode days, respectively. The additional benefit from OTC control strategies C2 and CE is only a few ppbs. The reductions in the ozone peaks for July 7, 1988 and July 19, 1991 are only a few ppbs. However, the reductions in persistence and severity are significant for all days with the exception of July 19, 1991. As can be seen in Figure 6, the maximum ozone contours of 140 ppb are mostly concentrated at the northeast corner of the domain, reflecting high emission levels from New York City. Therefore, less weight should be assigned to predictions in the northeast cells of the domain. For the three days (July 7-8, 1988, July 20, 1991), the reductions in persistence are in the range of 81.0 to 84.9 percent, and the reductions in severity are in the range of 81.6 to 85.0 percent.

**TABLE 5
RESULTS OF UAM SIMULATIONS FOR THE PHILADELPHIA/NEW JERSEY**

MODELING DATE	SCENARIO	MAXIMUM O ₃ (ppb)	PERSISTENCE
July 7, 1988	Base Case 1988	185	417
	2005 CAAA Base Case	179	107
	OTC-CS-C2	176	648
	OTC-CS-E	176	630
July 8, 1988	Base Case 1988	213	823
	2005 CAAA Base Case	178	272
	OTC-CS-C2	178	164
	OTC-CS-E	177	156
July 19, 1991	Base Case 1991	156	630
	2005 CAAA Base Case	154	654
	OTC-CS-C2	152	625
	OTC-CS-E	151	588
July 20, 1991	Base Case 1991	190	495
	2005 CAAA Base Case	161	147
	OTC-CS-C2	157	939
	OTC-CS-E	152	766

3.1.4 OTAG Control Strategy Metrics

The OTAG ranked the control packets from level 0, the least stringent (the reductions anticipated by the states through implementation of their own measures through 1996 plus any federal measures by 2007), to level 3, the most stringent. Because NO_x controls have greatest effect on regional ozone transport, OTAG controls focused more on NO_x controls, although the identified VOC controls were used in OTAG strategy runs that applied VOC controls. The matrix included a total of five levels of utility NO_x controls:

- Level 0, which was no additional controls beyond those required by states by 1996 and/or by the CAAA.
- Level 1, which reduced NO_x emissions to the less stringent of 55% of the 1990 rate or a rate of 0.35 lb/mmBTU.
- Level 2a, which reduced NO_x emissions to the less stringent of 65% of the 1990 rate or a rate of 0.25 lb/mmBTU.
- Level 2b, which reduced NO_x emissions to the less stringent of 75% of the 1990 rate or a rate of 0.20 lb/mmBTU.
- Level 3, which reduced NO_x emissions to the less stringent of 85% of the 1990 rate or a rate of 0.15 lb/mmBTU.

The NO_x rates identified above are for coal units; gas units were limited to 0.20 lb/mmBTU except at level 3 where the limit was 0.15 lb/mmBTU. There were no divisions of level 2 for other sectors. For other point and area sources, control levels were generally based on emissions rate, each level becoming more stringent. Non-road mobile source control measures included federal engine standards for non-road sources, including locomotives, and limitations on emissions resulting from use of fuel reformulation. On-road mobile source controls included the national low emission vehicle (NLEV) beginning at level 0 and high-enhanced vehicle inspection and maintenance (E I/M) beginning at level 1.

3.1.5 UAM Simulations With OTAG Boundary Conditions Addressing Transport

With the conclusion of the OTAG analysis in 1997, the ORC carried out the modeling analysis only for July 18-20, 1991 episode. The base case was performed with wind fields obtained from the Diagnostic Wind Model (DWM) and spatially varying mixing heights obtained from MIXEMUP. Delaware, Pennsylvania and New Jersey furnished the ORC with 2005 projected emissions data, and data for Maryland and New York were derived from the OTAG. EPA interim 2005 baseline emissions estimates were

also used in the simulations. The state supplied projected emissions have the CAAA controls, control strategies from the 15% Plan, and any other known national, regional and local controls. The biogenic emissions were estimated by the OCC using the BEIS1 model. The control strategies used in Delaware's attainment demonstration are listed in Table 6.

TABLE 6

DELAWARE'S CONTROL MEASURES IN ATTAINMENT DEMONSTRATION

POINT SOURCE CONTROLS
RACT IN KENT COUNTY
Solvent Metal Cleaning
Surface Coating of Metal Furniture
Leaks from Synthetic Organic Chemical, Polymer, and Resin Manufacturing Equipment Creditable
DELAWARE RACT REGULATIONS
Bulk Gasoline Marine Tank Vessel Loading
SOCMI Reactor Processes and Distillation
Batch Processing Operations
Offset Lithography
Aerospace Coatings
Industrial Cleaning Solvents
Non-CTG RACT
Delaware NO _x RACT
REGIONAL CONTROLS
Regional NO _x MOU
FEDERAL RULES
Benzene Waste Rule
OTHER DELAWARE REGULATIONS
Sanitary Landfills
Irreversible Process Changes
STATIONARY AREA SOURCE CONTROLS
RACT "CATCH-UPS" IN KENT COUNTY
Solvent Metal Cleaning
Cutback Asphalt
DELAWARE RACT REGULATIONS
Stage I Vapor Recovery- Gasoline Dispensing Facilities
Emulsified Asphalt
Motor Vehicle Refinishing
Offset Lithography
Aerospace Coatings
Stage II Vapor Recovery Systems
OTHER DELAWARE REGULATIONS
Open Burning
FEDERAL RULES
AIM Coatings
Consumer and Commercial Solvents
OFF-ROAD MOBILE SOURCE CONTROLS
Reformulated Gasoline
New Emissions Standards for Spark Ignition Engines
New Emissions Standards for Compression Ignition Engines
New Emissions Standards for Marine Engines
New Emissions Standards for Locomotive Engines
ON-ROAD MOBILE SOURCE CONTROLS
FMVCP and RVP
Tier I Vehicle Emissions Standards
a. Basic I/M in Kent County
b. ATP and Pressure Test in Kent County
ATP and Pressure Test in New Castle County
Reformulated Fuel
LEV Program

Boundary conditions were obtained from the ROM 2005 Base Case that corresponds to the OTC-2005 Base Case, ROM 2005 Strategy E that corresponds to the OTC Strategy Run E, UAM 2007 Base1C that corresponds to the OTAG 2007 Base1C simulation, and UAM 2007 Sensitivity 2 that corresponds to the OTAG Sensitivity Simulation 2 with level 3 controls applied to all sources.

Simulations were performed with UAM-IV and OTAG boundary conditions as listed in Table 7 with EPA interim and State projected emissions inventories. As can be seen in the Table 7, simulations were also performed for zero anthropogenic emissions maintaining the biogenic emissions at the same level.

**TABLE 7
BOUNDARY CONDITIONS IN ATTAINMENT DEMON**

BOUNDARY CONDITIONS	EMISSIONS T ₁	
	EPA INTERIM 2005	STATE 2005
UAM 2007 Base1C	X	X
UAM 2007 Sensitivity 2	X	X
ROM 2005 Base Case	X	X
ROM 2005 Strategy E	X	X

UAM simulations were performed for a suite of emissions inputs and boundary conditions. The results of the simulations are illustrated in Tables 8 and 9.

**TABLE 8
RESULTS OF UAM-IV SIMULATIONS FOR JULY**

BOUNDARY CONDITIONS	EMISSIONS INVENTORY	MAX 1-HR OZONE (ppb)	PE
UAM-V 2007 Base1C	Interim 2005	173.1	
	State 2005	153.0	
	Zero Anthropogenic	99.9	
UAM-V 2007 Run 2	Interim 2005	168.8	
	State 2005	149.5	
	Zero Anthropogenic	88.5	
ROM 2005 Base	Interim 2005	156.5	
	State 2005	138.6	
	Zero Anthropogenic	107.8	
ROM 2005 Strategy E	Interim 2005	155.6	
	State 2005	137.6	
	Zero Anthropogenic	104.9	

TABLE 9
RESULTS OF UAM-IV SIMULATIONS FOR JULY 20, 1991

BOUNDARY CONDITIONS	EMISSIONS INVENTORY	MI	
		MAX 1-HR OZONE (ppb)	PERSISTENT NCI
UAM-V 2007 Base1C	Interim 2005	167.3	189
	State 2005	159.8	192
	Zero Anthropogenic	150.0	166
UAM-V 2007 Run 2	Interim 2005	158.4	90
	State 2005	149.7	83
	Zero Anthropogenic	129.7	1
ROM 2005 Base	Interim 2005	160.8	157
	State 2005	158.1	149
	Zero Anthropogenic	150.6	13
ROM 2005 Strategy E	Interim 2005	151.6	98
	State 2005	149.3	90
	Zero Anthropogenic	141.4	6

Daily Maximum Ozone Concentration Plots

Figures 10-25 illustrate the results of UAM through IV simulations performed with:

- (a) EPA Interim 2005 Inventories
- (b) State 2005 Inventories
- (c) Zero Anthropogenic Emissions in the Domain
- (d) Difference Plots of Daily Maxima of (a) - (b)

UAM Simulations for July 19, 1991 Episode

Figures 10 and 11 illustrate the results of simulations for boundary conditions from OTAG's base case with the interim inventory and state emissions data projected to 2005. Figures 12 and 13 illustrate the results of simulations for OTAG boundary conditions from Run2 with the interim inventory and state emissions data projected to 2005. Figures 14 and 15 illustrate the results of simulations for boundary conditions from ROM-2005 base case with the interim inventory and state emissions data projected to 2005. Figures 16 and 17 illustrate the results of simulations for boundary conditions from ROM-2005 Control Strategy E with the interim inventory and state emissions data projected to 2005. All of these simulations show Delaware in attainment of the 1-hour ozone standard.

UAM Simulations for July 20, 1991 Episode

Figures 18 and 19 illustrate the results of simulations for boundary conditions from OTAG's base case with the interim inventory and state emissions data projected to 2005. Figures 20 and 21 illustrate the results of simulations for OTAG boundary conditions from Run2 with the interim inventory and state emissions data projected to 2005. Figures 22 and 23 illustrate the results of simulations for boundary conditions from ROM-2005 base case with the interim inventory and state emissions data projected to 2005. Figures 24 and 25 illustrate the results of simulations for boundary conditions from ROM-2005 Control Strategy E with the interim inventory and state emissions data projected to 2005.

Simulation results illustrated in Figures 18 and 19 with boundary conditions from the OTAG base case are of little significance as the OTAG base case does not take into consideration all the regional controls that mitigate the impact of transported ozone into Philadelphia CMSA. Results illustrated in Figures 20 and 21 with boundary conditions from OTAG Run2 are of importance for the attainment demonstration. As can be seen in these figures, Delaware is showing attainment of the 1-hour ozone standard. Figures 22 through 25 illustrate the simulation results for boundary conditions derived from the ROM base case and control strategy E. As the ROM boundary conditions do not address sufficiently the issues related to transported ozone, the results from these simulations are of little significance.

[insert Figure 10]
 [insert Figure 11]
 [insert Figure 12]
 [insert Figure 13]
 [insert Figure 14]
 [insert Figure 15]
 [insert Figure 16]
 [insert Figure 17]
 [insert Figure 18]
 [insert Figure 19]
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 [insert Figure 24]
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3.2 OZONE AIR QUALITY MONITORING AND TRENDS

3.2.1 Air Quality Monitoring in Philadelphia CMSA

The design value of the nonattainment area determines whether or not the area is in attainment. It is the fourth highest 1-hour averaged measured ozone concentrations over a period of three years. The criteria for attainment is that the average number of 1-hour exceedances of the standard over a three year period be less than or equal to one. This means that the nonattainment area is allowed three exceedances over a three year period. The criteria for attaining the standard is 124 ppb of ozone whereas the standard is set at 120 ppb.

The monitoring data for the Philadelphia CMSA show that the ozone concentrations have declined over the 1974-1997 period. Also ozone concentrations at the individual monitors within the Philadelphia CMSA have declined over the 1974-97 period. In spite of some hot summers, the overall downward trend in the Philadelphia CMSA seems to continue. The monitoring data seem to indicate that emission reduction programs have been effective and made substantial progress in lessening the extent and severity of ozone concentrations across the Philadelphia CMSA. The maximum design values for the Philadelphia CMSA are illustrated in Figure 26.

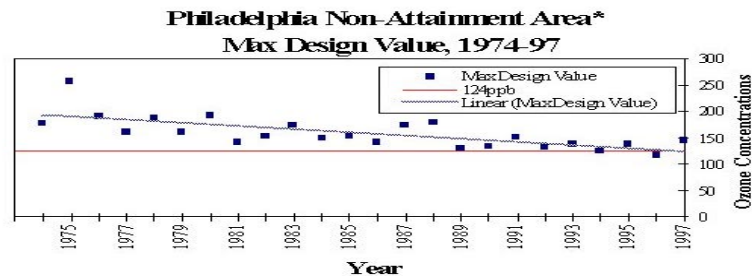


Figure 26. Philadelphia CMSA Maximum Design Values and Fitted Line, 1974-97
 *Note: Does not include Fairhill, MD

3.2.2 History of Ozone Exceedances

The number of days exceeding the ozone standard for Kent and New Castle Counties are depicted in Figure 27 for the period 1982-1997. As seen in the Figure, the exceptional hot summers of 1983 and 1988 produced the highest ozone levels and number of exceedances. Even with a very effective emission control program, it is difficult to avoid exceedances during the summers of extreme heat.

PROPOSED REGULATIONS

The stochastic and seasonal variations in the ozone monitoring data make it difficult to assess the effectiveness of control strategies. Therefore, in order to determine the ozone trends, there is a need to separate meteorological influences from the monitored data. The Department has begun such a study of trends in long-term ozone monitoring data using statistical smoothing techniques. The study is complex, encompassing all domain-wide monitoring data, and will take several months to complete and determine the impact of meteorological fluctuations on the ambient ozone levels.

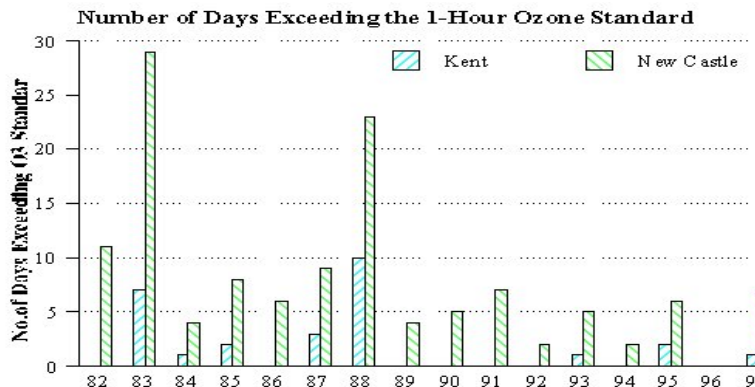


Figure 27. Number of Days Exceeding the 1-Hour Ozone Standard in Kent and New Castle Counties.

3.2.3 Trends in Ozone Monitored Data in Kent And New Castle Counties

Here we provide a much simpler trend analysis focusing on Delaware only. The fourth high one-hour ozone concentrations for monitors in Kent, New Castle and Sussex Counties are plotted and shown in Figures 28, 29, and 30, respectively. A downward trend in ozone concentrations can be seen in these two figures. The poor correlation seen in Figures 29 and 30 is due to the meteorological influences.

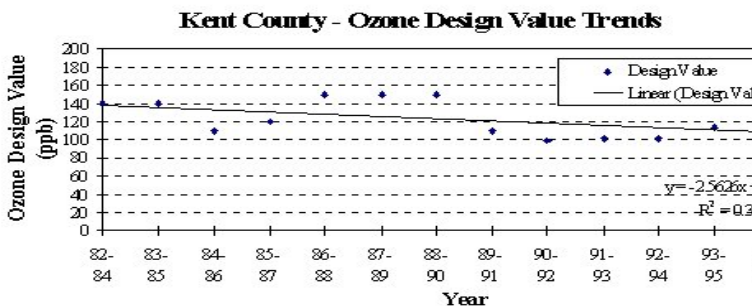


Figure 28. Kent County - Ozone Design Value Trends

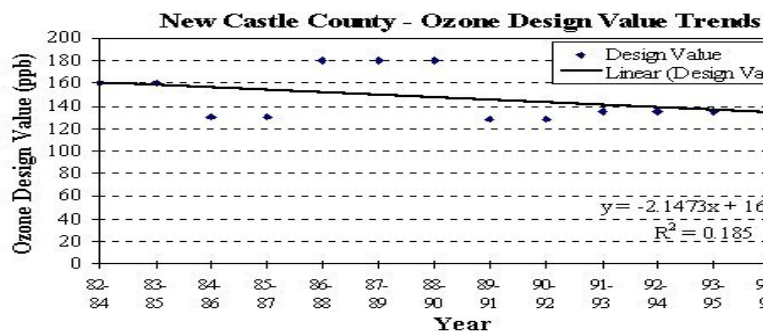


Figure 29. New Castle County - Ozone Design Value Trends

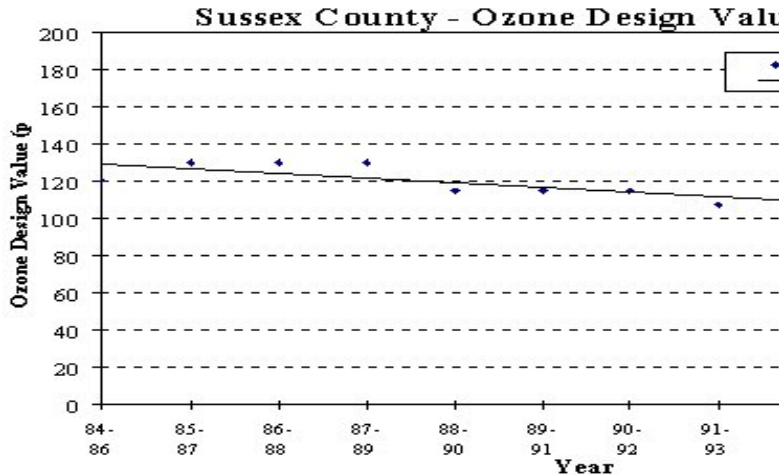


Figure 30. Sussex County - Ozone Design Value

3.3 ATTAINMENT DEMONSTRATION AND RELATED ISSUES

This section of the document demonstrates attainment of the one-hour ozone standard in Delaware based on the premise that UAM modeling available to date shows attainment of the one-hour ozone standard for all counties in Delaware. Also trends analysis of the ozone monitoring data shows significant improvement in the air quality not only in Delaware but also in the Philadelphia CMSA. Control measures resulting from NO_x SIP Call as a result of OTAG analysis further help the Philadelphia CMSA in progressing toward attainment and eventually maintenance of the 1-hour ozone standard in the CMSA. However, continued reliance on federal measures, including AIM coatings, consumer solvents, Tier II standards is necessary for progressing toward attainment of the 1-hour ozone standard.

3.3.1 Findings of OTAG Analysis

The purpose of the OTAG study is to assess the transport of ozone and its precursors and also to determine the air quality benefits from national and regional control measures. OTAG performed three types of modeling: (1) basecase modeling, to evaluate the performance of the model; (2) sensitivity modeling, to assess the response of the model to changes in ozone precursor emissions; and (3) strategy modeling, to estimate the air quality impact of specific control measures. State-of-the science models and data bases were used for simulating the physical and chemical processes involved in the formation and transport of ozone and precursor species over multi-day episodes and regional scales. OTAG chose four specific episodes for model simulations. These are: July 1-11, 1988; July 13-21, 1991; July 20-30, 1993; and July 7-18, 1995. During each episode, high ozone concentrations were observed in much of the eastern United States. Each of the episodes represent somewhat different characteristics in terms of transport and spatial extent of ozone concentrations. The 1988 and 1995 episodes featured high ozone concentrations in the Northeast, Midwest, and Southeast with wind regimes that provided the meteorological potential for intra- and inter-regional transport.

OTAG selected UAM-V, the state-of-science computer-based ozone model for the simulations. The model simulated ozone concentrations based on information about ozone precursor emissions, weather conditions, and relevant atmospheric and chemical processes. The modeling region covered most of the eastern half of the United States (from Texas to the Dakotas and from Maine to Florida), see Figure 3, and was large enough to capture the weather systems and include all possible source areas. Model grid resolution (12-km grid cells) was adequate to provide a reasonable representation of ozone concentrations on a regional scale and the response in ozone concentrations due to VOC and NO_x emissions reductions.

The findings of the OTAG modeling are as follows:¹⁶

- Basecase modeling showed reasonably good agreement between simulated and observed surface ozone concentrations, with no large positive or negative biases. However, based on limited aircraft measurements, the model underestimated

observed ozone concentrations aloft, which suggests that the model may be underestimating transport.

- NO_x emissions reductions are more effective than VOC emissions reductions in lowering ozone concentrations on a regional scale; NO_x reductions decrease ozone domainwide, while VOC reductions decrease ozone only in urban areas.
- Both elevated and low-level NO_x emissions reductions are effective in lowering ozone concentrations on a regional scale.
- More NO_x emissions reductions result in more ozone benefits.
- Regional NO_x emissions reductions due to the CAAA controls, as well as possible OTAG controls, will reduce ozone and ozone precursors on a regional scale but may not be sufficient to provide for attainment of the 1-hour ozone standard throughout the eastern United States.
- Ozone reductions in a given region are most influenced by emissions reductions in that same region but are also influenced by emissions reductions in upwind regions.
- There are several different scales of transport: inter-city, inter-state, and inter-regional. Spatial scales are farther in the North than in the South.
- The magnitude and spatial extent of the 8-hour concentration differences are similar to 1-hour concentration differences. This suggests that a regional strategies designed to help a 1-hour standard will also help meet an 8-hour standard.

The UAM simulation results of the Philadelphia CMSA with OTAG boundary conditions are already presented in the foregoing. Its worth looking at the results of OTAG simulations, particularly the peak ozone plots for strategy run 2. The results of the simulations are illustrated for July 1991, July 1993 and July 1995 episodes in Figures 31-32, 33-35, and 36, respectively. As can be seen in these figures, the OTAG runs show Delaware in attainment, although other parts of the Philadelphia CMSA do not show attainment. This information is consistent with our hypothesis that the Delaware portion of the Philadelphia CMSA can demonstrate attainment of the 1-hour ozone standard.

3.3.2 Additional Findings of UAM Modeling For Philadelphia CMSA

As already mentioned in the foregoing, the UAM-IV simulations performed with the OTAG boundary conditions for the July 1991 episode for the Philadelphia CMSA confirm that OTAG controls will not be sufficient to achieve the 1-hour ozone standard in the Philadelphia CMSA. In other words additional reductions both upwind and within the modeling domain are necessary for attaining the standard in the CMSA.

UAM sensitivity simulations were also performed for the modeling domain of Philadelphia CMSA¹⁷ with ROM initial and boundary conditions from ROM simulations. The ozone episode considered for this study was July 6-8, 1988, which was characterized by high ozone levels throughout the northeastern part of the United States, and the observed ozone maximum within the domain was 210 ppb on both July 7 and 8. From performance evaluation studies of different base cases, a combination of wind fields from the Diagnostic Wind Model and spatially varying mixing heights from the MIXEMUP algorithm was chosen for use. For this study, two sets of emissions inputs, the EPA 1988 interim emissions inventories and 1990 state base year emissions inventories backcasted to 1988, were used. Contour plots of daily maximum ozone concentrations for the basecase simulations of July 7 and 8, 1988 show the ozone plumes to be located around the areas of northwest of Philadelphia and north of New York City. In order to gain understanding of the problem, the modeling domain was divided into four subdomains, and the effects of NO_x vs. VOC reductions were further examined separately for each subdomain.

Subdomains 2 and 3 are centered around major metropolitan areas while subdomains 1 and 4 contain mostly suburban and rural areas. Northeastern Pennsylvania is included in subdomain 1, while northern New Jersey, New York City, and a part of New York state north of the city are included in subdomain 2. Most of the southeastern Pennsylvania, parts of Maryland, and Delaware

are included in subdomain 3, and subdomain 4 contains the southern half of New Jersey.

The findings of the analysis for the domain and subdomains are as follows:

- There is significant transport of both ozone and precursors from the southern and western boundaries of the domain.
- Ozone predictions from the ROM Matrix simulations for the domain show that both VOC and NO_x reductions tend to uniformly decrease the domain-wide ozone maxima.
- VOC reductions are effective in reducing exposures to higher concentration levels, while NO_x reductions become effective when a lower target level (i.e., 80 ppb) is set.
- NO_x reductions in subdomain 2 appear counter-beneficial in reducing peak ozone concentrations.
- In subdomain 3, at all levels of VOC reductions, reductions in NO_x tend to uniformly decrease the maximum ozone.
- Subdomains 1, 3, and 4 show uniform reductions in peak ozone predictions for all levels of NO_x and VOC reductions.
- The magnitudes of peak ozone predictions are lower in the rural subdomains than in the urban portions.
- NO_x controls localize the ozone maxima while VOC controls tend to uniformly reduce the maxima levels.

The findings of this analysis are directionally consistent with those of the OTAG analysis. Therefore, the VOC and NO_x emissions reductions in Delaware should be accelerating the attainment of the 1-hour ozone standard of the Philadelphia CMSA.

3.3.3 EPA's NO_x SIP Call

Based on Section 110 of the CAAA, the EPA¹⁸ proposed a NO_x SIP Call for 22 states and District of Columbia on November 3, 1997. The SIP Call ensures that the NO_x emissions reductions are achieved from the affected States in order to mitigate transport of ozone and NO_x across state boundaries in the eastern half of the United States. In the SIP Call, EPA proposed appropriate levels of NO_x emissions that each of the affected States will be required to achieve. Therefore, each affected state will be required to reduce NO_x emissions to levels specified in the SIP Call. The SIP Call requires the affected States to implement necessary controls by September 2002. However, EPA is soliciting comments on the range of implementation dates from September 2002 and September 2004. The SIP Call also requires that the mandated budgets be met by the end of year 2007, by which time additional reductions from various federal measures will also be achieved. The EPA believes that requiring implementation of the upwind controls, and thereby mandating upwind reductions, by no later than these 2002-2004 dates, is consistent with the attainment schedule for the downwind areas. Because the downwind areas depend on upwind reductions to reach attainment, mandating upwind controls on a schedule consistent with downwind attainment requirement is appropriate. Within 12 months after publication of rulemaking, States, including Delaware, will be required to adopt and submit SIPs explaining how they will meet the set statewide emissions budget in order to mitigate the ozone transport problem.

3.3.4 Provisions of Section 182(j) of the CAAA

Kent and New Castle Counties of Delaware are part of the Philadelphia-Wilmington-Trenton severe ozone nonattainment area, and therefore, part of a multi-state ozone nonattainment area. As discussed in the foregoing, Delaware is able to demonstrate attainment of the 1-hour ozone standard for its part of the multi-state nonattainment area, but fails to demonstrate attainment of the whole regulatory domain. Therefore, under the provisions of section 182(j) of the CAAA, the Department is hereby petitioning the EPA Administrator to make a finding that Delaware would have been able to demonstrate attainment of the whole CMSA but for the failure of other States in the CMSA to implement all measures required under section 182. Such a finding would exempt Delaware from the provisions of Section 179 relating to sanctions.

3.3.5 Delaware's Commitments and Recommendations for Continued Support of Federal Measures

PROPOSED REGULATIONS

As already mentioned in the foregoing, Delaware provided demonstration of attainment of the 1-hour ozone standard for its portion of the Philadelphia CMSA; however, Delaware could not provide attainment of the standard for the whole CMSA. The Department believes that Delaware will have to commit to additional control measures to mitigate the transport of ozone and its precursors to its downwind area in the CMSA, thereby helping the attainment of the standard in the CMSA. The NO_x emissions reductions resulting from the 110 SIP Call, and any additional VOC and NO_x emissions reductions as a result of commitments from rest of the CMSA will help the CMSA progress toward the attainment of the standard.

The Department believes more upwind reductions coupled with reductions in the Philadelphia CMSA will help attain the 1-hour ozone standard of the CMSA. The Department also believes that continued support of federal measures is critical in attaining the standard. The Department commits to certain control measures, as determined necessary to attain the standard in the CMSA. These measures are listed in Table 10.

TABLE 10
DELAWARE'S COMMITMENTS FOR ATTAINING THE OZONE STANDARD IN THE PHILADELPHIA CMSA

CONTROL MEASURES
Rule effectiveness improvements
Development of VOC cap/reduce program from large point sources
Implementation of high-enhanced inspection and maintenance program
Expansion of regional NO _x MOU universe

The Department believes that continued support of the federal measures is critical for attainment of the 1-hour ozone standard in the Philadelphia CMSA, and it encourages, besides the measures proposed for OTAG Modeling RUN 2, support of the following federal measures.

TABLE 11
FEDERAL MEASURES TO HELP ATTAIN THE OZONE STANDARD IN THE PHILADELPHIA CMSA

FEDERAL MEASURES
Tier II tailpipe emissions standards with stringency beyond U.S. EPA standards
National open burning ban during the peak ozone season
Stringent standards for architectural and maintenance (AIM) coatings
Stringent standards for consumer/commercial products
Stringent standards for autobody refinishing
Stringent standards for phase II reformulated gasoline (RFG)
Stringent standards for phase II small engines
Stringent standards for marine engines
Stringent standards for heavy duty highway vehicles
Stringent standards for non-road diesel engines
Stringent standards for locomotives

3.3.6 Conclusion

The Department successfully demonstrated that Delaware could demonstrate attainment of the 1-hour ozone standard for its nonattainment portion of the Philadelphia CMSA for the July 1991 episode. The OTAG run 2 modeling results for the July 1991, July 1993 and July 1995 episodes demonstrate that Delaware will be in attainment of the 1-hour ozone standard. The trends analysis of the ozone monitoring data show a downward trend of the ozone concentrations for all monitoring stations in the state. Improvements of ozone air quality are observed from all monitoring stations in the Philadelphia CMSA. The Department recognizes that more upwind emissions reductions coupled with reductions within the modeling domain will demonstrate attainment of the 1-hour ozone standard for the Philadelphia CMSA. Control measures resulting from the NO_x SIP Call are critical for the Philadelphia CMSA in progressing toward the attainment and eventually maintenance of the 1-hour ozone standard in the CMSA. The Department commits to several control measures, as determined necessary, to help other nonattainment areas in the Philadelphia CMSA in progressing toward attainment of the ozone standard. The Department believes that continued support of federal measures, including stringent Tier II tailpipe emissions standards, is critical in demonstrating attainment of the standard for the Philadelphia CMSA. Finally, the Department is petitioning under Section 182(j) of the CAAA

to obtain an exemption from the sanction provisions of Section 179 of the CAAA.

¹ Federal Clean Air Act, 42 U.S.C.A. '7401 *et seq.*, as amended by the Clean Air Act Amendments of 1990, P.L. 101-549, November 15, 1990

² Ozone Attainment Demonstrations, Mary D. Nichols, Assistant Administrator for Air and Radiation, U.S. EPA, Washington, D.C. 20460, March 02, 1995.

³ EOHSI is a joint venture of Rutgers, the State University of New Jersey and the University of Medicine and Dentistry, New Jersey.

⁴ *Guidance for Implementing the 1-Hour Ozone and Pre-Existing PM₁₀ NAAQS*, with an attached memo from Richard D. Wilson, Acting Assistant Administrator for Air and Radiation, December 23, 1997.

⁵ The core parts of the OTAG domain consists of the following states: Alabama, Connecticut, District of Columbia, Delaware, Georgia, Illinois, Indiana, Kentucky, Maine, Massachusetts, Maryland, Michigan, Missouri, North Carolina, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, Wisconsin, West Virginia.

⁶ *The Delaware 15 Percent Rate-of-Progress Plan*, Delaware Department of Natural Resources and Environmental Control in Conjunction with Delaware Department of Transportation, Dover, Delaware, February, 1995.

⁷ *The Delaware 1999 Rate-of-Progress Plan for Kent and New Castle Counties*, Delaware Department of Natural Resources and Environmental Control in Conjunction with Delaware Department of Transportation, Dover, Delaware, December, 1997.

⁸ *Delaware Air Pollution Control Regulation 37: NO_x Budget Program*. Delaware Department of Natural Resources and Environmental Control, Dover, Delaware, December 18, 1997.

⁹ *I/M Briefing Book*, EPA-AA-EPSP-IM-94-1226, Office of Air and Radiation, U.S. EPA, Washington, DC, February, 1995.

¹⁰ Ozone SIP Modeling Technical Support Documentation Summary for the New Jersey--Philadelphia CMSA Area, Ozone Research Center Technical ORC-TR9502, EOHSI, April 1995.

¹¹ Guideline for Regulatory Application of the Urban Airshed Model, EPA-450/4-91-013, EPA, 1991.

¹² Guidance on the use of Modeled Results to Demonstrate Attainment of the Ozone NAAQS, EPA-454/B-95-007, EP, June 1996.

¹³ Cox, W.M. and S. Chu (1993), Meteorologically adjusted Ozone Trends in Urban Areas: A Probabilistic Approach, *Atmospheric Environment*, 27B, (4), pp.425-434.

¹⁴ Cox, W.M. and S. Chu (1996), Assessment of Interannual Ozone Variation in Urban Areas from a Climatological Perspective, *Atmospheric Environment*, 30, pp.2615-2625.

¹⁵ OTAG, 1997: OTAG Draft Modeling Report, Regional and Urban Scale Modeling Workgroup, February 12, 1997.

¹⁶ Ozone Transport Assessment Group, Executive Report 1997

¹⁷ Georgopoulos, P.G., Arunachalam, S., and Wang S., Alternative Metrics for Assessing the Relative Effectiveness of NO_x and VOC Emission Reductions in Controlling Ground-Level Ozone, *Journal of Air & Waste Management Association*, Vol.47, pp.838-850, August 1997.

¹⁸ EPA, 40 CFR Part 52: Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone.

PROPOSED REGULATIONS

DEPARTMENT OF ADMINISTRATIVE SERVICES

DIVISION OF PROFESSIONAL REGULATION

BOARD OF EXAMINERS OF PRIVATE INVESTIGATORS & PRIVATE SECURITY AGENCIES

Statutory Authority: 24 Delaware Code,
Section 1304(b)(3) (24 Del.C. 1304(b)(3))

Notice is hereby given that the Board of Examiners of Private Investigators and Private Security Agencies, in accordance with Del. Code Title 24 chapter 13 proposes to amend Adopted Rules 11/04/1994-1 - Firearm's Policy; 11/04/1994-3 - Personnel Rosters and Job Assignments; 11/04/1994-5 - Uniforms, Patches, Badges, Seals, Vehicular Markings; and to adopt Rule 04/23/1998-11 - Use Of Animals. Any persons wishing to present views may either submit them in writing or attend a public hearing scheduled for 10:00am on Thursday, April 23, 1998 at the Delaware State Police Headquarters Conference Room, 1441 North DuPont Highway in Dover, Delaware.

11/04/1994-1 - FIREARM'S POLICY

No person licensed under Title 24 Chapter 13 Sections 1315 & 1317 shall carry a firearm unless that person has first passed an approved firearms course given by a Board approved certified firearms instructor, which shall include a minimum 40 hour course of instruction. Individuals licensed to carry a firearm must certify at least three (3) times a year by a Board approved certified firearms instructor shoot a minimum of three (3) qualifying shoots per year, scheduled on at least two (2) separate days, with a recommended 90 days between scheduled shoots. Of these three, there will be one (1) mandatory "low light" shoot. Simulation is permitted and it may be combined with a daylight shoot.

A. Firearms - approved type of weapons

1. 9mm
2. .357
3. .38

B. All weapons must be either a revolver or semi-automatic and must be double-action or double-action only and must be maintained to factory specifications.

C. Under no circumstances will anyone be allowed to carry any type of shotgun or rifle or any type of weapon that is not described herein.

D. All individuals must qualify with the same type of weapon that he/she will carry.

E. All ammunition will be factory fresh (i.e. no reloads), no hot loads). Ammunition will be P or +P, no +P+ ammunition.

F. The minimum passing score is 75%. All licenses are valid for a period of one (1) year.

11/04/1994-2 - NIGHTSTICK, PR24, MACE, PEPPER GAS AND HANDCUFFS

To carry the above weapons/items a security guard must have completed a training program on each and every weapon/item carried, taught by a certified instructor representing the manufacturer of the weapon/item. Proof of these certifications must be provided to the Director of the Board of Examiners. Under no circumstances would a person be permitted to carry any other type weapon/item, unless first approved by the Director of the Board of Examiners.

11/04/1994-3 - PERSONNEL ROSTERS AND JOB ASSIGNMENTS

Anyone licensed under Title 24 Chapter 13 shall submit an alphabetical personnel roster and a job assignment site list to the director of the Detective Licensing Unit Section by the first tenth of every month. Alphabetical personnel rosters shall include the full name, DOB, race, sex, expiration date, and position code of each individual in your employ. For example:

Mark A. Smith	01/25/60	W	M	01/25/99	SG
Helen E. White	03/17/71	B	F	03/17/00	FA
John F. Henry	05/23/43	B	M	05/23/00	PI
James D. Williams	12/03/40	W	M	06/30/99	MG
Frank G. Montgomery	07/24/55	B	M	06/30/99	LH
Anne L. Murray	10/20/40	W	F	06/30/99	CO

SG	Security Guard
FA	Firearm's
PI	Private Investigator
MG	Delaware Manager
LH	License Holder
CO	Corporate Officer

Job assignment site lists shall include the name, address, and location, that each employee is assigned to work and the hours of coverage. For example:

The DuPont Site Industry
Barley Mill Road
2200 - 0600 Hours, Monday, Wednesday, and Friday

11/04/1994-4 - RECORD BOOK; RIGHT OF INSPECTION

All persons licensed under Title 24 Chapter 13 shall keep and maintain at their place of business, at all times, a book that shall contain the names and positions of all employees along with the location that each employee is assigned to work. This book shall contain all current personnel information and at all times shall be current and up-to-date to include the list of weapons/items each employee is qualified to carry, the certification dates, scores and the serial number of the weapon/item, if applicable.

11/04/1994-5 - UNIFORMS, PATCHES, BADGES, SEALS, VEHICULAR MARKINGS AMENDED 04/17/97

No person licensed under Title 24 Chapter 13 shall wear or display any uniform, patch, or badge unless first approved by the Board of Examiners. The use of "patrol" and/or "officer" on any type of uniform, patch, badge, seal, vehicular marking or any type of advertisement shall first be preceded by the word "security". Under no circumstances shall a uniform, patch, badge, seal, vehicular marking, letterhead, business card or any type of advertisement contain the seal or crest of the State of Delaware, any state of the United States, the seal or crest of any county or local sub division, or any facsimile of the aforementioned seals or crests.

A. Advertisement and other forms of publications:

No letterhead, business card, advertisement, or other form of publication including but not limited to uniforms, patches, badges, seals, vehicular markings and similar items may be used or displayed unless first approved by the Board of Examiners. No such items will be approved by the Board if the item will mislead the public by confusing the licensee and/or his/her employees with official law enforcement agencies and/or personnel.

All uniforms displaying a patch must contain an approved patch that is not generic in nature. The patch must have the name of the agency printed on it.

Auxiliary lights on vehicles, used for patrol, shall be amber and/or clear only. Use of sirens is prohibited.

11/04/1994-6 - QUALIFIED MANAGER

A qualified manager cannot be employed by more than one company at the same time. For example; a person cannot serve as a qualified manager for two separate private security agencies and/or private investigative agencies.

11/04/1994-7 - EMPLOYMENT NOTIFICATION

It shall be the responsibility of each person licensed as a security guard under Title 24 Chapter 13 to notify the Director of the Board of Examiners, in writing within 24 hours, if such person is terminated or leaves one agency for employment with another or works for more than one security guard agency. Under no circumstances will a security guard be permitted to be employed by more than two agencies at a time. It is also the responsibility for each licensed security guard to advise his/her employer(s) of whom he/she is employed with (i.e. If a security guard is employed with two security guard agencies, both employers must be made aware of this fact as well as the Director of the Board of Examiners.)

A. Employers Responsibility

A license holder of a private security agency shall notify the Director within 24 hours, if an employee is terminated and/or ceases employment.

11/04/1994-8 - CRIMINAL OFFENSES

In addition to those qualifications set forth in Title 24 Chapter 13 Section 1314, no person required to be licensed under this chapter shall be issued a license, if that person has been convicted of Assault III or Offensive Touching misdemeanor within the last three (3) years.

11/04/1994-9 - PRIVATE INVESTIGATORS

A. A Private Investigator must not be a member or employee of any Law Enforcement Organization, as defined by the Council on Police Training.

B. At the time of processing, a Private Investigator must provide proof of employment by a licensed Private Investigative Agency with the Private Investigator application signed by the employer. The identification card will bear the employer's name. Upon termination of employment, the identification card is no longer valid. If seeking employment with another licensed agency, the Private Investigator must be re-licensed with the new employer and a new identification card will be issued as in the previous procedure.

C. A licensed Private Investigator may only be employed by one licensed private investigative agency at a time.

11/04/1994-10 - LICENSING FEES**A. Class A License - Private Investigative Agency In-State License Holder**

Individual - No Employees - Not Corporation
\$230 for 2 years to expire June 30th of odd

years	\$520 for 2 years to expire June 30th of odd years
\$5,000 Bond	\$15,000 Bond
\$1,000,000 Liability Insurance per occurrence	\$1,000,000 Liability Insurance per occurrence
Corporation - Has Employees	
\$345 for 2 years to expire June 30th of odd years	Office Manager
\$10,000 Bond	\$345 for 2 years to expire June 30th of odd years
\$1,000,000 Liability Insurance per occurrence	\$10,000 Bond
License Holder	
\$345 for 2 years to expire June 30th of odd years	D. Class D License - Armored Car Agency License
	License Holder
Out-of-State	Corporation - Has Employees
Individual and Corporation	\$345 for 2 years to expire June 30th of odd years
\$10,000 Bond	Banking Commissioner License
\$1,000,000 Liability Insurance per occurrence	Title 5 Chapter 32 Section 3203
Office Manager	
\$230 for 2 years to expire June 30th of odd years	<u>04/23/1998-11 - Use Of Animals</u>
\$5,000 Bond	
	<u>The use of animals is prohibited in the performance of private security activities.</u>
B. Class B License - Private Security Agency	
In-State License Holder	
Individual - No Employees - Not Corporation	
\$230 for 2 years to expire June 30th of odd years	
\$5,000 Bond	
\$1,000,000 Liability Insurance per occurrence	
Corporation - Has Employees	
\$345 for 2 years to expire June 30th of odd years	
\$10,000 Bond	
\$1,000,000 Liability Insurance per occurrence	
\$10,000 Bond	
\$1,000,000 Liability Insurance per occurrence	
Office Manager	
\$230 for 2 years to expire June 30th of odd years	
Individual and Corporation	
Out-of-State	
License Holder	
\$345 for 2 years to expire June 30th of odd years	
\$5,000 Bond	
C. Class C License - Private Investigative & Private Security Agency	
In-State License Holder	
Individual - No Employees - Not Corporation	
\$345 for 2 years to expire June 30th of odd years	
\$10,000 Bond	
\$1,000,000 Liability Insurance per occurrence	
Corporation - Has Employees	
\$520 for 2 years to expire June 30th of odd years	
\$15,000 Bond	
\$1,000,000 Liability Insurance per occurrence	
Out-of-State	
Individual and Corporation	
License Holder	

Symbol Key

Roman type indicates the text existing prior to the regulation being promulgated. Underlined text indicates new text added at the time of the proposed action. Language which is ~~stricken~~ through indicates text being deleted. [**Bracketed Bold language**] indicates text added at the time the final order was issued. [~~Bracketed-stricken through~~] indicates language deleted at the time the final order was issued.

Final Regulations

The opportunity for public comment shall be held open for a minimum of 30 days after the proposal is published in the Register of Regulations. At the conclusion of all hearings and after receipt within the time allowed of all written materials, upon all the testimonial and written evidence and information submitted, together with summaries of the evidence and information by subordinates, the agency shall determine whether a regulation should be adopted, amended or repealed and shall issue its conclusion in an order which shall include: (1) A brief summary of the evidence and information submitted; (2) A brief summary of its findings of fact with respect to the evidence and information, except where a rule of procedure is being adopted or amended; (3) A decision to adopt, amend or repeal a regulation or to take no action and the decision shall be supported by its findings on the evidence and information received; (4) The exact text and citation of such regulation adopted, amended or repealed; (5) The effective date of the order; (6) Any other findings or conclusions required by the law under which the agency has authority to act; and (7) The signature of at least a quorum of the agency members.

The effective date of an order which adopts, amends or repeals a regulation shall be not less than 10 days from the date the order adopting, amending or repealing a regulation has been published in its final form in the Register of Regulations, unless such adoption, amendment or repeal qualifies as an emergency under §10119.

**DEPARTMENT OF
ADMINISTRATIVE SERVICES
DIVISION OF PROFESSIONAL REGULATION
BOARD OF VETERINARY MEDICINE**

Statutory Authority: 24 Delaware Code,
Section 3306(a)(1) (24 **Del.C.** 3306(a)(1))

ORDER

The Delaware Board of Veterinary Medicine (hereinafter "the Board"), after proper notice was given, held a hearing at 1:00 p.m. on January 20, 1998 in the Cannon Building, Silver Lake Boulevard, Dover, Delaware to receive public comment on the proposed revisions to the Rules and Regulations. There was no written comment received prior to the hearing, and no witnesses appeared at the hearing to present either written or verbal testimony regarding the revised Rules and Regulations.

The Board notes that the Rules and Regulations were revised to conform to the Final Report of the Sunset Committee.

The revised Rules and Regulations were proposed for adoption, and the Board received no written or verbal

comment. The Board, therefore, adopts the proposed Rules and Regulations without change. (A copy of the Rules and Regulations is attached.)

IT IS SO ORDERED this 10th day of March, 1998.

Dr. William C. Wade, President
Dr. Caroline Hughes
Mr. Louise Goorland
Dr. William F. Moffett
Ms. Peggy Swygert

DELAWARE STATE BOARD OF VETERINARY
MEDICINE

RULES AND REGULATIONS**Regulation I. Filing Date for Examinations**

A. An applicant taking examinations in the State of Delaware must have the completed application filed with the Board office ~~sixty (60) days prior to~~ nine weeks before the announced date of the examination as established by the testing service.

B. The examination will be given at least once annually on the date(s) established by the testing service.

Regulation II. Qualification for Licensure by Examination as a Veterinarian

A. Applicant shall file the following documents ~~sixty (60) days prior to the announced date of examination:~~

1. Completed application form obtained from the Board office.

2. ~~Two (2) letters of recommendation from veterinarians~~ Official transcript from an AVMA approved veterinary college or university or its equivalent (Educational Commission for Foreign Veterinary Graduates.

3. ~~Authenticated copy of applicant's veterinary college or university transcript or a notarized letter from the college dean verifying status of graduation~~ Letters of good standing from any other jurisdictions in which applicant is/or has been licensed.

4. ~~Graduates of foreign veterinary schools must submit a translated copy of their grades and course work toward their degree along with a copy of their diploma. These documents should be certified as true and correct copies. Graduates of foreign veterinary schools must also submit a letter from the AVMA verifying satisfactory completion of the ECFVG program~~ Official National Board Examination (NBE) and Clinical Competency Test (CCT) scores.

5. ~~Copy of license(s) issued to the applicant in other jurisdictions and certificate(s) of good standing from those jurisdictions. Check or money order payable to the "State of Delaware" for the amount prescribed by the Division of Professional Regulation~~

6. ~~Check or money order payable to the "State of Delaware" for the amount prescribed by the Division of Professional Regulation. This fee is not refundable and cannot be carried over to a future examination.~~

B. Only completed applications will be accepted. In case of incomplete applications, omissions will be noted to the applicant. Any information provided to the Board is subject to verification

Regulation III. Character of Examination -- National Board Examination and Clinical Competency Test

A. Examination for licensure to practice veterinary medicine in the State of Delaware shall consist of the National Board Examination ("NBE") and the Clinical Competency Test ("CCT").

1. Passing scores for the NBE and CCT shall be ~~1.5 standard deviation units (given as "z" scores) below~~

~~the average score for the criterion group~~ the score as recommended by the National Board Examination Committee.

Regulation IV. Licensure -- Renewal

A. All licenses are renewed biennially (every 2 years). A licensee may have his/her license renewed by submitting a renewal application to the Board by the renewal date and upon payment of the renewal fee prescribed by the Division of Professional Regulation along with evidence of completion of continuing education requirements. The failure of the Board to give, or the failure of the licensee to receive, notice of the expiration date of a license shall not prevent the license from becoming invalid after its expiration date.

B. All licensees must meet the continuing education requirements of ~~twelve (12) hours for each year of the biennial license--~~ a total of twenty-four (24) hours for two (2) years.

C. Any licensee who fails to renew his/her license by the renewal date may still renew his/her license during the one (1) year period immediately following the renewal date provided the licensee pay a ~~50%~~ late fee established by the Division of Professional Regulation in addition to the prescribed renewal fee.

Regulation V. Licenses, Certifications and Registrations -- Display

A. Each licensed veterinarian shall have posted or displayed at his/her office, in full view of clients, his/her Delaware license to practice veterinary medicine.

Regulation VI. Continuing Education

A. Any veterinarian (active or inactive) licensed to practice in the State of Delaware shall meet the following continuing education requirements to the satisfaction of the Board.

1. Twenty-four (24) hours of approved certified continuing education credits for the immediate two year period preceding each biennial license renewal date.

2. The number of credit hours shall be submitted to the Board with each biennial license renewal application on the proper reporting form supplied by the Board.

B. The Board may approve continuing education courses or sponsors upon written application ~~to the Board office~~ on Board supplied forms. In addition, the Board

may approve continuing education courses or sponsors on its own motion and may issue from time to time a list of accredited courses and sponsors it deems to meet the requirements set forth in subsection C of this Regulation. A list of accredited courses and sponsors will be kept in the Board's office.

~~C. Accreditation by the Board of continuing education courses will be based upon program content. Continuing education courses shall be directed toward improvement, advancement, and extension of professional skill and knowledge relating to the practice of veterinary medicine. The following organizations are approved for formal continuing education activities.~~

~~1. AVMA~~

~~2. AVMA accredited schools~~

~~3. Federal/State/County Associations~~

~~4. Correspondence and In-House: Compendium on continuing education for the practicing veterinarian; Internet; NOAH; VIN. This may be used to satisfy ½ of the continuing education requirement.~~

~~5. Other forms of CE as long as a Veterinary Board Certified Diplomat or Veterinary Board Qualified Presenter presents the activity and the activity is approved by the Delaware Board of Veterinary Medicine. This may be used to satisfy ½ of the continuing education requirement.~~

~~6. University course work consisting of post-graduate credits, subject to Board approval.~~

~~D. The Board may at any time re-evaluate an accredited course or sponsor and withdraw its approval of a previously accredited continuing education course or sponsor. Accreditation by the Board of continuing education courses will be based upon program content. Continuing education courses shall be directed toward improvement, advancement, and extension of professional skill and knowledge relating to the practice of veterinary medicine.~~

~~E. The Board may at any time re-evaluate an accredited course or sponsor and withdraw its approval of a previously accredited continuing education course or sponsor.~~

Regulation VII. Reciprocity

A. Applications for licensure by reciprocity shall be the same application used for licensure by examination and be subject to the same application requirements set forth in Regulation II.

DEPARTMENT OF FINANCE

DIVISION OF REVENUE

OFFICE OF THE STATE LOTTERY

Statutory Authority: 29 Delaware Code,
Section 4805(a), (a)(24)(f), (25) (29 **Del.C.** §§
4805(a), (a)(24)(f), (25))

ORDER

Pursuant to 29 Del. C. section 4805(a), the Delaware State Lottery Office hereby issues this Order adopting the proposed amendments to the previously promulgated Video Lottery Employee Organization and Lottery Employee Regulations. Following notice, the Lottery Office makes the following findings and conclusions:

SUMMARY OF EVIDENCE AND INFORMATION SUBMITTED

1. The Lottery Office posted public notice of the proposed Regulations in the Register of Regulations and in the News-Journal and Delaware State News. The Lottery Office proposed amendments to Regulation 3.2(4)(9)(12), Regulation 4.2(10)(ii), Regulation 4.2(13)(15)(17), and Regulation 6.1.

2. The Lottery Office received no written comments from the public concerning the proposed Regulations prior to the public hearing.

FINDINGS OF FACT

3. The public was given notice and an opportunity to provide the Lottery Office with comments in writing and by oral testimony on the amended regulations. The Lottery Office received no written comments from the public regarding the proposed amendments.

4. The proposed Regulations were required by the passage of House Bill No. 18 as amended by House Amendment No. 1, Del. Laws Volume 71, Chapter 184. Section 4805(a)(24)(f) of 29 Del. C. requires the Lottery Office to enact regulations for the registration of employee organizations and key employees. The legislation provided the Lottery Director with specific standards to review and assess the competency of employee organizations and key employees who wish to represent employees of a Delaware video lottery agent.

5. The proposed Regulations were promulgated by the Lottery Office in accord with its statutory duties and authority as set forth in 29 Del. C. section 4805(a). The

Lottery deems the proposed Regulations necessary for the effective enforcement of 29 Del. C. section 4805 and for the full and efficient performance of the Lottery's duties thereunder. The Lottery concludes that the adoption of the proposed Regulations would be in the best interests of the citizens of the State of Delaware and consonant with the dignity of the State and the general welfare of the people under section 4805(a).

6. The Lottery, therefore, adopts pursuant to 29 Del. C. section 4805 and 29 Del. C. section 10118 the proposed amendments to Video Lottery Employee Organization and Lottery Employee Regulations 3.2(4), 3.2(9), 3.2(12), 4.2(10)(ii), 4.2(13), 4.2(15), 4.2(17), and 6.1. A copy of the amended Regulations is attached to this Order as Exhibit #1 and incorporated herein. The amended Regulations are hereby incorporated as part of the previously adopted set of Video Lottery Employee Organization and Lottery Employee Regulations.

7. The effective date of this Order shall be ten (10) days from the date of publication of this Order in the Register of Regulations on April 1, 1998.

Donald Johnson
Hearing Officer
Delaware State Lottery Office

It is So Ordered This 10th day of March, 1998.

Exhibit #1

Amendments to Video Lottery Employee Organization
and Lottery Employee Regulations

1. Regulations 3.2(4)(9)(12)

3.2 The employee organization shall register with the Agency on registration forms supplied by the Agency. Registration forms shall require the employee organization to provide the following, without limitation:

(4) The name and address of [:(i)] all affiliates which are either a parent body or any superior organization with any right or ability to control, supervise, discipline or set policy for this organization;

(9) Any other information the Director determines is needed, necessary, and reasonably related to the competence, honesty, and integrity of the applicant or registrant as required by title 29 of the Delaware Code.

(12) A list of any known litigation involving the employee organization [~~within~~] [~~over~~] the last five years.

2. Regulations 4.2(10)(ii), (13), (15), (17)

4.2 The key employee shall register with the Agency on registration forms supplied by the Agency. Registration forms shall require the key employee to provide the following, without limitation:

(10) Excluding minor traffic offenses, a detailed description of the following areas of criminal conduct, if any, including whether the crime involved is denominated a felony or a misdemeanor:

(ii) Any criminal offenses, that occurred within ten years of the application or registration, for which the applicant or registrant was arrested, charged, indicted or summoned to answer, which are pending or for which he was not convicted;

(13) Whether he has ever been subpoenaed as a witness before any grand jury, legislative body, administrative body, or crime commission on matters pertaining to the operation or performance in any labor organization, which shall include all details relating thereto.

(15) Any other information the Director determines is needed to determine the competence, honesty, and integrity of the applicant as required by title 29 of the Delaware Code.

(17) A Release Authorization directing all courts, probation departments, [**selective service boards**], employers, educational institutions, financial and other institutions and all governmental agencies to release any and all information pertaining to the applicant ~~for registrant~~] as requested by the Agency or the Delaware State Police that bears on and is necessary and reasonably related to the statutory standards of competence, honesty, or integrity as specified by 29 Del. C. section 4805(a)(24)(c)(ii).

3. Regulation 6.1

6.1 The Director shall conduct employment investigations for any person seeking employment with the Agency for compensation for a position which has direct access to lottery ticket sales agents, video lottery agents, or vendors. Those new employee applicants who do not meet the requirements of these Regulations and 29 Del. C. chapter 48 may not be permitted to be employed by the Lottery.

**DEPARTMENT OF HEALTH &
SOCIAL SERVICES****DIVISION OF SOCIAL SERVICES**

Statutory Authority:

IN THE MATTER OF: |

REVISION OF THE |
REGULATIONS |
OF THE MEDICAID/MEDICAL |
ASSISTANCE PROGRAM |

NATURE OF THE PROCEEDINGS:

The Delaware Department of Health and Social Services ("Department") initiated proceedings to update general policies and policies related to hospice, practitioner, independent laboratory, non-emergency medical transportation, long-term care, and MR waiver services. The Department's proceedings to amend its regulations were initiated pursuant to 29 Delaware Code Section 10114 and its authority as prescribed by 31 Delaware Code Section 512.

The Department published its notice of proposed regulation changes pursuant to 29 Delaware Code Section 10115 in the February 1998 Register of Regulations, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by March 1, 1998, at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

No written or verbal comments were received relating to this proposed rule.

FINDINGS OF FACT:

The Department finds that the proposed changes as set forth in the February Register of Regulations should be adopted as written.

THEREFORE, IT IS ORDERED, that the proposed regulations of the Medicaid/Medical Assistance Program are adopted and shall be final effective April 10, 1998.

Date of Signature, March 12, 1998

Gregg C. Sylvester, M.D.
Secretary**GENERAL POLICY****Licensure/Certification**

All providers who are enrolled with the DMAP must be professionally and properly licensed and/or certified in accordance with the federal and state laws in the state in which they are located. The provider type must match the State licensing category.

In addition, the following providers must meet the requirements for participation in Medicare (Title XVIII) as evidenced by certification from the Division of Public Health Office of Health Facilities Licensure and Certification: Long Term Care facilities, Inpatient and Outpatient hospitals, Rehabilitation agencies, Independent laboratories, Hospice organizations, Home Health agencies, Certified Physical Rehabilitation units of an Acute Care hospital, Ambulatory Surgical Centers/Free Standing Surgical Centers, and Renal Care Centers.

With the exception of behavioral health services provided through a Managed Care Organization (MCO), mental health clinic services shall be rendered only by providers which have been certified by the Division of Alcoholism, Drug Abuse and Mental Health (DADAMH) of the Department of Health and Social Services (DHSS).

Ambulance companies located in Delaware must be certified in accordance with the State Fire Prevention Commission (Title 16, Del. Code, Chapter 67). Ambulance companies located outside of Delaware must be properly licensed and certified by the State in which they are located.

Failure to be certified and properly licensed at the time service was provided may result in penalties and denial of payment by the DMAP.

Family Planning and Related Services*Who is Eligible*

Females of childbearing years whose Medicaid (categorically or expanded population) is terminated for a non-fraudulent reason are eligible for family planning and related services for 24 months. Family planning services are defined as those services provided to females of childbearing age to temporarily or permanently prevent or delay pregnancy.

What Services Are Covered

Effective for dates of service 1/1/96 and after, the Family Planning and Related Services Benefit Package includes:

- contraceptive management; including non-systemic drugs and devices (excluding condoms), ~~and oral contraceptives~~ systemic drugs, and related surgical procedures (for example, ligation of fallopian tubes).
- diagnosis and treatment of sexually transmitted diseases (STDs) when provided or prescribed during the family planning visit.
- HIV screening, diagnosis, and counseling ONLY when provided during a family planning visit.

Effective for dates of service 3/1/96 and after, coverage of pharmaceuticals prescribed during the family planning visit to eradicate the causative organism of a covered STD will be added to the Family Planning and Related Services Benefit Package. Those pharmaceuticals covered for a diagnosis of STD will be limited to the following four therapeutic classes: antibiotic, anti viral, anti fungal, anti protozoan. Pharmaceuticals prescribed to treat an STD **outside** of a family planning visit are not covered.

Non-Qualified Non-Citizens (Aliens) Aliens

Illegally Residing, Non-Qualified

Effective for dates of service 7/1/97 and after, illegally residing, non-qualified ~~Non-Citizens~~ (aliens are eligible **ONLY** for coverage of emergency and labor/delivery services. These services must be rendered in an acute care hospital emergency room or in an acute care inpatient hospital. In addition, emergency services must be rendered for diagnoses designated by the DMAP as an emergency (see Appendix G for a comprehensive list of the covered diagnoses).

The DMAP defines an emergency as:

- a sudden serious medical situation that is life threatening; **OR**
- a severe acute illness or accidental injury that demands immediate medical attention or surgical attention; **AND**
- without the treatment a person's life could be threatened or he/she could suffer serious long lasting disability.

Medically necessary physician (surgeon, pathologist, anesthesiologist, emergency room physician, internist, etc.) or midwife services rendered during an emergency service that meets the above criteria are covered.

Ancillary services (lab, x-ray, pharmacy, etc.) rendered during an emergency service that meets the above criteria are covered.

Emergency ambulance services to transport these

individuals to and from the services defined above are also covered.

Services **not** covered for illegally residing, non-qualified ~~Non-Citizens~~ aliens include, but are not limited to:

- **ANY** service delivered in a setting other than an acute care hospital emergency room or an acute care inpatient hospital.
- **ANY** service (pharmacy, transportation, office visit, lab, x-ray, or home health, etc.) that *precedes or is subsequent* to a covered emergency service (except that emergency ambulance transportation directly related to the emergency service IS covered).
 - Organ transplants.
 - Long term care or rehabilitation care.
 - Routine prenatal care and post partum care.

Legally Residing, Qualified and Non-Qualified

Legally residing, qualified and non-qualified aliens may be found eligible for full Medicaid benefits.

Medicaid/Medicare Recipients

Medicaid "Buys-in" Part A and/or Part B Medicare for certain eligible recipients. Some of these recipients are eligible for the whole range of Medicaid services and some, such as QMBs and SLIMBs, are not. All are eligible for the full range of Medicare services.

For these dual eligibles, DMAP will pay an amount equal to, part, or all of the incurred Part B deductible or coinsurance remaining after Medicare has paid. ~~Medicare Part A deductible and coinsurance amounts will be paid in full by DMAP.~~ The specific payment methodology is as follows:

For services that the DMAP normally covers, the amount paid for the Part B co-insurance and deductible will be limited to either: 1) the maximum Medicaid rate for the service minus the actual Medicare payment or, 2) the deductible/coinsurance, whichever is less. Zero payment will be made when the Medicare payment is equal to or higher than the Medicaid rate.

~~Effective September 1, 1996, Medicaid will reimburse the full co-insurance and deductible amounts for QMBs after Medicare payment.~~

For services that are not normally covered by the DMAP program, the provider will be reimbursed the full Part B coinsurance and/or deductible amount identified by

Medicare.

If a dual eligible also carries other health insurance coverage in addition to Medicare and Medicaid, that resource must be billed before Medicaid.

Participating providers agree to accept the final DMAP payment disposition as payment in full. Therefore, recipients eligible for both Medicaid and Medicare should not be billed for any non-covered charges or remaining portions of the Medicare deductible and coinsurance. Exceptions to the DMAP policy prohibiting the billing of recipients can be referenced in the Billing DMAP Recipients section of this General Policy.

LONG-TERM CARE PROVIDER MANUAL

VII. NURSING FACILITY ANCILLARY CHARGES

The DMAP will reimburse private nursing facility providers for some ancillary charges that are separate from the facility's per diem rates as follows:

- Physical therapy, by RPT only.
- Occupational therapy.
- Speech therapy.
- Oxygen.

Facilities will be paid at the median cost for each service (cap) or their actual cost, whichever is lower. Facilities must bill for these ancillary services utilizing their Ancillary provider Identification number ending in the number twenty-six (26) and utilizing a HCFA 1500 claim form. See APPENDIX C for valid HCPC procedure codes. A further explanation of covered ancillaries follows:

Oxygen

Oxygen H size Tank. (Maximum fee = \$30.50 per tank):
Oxygen must be ordered by a physician. For date of service, use first day the oxygen tanks were actually used by patient. Claims will pend for review if more than four (4) tanks per month are billed. Use of more than four (4) tanks may indicate need for more cost effective system. Supportive documentation must be attached to the claim justifying need for this method if patient used more than four (4) tanks in a month.

Oxygen per hour on monthly basis. (Maximum fee = \$1.25 per hour):

Oxygen must be ordered by physician. Claim will pend for review if facility bills for more than two hundred forty-eight (248) hours in a month. If after first month patient requires more than two hundred forty-eight (248)

hours of oxygen, facility should switch to concentrator system for patient's future use.

Oxygen concentrator per day per month. (Maximum fee = \$8.00 per day):

Oxygen must be physician ordered. Facility must specify which days of the month the concentrator was used. Facility can only bill for maximum of thirty-one (31) days. If facility bills for more than thirty-one (31) days on a claim form, the claim will reject and will be returned for correction. After facility bills for more than three (3) months worth of oxygen, supportive documentation must be attached to the claim to justify need for continuous oxygen.

If more than one type of oxygen is used in a month, provide an explanation.

Physical Therapy

Physical Therapy Evaluation. (Maximum fee = \$45.00 evaluation):

The DMAP will reimburse for the initial evaluation performed by Registered Physical Therapist. The DMAP will pay for one (1) evaluation per treatment course. Date of service is the actual day evaluation was performed. If facility bills for more than one (1) evaluation in six (6) months, supporting documentation must be attached to the claim to justify the need for the new evaluation and new course of treatment.

Physical Therapy Treatment. (Maximum fee = \$31.00 per treatment):

The DMAP will reimburse for one treatment per session provided by Registered Therapist only. The DMAP will not reimburse for physical therapy treatment delivered on the same day as a physical therapy evaluation. The DMAP will reimburse for maintenance as well as restorative therapy if doctor ordered and if monthly progress notes are completed by the therapist indicating what treatment was rendered at each session and the progress of the patient.

The DMAP will reimburse for up to twenty-three (23) sessions in a month. If more than twenty-three (23) sessions are required in a month, prior authorization must be requested of the Long-Term Care Coordinator. Payment will not be made for more than twenty-three (23) sessions if they have not been prior authorized.

If therapy continues for longer than ninety (90) days, claims must have supporting documentation attached justifying need for therapy after ninety (90) days. Supporting documentation would include a copy of the

physician's order for therapy and copies of the therapist's progress notes indicating that the resident is still making progress.

Speech Therapy

Speech Therapy Evaluation (Maximum fee = \$55.00 per evaluation)

The DMAP will reimburse for the initial evaluation for a course of treatment. The evaluation must be performed by a MSCCCSLP (Master of Science Certification Clinical Competency Speech Language Pathologist). The facility should bill for actual date of service. If the facility bills for more than one (1) evaluation in a year, supporting documentation must be attached to the claim to justify the need.

Speech Therapy Treatment (Maximum fee = \$35.00 per treatment)

The DMAP will reimburse for one (1) treatment per session. Therapy must be provided by a MSCCCSLP. Monthly progress notes must be written by MSCCCSLP. Reimbursement will not be made for speech therapy treatment delivered on the same day as a speech therapy evaluation.

The DMAP will reimburse for a maximum of twenty-three (23) sessions per month. If more than twenty-three (23) sessions are required in a month, prior authorization must be requested of the Long-Term Care Coordinator. Reimbursement will not be made for more than twenty-three (23) sessions if they have not been prior authorized.

If therapy continues for more than ninety (90) days, the facility must attach supporting documentation to the claim to justify continuing need. Supporting documentation would include copies of the physician order for therapy and the therapist's progress notes. Notes must indicate what treatment was rendered in each session and progress or outcome of the session.

Occupational Therapy

Occupational Therapy Evaluation (Maximum fee = \$60.00 per evaluation)

The DMAP will reimburse for one (1) evaluation per treatment course. Evaluation must be performed by a Registered Occupational Therapist (ROT). The facility should bill actual date evaluation was completed. If the facility bills for more than one (1) occupational therapy evaluation in a year, supporting documentation must be attached to the claims to justify the need for a new evaluation and new course of treatment.

Occupational Therapy Treatment (Maximum fee = \$38.00 per treatment)

The DMAP will reimburse for one (1) treatment per session performed by a Registered Occupational Therapist or by an Certified Occupational Therapy Aide under the direct supervision of a Registered Occupational Therapist. The therapy must be ordered by a physician. Monthly progress notes must be completed by the therapist indicating what treatment was rendered at each session and progress made by the patient. Reimbursement will not be made for therapy treatments provided on the same day as an occupation therapy evaluation.

The DMAP will reimburse for up to twenty-three (23) sessions per month. If more than twenty-three (23) sessions are required in a month, prior authorization must be requested of the Long-Term Care Coordinator. Reimbursement will not be made for more than twenty-three (23) sessions if they have not been prior authorized.

If therapy continues for longer than ninety (90) days, claims must have supporting documentation attached justifying need for therapy after ninety (90) days. Supporting documentation would include copies of the physician's order for therapy and the therapist's progress notes.

NON-EMERGENCY MEDICAL TRANSPORTATION PROVIDER POLICY

I. GENERAL INFORMATION

In accordance with Federal Regulation 42 CFR 431.53 the Delaware Medical Assistance Program (DMAP) will assure transportation for eligible Medicaid recipients who need to secure necessary medical care ~~that is covered by the DMAP~~ and who have no other means of transportation. The DMAP is designed to assist eligible Medicaid recipients in obtaining medical care within the guidelines specified in this policy.

The DMAP defines non-emergency medical transportation services as transportation to or from medical care for the purpose of receiving treatment and/or medical evaluation. The DMAP will determine the transportation provider to be in compliance with this policy as long as the transport is to or from a medical service.

The DMAP assigns a unique provider number ending with "15" to each non-emergency transportation provider enrolled with the DMAP.

Scope of Service

Transportation services are available through the DMAP when provided by an enrolled Medical Transportation provider to an eligible Medicaid recipient when:

- The recipient is transported to or from a medical provider to receive a medical service that is covered by the DMAP:
- The transport is the least expensive available means suitable to the recipient's medical needs.
- The transport used to get a Medicaid recipient to a medical provider of their choice is generally available and used by other residents of the community.

The DMAP covers transportation is covered for eligible Medicaid clients from the point of pickup to the medical provider location or from the medical provider location to the point of delivery. If an individual only goes to a medical appointment and does not return to the original pick up designation, the DMAP will only be charged one way and not a round trip fare. The service will include all vehicles, drivers, dispatch, vehicle maintenance, fuel, lubricants, and any and all other components necessary to provide a transportation service for the needs of the DMAP client.

The DMAP covers transportation for an individual who is responsible for the care of a Medicaid client. Transportation shall be provided to the individual to receive medical instructions in the care of the Medicaid client or to visit the Medicaid client when they are hospitalized. The transport will be considered a service to the Medicaid client and therefore must be billed using the Medicaid ID# of the hospitalized client. The transportation provider must fully document these transports. The documentation must include the name(s) of those being transported and the reason they are being transported. The provider must bill these transports using the appropriate HCPCS procedure code found in Appendix A. In cases when there are two persons responsible for the care of a Medicaid client, and both are transported the provider must use the appropriate HCPCS procedure code with the modifier Y1.

Transportation services provided to Medicaid recipients are reimbursable by the DMAP only when the medical service received by the recipient is a service that is covered by the DMAP at the time the transportation service is provided or is a service provided by a Managed Care Organization (MCO) which is not normally covered by the DMAP (except routine eye care for adults). Transportation services provided to non-Medicaid recipients cannot be claimed for DMAP reimbursement.

Definitions

Non-emergency medical transportation services are defined as transportation to or from any DMAP covered medical service for the purpose of receiving treatment and/or medical evaluation. ~~Whenever possible, medical transportation funded by the DMAP shall be integrated with transportation services provided by other departments of Health and Social Services. Transportation services available without cost to the general public must also be made available without cost to Medicaid recipients. Volunteer groups and non-profit agencies should be used to the extent possible, including, but not limited to, senior citizen organizations, agencies on aging, etc. If neighbors, friends, relatives or voluntary organizations have been providing transportation services to a Medicaid recipient, it is reasonable to expect them to continue.~~

The following definitions pertain to non-emergency medical transportation only.

Appropriate Method of Transportation is the least expensive type of transportation that best meets the physical and medical circumstances of a recipient requiring transportation to a medical service.

Assistance is when a recipient must be physically helped from within or into a building and/or from within or into the medical provider's site. Without such assistance, it would be unsafe or impossible for the recipient to reach the vehicle or the medical provider's site. The assistance is included as part of the transportation rate.

Attendant is an employee of a transportation provider, who in addition to the driver, is required to assist in the transport of the recipient due to his/her physical, mental or developmental status.

~~*Available Transportation* is public transportation, an enrolled Medicaid provider, organization, or agency who offers appropriate transportation services to a recipient who requires medical transportation to a medical service.~~

Cancel Call is notification to the transportation provider, prior to the time the vehicle is enroute to the pickup point, not to provide services to a recipient.

Escort is an interested individual that must accompany a recipient due to recipient's physical/mental/developmental capacity. Examples of an escort include, but are not limited to, a parent, guardian, or an individual who assumes parental like responsibility, or a child of a geriatric parent. The escort's presence is required to

ensure that the recipient receives proper medical service/treatment. Refer to Appendix A, modifier Y1 for billing information.

Loaded Mileage is the distance traveled by a motor vehicle while transporting a recipient from a pickup point to a drop-off point.

Night Call Charge is an additional fee that may be paid when transportation service is dispatched between the hours of 6:00 p.m. and 6:00 a.m. inclusive.

No-Show is when a recipient fails to cancel a scheduled transportation service.

Prior Authorization is the approval for a service by the DMAP or the DMAP's agent before the provider actually renders the service. In order to receive reimbursement from the DMAP, a provider must comply with all prior authorization requirements. The DMAP in its sole discretion determines what information is necessary in order to approve a prior authorization request.

Provider Agreement is the signed written contractual agreement between the DMAP and the provider of services or goods.

Provider Headquarters is the provider's base of operations closest to the pickup point. A provider may have more than one (1) headquarters.

Recipient/Client is a person eligible for services under the DMAP.

Shared Ride a shared ride is when more than one recipient occupies a vehicle during the same trip.

Trip - One Way and Round Trip A one way trip is the dispatching of a vehicle to the recipient(s)' pickup point and transporting the recipient(s) to a medical provider, or from a medical provider to the drop-off point. A round trip is the dispatching of a vehicle to the recipient(s)' pickup point, transporting the recipient(s) to a medical provider and transporting the recipient(s) back to the pickup point.

Unloaded Mileage is the distance traveled by the motor vehicle carrying no passengers, enroute to the point of pickup or enroute from the point of drop-off.

Waiting Time is the time a vehicle is waiting at a medical provider's facility, to which the transportation provider transported the recipient, in order to transport the recipient to another destination, during the same trip.

Covered Medical Services

The DMAP will reimburse non-emergency transportation providers for transporting eligible Medicaid recipients to or from ~~one of the following~~ a medical services covered by the DMAP: Examples of medical services are found in the General Policy section of the manual.

- ~~Acute care inpatient general hospital services (other than services in institutions for tuberculosis or mental diseases)~~
- ~~Outpatient hospital services~~
- ~~Rural health clinic services and Federally-qualified health center services~~
- ~~Laboratory and X-ray services~~
- ~~Early and periodic screening, diagnosis, treatment (including routine eye care, dental services, and other medically necessary services that are not covered for the general population) for individuals under age 21~~
- ~~Family planning services (including voluntary sterilization)~~
- ~~Physician services~~
- ~~Durable medical equipment (see Limitations and Exclusions)~~
- ~~Nurse-midwife services~~
- ~~Services furnished by a certified nurse practitioner~~
- ~~Podiatry services for routine foot care only for recipients who are diagnosed as having diabetes or circulatory/vascular disorders~~
- ~~Clinic services, including mental health clinics, ambulatory surgical centers (ASCs) or free-standing surgical centers (FSSCs)~~
- ~~Extended/enhanced services for high risk pregnant women (Smart Start Program)~~
- ~~Rehabilitative services, including Community Support Services (CSS) and personal care services for individuals active with the Division of Alcohol, Drug Abuse and Mental Health determined to need intervention due to alcoholism, drug abuse or mental illness, & Day Health and Rehabilitation Services for individuals with mental retardation~~
- ~~HMO's~~
- ~~Physical, Occupational, Speech and Hearing Therapies for adults when provided by an authorized rehabilitative agency, home health agency or outpatient hospital.~~

Non-emergency transportation providers who believe that they are furnishing transportation for a Medicaid recipient on the same day as another transportation company may wish to submit a paper claim to EDS with documentation attached that will verify the transport.

Non-Covered Medical Services

Examples of medical services that are not covered by the DMAP include, but are not limited to, those list below. If any of the medically-related services listed below are provided to a Medicaid recipient who is enrolled with an MCO as part of that MCO's benefit package, Medicaid reimbursement is available:

- Chiropractic Services
- Routine dental, vision, prosthetics, orthotics and psychological services for adults (age 21 and over)
- Cosmetic surgery
- Psychologist services for adults
- Social Services
- Educational Services
- Reversal of sterilization or fertility related services
- Autopsies
- Inter-Hospital transportation
- Vocational Training
- Day Care
- Supplies in a non-emergency ambulance incident to the patient's condition, i.e., oxygen, intravenous.

Limitations and Exclusions

Reimbursement for medical transportation will be made subject to the limitations and exclusions that apply to these services. The limitation and exclusions are, but not limited to:

Limitations

- The DMAP reserves the right to make the determination as to which type of transportation is the most appropriate for the recipient.
- The DMAP may pay for only the least expensive appropriate method of transportation, depending on the availability of the service and the physical and medical circumstances of the patient (recipient).
- The DMAP reserves the right to limit its payment of transportation to the nearest appropriate provider of medical services when it has made a determination that traveling further distances provides no medical benefit to the recipient.
- The DMAP may pay for transportation to procure Durable Medical Equipment (DME) which requires individualized fittings or measurements when the service cannot be provided in the home.

Exclusions

- The DMAP will not provide transportation to receive services not covered by the Program.
- The DMAP will not reimburse for services in which prior approval is required but was not obtained.

- The DMAP will not be reimburse for services that are not medically necessary or which are not provided in compliance with the provisions of the Program.

- The DMAP will not reimburse for any travel when the Medicaid recipient is not an occupant of the vehicle.

- The DMAP will not transport a recipient to a medical facility for reasons other than a medical examination and/or treatment.

- The DMAP will not reimburse for transportation provided by relatives or individuals living in the same household with the recipient.

- The DMAP will not reimburse for transportation provided in the recipient's vehicle, driven by the recipient or another person.

The DMAP will not provide transportation to a medical facility when the visit is for the sole purpose of the recipient picking up a prescription or written prescription order.

- The DMAP will not reimburse for unloaded mileage, waiting time, or no-shows. The following definitions apply:

- * Unloaded mileage is the distance traveled by the vehicle carrying no passengers, enroute to the point of pick-up or enroute from the point of drop-off.

- * Waiting time is the time a vehicle is waiting at a pick-up point in order to transport the recipient.

- * A no-show is when a recipient fails to cancel a scheduled transportation service and the transport arrives a the pick-up point.

Services Which Require Prior Approval

~~As a condition of reimbursement, the DMAP requires that certain services be approved prior to the time they are rendered. In order to be reimbursed for prior approved services, the recipient must be Medicaid eligible at the time the services are rendered.~~

~~Prior approval, when required, must be obtained before non-emergency transportation services are rendered and, if possible, at least forty-eight (48) hours in advance. When the recipient receives health care services from more than one provider and requires approved transportation to each, a separate prior approval must be obtained for transportation to each health care provider.~~

A non-emergency transportation provider must obtain prior approval from the DMAP before providing the following transport services. listed below:

- Any transportation by commercial bus, train, or air service;
- Any transportation involving lodging and/or meals (reimbursement for meals is limited to the amount

authorized for State employees or less);

- All transportation services outside the region (the region is D.C., PA. NJ and MD).

Requests for approval must be submitted in writing and mailed or faxed to the Medicaid Out-of-State Coordinator at:

Division of Social Services
Medicaid Unit, Lewis Building
P.O. Box 906
New Castle, DE 19720
FAX #: 302-577-4899

If possible, approval must be obtained at least forty-eight (48) hours before non-emergency transportation services are rendered. When the recipient receives health care services from more than one provider and requires approved transportation to each, a separate prior approval must be obtained for transportation to each health care provider.

Failure to secure approval from the Out-of-State Coordinator can result in non-payment from the DMAP.

Insurance Co-Payments

DMAP recipients may also be covered by plans such as BC/BS's Total Health Plus, CIGNA's Healthplan of Delaware, and Healthcare of Delaware, as well as other HMOs, etc. Under these kinds of plans, the patients choose a primary care physician who provides total care. The primary care physician refers patients to member specialists when necessary. There is frequently a co-pay amount incurred for all sick office visits, emergency room visits, specialist visits, etc.

~~In those instances where a Medicaid recipient is also covered by a plan for which payment of the above mentioned co-pays is required, the DMAP will cover the applicable co-pay amounts. (co-pays are differentiated from amounts are not to be confused with "non-covered" or "non-allowed" charges.)~~

Any person who is a member of an accessible managed care organization must use the services of the accessible managed care organization. Refer to the Accessible Managed Care Insurance Carriers section of the General Policy.

~~There is a specific Level III HCPCS procedure codes that is used when billing the DMAP for co-pay amounts. See APPENDIX A for the Level III HCPCS procedure code for transportation co-pay.~~

When billing the DMAP for co-pay amounts, refer to Appendix A for the Specific Level III HCPCS procedure code for transportation co-pay.

When billing the DMAP for co-pay the transportation provider must complete the HCFA 1500 as instructed in the Billing Section with the following exceptions:

- Enter the appropriate HCPCS co-pay procedure code in block 24D rather than the HCPCS procedure code for the actual service provided.
- Enter only the co-pay amount in block 24F. Do not enter your usual and customary charge nor add in any non-allowed charges.
- Leave block 29 blank. Do not enter the capitation amount, do not carry over the co-pay amount as a balance due, and do not enter a percentage of the capitation payment in an effort to apply it to the service provided.
- A copy of the payment voucher MUST be attached to the HCFA 1500.

II. PROVIDER PARTICIPATION RESPONSIBILITIES

~~The DMAP provides reimbursement for non-emergency transportation for Medicaid recipients to obtain necessary medical services. As a The provider of non-emergency transportation services, it is the responsibility of the provider must to abide by the following policies and procedures. of the DMAP. This includes, but is not limited to:~~

~~- Providers may bill only for transportation services rendered to Medicaid recipients (and escorts, as required) to receive necessary medical care that is covered by DMAP.~~

~~:- The providers must is responsible for maintaining all state-and/or locally required insurance coverage for the protection of its fleet, clients, and personnel, and upon request, furnish the DMAP with proof of this coverage.~~

~~- Providers must install seat belts and/or shoulder straps, to be worn by Medicaid recipients. The vehicle operators shall be instructed to refuse to operate the vehicle as long as any occupant is not wearing seat belts and/or shoulder straps.~~

~~:- The providers must is responsible for maintaining current licenses, permits, or certifications as required by all levels of government in Delaware for operation of a vehicle(s). This includes, but is not limited to, vehicle license, driver's license, and business license.~~

~~:- The providers will is responsible to provide door-to-door service, and when necessary, the operator or attendant must provide will assistance to those recipients in boarding and/or alighting from the vehicle. An~~

attendant is an employee of the transportation provider who in addition to the driver is required to assist in the transport of the recipient due to his/her physical, mental or developmental status. Providing assistance is necessary when a recipient must be physically helped into or out of the vehicle, residence, or the medical provider's site. Without such assistance it would be unsafe or impossible for the recipient to reach the destination. If it is the policy of a transportation provider not to provide an attendant to assist recipients, it is their responsibility to inform the recipient when completing the Mobility Limitations" line on the Transportation Scheduling Form (see Appendix B.)

~~- Provider will render transportation services in late model vehicles which will be maintained and kept in good condition at all times.~~

~~· fully disclose the extent of services provided and when required to furnish the Department DMAP and Federal or State representatives with information regarding transportation services. For example, Records must include; but, are not limited to the following:~~

- ~~- recipient's name, address and DMAP number;~~
- ~~- recipient's point of origin and destination;~~
- ~~- date of transportation service;~~
- ~~- escort's name, address, and relationship;~~
- ~~- number of miles traveled and mode of transportation;~~
- ~~- service provider's name, address and DMAP provider number;~~
- ~~- a copy of a properly signed approval form, when required.~~

~~* A Transportation Scheduling Form (see Appendix B of this manual. This form must be completed in its entirety. every line on the form must be completed with legible and accurate information;~~

~~* A driver's log that includes the recipient's name, address, time of pick-up, destination, and actual odometer reading.~~

~~· The providers may is responsible for billing the DMAP only for actual loaded miles provided.~~

~~· The provider is obligated to responsible for arranging and providing transportation services for DMAP recipients as follows:~~

- ~~* receive request from recipient and complete screening form. At the time of request for transportation the provider shall complete a Transportation Scheduling Form (see Appendix B) to accurately reflect the reason for the transport and to detail all information received from the recipient regarding the transport. The completion of the Transportation Scheduling Form will assist the transportation provider with a profile of the recipient and will help in determining the recipient's needs (if any);~~
- ~~- determine that the transportation is to or~~

~~from a covered service;~~

~~* Verify individual's DMAP eligibility. The provider may contact Confirm to verify an individual's eligibility;~~

~~* Obtain prior authorization if required. (see "Services Which Require Prior Approval section of this manual);~~

~~* Schedule transportation and confirm the transport with the recipient;~~

~~* Arrive at the location timely;~~

~~* Always provide prompt and courteous service; and~~

~~* - provide service and submit claim.~~

~~* Submit a claim to the DMAP for only those services that were rendered.~~

The provider must maintain records to verify the services provided to Medicaid recipients as required in the General Policy and Provider Specific Policy.

III. MINIMUM VEHICLE STANDARDS

~~Client transportation vehicle safety is of primary importance during operation of vehicles utilized by providers enrolled non-emergency transportation providers in the DMAP. Providers of non-emergency transportation services must adhere to these minimum standards unless the vehicles used to transport clients are emergency ambulance vehicles. The DMAP places particular emphasis is placed on the safety of Medicaid clients while being transported in Medicaid reimbursed vehicles; the vehicles transporting Medicaid clients. Providers of non-emergency transportation services must adhere to the following standards and must ensure that:~~

~~· A basic first aid kit is on each vehicle operated by DMAP providers.~~

~~- Providers have A regulation size Class B chemical type fire extinguisher is on each vehicle. Extinguisher must have a visible gauge or inspection tag reflecting annual inspections and be placed in easy reach of the driver. The extinguisher must be mounted in a bracket located in the driver's compartment and be readily accessible to the driver and passenger(s). A The extinguisher's pressure gauge shall must be mounted on the extinguisher so as to be easily read without moving the extinguisher from its mounted position. The operating mechanism shall be sealed with a type of seal which that will not interfere with the use of the fire extinguisher.~~

~~- Passengers will wear Seat belts and/or shoulder straps are installed in all vehicles at all times with only one passenger per belt where applicable. For children, see, "Vehicles Transporting Children".~~

~~- Passengers will be seated while vehicle is in motion.~~

- ~~Passengers unable to care for themselves will not be left unattended in the vehicle.~~
 - Passenger occupancy for adults will not exceed the vehicle manufacturer's approved seating occupancy.
- ~~Vehicle will be parked or stopped so that passengers will not have to cross the street to get their destination or pickup point.~~
 - Vehicle interior and exterior will be free of hazardous debris or unsecured items.
 - Interior vehicle equipment will be secured at all times.
- ~~Vehicles will be operated by driver's who possess appropriate licenses and current training.~~
 - Vehicles will be operated within manufacturer's safe operating standards at all times.
- ~~There will be no smoking by drivers or passengers.~~
 - Vehicles will display a Company Identification when transporting DMAP clients.
- ~~Non-Emergency ambulance vehicles will meet or exceed standards required by the appropriate state licensing authority.~~
- ~~Vehicles used to provide service shall be licensed, registered and insured according to State regulations.~~
- Transportation services are rendered in vehicles that are maintained and kept in good condition at all times.

Vehicles Transporting Mobility Impaired Clients

~~Additional policies for these clients are:~~ In addition to the vehicle standards previously mentioned, providers of non-emergency transportation services who transport mobility impaired clients must provide the following:

- Safe physical arrangements ~~will~~ must be available for the transportation of clients in wheelchairs. ~~and clients requiring a stretcher.~~ The wheelchair ~~or stretcher~~ must be secured to the vehicle at all times while the vehicle is in motion.
- Vehicles are handicap accessible, for example:
 - * Ramps must be available to provide easy access for a wheelchair to enter and exit the vehicle; and
 - * Doors of the vehicle must be wide enough to accommodate a wheelchair.

Vehicles Transporting Children

~~Additional policies for these clients are:~~ The following are additional policies for non-emergency transportation providers who transport children:

- An approved infant or child car seat or other specially adapted seating appropriate to age and size of child must be utilized for transporting children. The provider ~~shall~~ must exercise reasonable care that its infant or child car

seats or other specially adapted seating are safe.

- The provider ~~shall~~ must assume responsibility for children transported without an escort from time and place of pickup until delivered to parents, guardians or responsible person(s) designated by parents or guardians.
- Passenger windows will not be opened more than 50% when children are in transport.

IV. MINIMUM DRIVER STANDARDS

General Safety

~~The first responsibility is the safety need of the client. Immediately evacuate passengers from vehicles in case of fire. Prior to evacuation, in case of an accident, evaluate injuries carefully.~~

Driver Qualifications

~~Driver's must be qualified by the minimum standards listed below as applicable:~~

Drivers of medical transportation vehicles are responsible for the following general safety standards:

- ~~Drivers will possess a current state license and appropriate training. All drivers who transport clients in vehicles designed to carry sixteen (16) or more passengers including the driver are required to have a Class C driver's license and adhere to the Delaware transportation code. The capacity of the vehicle, not the number of persons carried is the controlling factor.~~
- ~~Drivers must have a pre-employment health screening and a physical examination by a physician within six weeks of initial employment, or date of assignment to a driver's position, with an annual review of health status. Providers must use all appropriate means to assure that all drivers employed are drug and alcohol free while transporting DMAP clients.~~
- ~~Valid documentation of a driver's previous training record must be obtained prior to employment to assist in assuring that the applicant has a safe and competent driving history. For three years prior to employment, drivers must not have D.U.I. (driving under influence) convictions or license revocation. Valid documentation of driving record must be obtained annually thereafter.~~
- ~~Drivers must receive training in the operation of all vehicle equipment, first aid, CPR, emergency exits, fire extinguishers, wheelchair lifts, stretchers, lockdowns, etc. This certification shall include training in passenger handling techniques, e.g., wheelchair movement and securement; stretcher loading; boarding assistance; etc. Training must also be given on patient confidentiality. Documentation of this training must be kept in the provider's files with proof of annual review.~~
- ~~Drivers must complete training such as defensive~~

driving within six months of initial employment with review as set by State of Delaware Safety Council.

- All drivers must practice safe driving, observe all Public Safety traffic laws and driving courtesy.

- Drivers and passengers must wear seat belts at all times as required by Delaware law. For children, see "Vehicles Transporting Children".

- Drivers must maintain a professional manner with all DMAP clients at all times.

- Drivers should present valid Provider issued identification to DMAP passengers at the time service is rendered.

: The driver must refuse to operate the vehicle as long as any occupant is not wearing a seat belt and/or a shoulder strap as required by Delaware law. Passengers must wear a seat belt at all times with only one passenger per belt where applicable. For children, see "Vehicles Transporting Children" section of this manual.

: The driver must insist that all passengers be seated while the vehicle is in motion.

: The driver must park or stop the vehicle so that passenger will not have to cross the street to get to their destination or pickup point.

: The driver must not permit smoking by passengers. The driver is also expected to refrain from smoking while transporting DMAP recipients.

: The driver must not leave passengers who are unable to care for themselves unattended in the vehicle.

Driver Qualifications

Enrolled transportation providers who employ drivers and/or sub-contract with drivers are responsible for the following driver qualifications:

Drivers (employed or sub-contracted) must be qualified by the standards listed below (as applicable):

: Drivers (employed or sub-contracted) must possess a current state license and appropriate training. All drivers who transport clients in vehicles designed to carry sixteen (16) or more passengers including the driver are required to have a Class C driver's license and adhere to the Delaware transportation code. The capacity of the vehicle not the number of persons carried is the controlling factor.

: Drivers (employed or sub-contracted) must have a pre-employment health screening and a physical examination by a physician within six weeks of initial employment, or date of assignment to a driver's position, with an annual review of health status. Providers must use all appropriate means to assure that drivers (employed or sub-contracted) are drug and alcohol free while transporting DMAP clients.

: Valid documentation of a driver's (employed or sub-contracted) previous training record must be obtained prior to employment to assist in assuring that the applicant has a safe and competent driving history. For three years prior to transporting Medicaid clients, drivers (employed or sub-contracted) must not have D.U.I. (driving under the influence) convictions or license revocation for D.U.I., or must not have three moving traffic violations on his/her driving record. Valid documentation of driving record must be obtained annually thereafter.

: vehicle equipment, first aid, CPR, emergency exits, fire extinguishers, wheelchair lifts, lockdowns, etc. This certification must include training in passenger handling techniques, e.g., wheelchair movement and securement, boarding assistance, etc. Training must also be given on patient confidentiality. Documentation of this training must be kept in the provider's files with proof of annual review.

: All drivers (employed or sub-contracted) must complete training such as defensive driving with six months of initial employment with review as set by the State of Delaware Safety Council.

: Drivers (employed or sub-contracted must maintain a professional manner with DMAP clients at all times. At the time transportation services are rendered, drivers (employed or sub-contracted) drivers should present a valid "provider issued" identification to DMAP passengers. A current picture of the driver must appear on the identification.

V. OPERATIONAL REQUIREMENTS

Providers must maintain office records which address the operational requirements listed below:

- Service Policies:
 - * Hours/days of service
 - * Booking/dispatch procedures
 - * Conditions for denial of service
 - * Complaint procedures
 - * Incident reports
 - * Waiting time provisions
 - * Attendant/escort provisions
 - * Miscellaneous operating regulations (e.g., smoking aboard vehicles)
 - * Entering client homes
 - * Stopping enroute for client's convenience
 - * Emergency procedures
 - * Passenger handling (wheelchair, stretcher, number of attendants, seat belts, weight restrictions, etc.
- Personnel Policy:
 - * Discipline procedures for safety violations, passenger mishandling and training programs.
 - * Provider must maintain and enforce policy

regarding employee drug and alcohol use.

- Equipment Policies:
 - * Specifications (vehicle type, auxiliary equipment);
 - * Maintenance procedures;
 - * Replacement policy.
- Vehicle Maintenance:
 - * Maintenance records must be kept on all vehicle.
 - * Vehicle maintenance and safety checks must be done monthly.
 - * Maintenance and records must comply with Delaware Department of Motor Vehicle (DMV) standards and inspections.

Providers must have documentation of vehicles modified to adapt to alternate modes of service, e.g., passenger van converted to non-emergency ambulance, wheelchair lifts added, etc., and remain within the codes and regulations of the State of Delaware's DMV.

VI. REIMBURSEMENT

Non-emergency medical transportation providers, except taxi providers, are reimbursed a prospective rate per mile based on reported historic costs (cost reports).

Non-emergency medical transportation by taxi is reimbursed at the metered rate.

Reimbursement includes all vehicles, drivers, dispatch, vehicle maintenance, fuel, lubricants, and all components necessary to provide medical transportation services.

HOME AND COMMUNITY BASED WAIVER FOR THE MENTALLY RETARDED PROVIDER SPECIFIC POLICY

Health care services are provided to the majority of Medicaid clients through a Managed Care Organization (MCO). ~~This manual reflects the policies as they relate to Medicaid clients who are exempt from managed care coverage or who may require practitioner orders to receive services outside the MCO package (see list of those exempt from managed care coverage in the Managed Care section of the General Policy).~~ However, Home and Community-Based Services (HCBS) waiver clients are exempt from managed care coverage. Services provided to clients eligible for HCBS waiver services will be reimbursed on a "fee-for-service" basis.

I. DEFINITION AND OVERVIEW

The waiver to provide home and community based services

to mentally retarded adults was developed by the Divisions of Mental Retardation (DMR) and Social Services (DSS) in 1982 and received approval from the Health Care Financing Administration (HCFA) and became effective on July 1, 1983. The waiver includes support services necessary to maintain individuals in the community as an alternative to institutionalization. The cost of the Home and Community-Based Services Waiver for the Mentally Retarded (HCBS/MR) shall not exceed the cost of care of the Intermediate Care Facility for the Mentally Retarded (ICF/MR).

VI. CONTENT/DESCRIPTION OF SERVICES

~~When billing the DMAP for HCBS/MR services, the provider must use their unique MR provider ID number that ends with "56". The procedure codes to be used for billing services under the Home and Community-Based Waiver for the Mentally Retarded are listed in Appendix A.~~

Services provided under the HCBS/MR waiver include:

Case Management Services

Case management services include responsibility for locating, managing, coordinating and monitoring:

- All proposed waiver services;
- Other State Plan services;
- Needed medical, social, educational and other publicly-funded services (regardless of funding source); and,
- Informal community supports needed by eligible persons.

The intent of case management services is to enable waiver participants to receive a full range of appropriate services in a planned, coordinated, efficient and effective manner.

Case management services consist of the following activities:

- Arranging for the provision of services;
- Initiation and oversight of the process of assessment and reassessment of program participant level of care and yearly review of plans of care;
- Determination and monitoring the cost-effectiveness of the provision of home and community services;
- Monitoring and review of waiver participant's services;
- Service coordination;
- Crisis intervention;
- Case planning;
- Assessment and referral; and,
- Follow-along to ensure quality of care and case

reviews when focus on the individual's progress in meeting goals and objectives established through the care plan.

Case Management is administered by qualified mental retardation professional staff who meet the minimum requirements for job specifications as set forth by the State of Delaware Personnel Commission and outlined in the Merit System Procedure Manual.

Clinical Support

Clinical support includes physician services, home health care services, physical therapy services, occupational therapy services, speech, hearing and language services and prescribed drugs.

Clinical evaluation and consultation is administered by staff meeting the minimum requirements for job specifications as set forth by the State of Delaware Personnel Commission and outlined in the Merit System Procedure Manual.

Day Habilitation

Day habitation includes assistance with acquisition, retention, or improvement in self-help, socialization and adaptive skills which takes place in a non-residential setting, separate from the home or facility in which the recipient resides. Services shall normally be furnished four (4) or more hours per day on a regularly scheduled basis for one (1) or more days per week, unless provided as an adjunct to other day activities included in the recipient's plan of care. Day habilitation services shall focus on enabling the individual to attain his or her maximum functional level, and shall be coordinated with any physical, occupational, or speech therapies listed in the plan of care. In addition, day habilitation services may serve to reinforce skills or lessons taught in school, therapy, or other settings.

Residential Habilitation

Residential Habilitation (State definition) is a continuum of settings where specialized training and supervision is provided within the following community residential settings:

- neighborhood group homes;
- ~~specialized foster care programs;~~
- foster training homes
- staffed apartments; and,
- supervised apartments.

Training services in these settings are provided in

accordance with an IPP which has been designed in the client assessment. The objectives of the residential habilitation services are to:

- address functional needs by modifying inappropriate behavior and enhancing beneficiary competence;
- address physical needs by promoting proper diet, exercise and health care by taking the necessary action to remedy an impairment as soon as possible after it occurs, and by assisting the beneficiary to adapt to an impairment;
- address emotional needs by strengthening the client's self-image, by the development of constructive relationships and by counseling supports if necessary;

HOSPICE PROVIDER SPECIFIC POLICY MANUAL

II. HOSPICE SERVICES

Hospice services will be provided in accordance with Sections 4305 through 4307 of the State Medicaid Manual. This part of the State Medicaid Manual is reproduced in its entirety in APPENDIX A of this manual.

An individual may elect to receive hospice care during one or more of the following election periods:

- An initial 90 day period.
- A subsequent 90 day period.
- ~~A subsequent 30 day period.~~
- ~~A subsequent extension period of unlimited duration during the individual's lifetime.~~
- Unlimited number of subsequent 60 day periods.

The periods of care are available in the order listed and may be elected separately at different times.

PRACTITIONER PROVIDER SPECIFIC POLICY

Practitioner Laboratories

General Information

The DMAP reimburses enrolled providers for properly ordered, medically necessary, non-experimental, non-investigational, Clinical Laboratory Improvement Amendments (CLIA) certified laboratory services when properly performed, documented, and billed.

All tests performed by a practitioner in his/her laboratory must be documented by a written order from the ordering practitioner. The signing of the practitioner's name by another individual or the use of facsimiles are not acceptable. Any telephone order for laboratory testing must be supported by a signed order from the practitioner.

As a result of Public Law 98-369, the DMAP prohibits practitioners from billing for clinical diagnostic laboratory tests that are not personally performed or supervised by the practitioner start-to-finish in his/her office. The following policies apply:

- Practitioners may only bill the program for those laboratory procedures which they personally perform or supervise start-to-finish in their office.
- Laboratory procedures which the practitioner refers to an outside laboratory must be billed by the laboratory.
- Interpretation of laboratory results or the taking of blood or other specimens is considered part of the visit and may not be charged as a separate procedure by the practitioner.

CLIA

The Clinical Laboratory Improvement Amendments of 1988 were enacted by Congress to improve the quality and reliability of clinical laboratory testing. CLIA applies to any provider who performs any laboratory test used for health purposes, no matter how simple or routine.

CLIA Certificate of Waiver Tests

The following Clinical diagnostic laboratory tests are considered to be CLIA Certificate of Waiver tests are listed in Appendix H. These are the only HCPCS procedure codes that may be billed to the DMAP by a provider who holds a CLIA Certificate of Waiver. If there is a specific product name or manufacturer listed, a provider who holds a CLIA Certificate of Waiver may only bill if the test is done **USING THE SPECIFIC PRODUCT AND MANUFACTURER AS LISTED.**

CODE	DEFINITION	PRODUCT NAME	MANUFACTURER
*80002 effective 1/23/96	Glucose; quantitative	Cholestech LDX	Cholestech
*80002 effective 1/23/96	Triglycerides	Cholestech LDX	Cholestech
*80002 effective 1/1/97 (replaces G0054)	Cholesterol; total	1. Chemtraka Accumeter 2. Advanced-Care Mannheim 3. Boehringer Mannheim AccuChek Instant Plus Cholesterol 4. Cholestech LDX	1. Chemtrak 2. Johnson & Boehringer Mannheim 4. Cholestech
81002	Urinalysis;		

	by dipstick or tablet reagent for bilirubin; glucose; hemoglobin; ketones; leukocytes; nitrite, pH; protein, specific gravity; urobilinogen; any number of these constituents; non automated, without microscopy	Various	Various
81025	Urine pregnancy test, by visual color comparison methods	Various	Various
82044 effective 1/23/96	Albumin; urine, microalbumin; semiquantitative (eg, reagent strip assay)	Boehringer Mannheim Chemstrip Micral	Boehringer Mannheim
82270	Blood, occult; feces screening, 1-3 simultaneous determinations	Various	Various
82273 effective 1/23/96	Blood, occult; other sources; qualitative	SmithKline Gastrocult	SmithKline
82950 effective 1/1/97 (replaces G0055)	Glucose; post glucose dose (includes glucose)	HemoCue-B Glucose Photometer	HemoCue
82951 effective 1/1/97 (replaces G0056)	Glucose; tolerance test (GTT), three specimens (includes glucose)	HemoCue-B Glucose Photometer	HemoCue
*If one (1) or two (2) of these tests are done, the provider must bill procedure code 80002 with one (1) unit. If all three (3) of these tests are done, the provider must bill procedure code 80003 with one (1) unit.			
CODE	DEFINITION	PRODUCT NAME	MANUFACTURER
82952 effective 1/1/97 (replaces G0057)	Glucose; tolerance test, each additional beyond three specimens	HemoCue-B Glucose Photometer	HemoCue

82962 effective 1/23/96	Glucose, blood by glucose monitoring device(s) cleared by the FDA specifically for home use	Various	Various
83026	Hemoglobin; by copper sulfate method, non automated	Various	Various
83718 effective 1/23/96	Lipoprotein, direct measurement; high density cholesterol (HDL cholesterol)	Cholestech LDX	Cholestech
83986 effective 1/23/96	pH, body fluid; except blood. Using qualitative color comparison	Various	Various
85013	Blood count; spun microhematocrit	Various	Various
85018 effective 1/1/97 (replaces Q0H6)	Blood count; hemoglobin	Hemoglobin by single instrument with self-contained or component features to perform specimen/reagent interaction; providing direct measurement and readout	HemoCue
85651	Sedimentation rate; erythrocyte; non automated	Various	Various
86588 effective 1/23/96	Streptococcus; screen, direct	Quick Vue In-Line One-Step Strep A Test	Quidel
87072 effective 1/23/96	Culture or direct bacterial identification method, each organism; by commercial kit, any source except urine	Serim Pyloritek Test Kit	Serim

NOTE: The DMAP does not cover any services relating solely to the treatment of infertility. Therefore, the following waiver test is not reimbursable by the DMAP:

84830 Ovulation tests, by visual color comparison methods for human luteinizing hormone

CLIA Certificate for Provider-Performed Microscopy Procedures (PPMP)

The following Clinical diagnostic laboratory tests are considered CLIA provider-performed microscopy

procedures are listed in Appendix I. A provider who holds a CLIA Certificate for Provider-Performed Microscopy may bill the DMAP for the following procedures in addition to the Certificate of Waiver tests.

81000	Urinalysis, by dipstick or tablet reagent for bilirubin, glucose, hemoglobin, ketones, leukocytes, nitrite, pH, protein, specific gravity, urobilinogen, any number of these constituents; non-automated, with microscopy
81015	Urinalysis; microscopic only
89190	Nasal smear for eosinophils
G0026	Fecal leukocyte examination

NOTE: The DMAP considers the following provider-performed microscopy procedures to be part of the physician evaluation and management service. Therefore, the following are not separately reimbursable by DMAP:

Q0H1	Wet mounts, including preparations of vaginal, cervical or skin specimen
Q0H2	All potassium hydroxide (KOH) preparations
Q0H3	Pinworm examinations

NOTE: The DMAP does not cover any services relating solely to the treatment of infertility. Therefore, the following provider-performed microscopy procedures are not reimbursable by DMAP:

Q0H4	Fern test
Q0H5	Post-coital direct, qualitative examinations of vaginal or cervical mucous
G0027	Semen analysis; presence and/or motility of sperm excluding Huhner test

CLIA Certificate of Registration Tests that DO NOT Require Additional Certification by the DMAP

A practitioner who holds a CLIA Certificate of Registration may bill the DMAP for the following some routinely performed clinical diagnostic laboratory tests in addition to both the Certificate of Waiver tests and the Provider-Performed Microscopy procedures without These tests do not require additional certification by the DMAP. Refer to Appendix J for a list of appropriate HCPCS procedure codes.

NOTE: Skin tests (86485-86586) are not considered to be clinical diagnostic laboratory tests and are, therefore, not monitored by CLIA.

80002	Automated multichannel test; 1 or 2 clinical chemistry tests
80003	Automated multichannel test; 3 clinical chemistry tests
80004	Automated multichannel test; 4 clinical chemistry tests
80005	Automated multichannel test; 5 clinical chemistry tests

80006	Automated multichannel test; 6 clinical chemistry tests	87072	Culture or direct bacterial identification method, each organism, by commercial kit, any source except urine
80007	Automated multichannel test; 7 clinical chemistry tests	87081	Culture, bacterial, screening only, for single organisms
80008	Automated multichannel test; 8 clinical chemistry tests	87082	Culture, presumptive, pathogenic organisms, screening only, by commercial kit (specify type); for single organisms
80009	Automated multichannel test; 9 clinical chemistry tests	87083	Culture, presumptive, pathogenic organisms, screening only, by commercial kit (specify type); multiple organisms
80010	Automated multichannel test; 10 clinical chemistry tests	87086	Culture, bacterial, urine; quantitative, colony count
80011	Automated multichannel test; 11 clinical chemistry tests	87087	Culture, bacterial, urine; commercial kit
80012	Automated multichannel test; 12 clinical chemistry tests	87101	Culture, fungi, isolation (with or without presumptive identification); skin
81001	Urinalysis, by dip stick or tablet reagent for bilirubin, glucose, hemoglobin, ketones, leukocytes, nitrite, pH, protein, specific gravity, urobilinogen, any number of these constituents; automated, with microscopy	87102	Culture, fungi, isolation (with or without presumptive identification); other source (except blood)
81003	Urinalysis, by dip stick or tablet reagent for bilirubin, glucose, hemoglobin, ketones, leukocytes, nitrite, pH, protein, specific gravity, urobilinogen, any number of these constituents; automated, without microscopy	87205	Smear, primary source, with interpretation; routine stain for bacteria, fungi, or cell types
81005	Urinalysis; qualitative or semiquantitative, except immunoassays	87208	Smear, primary source, with interpretation; direct or concentrated, dry, for ova and parasites
82044	Albumin; urine, microalbumin, semiquantitative (eg, reagent strip assay)	87220	Tissue examination for fungi (eg, KOH slide)
82273	Blood, occult; other sources, qualitative	A practitioner who holds a CLIA Certificate of Registration and has a specialty of rheumatology may also bill the DMAP for the following routinely performed tests without Medicaid certification.	
82948	Glucose; blood, reagent strip	83872	Mucin, synovial fluid (Ropes test)
82950	Glucose; post glucose dose (includes glucose)	89060	Crystal identification by light microscopy with or without polarizing lens analysis, any body fluid (except urine)
82951	Glucose; tolerance test (GTT), three specimens (includes glucose)	<u>CLIA Certificate of Registration Tests that DO Require Additional Certification by the DMAP</u>	
82952	Glucose; tolerance test, each additional beyond three specimens	Any other clinical diagnostic laboratory tests performed start-to-finish in a practitioner's office require BOTH a CLIA Certificate of Registration and certification by the Medicaid Laboratory Consultant.	
83718	Lipoprotein, direct measurement; high density cholesterol (HDL cholesterol)	To request this certification, submit a letter to:	
83986	pH, body fluid, except blood	Medicaid Laboratory Consultant	
84525	Urea nitrogen; semiquantitative (eg, reagent strip test)	Division of Social Services	
84703	Gonadotropin, chorionic (hCG); qualitative	P.O. Box 906	
85014	Blood count; other than spun hematocrit	Lewis Building	
85018	Blood count; hemoglobin	New Castle, DE 19720	
85021	Blood count; hemogram, automated (RBC, WBC, Hgb, Het and indices only)	with the following information:	
85022	Blood count; hemogram, automated, and manual differential WBC count (CBC)	<ul style="list-style-type: none"> • Describe the office procedure from start to finish in detail. You may enclose a copy of the package insert for commercial kits. • Enclose a sample of how your test results will be recorded in your office record. • Indicate your CLIA Certificate of Registration Number. • Indicate the name of the physician(s) who will personally perform or supervise the laboratory procedure 	
85023	Blood count; hemogram and platelet count, automated, and manual differential WBC count (CBC)		
85027	Blood count; hemogram and platelet count, automated		
85031	Blood count; hemogram, manual, complete CBC (RBC, WBC, Hgb, Het, differential and indices)		
85044	Blood count; reticulocyte count, manual		
85048	Blood count; white blood cell (WBC)		
85585	Platelet; estimation on smear, only		
85590	Platelet; manual count		
85595	Platelet; automated count		
86063	Antistreptolysin O; screen		
86280	Hemagglutination inhibition test (HAI)		
86308	Heterophile antibodies; screening		
86403	Particle agglutination, screen, each antibody		
86430	Rheumatoid factor; qualitative		
86588	Streptococcus, screen, direct		
86592	Syphilis test, qualitative (eg, VDRL, RPR, ART)		

and include the DMAP provider ID number(s) which will be used for billing.

This information should not be submitted with a claim. When the laboratory consultant has certified your practice to perform the procedure, you will receive a certification letter.

If a claim is submitted for a HCPCS procedure code that requires certification and the practitioner has not followed the above outlined procedure, the claim will be denied with the message "Provider Not Specified to Provide Service." Once a particular HCPCS procedure code has been denied with this message, do not resubmit additional claims for this procedure code until the above noted procedure is complete.

Refer to Appendix K for specific billing instructions for:

- Multiple Units Of Service
- Pregnancy Tests
- Panels and Profiles
- Drug Testing
- Therapeutic Drug Assays
- Urinalysis
- Chemistry and Toxicology
- Hematology
- Immunology
- Microbiology

Multiple Units of Service

The following restrictions apply when billing for multiple units of service:

- Repetition of the same test on the same specimen must not be billed.
- ~~When the same test is performed on separate specimens collected on the same day from the same patient, bill for multiple units of the appropriate HCPCS procedure code. In block 19 of the HCFA 1500 which is used to explain unusual services or circumstances, note the times that the specimens were collected.~~

~~EXAMPLE: If a glucose is drawn at 8 AM and again at 2 PM on the same day, bill for two units of 80002. In block 19 of the HCFA 1500, note that the specimens were collected at 8 AM and 2 PM.~~

- ~~When different procedures are described by one HCPCS procedure code, bill for multiple units of service. In block 19 of the HCFA 1500 which is used to explain unusual services or circumstances, identify the procedures performed.~~

~~EXAMPLE: When both a wound culture and an eye culture are performed on the same day, bill for two units of 87070. In block 19 of the HCFA 1500, state that one wound culture and one eye culture were performed.~~

Pregnancy Tests

The following restrictions apply:

- ~~HCPCS procedure code 81025 (Urine pregnancy test, by visual color comparison methods) should be used for pregnancy tests performed on urine samples that are reported as positive or negative by a visual color comparison.~~
- ~~HCPCS procedure code 84703 [Gonadotropin, chorionic (hCG); qualitative] should be used for pregnancy tests reported as positive or negative.~~
- ~~HCPCS procedure code 84702 [Gonadotropin, chorionic (hCG); quantitative] should be used when determining the range of values of the beta sub-unit of the chorionic gonadotropin. DO NOT USE THIS CODE FOR ROUTINE PREGNANCY TESTS.~~

Panels And Profiles (80002-80090)

Panels or profiles are groups of laboratory tests that are performed and billed as a single unit. Practitioners must use the appropriate single procedure code that describes the group of tests being performed.

The individual HCPCS procedure codes for the 22 tests listed below are NOT used by the DMAP:

<u>Name of Test</u>	<u>Individual HCPCS Procedure Codes Which Are Not Used</u>
Alanine aminotransferase (ALT, SGPT)	84460
Albumin	82040
Aspartate aminotransferase (AST, SGOT)	84450
Bilirubin; direct	82250, 82251
Bilirubin; total	82250, 82251
Calcium	82310
Carbon dioxide content	82374
Chloride	82435
Cholesterol	82465
Creatine kinase (CK, CPK)	82550
Creatinine	82565
Glucose (Sugar)	82947
Gamma-glutamyltransferase (GGT)	82977
Lactic dehydrogenase (LD)	83615
Phosphatase, alkaline	84075
Phosphorus (inorganic phosphate)	84100
Potassium	84132

Protein, total	84155,84160
Sodium	84295
Triglyceride	84478
Urea nitrogen (BUN)	84520
Uric acid	84550

When reporting any of these 22 tests, regardless of whether the tests are performed using manual or semi-automated methods, or on automated multichannel equipment, use the appropriate profile code 80002–G0060 listed below:

USE THESE CODES:

80002	Automated multichannel test; 1 or 2 clinical chemistry tests
80003	Automated multichannel test; 3 clinical chemistry tests
80004	Automated multichannel test; 4 clinical chemistry tests
80005	Automated multichannel test; 5 clinical chemistry tests
80006	Automated multichannel test; 6 clinical chemistry tests
80007	Automated multichannel test; 7 clinical chemistry tests
80008	Automated multichannel test; 8 clinical chemistry tests
80009	Automated multichannel test; 9 clinical chemistry tests
80010	Automated multichannel test; 10 clinical chemistry tests
80011	Automated multichannel test; 11 clinical chemistry tests
80012	Automated multichannel test; 12 clinical chemistry tests
80016	Automated multichannel test; 13–16 clinical chemistry tests
80018	Automated multichannel test; 17–18 clinical chemistry tests
80019	Automated multichannel test; 19 clinical chemistry tests
G0058	Automated multichannel test; 20 clinical chemistry tests
G0059	Automated multichannel test; 21 clinical chemistry tests
G0060	Automated multichannel test; 22 clinical chemistry tests

EXAMPLE: If a BUN and a glucose were run on the same specimen, the correct code would be one unit of 80002. If only a glucose was ordered, the correct code would still be one unit of 80002. If a glucose was run a 9 AM and again at 2 PM on the same day on different specimens, two units of 80002 would be billable.

EXAMPLE: If five of the above tests are ordered, the correct code would be one unit of 80005. Fifteen tests would be billed as one unit of 80016 while twenty-one tests would be one unit of G0059. In each case, the unit of service would be one, not the number of tests actually performed.

Drug Testing (80100-80103)

HCPCS procedure code 80100 (Drug, screen; multiple drug classes, each procedure) should be used for a qualitative drug screen that detects multiple drug classes in a single procedure. HCPCS procedure code 80101 (Drug, screen; single drug class, each drug class) should be used for a qualitative drug screen that detects a single

drug class. HCPCS procedure code 80102 (Drug, confirmation, each procedure) should be used for confirmation (by a second method) of any drugs detected in a drug screen.

HCPCS procedure code 83518 (Immunoassay for analyte other than antibody or infectious agent antigen, qualitative or semiquantitative; single step method [e.g., reagent strip]) should be used for a qualitative or semiquantitative immunoassay of an analyte other than an antibody. This includes quick screens, using low technology testing (e.g., reagent strips, dip stick, etc.).

Confirmed drugs may be quantitated using the appropriate code in the chemistry section (82000-84999) or therapeutic drug assay section (80150-80299).

Therapeutic Drug Assays (80150-80299)

Use the specific procedure code listed in the CPT book for individual quantitative assay. For non-quantitative testing, use codes 80100-80103.

Urinalysis (81000-81099)

Code 81000 is described as a complete urinalysis, non-automated. Code 81001 is a complete urinalysis, automated. Neither is to be used in conjunction with the following HCPCS procedure codes: 81002, 81003, 81005, and 81015. Any stick, dip, or tablet tests performed on a single specimen are considered to be part of the 81000 or 81001 and are not eligible for separate reimbursement. In order to bill for an 81000 or 81001, a microscopy must be performed.

Chemistry And Toxicology (82000-84999)

When billing for any specific chemistry test that is noted under the list of automated, multichannel tests, do not use the individual HCPCS procedure codes regardless of whether the tests are performed using manual methods or automated, multichannel equipment. The practitioner should bill using the appropriate profile code.

Hematology (85000 – 85999)

When billing codes for a complete blood count (CBC) or hemogram, identified as HCPCS procedure codes 85021, 85022, 85023, 85024, 85025, 85027, or 85031, do not bill for any code that is a component of a CBC for the same specimen. The following are the HCPCS procedure codes for components: 85007, 85008, 85013, 85014, 85018, 85029, 85030, 85041, 85048, 85585, 85590, and 85595.

~~Providers are reminded not to use multiple procedure codes when a single procedure code accurately describes the service rendered.~~

Immunology (86000 - 86999)

When there is no specific code for an immunology procedure, the code for the methodology is to be used. Certain codes can be used to describe many different tests. When two or more different tests are described by the same code and are performed on the same patient on the same day, bill on a single line using multiple units of service. Identify the procedures performed in Block 19 of the HCFA 1500, which is used to explain unusual services or circumstances.

Microbiology (87001 - 87999)

The following policies apply:

- A definitive culture is one in which ALL probable pathogens are isolated and identified. Commercial kits are not considered to be definitive culture methods.

EXAMPLE: When billing code 87060 (Culture, bacterial, definitive; throat or nose), the practitioner is expected to be able to isolate and identify Haemophilus, gram negative rods, staphylococci, pneumococci, and other probable naso-pharyngeal pathogens in addition to beta hemolytic streptococci.

- A presumptive or screening culture is one in which a single pathogen is isolated but may or may not be definitively identified.

EXAMPLE: When a throat culture is screened for the presence or absence of group A beta streptococci using a low concentration bacitracin disc, bill for one unit of 87081. Identification aids such as bacitracin and neomycin discs are considered part of the screen and should not be billed in addition to the 87081.

EXAMPLE: When a genital culture is screened for the presence or absence of Neisseria gonorrhea (GC), bill for one unit of 87081.

- Commercial kits are self-contained microbiology systems that offer screening information on one or more probable pathogens. HCPCS procedure codes for commercial kits are found in the microbiology section of the CPT book. Cultures performed using commercial kits are not considered definitive. In block 19 of the HCFA 1500 which is used to explain unusual services or circumstances,

identify the commercial kit used.

EXAMPLE: When a culture of the urethra for Neisseria gonorrhea (GC) is performed using the Isocult commercial kit for gonorrhea, bill for one unit of HCPCS procedure code 87082. In block 19 of the HCFA 1500, note that Isocult was the commercial kit used.

- Direct sensitivities are not reimbursable. A direct sensitivity is inoculated directly from the specimen at the time of the initial culture. DO NOT use HCPCS procedure codes 87181, 87184, 87186, or 87188 to describe direct sensitivities. Sensitivities will only be reimbursed after a pathogen has been isolated and set up for sensitivities.

- HCPCS procedure code 87088 is described as a culture, bacterial, urine; identification, in addition to quantitative or commercial kit. It is not to be used in conjunction with procedure code 87086 (Culture, bacterial, urine; quantitative, colony count) or with procedure code 87087 (Culture, bacterial, urine; commercial kit). They are considered to be part of procedure code 87088 when performed on the same specimen.

Laboratory Codes

HCPCS procedure codes 80002 - 80019 and G0058 - G0060 have been deleted in the CPT book but Delaware Medicaid will continue to use this coding series for automated multichannel testing.

The newly added 1998 CPT codes for organ or disease oriented panels will not be used. Use the appropriate automated multichannel test in the 80002 - 80019 series. For 80049, use 80007. For 80051, use 80004. For 80054, use 80012.

INDEPENDENT LABORATORY PROVIDER MANUAL

IV. BILLING FOR SPECIFIC LABORATORY SERVICES

HCPCS procedure codes 80002-80019 and G0058-G0060 have been deleted in the CPT book but Delaware Medicaid will continue to use this coding series for automated multichannel testing.

The newly added 1998 CPT codes for organ or disease oriented panels will not be used. Use the appropriate authomated multichannel test in the 8002-80019 series. For 80049, use 80007. For 80051, use 80004. For 80054, use 80012.

CLIA Certificate of Waiver Tests

The following Clinical diagnostic laboratory tests are considered to be CLIA Certificate of Waiver tests are listed in Appendix A. These are the only HCPCS procedure codes that may be billed to the DMAP by a provider who holds a CLIA Certificate of Waiver. If there is a specific product name or manufacturer listed, a provider who holds a CLIA Certificate of Waiver may only bill if the test is done **USING THE SPECIFIC PRODUCT AND MANUFACTURER AS LISTED.**

CODE	DEFINITION	PRODUCT NAME	MANUFACTURER
*80002 effective 1/23/96	Glucose; quantitative	Cholestech LDX	Cholestech
*80002 effective 1/23/96	Triglycerides	Cholestech LDX	Cholestech
*80002 effective 1/1/97 (replaces G0054)	Cholesterol; total	1. Chemtraka Accumeter 2. Advanced Care 3. Boehringer Mannheim AccuChek Instant Plus Cholesterol 4. Cholestech LDX	1. Chemtrak 2. Johnson & 3. Boehringer Mannheim
81002	Urinalysis; by dipstick or tablet reagent for bilirubin, glucose, hemoglobin, ketones, leukocytes, nitrite, pH, protein, specific gravity, urobilinogen, any number of these constituents; non automated, without microscopy	Various	Various
81025	Urine pregnancy test, by visual color comparison methods	Various	Various
82044 effective 1/23/96	Albumin; urine; microalbumin; semiquantitative (eg, reagent strip	Boehringer Mannheim Chemstrip Micral	Boehringer Mannheim

82270	Blood, occult; feces screening, 1-3 simultaneous determinations	Various	Various
82273 effective 1/23/96	Blood, occult; other sources; qualitative	SmithKline Gastrocult	SmithKline
82950 effective 1/1/97 (replaces G0055)	Glucose; post glucose dose (includes glucose)	HemoCue-B Glucose Photometer	HemoCue
82951 effective 1/1/97 (replaces G0056)	Glucose; tolerance test (GTT), three specimens (includes glucose)	HemoCue-B Glucose Photometer	HemoCue

*If one (1) or two (2) of these tests are done, the provider must bill procedure code 80002 with one (1) unit. If all three (3) of these tests are done, the provider must bill procedure code 80003 with one (1) unit.

CODE	DEFINITION	PRODUCT NAME	MANUFACTURER
82952 effective 1/1/97 (replaces G0057)	Glucose; tolerance test, each additional beyond three specimens	HemoCue-B Glucose Photometer	HemoCue
82962	Glucose, blood by glucose monitoring device(s) cleared by the FDA specifically for home use	Various	Various
83026	Hemoglobin; by copper sulfate method, non automated	Various	Various
83718 effective 1/23/96	Lipoprotein, direct measurement; high density cholesterol (HDL cholesterol)	Cholestech LDX	Cholestech
83986 effective 1/23/96	pH, body fluid; except blood. Using qualitative color comparison	Various	Various
85013	Blood count; spun microhematocrit	Various	Various
85018 effective 1/1/97 (replaces Q0H6)	Blood count; hemoglobin	Hemoglobin by single instrument with self-contained or component features to perform specimen/reagent	HemoCue

		interaction; providing direct measurement and readout	
85651	Sedimentation rate, erythrocyte; non automated	Various	Various
86588	Streptococcus; effective screen, direct	Quick-Vue In-Line One-Step Strep A-Test	Quidel
1/23/96			
87072	Culture or direct effective bacterial identifica- tion method, each organism, by commercial kit, any source except urine	Serim Pyloritek Test Kit	Serim
1/23/96			

NOTE: The DMAP does not cover any services relating solely to the treatment of infertility. Therefore, the following waiver test is not reimbursable by the DMAP:

84830 Ovulation tests, by visual color comparison methods for human luteinizing hormone

CLIA Certificate for Provider-Performed Microscopy Procedures (PPMP)

The following Clinical diagnostic laboratory tests are considered CLIA provider-performed microscopy procedures are listed in Appendix B. A provider who holds a CLIA Certificate for Provider-Performed Microscopy may bill the DMAP for the following procedures in addition to the Certificate of Waiver tests.

81000	Urinalysis, by dipstick or tablet reagent for bilirubin, glucose, hemoglobin, ketones, leukocytes, nitrite, pH, protein, specific gravity, urobilinogen, any number of these constituents; non-automated, with microscopy
81015	Urinalysis; microscopic only
89190	Nasal smear for eosinophils
G0026	Fecal leukocyte examination

NOTE: The DMAP considers the following provider-performed microscopy procedures to be part of the physician evaluation and management service. Therefore, the following are not separately reimbursable by DMAP:

Q0114	Wet mounts, including preparations of vaginal, cervical or skin specimen
Q0112	All potassium hydroxide (KOH) preparations
Q0113	Pinworm examinations

NOTE: The DMAP does not cover any services relating

solely to the treatment of infertility. Therefore, the following provider-performed microscopy procedures are not reimbursable by DMAP:

Q0114	Fern test
Q0115	Post-coital direct, qualitative examinations of vaginal or cervical mucous
G0027	Semen analysis; presence and/or motility of sperm excluding Huhner test

CLIA Certificate of Registration Tests

An independent laboratory who holds a CLIA Certificate of Registration may bill the DMAP for any clinical diagnostic laboratory test for which they have received CLIA certification.

Refer to Appendix C for specific billing instructions for:

- Multiple Units of Service
- Pregnancy Tests
- Panels and Profiles
- Drug Testing
- Therapeutic Drug Assays
- Urinalysis
- Chemistry and Toxicology
- Hematology
- Immunology
- Microbiology

Multiple Units of Service

The following restrictions apply when billing for multiple units of service:

- Repetition of the same test on the same specimen must not be billed.
- When the same test is performed on separate specimens collected on the same day from the same patient, bill for multiple units of the appropriate HCPCS procedure code. In block 19 of the HCFA 1500 which is used to explain unusual services or circumstances, note the times that the specimens were collected.

EXAMPLE: If a glucose is drawn at 8 AM and again at 2 PM on the same day, bill for two units of 80002. In block 19 of the HCFA 1500, note that the specimens were collected at 8 AM and 2 PM.

- When different procedures are described by one HCPCS procedure code, bill for multiple units of service. In block 19 of the HCFA 1500 which is used to explain unusual services or circumstances, identify the

procedures performed:

~~EXAMPLE: When both a wound culture and an eye culture are performed on the same day, bill for two units of 87070. In block 19 of the HCFA 1500, state that one wound culture and one eye culture were performed.~~

~~Pregnancy Tests~~

The following restrictions apply:

- ~~- HCPCS procedure code 81025 (Urine pregnancy test, by visual color comparison methods) should be used for pregnancy tests performed on urine samples that are reported as positive or negative by a visual color comparison.~~
- ~~- HCPCS procedure code 84703 [Gonadotropin, chorionic (hCG); qualitative] should be used for pregnancy tests reported as positive or negative.~~
- ~~- HCPCS procedure code 84702 [Gonadotropin, chorionic (hCG); quantitative] should be used when determining the range of values of the beta sub-unit of the chorionic gonadotropin. DO NOT USE THIS CODE FOR ROUTINE PREGNANCY TESTS.~~

~~Panels and Profiles (80002-G0060)~~

~~Panels or profiles are groups of laboratory tests that are performed and billed as a single unit. Practitioners must use the appropriate single procedure code that describes the group of tests being performed.~~

~~The individual HCPCS procedure codes for the 22 tests listed below are NOT used by the DMAP.~~

Name of Test	Individual HCPCS Procedure Codes Which Are Not Used
Alanine aminotransferase (ALT, SGPT)	84460
Albumin	82040
Aspartate aminotransferase (AST, SGOT)	84450
Bilirubin; direct	82250, 82251
Bilirubin; total	82250, 82251
Calcium	82310
Carbon dioxide content	82374
Chloride	82435
Cholesterol	82465
Creatine kinase (CK, CPK)	82550
Creatinine	82565
Glucose (Sugar)	82947
Gamma-glutamyltransferase (GGT)	82977
Lactic dehydrogenase (LD)	83615
Phosphatase, alkaline	84075
Phosphorus (inorganic phosphate)	84100

Potassium	84132
Protein, total	84155, 84160
Sodium	84295
Triglyceride	84478
Urea nitrogen (BUN) 84520	
Uric acid	84550

~~When reporting any of these 22 tests, regardless of whether the tests are performed using manual or semi-automated methods, or on automated multichannel equipment, use the appropriate profile code 80002-G0060 listed below:~~

~~USE THESE CODES:~~

80002	Automated multichannel test; 1 or 2 clinical chemistry tests
80003	Automated multichannel test; 3 clinical chemistry tests
80004	Automated multichannel test; 4 clinical chemistry tests
80005	Automated multichannel test; 5 clinical chemistry tests
80006	Automated multichannel test; 6 clinical chemistry tests
80007	Automated multichannel test; 7 clinical chemistry tests
80008	Automated multichannel test; 8 clinical chemistry tests
80009	Automated multichannel test; 9 clinical chemistry tests
80010	Automated multichannel test; 10 clinical chemistry tests
80011	Automated multichannel test; 11 clinical chemistry tests
80012	Automated multichannel test; 12 clinical chemistry tests
80016	Automated multichannel test; 13-16 clinical chemistry tests
80018	Automated multichannel test; 17-18 clinical chemistry tests
80019	Automated multichannel test; 19 clinical chemistry tests
G0058	Automated multichannel test; 20 clinical chemistry tests
G0059	Automated multichannel test; 21 clinical chemistry tests
G0060	Automated multichannel test; 22 clinical chemistry tests

~~EXAMPLE: If a BUN and a glucose were run on the same specimen, the correct code would be one unit of 80002. If only a glucose was ordered, the correct code would still be one unit of 80002. If a glucose was run a 9 AM and again at 2 PM on the same day on different specimens, two units of 80002 would be billable.~~

~~EXAMPLE: If five of the above tests are ordered, the correct code would be one unit of 80005. Fifteen tests would be billed as one unit of 80016 while twenty-one tests would be one unit of G0059. In each case, the unit of service would be one, not the number of tests actually performed.~~

~~Drug Testing (80100-80103)~~

~~HCPCS procedure code 80100 (Drug, screen; multiple drug classes, each procedure) should be used for a qualitative drug screen that detects multiple drug classes in a single procedure. HCPCS procedure code 80101 (Drug, screen; single drug class, each drug class) should~~

be used for a qualitative drug screen that detects a single drug class. HCPCS procedure code 80102 (Drug, confirmation, each procedure) should be used for confirmation (by a second method) of any drugs detected in a drug screen.

HCPCS procedure code 83518 (Immunoassay for analyte other than antibody or infectious agent antigen, qualitative or semiquantitative; single step method [e.g., reagent strip]) should be used for a qualitative or semiquantitative immunoassay of an analyte other than an antibody. This includes quick screens, using low technology testing (e.g., reagent strips, dip stick, etc.).

Confirmed drugs may be quantitated using the appropriate code in the chemistry section (82000-84999) or therapeutic drug assay section (80150-80299).

Therapeutic Drug Assays (80150-80299)

Use the specific procedure code listed in the CPT book for individual quantitative assay. For non quantitative testing, use codes 80100-80103.

Urinalysis (81000-81099)

Code 81000 is described as a complete urinalysis, non-automated. Code 81001 is a complete urinalysis, automated. Neither is to be used in conjunction with the following HCPCS procedure codes: 81002, 81003, 81005, and 81015. Any stick, dip, or tablet tests performed on a single specimen are considered to be part of the 81000 or 81001 and are not eligible for separate reimbursement. In order to bill for an 81000 or an 81001, a microscopy must be performed.

Chemistry And Toxicology (82000-84999)

When billing for any specific chemistry test that is noted under the list of automated, multichannel tests, do not use the individual HCPCS procedure codes regardless of whether the tests are performed using manual methods or automated, multichannel equipment. The practitioner should bill using the appropriate profile code.

Hematology (85000 - 85999)

When billing codes for a complete blood count (CBC) or hemogram, identified as HCPCS procedure codes 85021, 85022, 85023, 85024, 85025, 85027, or 85031, do not bill for any code that is a component of a CBC for the same specimen. The following are the HCPCS procedure codes for components: 85007, 85008, 85013, 85014, 85018, 85041, 85048, 85585, 85590, and 85595.

~~Providers are reminded not to use multiple procedure codes when a single procedure code accurately describes the service rendered.~~

Immunology (86000 - 86999)

When there is no specific code for an immunology procedure, the code for the methodology is to be used. Certain codes can be used to describe many different tests. When two or more different tests are described by the same code and are performed on the same patient on the same day, bill on a single line using multiple units of service.

Identify the procedures performed in Block 19 of the HCFA 1500, which is used to explain unusual services or circumstances.

Microbiology (87001 - 87999)

The following policies apply:

- A definitive culture is one in which ALL probable pathogens are isolated and identified. Commercial kits are not considered to be definitive culture methods.

EXAMPLE: When billing code 87060 (Culture, bacterial, definitive; throat or nose), the practitioner is expected to be able to isolate and identify Haemophilus, gram negative rods, staphylococci, pneumococci, and other probable naso-pharyngeal pathogens in addition to beta hemolytic streptococci.

- A presumptive or screening culture is one in which a single pathogen is isolated but may or may not be definitively identified.

EXAMPLE: When a throat culture is screened for the presence or absence of group A beta streptococci using a low concentration bacitracin disc, bill for one unit of 87081. Identification aids such as bacitracin and neomycin discs are considered part of the screen and should not be billed in addition to the 87081.

EXAMPLE: When a genital culture is screened for the presence or absence of Neisseria gonorrhoea (GC), bill for one unit of 87081.

- Commercial kits are self-contained microbiology systems that offer screening information on one or more probable pathogens. HCPCS procedure codes for commercial kits are found in the microbiology section of the CPT book. Cultures performed using commercial kits are not considered definitive. In block 19 of the HCFA 1500 which is used to explain unusual services or

circumstances, identify the commercial kit used.

~~EXAMPLE: When a culture of the urethra for Neisseria gonorrhoea (GC) is performed using the Isocult commercial kit for gonorrhoea, bill for one unit of HCPCS procedure code 87082. In block 19 of the HCFA 1500, note that Isocult was the commercial kit used.~~

~~- Direct sensitivities are not reimbursable. A direct sensitivity is inoculated directly from the specimen at the time of the initial culture. DO NOT use HCPCS procedure codes 87181, 87184, 87186, or 87188 to describe direct sensitivities. Sensitivities will only be reimbursed after a pathogen has been isolated and set up for sensitivities.~~

~~- HCPCS procedure code 87088 is described as a culture, bacterial, urine; identification, in addition to quantitative or commercial kit. It is not to be used in conjunction with procedure code 87086 (Culture, bacterial, urine; quantitative, colony count) or with procedure code 87087 (Culture, bacterial, urine; commercial kit). They are considered to be part of procedure code 87088 when performed on the same specimen.~~

**DEPARTMENT OF HEALTH &
SOCIAL SERVICES
DIVISION OF SOCIAL SERVICES**

IN THE MATTER OF:

**REVISION OF THE REGULATIONS
OF THE MEDICAID/MEDICAL
ASSISTANCE PROGRAM**

NATURE OF THE PROCEEDINGS:

The Delaware Department of Health and Social Services ("Department") initiated proceedings to update eligibility policies reflecting changes made as a result of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). The Department's proceedings to amend its regulations were initiated pursuant to 29 Delaware Code Section 10114 and its authority as prescribed by 31 Delaware Code Section 512.

The Department published its notice of proposed regulation changes pursuant to 29 Delaware Code Section 10115 in the February 1998 Register of Regulations, requiring written materials and suggestions from the public concerning the proposed regulations to be

produced by March 1, 1998, at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

No written or verbal comments were received relating to this proposed rule.

FINDINGS OF FACT:

The Department finds that the proposed changes as set forth in the February Register of Regulations should be adopted as written.

THEREFORE, IT IS ORDERED, that the proposed regulations of the Medicaid/Medical Assistance Program are adopted and shall be final effective April 10, 1998.
3/12/98

Date of Signature

Gregg C. Sylvester, M.D.
Secretary

Medicaid / Medical Assistance Program

In compliance with the State's Administrative Procedures Act (APA - Title 29, Chapter 101 of the Delaware Code) and with 42CFR §447.205, the Delaware Department of Health and Social Services (DHSS) Division of Social Services/Medical Assistance Program (DMAP) hereby publishes notice of proposed policy amendments to the Medicaid eligibility policy manual reflecting changes made to the program as a result of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L. 104-193 (PRWORA) and changes to coverage for aliens mandated by PRWORA and new coverage for some aliens funded by the State. The proposed policy changes are as follows:

240.10 CITIZENSHIP AND ALIENAGE

Overview

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA, P.L. 104-193) enacted on August 22, 1996, significantly changed Medicaid eligibility for individuals who are not citizens of the United States. The legislation revised the categories of noncitizens who may be determined eligible for Medicaid. The legislation identifies noncitizens as qualified aliens or nonqualified aliens. The term qualified refers to groups of aliens whose members may establish Medicaid eligibility under certain circumstances and subject to certain limitations. For specific groups of aliens identified as nonqualified, eligibility is limited to the treatment of an emergency medical condition as defined in this section.

In State Fiscal Year 1998, (SFY 98), the Delaware

legislature appropriated state only funds to restore coverage of full Medicaid benefits to legally residing noncitizens who lost eligibility for full Medicaid benefits because of PRWORA. Coverage for these aliens will be provided on a fee for service basis and is subject to the availability of state funding. In the event state funding is exhausted, the benefits will be reduced to coverage of emergency services and labor and deliver only.

Aliens who may be found eligible for full Medicaid coverage using the state funds include legally residing nonqualified aliens and qualified aliens subject to the 5 year bar. Illegally residing aliens and ineligible aliens are not eligible for full Medicaid coverage, but remain eligible for emergency services and labor and delivery only.

All applicants, whether aliens or citizens, must meet the technical and financial eligibility criteria of a specific eligibility group such as SSI related group, AFDC related group, or poverty level related group. Not every alien, qualified or nonqualified, will be eligible for Medicaid. For example, enrollment in a managed care organization is a technical eligibility requirement for adults in the expanded population under the Diamond State Health Plan demonstration waiver. A nonqualified alien or a qualified alien who is subject to the 5 year PRWORA bar cannot be found eligible in the expanded population. This is because the state funded benefits are provided on a fee for service basis. An individual cannot be found eligible under the expanded population for emergency services only because those benefits are provided on a fee for service basis. Adults in the expanded population are required to enroll in managed care to receive benefits.

I. United States Citizens

An individual qualifies as a U.S. citizen if the person was born in the 50 states and District of Columbia, Puerto Rico, Guam, U.S. Virgin Islands, or Northern Mariana Islands. Nationals from American Samoa or Swain's Island are regarded as U.S. citizens for purposes of Medicaid eligibility. Children of a U.S. citizen who are born outside the U.S., may automatically be eligible for a Certificate of Citizenship. In order to receive the certificate, an INS Form N-600 needs to be filed.

A. Medicaid Eligibility for U.S. citizens

Medicaid must be provided to eligible citizens or nationals of the United States.

II. Noncitizens or Aliens

The word "alien" is a technical, legal term for a person who is not a U.S. citizen. Common immigration terms

are listed at the end of this section. Medicaid eligibility for aliens is based on whether the alien is a qualified or nonqualified alien. The previous category of lawful permanent resident becomes a subcategory of the new term qualified alien. The category known as permanently residing in the United States under color of law (PRUCOL) no longer applies and is no longer an eligibility classification. Individuals who were formerly PRUCOL are now considered nonqualified aliens.

III. Qualified Aliens

A qualified alien is:

- a) an alien who is lawfully admitted for permanent residence under the Immigration and Nationality Act (INA). ~~An American Indian born in Canada is included in this designation provided he or she is of at least one-half American Indian blood. This does not include a spouse or child of the Indian or a non-citizen whose membership in an Indian tribe or family is created by adoption, unless the person is of at least 50% or more Indian blood.~~
- b) a refugee who is admitted to the United States under §207 of the INA
- c) an alien who is granted asylum under §208 of the INA
- d) an alien whose deportation is being withheld under §243(h) of the INA or §241(b)(3) of the INA
- e) an alien who is paroled into the United States under §212(d)(5) of the INA for a period of at least 1 year
- f) an alien granted conditional entry pursuant to §203(a)(7) of the INA as in effect before April 1, 1980
- g) honorably discharged veterans and aliens on active duty in the U.S. armed forces and the spouse or unmarried dependent children of a veteran or active duty serviceman. The discharge must not be due to alien status and the active duty status must not be for training. For example, the 2 weeks of active duty training usually required of members of the National Guard does not meet the definition of active duty. Hmong and other Highland Lao veterans who fought on behalf of the Armed Forces of the U.S. during the Vietnam conflict and who have lawfully been admitted for permanent residence are considered veterans.
- h) an alien granted status as a Cuban and Haitian entrant (as defined in Section 501(e) of the Refugee Education Assistance Act of 1980)
- i) an alien admitted to the U.S. as an Amerasian immigrant pursuant to Section 584 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1988
- j) aliens who have been subjected to battery or extreme cruelty and who meet certain criteria, including an alien whose child has been battered or an alien child whose parent has been battered

k) an American Indian born in Canada who is at least one-half American Indian blood and to whom the provisions of §289 of the INA apply or who is a member of an Indian tribe under section 4(e) of the Indian Self-Determination and Education Assistance Act

A. Medicaid Eligibility for Qualified Aliens

Effective January 1, 1998, all qualified aliens, regardless of the date of entry into the U.S., may be found eligible for full Medicaid benefits, including long term care services.

The Delaware legislature appropriated state only funds to restore full Medicaid benefits to legally residing noncitizens who lost eligibility for full Medicaid because of PRWORA. Under PRWORA, certain qualified aliens entering the U.S. on or after 8/22/96 were subject to a 5 year bar on eligibility. Coverage for full Medicaid benefits for the qualified aliens who are under the 5 year PRWORA bar, is subject to the availability of state funds.

The PRWORA policy (as amended by the Balanced Budget Act) which follows describes the eligibility for qualified aliens prior to the appropriation of state funds. In the event such state funding is exhausted, eligibility for qualified aliens will be determined using the PRWORA policy described below.

Under PRWORA, there are both mandatory and optional coverage groups for qualified aliens depending upon the alien's date of entry into the U.S. Delaware has decided to cover both the mandatory and optional groups.

The date of entry is significant for the aliens listed as a), e), f), j). These aliens who enter the U.S. on or after 8/22/96 are not eligible for full Medicaid benefits for 5 years after date of entry. These aliens are eligible only for emergency services and labor and delivery services during the first 5 years in the U.S.

The following qualified aliens may be found eligible for Medicaid regardless of their date of entry into the U.S.:

- Refugees (§207 of INA)
- Asylees (§208 of INA)
- Aliens who have had deportation withheld under §243(h) or §241(b)(3) of the INA
- Honorably discharged veterans and aliens on active duty in the U.S. armed forces and the spouse or unmarried dependent children of a veteran or active duty serviceman.
- Cuban and Haitian entrants
- Amerasians
- American Indian born in Canada or who is a member

of an Indian tribe under section 4(e) of the Indian Self-Determination and Education Assistance Act

In addition, title IVE Foster Children and Adoption Assistance children may be found eligible for Medicaid regardless of date of entry provided the foster or adoptive parent of the child is also a qualified alien or a citizen. The IVE agency is responsible for making that determination about the parent. If a IVE payment is being made on behalf of the child, then the child is deemed eligible for Medicaid.

For the following qualified aliens, eligibility under PRWORA is determined based upon the date of entry into the U.S.:

- Lawful permanent residents
- Aliens granted parole (parolees)
- Aliens granted conditional entry (conditional entrants)
- battered immigrants

If these aliens (lawful permanent residents, parolees, conditional entrants, battered immigrants) were living in the U.S. before August 22, 1996, they may be found eligible for Medicaid. If these aliens entered the U.S. on or after August 22, 1996, they are not eligible for full Medicaid benefits for 5 years from the date of entry into the U.S. They may be found eligible for emergency services only during the first 5 years after entering the U.S. Once these aliens have been in the U.S. for 5 years, they may be found eligible for full Medicaid.

IV. Legally Residing Nonqualified Aliens

These are aliens who do not meet the above definition of qualified aliens. Individuals formerly known as PRUCOL are now considered nonqualified aliens. Nonqualified aliens have to provide a Social Security Number (SSN) if one is available, or apply for a SSN if the applicant does not have one.

Legally residing nonqualified aliens include the following:

- aliens granted permission to remain and work in the U.S.
- individuals who have been paroled into the U.S. for less than 1 year
- applicants for immigration status such as applicants for asylum, adjustment to lawful permanent resident status, suspension of deportation
- aliens in Temporary Protected Status (TPS)
- aliens in temporary resident status

- Family unity beneficiaries
- aliens under deferred enforced departure
- aliens in deferred action status
- aliens who are the spouses or children of U.S. citizens with approved visa petitions and pending adjustment of status application.

A. Medicaid Eligibility for Legally Residing Nonqualified Aliens

Effective January 1, 1998, legally residing nonqualified aliens, regardless of the date of entry into the U.S., may be found eligible for full Medicaid benefits, including long term care services.

The Delaware legislature appropriated state only funds to restore full coverage of Medicaid benefits to legally residing noncitizens who lost eligibility for full Medicaid benefits because of PRWORA. Coverage for full Medicaid benefits for these legally residing nonqualified aliens is subject to the availability of state funds.

The PRWORA policy (as amended by the Balanced Budget Act) which follows describes the eligibility for legally residing nonqualified aliens prior to the appropriation of state funds. In the event such state funding is exhausted, eligibility for legally residing nonqualified aliens will be determined using the PRWORA policy described below.

Under PRWORA, legally residing nonqualified aliens, who meet the technical and financial requirements of a specific Medicaid eligibility group, are only eligible for the treatment of an emergency medical condition, as defined in this section, and labor and delivery services. Under PRWORA, legally residing nonqualified aliens are not eligible for any long term care Medicaid program.

V. Illegally Residing Nonqualified Aliens

The term nonqualified aliens also includes aliens who are illegally residing in the U.S. These aliens either were never legally admitted to the United States for any period of time, or were admitted for a limited period of time and did not leave the United States when the period of time expired. Unlike other nonqualified aliens, they are not issued SSNs. Aliens who are illegally residing in the U.S. do not have to provide a SSN.

Legal nonimmigrants are not included in the group of nonqualified aliens. Legal nonimmigrants are included with the group known as ineligible aliens.

A. Medicaid Eligibility for Illegally Residing Nonqualified Aliens

Illegally residing nonqualified aliens, who meet the technical and financial requirements of a specific Medicaid eligibility group, are only eligible for the treatment of an emergency medical condition, as defined in this section, and labor and delivery services. Illegally residing nonqualified aliens are not eligible for any long term care Medicaid program.

VI. Ineligible Aliens

Some aliens may be lawfully admitted to the United States but only for a temporary or specified period of time as legal nonimmigrants. They are known as ineligible aliens. These aliens do not have to provide a Social Security Number. The following categories of individuals are known as ineligible aliens:

- Foreign government representative on official business and their families and servants
- Visitors for business or pleasure, including exchange visitors
- Aliens in travel status while traveling directly through the U.S.
- Crewmen on shore leave
- Treaty traders and investors and their families
- Foreign students
- International organization representation and personnel and their families and servants
- Temporary workers including agricultural contract workers
- Members of foreign press, radio, film, or other information media and their families.

Ineligible aliens may present the following documentation:

- Form I-94 Arrival-Departure Record with codes other than those listed for qualified aliens, such as a nonimmigrant code
- Form I-185, Canadian Border Crossing Card
- Form I-186, Mexican Border Crossing Card
- Form I-95A, Crewman's Landing Permit.

A. Medicaid Eligibility for Ineligible Aliens

In some cases an alien in a currently valid nonimmigrant classification may meet State residence rules. When this is the case, the alien may be found eligible for Medicaid.

Ineligible aliens, who meet the technical and financial requirements of a specific Medicaid eligibility group (including State residency), are only eligible for the treatment of an emergency medical condition, as defined in this section, and labor and delivery services. Ineligible

aliens are not eligible for any long term care Medicaid program.

VII. Treatment of an Emergency Medical Condition

To be eligible for coverage of labor and delivery and emergency services, the alien must meet all eligibility requirements for a specific Medicaid eligibility group such as in the SSI related groups, poverty level related groups, or AFDC related groups. The alien does not have to meet the requirement concerning declaration of satisfactory immigration status and verification of that status.

Under PRWORA, nonqualified noncitizens (aliens) are eligible ONLY for coverage of emergency services and labor and delivery services. As noted previously, legally residing nonqualified aliens may be found eligible for full Medicaid benefits effective January 1, 1998. Illegally residing aliens and ineligible aliens are eligible ONLY for coverage of emergency services and labor and delivery services. These services must be rendered in an acute care hospital emergency room or in an acute care inpatient hospital. In addition, emergency services must be rendered for diagnoses designated by the Delaware Medical Assistance Program (DMAP) as an emergency. A comprehensive list of the covered diagnoses is available in Appendix G of the DMAP Provider General Policy Manual.

The DMAP defines an emergency as:

- a sudden serious medical situation that is life threatening; OR
- a severe acute illness or accidental injury that demands immediate medical attention or surgical attention; AND
- without the treatment a person's life could be threatened or he or she could suffer serious long lasting disability.

Medically necessary physician (surgeon, pathologist, anesthesiologist, emergency room physician, internist, etc.) or midwife services rendered during an emergency service that meets the above criteria are covered. Ancillary services (lab, x-ray, pharmacy, etc.) rendered during an emergency service that meets the above criteria are also covered. Emergency ambulance services to transport these individuals to and from the services defined above are also covered.

Services not covered for nonqualified noncitizens who are determined to be eligible for emergency service and

labor and delivery only include but are not limited to:

- any service delivered in a setting other than an acute care hospital emergency room or an acute care inpatient hospital.
- any service (such as pharmacy, transportation, office visit, lab or x-ray, home health) that precedes or is subsequent to a covered emergency service. Exception: ambulance transportation that is directly related to the emergency is covered.
- organ transplants
- long term care or rehabilitation care
- routine prenatal and post partum care

VIII. Documentation and Verification of Citizenship or Alien Status

A. Declaration of Satisfactory Immigration Status

As a condition of eligibility, applicants must sign a written declaration under penalty of perjury stating if he or she is a citizen, national of the United States or an alien in satisfactory immigration status. (qualified alien or alien in lawful status) This declaration is obtained on the Affidavit of Citizenship or Lawful Immigration Status form as part of the application for Medicaid. In the case of a child or incompetent applicant, an adult must sign on the applicant's behalf. The applicant must also sign the Consent of Disclosure (Form SAVE 2), which allows the Immigration and Naturalization Service (INS) to provide verification of the individual's alien status.

If the applicant is not a citizen, national of the United States, qualified aliens or an alien in lawful status, the declaration of citizenship or satisfactory immigration status and verification of such status is not required. If the applicant will not sign the declaration, he or she may be found eligible for coverage for labor and delivery and emergency services only.

B. Documentation of Citizenship or Alien Status

Applicants must provide documentation of citizenship, qualified alien status, or lawful alien status. All noncitizens who declare they are qualified aliens or in lawful alien status, must provide INS documents to establish immigration status. Examples of acceptable documentation for U.S. citizens, qualified aliens, and lawful alien status are given in this section.

If the applicant will not provide evidence of citizenship or alien status and does not allege qualified or lawful alien status, the application is not denied, but an eligibility determination is completed for coverage of labor and

delivery and emergency services only.

As required by §1137(d)(4) of the Social Security Act, Medicaid will be provided to individuals who meet all other nonimmigration Medicaid eligibility requirements, pending verification of immigration status. We will provide Medicaid to an otherwise eligible individual who has presented INS documents showing qualified or lawful alien status, pending verification of the document.

For noncitizen applicants who declare they are qualified or lawful aliens or for individuals who declare citizenship but have no documentation, we must allow the individual a reasonable opportunity to produce evidence of immigration or citizenship status. We will give the individual 30 days from the date of the receipt of application to produce an INS document or documentation of citizenship. If the individual meets all other eligibility requirements except for this documentation, we will provide Medicaid during this 30 day period.

If the applicant provides an expired INS document or has no documentation regarding his or her immigration status, refer the individual to the local INS district office to obtain evidence of status. As noted previously, Medicaid coverage is provided for a 30 day period pending verification of alien status. If the applicant can provide an alien registration number, follow the secondary verification procedures outlined below under Section “C. Verification of Immigration Alien Status”.

C. Verification of Immigration Alien Status

States are required to verify alien status with the INS. Delaware Medicaid will verify alien status through the Systematic Alien Verification for Entitlements (SAVE) mechanism in operation in the Division of Social Services. Verification must be completed at initial application and at redetermination.

Staff will institute primary verification to INS through the DSS form “Record of Contact with ASVI Data Base” (SAVE-1). ASVI is the acronym for Alien Status Verification Index. Clear copies of alien immigration documentation must be attached to the SAVE-1 form. If the response verifies alien status, process the case using the INS information. If the response states institute secondary verification, begin that process by completing all parts of Section A on the revised G-845S. A separate G-845S must be completed for each applicant and must include copies of the documents for that person only. If a family has applied for benefits, each member will require a separate G-845S. The local INS office will complete the G-845S and return it to the State

Office SAVE point-of-contact person, who will forward the response to the eligibility worker.

INS verification requests and responses (both primary and secondary) must be dated and filed in the case record.

An alien registration number is required for both primary and secondary verifications. If the applicant provides an alien registration number but does not have the INS document, complete Form G-845S including the alien registration number. If an applicant provides a receipt indicating that he or she has applied to INS for a replacement document, use a Form G-845S attaching a copy of the receipt.

D. Documentation of U.S. Citizenship

The following are examples of acceptable documentation of U.S. citizenship for Medicaid applicants:

- Birth certificate
- Religious record of birth recorded in the U.S. or its territories within 3 months of birth, which indicates a U.S. place of birth. The document must show either the date of birth or individual’s age at the time the record was made.
- Hospital record of birth in one of the 50 States, the District of Columbia, Puerto Rico (on or after January 13, 1941), Guam (on or after April 10, 1899), the U.S. Virgin Islands (on or after January 17, 1917), American Samoa, Swain’s Island or the Northern Mariana Islands (unless the person was born to foreign diplomats residing in such a jurisdiction)
- U.S. passport (not time limited passports, which are issued for periods of less than 5 years)
- Report of Birth Abroad of a Citizen of the U.S. (INS Form FS-240)
- TPQY from Social Security Administration showing citizen code “A” or “C”
- Certification of Birth (INS Form FS-545)
- U. S. Citizen I.D. Card (INS Form I-197)
- Naturalization Certificate (INS Form N-550 or N-570)
- Certificate of Citizenship (INS Form N-560 or N-561)
- Northern Mariana Identification Card (issued by the

INS to a collectively naturalized citizen of the U.S. who was born in the Northern Mariana Islands before November 3, 1986)

- American Indian Card with a classification code "KIC" and a statement on the back (issued by the INS to identify U.S. citizen members of the Texas Band of Kickapoos living near the U.S./Mexican border)
- Other alternative documentation that is determined to be acceptable by the State

E. Documentation of Qualified Aliens

Acceptable documentation of qualified alien status is listed below. The card should show the date of admission or date of entry into the United States.

1. Lawful Permanent Residents

INS Form I-551, or for recent arrivals, a temporary I-551 stamp in a foreign passport or on Form I-94.

NOTE: INS has replaced Forms I-151, AR-3 and AR-3a. If a lawful permanent resident presents one of these old INS forms as evidence of status, contact INS using a G-845S and attach the old card.

~~An American Indian Born in Canada is considered to be lawfully admitted for permanent residence if he or she is of at least one-half American Indian blood. Documentation to be used includes birth or baptismal certificate issued on a reservation, tribal records, letter from the Canadian Department of Indian Affairs or school records.~~

2. Refugees

INS Form I-94 annotated with stamp showing entry as refugee under §207 of the Immigration and Naturalization Act (INA) and date of entry to the United States; INS Form I-688B annotated 274a.12(a)(3); I-766 annotated A3; or Form I-571. Refugees usually adjust to Lawful Permanent Resident status after 12 months in the U.S. However, for purposes of eligibility, the individual is still considered a refugee and it is important to check the coding on Form I-551 for codes RE-6, RE-7, RE-8, or RE-9.

3. Asylees

INS Form I-94 annotated with stamp showing grant of asylum under §208 of the INA; a grant letter from the Asylum Office of the INS; Form I-688B annotated 274a.12(a)(5); I-766 annotated A5; or an order of an

Immigration Judge granting asylum. If the applicant provides a court order contact INS using a G-845S and attach a copy of the court order.

4. Alien who has had deportation withheld under §243(h) of the INA

Order of an Immigration Judge showing deportation withheld under §243(h) or §241(b)(3) and date of the grant; Form I-688B annotated 274a.12(a)(10); or I-766 annotated A10. If applicant provides a court order contact INS using G-845S and attach copy of court order.

5. Parolees

INS Form I-94 annotated with stamp showing grant of parole under §212(d)(5) of the INA and a date showing granting of parole for at least 1 year. INS Form I-688B annotated 274a.12(a)(4) or 274a.12(c)(11) or I-766 annotated A4 or C11 indicates status as a parolee but does not reflect the length of the parole period.

6. Conditional Entrant

INS Form I-94 annotated with stamp showing admission under §203(a)(7) of the INA, refugee-conditional entry; Forms I-688B annotated 274a.12(a)(3); or I-766 annotated A-3.

7. Evidence of Honorable Discharge or Active Duty Status

- Discharge - a copy of the veteran's discharge papers issued by the branch of service in which the applicant was a member. (Department of Defense Form 214)

- Active Duty Military - a copy of the applicant's current orders showing the individual is on full-time duty in the U.S. Army, Navy, Air Force, Marine Corps, or Coast Guard or an active military identification card, DD Form 2. Full time National Guard duty is excluded.

- A self declaration under penalty may be accepted pending receipt of acceptable documentation. The individual is given 30 days to produce evidence; and, if the individual is otherwise eligible, Medicaid is provided during this 30 day period.

8. Cuban and Haitian entrants

I-551 annotated CH6, CNP, CU6, CU7; I-688B annotated 274a.12(a)(4); I-94 annotated 212(d)(5)

9. Amerasian

I-94 annotated AM1, AM2, AM3; I-551 annotated AM1, AM2, AM3.

10. Battered Immigrant

In order to be a qualified alien based on battery or extreme cruelty, the alien must meet the requirements of 10.1. through 10.4 below:

10.1 the alien must not now be residing in the same household as the individual responsible for the battery or extreme cruelty

10.2 the alien or the alien's child has been battered or subjected to extreme cruelty in the U.S. by a spouse or parent of the alien, or by a member of the spouse's or parent's family residing in the same household as the alien, but only if the spouse or parent consents to or acquiesces in such battery or cruelty and, in the case of a battered child, the alien did not actively participate in the battery or cruelty

10.3. there is a substantial connection between the battery or extreme cruelty and the need for the public benefit sought. There is a substantial connection under any one or more of the following circumstances:

- a) Where the benefits are needed to enable the alien and/or the alien's child to become self-sufficient following separation from the abuser;
- b) Where the benefits are needed to enable the alien and/or the alien's child to escape the abuser and/or the community in which the abuser lives, or to ensure the safety of the alien and/or his or her child from the abuser;
- c) Where the benefits are needed due to a loss of financial support resulting from the alien's and/or his or her child's separation from the abuser;
- d) Where the benefits are needed because the battery or cruelty, separation from the abuser, or work absence or lower job performance resulting from the battery or extreme cruelty or from legal proceedings relating to the battery or cruelty (such as child support or child custody disputes) cause the alien and/or the alien's child to lose his or her job or require the alien and/or the alien's child to leave his or her job for safety reasons;
- e) Where the benefits are needed because the alien or his or her child requires medical attention or mental health counseling, or has become disabled, as a result of the battery or cruelty;
- f) Where the benefits are needed because the loss of a dwelling or source of income or fear of the abuser following separation from the abuser jeopardizes the alien's ability to care for his or her children (e.g. inability to house, feed, or clothe children or to put children into

day care for fear of being found by the batterer);

g) Where the benefits are needed to alleviate nutritional risk or need resulting from the abuse or following separation from the abuser;

h) Where the benefits are needed to provide medical care during an unwanted pregnancy resulting from the abuser's sexual assault or abuse of or relationship with the alien or his or her child; and/or to care for any resulting children; or where medical coverage and/or health care services are needed to replace medical coverage or health care services the applicant or child had when living with the abuser.

10.4 the alien or alien's child must have a petition approved by or pending with INS under one of several subsections of the INA that sets forth a prima facie case for the status.

11. American Indian born in Canada under section 289 of the INA or member of Indian tribe under section 4(e) of the Indian Self-Determination and Education Assistance Act

INS Form I-551 with the code S13; unexpired temporary I-551 stamp with code S13 in a Canadian passport or on Form I-94; satisfactory evidence of birth in Canada and a document that indicates the percentage of American Indian blood in the form of a birth certificate issued by the Canadian reservation or a record issued by the tribe; a membership card or other tribal document showing membership in the tribe that is on the list of recognized Indian tribes published annually by the Bureau of Indian Affairs in the Federal Register.

IX. Common Immigration Terms

1. Immigrant

A general term for new arrivals, this includes legal immigrants, refugees, asylees, parolees, and others. Legal immigrants are granted admission to the U.S. on the basis of family relation or job skill.

2. Nonimmigrant

An alien allowed to enter the U.S. for a specific purpose and for a limited period of time such as a student, visitor, or tourist.

3. Refugee

A person who flees his or her country due to persecution or a well-founded fear of persecution because of race,

religion, nationality, political opinion, or membership in a social group.

4. Asylee

Similar to a refugee, this is a person who seeks asylum and is already present in the U.S. when he or she requests permission to stay.

5. Parolee

The Justice Department has discretionary authority to permit certain persons or groups to enter the U.S. in an emergency or because it serves an overriding public interest. Parole may be granted for humanitarian, legal, or medical reasons. Some persons who fear persecution are "paroled" into the U.S. as refugees when the number of refugees allowed to enter that year has been exceeded.

6. Alien not lawfully present in the U.S.

Also known as an undocumented immigrant, this is someone who enters or lives in the U.S. without official authorization, either by entering without inspection by the INS, overstaying their visa, or violating the terms of their visa.

7. Cuban/Haitian entrants

This category was created for the Cuban and Haitian arrivals in 1980, who were allowed to obtain work permits.

8. PRUCOL

Permanently residing under color of law is not a method for entering the country, but indicates that an individual is legally present under statutory authority and may remain under administrative discretion. PRUCOL is no longer an eligibility classification under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. (PRWORA)

9. Deeming

Some legal immigrants come to the U.S. with the aid of citizens who serve as their sponsors. That sponsor signs an affidavit of support agreeing to help support and sustain the immigrant. Deeming means that the income and resources of the sponsor and his or her spouse are deemed or considered available when determining the sponsored alien's eligibility.

10. Affidavit of Support

An affidavit of support is the contract that an immigrant's sponsor signs, agreeing to financially assist the immigrant to prevent him or her from becoming a public charge. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 make affidavits of support legally binding documents and are enforceable until the immigrant naturalizes.

11. Public Charge

Immigrants who become dependent upon public assistance, fail to find employment, and are unlikely to be self-supporting in the future may be deported on the grounds that they have become a "public charge."

12. Naturalization

Naturalization is the process by which a foreign-born individual becomes a citizen of the U.S. Naturalization requires that the person be over 18 years old, lawfully admitted to the U.S., reside in the country continuously for five years, and have a basic knowledge of English, American government, and U.S. history. There is an exemption from the English and civics requirements for certain disabled immigrants.

~~301.10 AID TO FAMILIES WITH DEPENDENT CHILDREN (AFDC)~~

A BETTER CHANCE

~~Any family who is determined eligible, by the Public Assistance Units, for Aid to Families with Dependent Children (AFDC) or Aid to the Unemployed (AU) is also eligible for Medicaid coverage.~~

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L. 104-193, amended title IV-A of the Social Security Act to repeal the Aid to Families with Dependent Children (AFDC) program. The AFDC program provided an entitlement to cash assistance for eligible families with dependent children. The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) replaces AFDC with a program of block grants to States for Temporary Assistance for Needy Families (TANF). Under TANF, States have broad flexibility to provide assistance to needy families. Delaware implemented its TANF program, A Better Chance, on March 10, 1997.

Before the passage of PRWORA, anyone receiving cash assistance under AFDC was automatically entitled to Medicaid. Under the new law, families receiving

assistance under the block grant (TANF) are not automatically entitled to Medicaid. A new Medicaid eligibility group for low income families with children is established by Section 1931 of the Social Security Act as added by section 114 of PRWORA. These families will receive Medicaid if they meet the AFDC eligibility criteria in effect as of 7/16/96. The eligibility criteria for this new group is described in Section 301.15.

Section 1931 also gives States more flexibility in determining Medicaid eligibility. Delaware has used the authority in Section 1931 to keep the rules for A Better Chance and for Medicaid consistent and use a single application form to determine eligibility. This means that any family eligible for and receiving cash assistance under A Better Chance is also eligible for Medicaid under Section 1931 without having to complete a separate Medicaid eligibility determination.

The beginning date for Medicaid eligibility is generally the same as for the ~~AFDC-ABC~~ case with the following exceptions:

1. In cases where the cash assistance payment is prorated from the date of eligibility, the Medicaid effective date will be the first of that prorated month. The Medicaid state plan provides for full month eligibility.
2. Effective January 1, 1991, any infant born to a mother receiving Medicaid is also eligible for Medicaid effective the date of birth. The baby remains continuously eligible for one year provided the infant remains in the mother's household and the woman remains eligible or would be eligible if she were pregnant.
3. In cases where the family has unpaid medical bills in any of the three months prior to their month of application for cash assistance and would have been eligible if they had applied in that month, Medicaid may be provided for that month. Effective January 1, 1996, retroactive coverage is not available if, in the month of application, the family is eligible for enrollment into managed care. (see Section 306.40).

Ineligibility for cash assistance under ~~AFDC-ABC~~ does not mean automatic_ineligibility for Medicaid under Section 1931. Workers must determine if ~~AFDC-ABC~~ applicants or recipients would be eligible for Section 1931 Medicaid or any other type of Medicaid coverage before taking an action to close or deny the Medicaid case.

Transitional Medicaid

If a family becomes ineligible for Medicaid under this eligibility group because of either employment reasons or child support payments, determine if the family is eligible for extended Medicaid coverage under Section 301.55 or 301.60.

301.15 LOW INCOME FAMILIES WITH CHILDREN UNDER SECTION 1931

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L. 104-193, added Section 1931 of the Social Security Act. Section 1931 establishes a new Medicaid eligibility group for low income families with children. Coverage for this mandatory categorically needy group of families with children is effective March 10, 1997, the date that Delaware's TANF plan was approved.

Section 1931 defines the basic criteria for determining Medicaid eligibility based upon AFDC eligibility criteria. The criteria includes income and resource standards and methodologies as in effect on July 16, 1996, and deprivation and specified relative rules that were in effect on that date. Section 1931 gives states flexibility to change these criteria. Delaware has amended its Medicaid state plan to provide that the rules used to determine eligibility under this group are the same as the rules used to determine eligibility under ABC.

Families who are eligible for Medicaid under Section 1931 may be receiving ABC cash assistance or may be Medicaid only families.

Technical Eligibility

Applicants must meet general technical eligibility criteria such as state residency, citizenship or qualified alien status, Social Security number, assignment of rights, etc., as described in Section 200.

In addition to the general technical eligibility requirements, the family composition rules of the ABC cash assistance program must be met. The family must include a child who is living with a parent or specified relative. A child is an individual under the age of 18 or under age 19 and who is still a full-time student in high school, GED, or equivalent program and will graduate prior to his or her 19th birthday.

To be eligible for Medicaid under Section 1931, a child must be living in the home of a relative by blood, marriage, or adoption who is within the fifth degree of kinship to the child. The degree of relationship is as follows:

- . parent (1st degree)
- . grandparent (2nd degree)
- . sibling (2nd degree)
- . great-grandparent (3rd degree)
- . uncle or aunt (3rd degree)
- . nephew or niece (3rd degree)
- . great-great-grandparent (4th degree)
- . great-uncle or aunt (4th degree)
- . first cousin (4th degree)
- . great-great-great-grandparent (5th degree)
- . great-great-uncle or aunt (5th degree)
- . first cousin once removed (5th degree)

Any other persons named in the above groups whose relationship is one of the child's parents is established by legal adoption; the spouse of any person named in the above groups even though the marriage terminated by death or divorce.

The child must be living in the home of a parent or specified relative. The home is defined as the family setting where the child and the caretaker relative reside. The home exists as long as the relative is the responsible caretaker even if the child or the relative is temporarily absent. The rules of A Better Chance are used to determine if the child is living in the home of a parent or specified relative.

NOTE: Deprivation is not an eligibility requirement for this group. If the child is deprived of parental support, a referral to the Division of Child Support Enforcement must be made.

Financial Eligibility

Follow ABC income and resource standards and methodologies (disregards, exclusions, allocations).

Extended Medicaid

If a family becomes ineligible for Medicaid under this eligibility group because of either employment reasons or child support payments, determine if the family is eligible for extended Medicaid under Section 301.55 or 301.60.

301.30 FAMILIES WITH LESS THAN A \$10.00 NEED

Federal Regulation 42CFR 435.115(b)

Effective October 1, 1981, the Federal Government has declared that "no payment of aid shall be made ... for any month if the amount of such payment ... would be less than \$10.00, but an individual ... to whom a payment of

aid ... is denied solely by reason of this ... is deemed to be a recipient of aid..."

Therefore, anyone who would otherwise be eligible for an AFDC grant, or any person under age 18 who would otherwise be eligible for a GA grant, but who does not receive a grant because their need for assistance is less than \$10.00, is eligible for Medicaid.

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L. 104-193, amended title IV-A of the Social Security Act to repeal the Aid to Families with Dependent Children (AFDC) program. The AFDC program provided an entitlement to cash assistance for eligible families with dependent children. The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) replaces AFDC with a program of block grants to States for Temporary Assistance for Needy Families (TANF). Under TANF, States have broad flexibility to provide assistance to needy families. Delaware implemented its TANF program, A Better Chance, on March 10, 1997.

Before the passage of PRWORA, anyone receiving cash assistance under AFDC was automatically entitled to Medicaid. Under the new law, persons receiving assistance under the block grant (TANF) are not automatically entitled to Medicaid. A new Medicaid eligibility group for low income families with children is established by Section 1931 of the Social Security Act as added by section 114 of PRWORA. These families will receive Medicaid if they meet the AFDC eligibility criteria in effect as of 7/16/96. The eligibility criteria for this new group is described in Section 301.15.

Section 1931 also gives States more flexibility in determining Medicaid eligibility. Delaware has used the authority in Section 1931 to keep the rules for A Better Chance and for Medicaid consistent and use a single application form to determine eligibility. This means that any family eligible for and receiving cash assistance under A Better Chance is also eligible for Medicaid without having to complete a separate Medicaid eligibility determination.

Anyone who is otherwise eligible for ABC cash assistance but does not receive cash because their need for assistance is less than \$10.00 is still eligible for Medicaid under Section 1931.

301.40 DEEMING CASES

Federal Regulation 42 CFR 435.113, 435.122, 435.602

~~Any individual who is denied or loses AFDC benefits solely based on the budgeting of stepparent, grandparent, sibling, or alien sponsor income or resources may be eligible for Medicaid. An individual who is denied SSI benefits solely based on the budgeting of alien sponsor income or resources may be eligible for Medicaid.~~

~~Application Process~~

~~For AFDC deeming cases, the DSS application is used for the eligibility determination. A Medicaid application must be completed for SSI sponsor cases.~~

~~AFDC Deeming Cases~~

~~Following all AFDC rules and procedures, except for the deeming of income or resources from grandparents, stepparents, siblings, or alien sponsors, to determine Medicaid eligibility.~~

~~The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L. 104-193, amended title IV-A of the Social Security Act to repeal the Aid to Families with Dependent Children (AFDC) program. The AFDC program provided an entitlement to cash assistance for eligible families with dependent children. The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) replaces AFDC with a program of block grants to States for Temporary Assistance for Needy Families (TANF). Under TANF, States have broad flexibility to provide assistance to needy families. Delaware implemented its TANF program, A Better Chance, on March 10, 1997.~~

~~Before the passage of PRWORA, anyone receiving cash assistance under AFDC was automatically entitled to Medicaid. Under the new law, families receiving assistance under the block grant (TANF) are not automatically entitled to Medicaid. A new Medicaid eligibility group for low income families with children is established by Section 1931 of the Social Security Act as added by section 114 of PRWORA. These families will receive Medicaid if they meet the AFDC eligibility criteria in effect as of 7/16/96. The eligibility criteria for this new group is described in Section 301.15.~~

~~Section 1931 also gives States more flexibility in determining Medicaid eligibility. Delaware has used the authority in Section 1931 to keep the rules for A Better Chance and for Medicaid consistent and use a single application form to determine eligibility. This means that any family eligible for and receiving cash assistance under A Better Chance is also eligible for Medicaid under~~

~~Section 1931 without having to complete a separate Medicaid eligibility determination.~~

~~Any individual who is denied or loses Medicaid under Section 1931 based on the budgeting of stepparent, grandparent, or sibling income or resources may be eligible for Medicaid.~~

~~Follow all rules for Medicaid under Section 1931 (same as ABC rules) except for the deeming of income or resources from grandparents, stepparents, or siblings.~~

~~Alien Sponsor cases~~

~~Many aliens with little or no income who want to become lawful permanent residents have "sponsors" who pledge to support them. A sponsor is someone who completes an affidavit of support with the Immigration and Naturalization Service (INS) to help the alien friend or relative obtain lawful permanent resident status. The sponsor's income and resources are "deemed" or considered available when determining if the alien is eligible for certain assistance programs.~~

~~An alien who files an application and is determined ineligible for cash assistance under AFDC or SSI due to sponsor deeming, may be found eligible for Medicaid. The individual must meet all technical and financial requirements of either the AFDC or SSI program without the application of sponsor deeming. The alien must be determined ineligible for AFDC or SSI solely due to sponsor deeming.~~

~~A: AFDC alien sponsor~~

~~For AFDC alien sponsor deeming cases, follow all the AFDC rules published in the Division of Social Services Policy Manual.~~

~~B: SSI alien sponsor~~

~~For SSI alien sponsor deeming cases, follow the rules of the SSI program. The alien must be aged (65 or older), blind, or disabled. If the alien is not aged, a Comprehensive Medical Report must be sent to the Medical Review Team for the disability determination. A social summary is not required. The eligibility worker will send the medical report with a cover memo stating that the individual is claiming to be disabled under the SSI definition of disability.~~

~~Use the income and resource rules, including income disregards, described in the QMB section of this manual. (Section 307) Use the income standards of the SSI~~

program. Effective 1/1/97, the SSI income limit is \$484.00 for an individual and \$726.00 for a couple. The resource limits are \$2,000 for an individual and \$3000 for a couple.

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 requires Medicaid deeming for family sponsored immigrants who enter the U.S. on or after August 22, 1996. The deeming rules apply only to sponsors and immigrants who have signed the legally binding affidavits of support that are promulgated by the Attorney General. Sponsor deeming is required until the naturalization of the immigrant or until the sponsored immigrant can be credited with 40 qualifying quarters of work. Since family sponsored immigrants are subject to the 5 year bar on receiving benefits, there will be no new sponsor deeming for approximately 5 years.

For SSI-related Medicaid eligibility groups, use the rules of the SSI program. For AFDC-related Medicaid eligibility groups, use the rules of the ABC program.

301.55 TRANSITIONAL MEDICAID COVERAGE

The Family Support Act of 1988, PL 100-485, mandated that effective April 1, 1990, states provide health care coverage known as Transitional Medical Assistance for up to twelve months for families who become ineligible for AFDC due to increased earnings, increased hours of employment, or loss of earned income disregards. ~~It replaces the previous four and nine month extensions. Transitional Medicaid begins with the month of ineligibility for AFDC. The month of ineligibility is defined as the month following the last month AFDC was correctly received under the State's AFDC plan. Transitional Medicaid is divided into two discrete periods that have different eligibility requirements.~~

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), P.L. 104-193, repealed the AFDC program and replaced it with a program of block grants to states for Temporary Assistance for Needy Families (TANF). Delaware implemented its TANF program, A Better Chance (ABC), on March 10, 1997.

Prior to PRWORA, a family's eligibility for Transitional Medicaid was linked to receipt of AFDC. Under PRWORA, a family's eligibility for transitional Medicaid is linked to receipt of Medicaid under Section 301.15 "Low Income Families with Children under Section 1931".

The eligibility group described in Section 301.15, "Low Income Families with Children under Section 1931", will

be referred to as "receiving Medicaid under Section 1931" throughout this section. Any family eligible for and receiving ABC benefits is also eligible for Medicaid under Section 1931 and may be found eligible for Transitional Medicaid. This means references to "Medicaid under Section 1931" also refers to families receiving ABC.

Delaware's welfare reform waiver, "A Better Chance" (ABC) includes a modification to the length of the Transitional Medicaid period. The ABC waiver extends Transitional Medicaid benefits for up to 24 months.

Families must meet the initial eligibility requirements described in this section to receive the first 12 months of coverage. Families can be eligible when their income exceeds either 185% of the standard of need or the standard of need. The standard of need used is the same as the ABC standard of need.

To continue to receive Medicaid for the second 12 months, the family's gross earned income less child care costs must be at or below 185% FPL. Family income will be budgeted prospectively.

Initial Eligibility for First Six Months

NOTE: All references to "Medicaid under Section 1931" includes families determined eligible under Section 301.15 "Low Income Families with Children under Section 1931" and families who receive ABC benefits. ABC families are also eligible for Medicaid under Section 1931.

At the time a family becomes ineligible for ~~AFDC Medicaid under Section 1931~~ determine whether the family meets the following three requirements.

1. The family must have received ~~AFDC Medicaid under Section 1931~~ in three of the six months immediately preceding the month the family became ineligible for ~~AFDC Medicaid under Section 1931~~.

A family is considered to have received ~~AFDC Medicaid under Section 1931~~ in any month ~~payments were correctly paid Medicaid assistance was correctly provided~~. This does not include ~~payments made Medicaid assistance provided~~ in error; ~~payments made Medicaid assistance provided~~ pending a hearing if the family loses the hearing and the ~~payments Medicaid assistance provided~~ is recoverable as an overpayment; or ~~payments made Medicaid assistance provided~~ for a month of ineligibility because of administrative notice requirements. Recipients are obligated to report changes promptly.

When a change is reported, the worker must review eligibility. If the change will result in ineligibility, the worker must take action to close the case. This can affect the month of ineligibility.

1. The family must have received ~~AFDC Medicaid under Section 1931~~ in Delaware for three of the six months. Families who move into Delaware and who have not received three months of ~~AFDC Medicaid under Section 1931~~ here are not eligible for transitional Medicaid. Transitional Medicaid benefits are not transferable from one state to another. If a family is entitled to and receives six months of transitional Medicaid benefits in another state and then moves into Delaware, they are not eligible for transitional Medicaid here.

2. The family must become ineligible for ~~AFDC Medicaid under Section 1931~~ because of an increase in the hours of or increased income from the employment of the caretaker relative or because a member of the family loses the \$30 and 1/3 earned income disregard or the \$30 disregard.

This happens when:

- an increase in earned income (or countable earned income because of loss of disregard) makes the family ineligible or
- an increase in other income when combined with an increase in earned income (or countable earned income because of loss of disregard) makes the family ineligible.

~~It is assumed in a two-parent family, both parents are "caretakers" and therefore the principal wage earner would be a caretaker relative.~~

The following examples illustrate this requirement for a family of 4. The standard of need is \$1004.

Example 1

A family has recurring monthly unearned income of \$500. The mother becomes employed on June 6 and has countable earned income of \$600 in June. The family is no longer eligible for

~~AFDC Medicaid under Section 1931~~ in June due to excess income that is both earned and unearned. Without the increase in earned income, the family would have remained eligible for ~~AFDC Medicaid under Section 1931~~. The family is eligible for transitional Medicaid.

Example 2

The mother becomes employed on June 6 and has countable earned income of \$400. At the same time, she reports that beginning in June the family will receive monthly unearned income of \$1200. The family is no longer eligible for ~~AFDC Medicaid under Section 1931~~ in June due to excess income that is both earned and unearned.

Since the \$1200 increase in unearned income alone was sufficient to make the family ineligible for ~~AFDC Medicaid under Section 1931~~, but the \$400 earned income was not sufficient on its own to make the family ineligible, the family did not lose ~~AFDC Medicaid~~ because of the increase in earned income. The family is not eligible for transitional Medicaid.

Example 3

The family has no income. The mother becomes employed on June 6 and reports countable earned income of \$900 in June. In July, one child leaves the household. As a result, the income limit for the family in July is reduced to \$833. The family is no longer eligible for ~~AFDC Medicaid under Section 1931~~ in July due to excess income, all of which is earned. However, the family is not eligible for transitional Medicaid because the earnings did not increase in July, the month of ineligibility for ~~AFDC Medicaid under Section 1931~~.

Example 4

The mother is employed and has monthly countable earned income of \$900. She reports that she no longer has to pay for day care in June because free care is available. Without child care expenses, her countable earned income increases to \$1200 in June. The family is no longer eligible for ~~AFDC Medicaid under Section 1931~~ in June because of excess income. The earnings did not increase in June. Her countable income increased because of the loss of a child care deduction. The family is not eligible for transitional Medicaid.

3. The family must continue to have a child living in the home.

The family must continue to have a child living in the home that meets the age requirement for ~~AFDC Medicaid under Section 1931~~; that is, an individual under age 18, or under age 19, and and who is still a full-time student in high school, GED, or equivalent program and will graduate prior to his or her 19th birthday. The earned income of a child that meets the age requirement is excluded. The child does not have to meet the former AFDC definition

of dependent child. For AFDC purposes, a child must be both needy and deprived of parental care and support because of the absence, disability, unemployment, etc., of the parent. This means that for transitional Medicaid there is no deprivation requirement.

When the only child in the family no longer meets the age requirement, the family is no longer eligible for transitional Medicaid because there is no longer a child in the family. When one child turns age 18 or 19, but there is another child in the family, the child who turns age 18 or 19 is no longer considered a member of the transitional family unit. The rest of the family remains eligible.

Transitional Family Unit

Transitional Medicaid provides eligibility for families rather than individual eligibility. Transitional Medicaid coverage is provided to all individuals who were included in the ~~AFDC~~ family unit at the time the family ~~lost AFDC~~ became ineligible for Medicaid under Section 1931. In addition, family members who enter the household or family members who were absent but return may be found eligible.

An individual who enters the family unit (including a child born to the family during the transitional period) may be eligible for transitional Medicaid if that individual would have been included in the caretaker relative's assistance unit if the family were now applying for ~~AFDC Medicaid~~ under Section 1931. The rules for the composition of the assistance unit for Medicaid under Section 1931 are the same as the rules for the composition of the assistance unit for ABC. These rules are found in ABC policy at Section 3015 of the Division of Social Services Manual. The individual who enters the family must be one who could be found eligible for ~~AFDC Medicaid under Section 1931~~ in their own right.

The transitional family includes:

- family members who were in the ~~AFDC Medicaid under Section 1931~~ assistance unit when the AFDC Medicaid under Section 1931 was terminated, and
- family members who have since entered the household and who would be included in the assistance unit if the family were applying for ~~AFDC Medicaid under Section 1931~~ in the current month.

The earned income of an individual who has entered or returned to the family unit is included in the gross earnings and that individual is counted when determining

the family size. Follow the income rules of the ABC program. The earned income of a dependent child, regardless of student status, is not counted.

Example

A grandmother is payee for her two grandchildren. They have been receiving ~~AFDC Medicaid under Section 1931~~ for two years. The children's mother has been in prison during this period. She is released from prison and returns to the home. She becomes payee for the children and herself. Within two months, she becomes employed and her earnings cause ~~AFDC Medicaid~~ ineligibility. Is the family eligible for transitional Medicaid?

No. The family (Mom and two children) did not receive ~~AFDC Medicaid~~ in three of the six preceding months.

Example

A mother and her child are receiving transitional Medicaid. The father of the child returns to the home in the second 12 month period. How does his return to the home affect the family's continued eligibility for transitional Medicaid?

~~Since AFDC policy requires that a natural father be included in the assistance unit, the father is considered to be a member of the family unit for transitional Medicaid. We must use the family composition rules for Medicaid under Section 1931. The family composition rules for Medicaid under Section 1931 are the same as the family composition rules for ABC. The natural father must be included in the assistance unit. His earnings are considered in determining if the family's earned income exceeds 185% of the federal poverty level (FPL). If the family remains eligible, the father is also eligible for transitional Medicaid.~~

Example

A mother receiving transitional Medicaid gives birth and the baby is deemed eligible. Is the baby counted when establishing family size for purposes of the 185% FPL test?

Yes.

Sanctioned Individuals

~~Individuals who are under any AFDC sanction may be included as part of the transitional family during both the first and second 12-month periods. This includes:~~

- ~~individuals who have not received 3 out of 6 months~~

prior to the month of ineligibility (i.e., were not included on the grant) because of a sanction, and

- sanctioned individuals who are not on the grant in the month of ineligibility for AFDC.

Individuals who are under any ABC sanction are eligible for Medicaid under Section 1931. These individuals are included in the transitional family.

Eligibility Determination

Families who lose ~~AFDC~~ Medicaid under Section 1931 because of earnings or loss of earned income disregards are eligible for transitional Medicaid when their income exceeds either 185% of the standard of need OR the standard of need. The standard of need is the same as the ABC standard of need.

NUMBER OF PEOPLE IN BUDGET	185% OF THE STANDARD OF NEED*	STANDARD OF NEED (75% FPL)**
1	\$ 912	\$ 493
2	1,228	664
3	1,541	833
4	1,857	1,004
5	2,170	1,173
6	2,484	1,343
7	2,800	1,514
8	3,115	1,684

- * Add \$318 per person above eight in the family
- ** Add \$170 per person above eight in the family

Example

185% Standard of Need \$1,541 Standard of Need \$833

Mrs. Johnson receives ~~AFDC~~ Medicaid under Section 1931. She earns \$7.00 per hour and works 40 hours per week. Her monthly income is \$1212.40 (\$7.00 x 40 x 4.33). She has been receiving the 30 and 1/3 disregard. Budget follows:

\$1212.40	monthly earned income
- 90.00	earned income deduction
1122.40	
- 30.00	\$30 disregard
1092.40	
- 364.13	1/3 disregard
\$ 728.27	net income < \$833 standard of need

Her income does not change but she will lose 1/3

disregard effective December. Without the 1/3 disregard her countable income is \$1092.40. This exceeds the standard of need of \$833 and the family is ineligible for Medicaid under Section 1931 because of earnings. The family is eligible for transitional Medicaid beginning December 1.

Month of Ineligibility for ~~AFDC~~ Medicaid under Section 1931

~~Transitional Medicaid begins with the month following the last month in which AFDC was correctly received. An AFDC payment is not correctly received when it is recoverable as an overpayment.~~

~~If ineligibility results because of an increase in income, the worker determines if income received in the month it began was enough to make the family unit totally ineligible. If so, the payment must be recovered in an overpayment. Anytime ineligibility occurs after the first day of the month because of increased income, the case must be closed effective the following month. When the change is reported too late in the month to allow advance notice, the case is closed effective the next month.~~

Transitional Medicaid begins with the month of ineligibility for Medicaid under Section 1931 due to an increase in income or loss of earned income disregards. The month of ineligibility for Medicaid is the month in which the family's income exceeds either 185% of the standard of need or the standard of need. The standard of need for Medicaid under Section 1931 is the same as the ABC standard of need.

Example: Ms. Smith reports a new job on November 3 and is determined prospectively ineligible. ~~She is also ineligible for November.~~ The family income exceeds the standard of need. Transitional Medicaid begins in November because that is the month ~~AFDC~~ the family income exceeds the standard of need for Medicaid under Section 1931.

Example: Ms. Little begin working November 27 and reports to her worker promptly. The family is determined prospectively ineligible for ABC and Medicaid under Section 1931 for December. ~~Because of advance notice requirements, the case is closed on December 31.~~ The transitional Medicaid period begins in December because December is the month ~~of ineligibility for AFDC~~ the family income exceeds the standard of need.

Someone who is not timely in reporting the start of employment or increased wages could have their family's transitional benefits reduced so that they only receive the

24 months of transitional coverage from when they should have been closed. But, we will not totally disqualify a family.

Example: Mrs. Thomas begins working on April 15, 1996. She does not report her job until she receives her first pay on May 25. ~~Because of advance notice requirements, her case is not closed until June 30, 1996. She should have reported April 15 and her AFDC case would have been closed April 30, 1996. The family income exceeds the standard of need in May.~~ The transitional Medicaid should begin on May 1, 1996, and finish April 30, 1998.

Eligibility During the First 12-Month Period

The family will receive Transitional Medicaid without any reapplication for the first 12 months. The family must be notified ~~at the time of the termination of AFDC when they lose eligibility for Medicaid under Section 1931~~ that they are eligible for transitional Medicaid and the reasons why the benefits could be terminated. DCIS will automatically notify ~~AFDC transitional Medicaid families~~ and issue a card for the ~~AFDC family members~~. The notice will include this information about termination of benefits.

To continue to receive Medicaid throughout the first 12-month period the following conditions must be met in addition to the initial eligibility requirements:

there is a child living in the home.

The rules of ABC are used to determine if a child is living in the home. When it is determined that a family no longer has a child living in the home, the family is no longer eligible under this program. The case must be reviewed to determine if the family members are eligible for Medicaid under another program.

Eligibility During Second 12-Month Period

A redetermination of eligibility must be completed at the end of the first 12-month period. To continue to receive Medicaid during the second 12-month period, the following conditions must be met in addition to the initial eligibility requirements:

1. there is a child living in the home, and
2. the caretaker relative is employed during each month unless good cause exists, and
3. the family's gross monthly earnings (less the monthly costs of necessary child care) are at or below 185% of

the Federal Poverty Level (FPL) and continue to be at or below 185% FPL throughout the second 12-month period.

There are no limits on necessary child care costs. Prospective budgeting is used to determine family income. Do not add unearned income to earned income. Count the earned income of all family members (except the earned income of a dependent child, regardless of student status) living in the home who were members of the family unit the month the family became ineligible for ~~AFDC Medicaid under Section 1931~~ and any individual who would be included in the caretaker relative's assistance unit if the family were now applying for ~~AFDC Medicaid under Section 1931~~.

Income Limits for Second 12 Months

Family Size	Income Limit \$
1	1,217
2	1,636
3	2,056
4	2,475
5	2,894
6	3,314
7	3,733
8	4,152
9	4,572
10	4,991

Good cause for terminating employment is:

1. Circumstances beyond the individual's control such as but not limited to illness, illness of another family member requiring the wage earner's presence, a household emergency, the unavailability of transportation, and the lack of adequate child care.
2. Instances in which employment was unsuitable such as:
 - wages offered less than the Federal minimum wage,
 - employment on a piece-rate basis and the average hourly yield the employee receives is less than the Federal minimum wage,
 - unreasonable degree of risk to one's health and safety,
 - the individual is physically or mentally unfit to perform the employment as documented by medical evidence or reliable information from other sources,
 - the distance from the individual's house to place of employment is unreasonable considering the expected wage and the time and cost of commuting,
 - the working hours or nature of employment interferes with the members religious observance, convictions or

beliefs.

3. Discrimination by an employer based on age, race, sex, disability, religious belief, national origin, or political belief.
4. Work demands or conditions that are unreasonable such as working without being paid on schedule.
5. Acceptance of other employment or enrollment at least half-time in a school, training program, or college.
6. Resignations by persons under the age of 60 that are recognized by the employer as retirement.
7. Leaving a job in connection with patterns of employment in which workers move from one employer to another as in migrant farm labor or construction work.

24-month Period of Eligibility

A family gets 24 months of transitional Medicaid from the month of ineligibility for ~~AFDC Medicaid under Section 1931~~, even if they become eligible again for ~~AFDC Medicaid under Section 1931~~. The clock on the 24-month period does not stop running when ~~AFDC eligibility for Medicaid under Section 1931~~ is reestablished. The 24 months of transitional Medicaid run concurrently with months of ~~AFDC eligibility for Medicaid under Section 1931~~.

If the family is again loses eligibility for ~~AFDC Medicaid under Section 1931~~ for non-work reasons, the transitional benefit period is unaffected. If the family is terminated again for earned income reasons, a new transitional period may begin.

Example 1

A mother and her children have received ~~AFDC Medicaid under Section 1931~~ continuously since April 1997. Mom becomes employed and loses ~~AFDC eligibility for Medicaid under Section 1931~~ effective October 1997 due to earned income. The family is determined eligible for transitional Medicaid effective October. In December she loses her job and applies for ~~AFDC ABC~~. She is approved for ~~AFDC ABC~~ effective January 1998. She is also eligible for Medicaid under Section 1931. She becomes employed again in February and her earned income causes her to be ineligible for ~~AFDC Medicaid under Section 1931~~ in February. Does the family continue with the original transitional period?

No. A new 24 month period of transitional Medicaid

begins in February. When ~~AFDC Medicaid under Section 1931~~ eligibility was lost in February because of earnings, the family had received ~~AFDC Medicaid under Section 1931~~ in three of the six preceding months. The six preceding months are January 1998, December, November, October, September, and August 1997. The family received ~~AFDC Medicaid under Section 1931~~ in January 1998, September and August 1997.

Example 2

A family is determined eligible for transitional Medicaid from 11/1/96 to 10/31/98. The mother is employed for the entire period. The family becomes eligible for ~~AFDC Medicaid under Section 1931~~ during May and June 1997. The family becomes ineligible for ~~AFDC Medicaid under Section 1931~~ due to wages effective July. Does the family continue with the original transitional period?

Yes. The family is not eligible for a new transitional Medicaid period because the family did not receive ~~Medicaid under Section 1931~~ in the six months preceding the month of ineligibility (July). The family continues to be eligible for the original transitional Medicaid period.

Example 3

A family has been receiving ~~AFDC Medicaid under Section 1931~~ from June 1997 to October 1997. The ~~AFDC Medicaid under Section 1931~~ is closed for earned income and transitional Medicaid begins November 1997. In December Mom loses her job and the family is opened in ~~AFDC ABC~~. The family is also eligible for Medicaid under Section 1931. In January 1998 Mom is approved for Social Security and the ~~AFDC ABC case and Medicaid under Section 1931~~ are closed 1/31/98. Is the family eligible for transitional Medicaid?

Yes. The family continues with the transitional Medicaid period that began in November 1997.

Reporting Requirements

~~The Social Security Act at §1925 describes the reporting requirements under Transitional Medicaid.~~

~~Effective 11/1/95 Delaware's welfare reform program "A Better Chance" eliminated monthly reporting requirements for AFDC families and the Section 1115 Medicaid Demonstration Waiver, "Diamond State Health Plan" eliminated the quarterly reporting requirements for Transitional Medicaid. Instead, families are required to report significant changes in circumstances. A significant~~

change in circumstances is as follows:

- change in household size
- a new job
- a change from full-time to part-time employment
- loss of employment
- an increase or decrease of forty hours in employment per month
- a new unearned income
- unearned income goes up or down more than \$50.00 per month

NOTE: Changes in unearned income do not affect continued eligibility for transitional Medicaid.

The eligibility requirements for transitional Medicaid remain the same; however, the family does not have to meet the reporting requirements described at §1925 of the Social Security Act.

Termination of Benefits

First 12-month period

Medicaid benefits will be terminated if:

1. The family no longer has a child living in the home. Use the definition for child as defined under AFDC Section 1931 Medicaid. A child is under age 18 or is under age 19 and who is still a full-time student in high school, GED, or equivalent program and will graduate prior to his or her 19th birthday.
2. The family is found to have received AFDC Medicaid under Section 1931 "fraudulently" in the preceding six months. Fraud is defined at the end of this section.

Second 12 month period

Medicaid benefits will be terminated if:

1. The family no longer has a child (defined above) living in the home.
2. The caretaker relative is no longer employed and good cause does not apply.
3. The family's monthly gross earned income minus child care costs exceeds 185% FPL.

We must explore eligibility for any other Medicaid program before transitional Medicaid is terminated.

Notices

Families who lose AFDC Medicaid under Section 1931 receive a notice that advises them of the eligibility requirements for continued coverage under transitional Medicaid. The notice contains a statement advising families of the right to extended Medicaid benefits and an explanation of circumstances that could result in termination during the extended periods.

Fraud

Section 1925(d) of the Social Security Act specifies that extended Medicaid must not be granted to any individual who has committed fraud during the last 6 months in which the family was receiving aid before otherwise being provided extended Medicaid eligibility. been legally determined by the Medicaid agency to be ineligible for Medicaid under Section 1931 because of fraud at any time during the last prior six months in which the family received Medicaid under Section 1931. The fraud determinations are subject to the fraud and program abuse provisions under Sections 1128, 1128A, and 1128B of the Social Security Act.

~~Under the AFDC program, a determination of fraud must be made following a hearing. Under Medicaid, a conviction for fraud must be made by a court of competent jurisdiction.~~

~~For purposes of the exclusion from transitional Medicaid, an individual is considered to have been convicted of a criminal offense:~~

~~when a judgment of conviction has been entered against the individual by a Federal, State, or local court, regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to criminal conduct has been expunged;~~

~~when there has been a finding of guilt against the individual by a Federal, State, or local court;~~

~~when a plea of guilty or nolo contendere by the individual has been accepted by a Federal, State, or local court; or~~

~~when the individual has entered into participation in a first offender or other program where judgment of conviction has been withheld.~~

301.60 PROSPECTIVE PROGRAM (CHILD SUPPORT)
42 CFR 435.115(f),(g),(h)
Section 406(h) of the Social Security Act

~~An individual will be deemed to be receiving AFDC if a new collection or increased collection of child or spousal~~

~~support under title IV-D of the Social Security Act results in the termination of AFDC eligibility according to section 406(h) of the Social Security Act. This regulation also covers families that do not receive a grant because their need is below \$10.00. Medicaid will be continued for four consecutive calendar months, beginning with the first month of AFDC ineligibility, to each dependent child and each relative with whom such a child is living (including the eligible spouse of such relative) who:~~

- ~~- becomes ineligible for AFDC on or after August 16, 1984; and~~
- ~~- has received AFDC for at least three of the six months immediately preceding the month in which the individual becomes ineligible for AFDC; and~~
- ~~- becomes ineligible for AFDC wholly or partly as a result of new or increased child or spousal support collections under title IV-D.~~

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), P.L. 104-193, repealed the AFDC program and replaced it with a program of block grants to states for Temporary Assistance for Needy Families (TANF). Prior to PRWORA, a family's eligibility for Prospective Medicaid was linked to receipt of AFDC. Under PRWORA, a family's eligibility for Prospective Medicaid is linked to receipt of Medicaid under Section 301.15, "Low Income Families with Children under Section 1931.

NOTE: All references to Medicaid under Section 1931 also include families who receive ABC benefits. ABC families are also eligible for Medicaid under Section 1931.

Medicaid eligibility is extended for four consecutive months to families who become ineligible for Medicaid under Section 1931 because of a new or increased collection of child or spousal support under title IV-D of the Social Security Act.

Collection of Support

Regulations require that the collection of support made by absent parents and spouses be paid directly to the IV-D agency; the Division of Child Support Enforcement (DCSE). ~~AFDC Medicaid~~ recipients occasionally receive child or spousal support directly. Extended Medicaid coverage will be provided when collections of child or spousal support that are received by the assistance unit are turned over to the DCSE. Support payments that are not forwarded to the DCSE do not constitute a "collection" under title IV-D; therefore, the family would not be eligible for prospective Medicaid. The amount of support

ordered is not material when establishing eligibility for prospective Medicaid. Eligibility is based on the amount of support collected.

Eligibility Determination

~~The family is eligible if the collected support exceeds 185% of the standard of need or the standard of need. The collection of support must actually cause or actively contribute to ineligibility for AFDC, even if there are other factors that also contribute to ineligibility or could simultaneously cause it.~~

At the time the family becomes ineligible for Medicaid under Section 1931, determine whether the family meets the following three requirements:

1. The family has received Medicaid under Section 1931 in three of the six months immediately preceding the month the family became ineligible for Medicaid under Section 1931.
2. The family lost eligibility for Medicaid under Section 1931 wholly or partly as a result of new or increased child or spousal support collections under title IV-D. The family is eligible if the collected support exceeds 185% of the ABC standard of need or the ABC standard of need. The collection of support must actually cause or actively contribute to ineligibility for Medicaid under Section 1931, even if there are other factors that also contribute to ineligibility or could simultaneously cause it.

Example

An family receives \$300 in countable child support collections and \$400 in Social Security benefits. The standard of need is \$833. In the next month both the child support collection and the Social Security benefit increase by \$150, for a total increase of \$300 a month. The family is ineligible for ~~AFDC Medicaid~~ Medicaid under Section 1931 due to the child support collection because the change in support by itself, when added to the unchanged Social Security would cause ineligibility for ~~AFDC Medicaid~~ Medicaid under Section 1931. The family is eligible for extended Medicaid.

Example

An family receives \$750 in countable child support collections and the standard of need is \$1004. In the next month, the countable child support collection increases to \$900 and at the same time one of the older children leaves home. As a result, the standard of need is reduced to \$833. The countable child support collection

of \$900 exceeds the new standard of need of \$833. The family is eligible for extended Medicaid, since the collection of child support increased and contributed to the ineligibility for ~~AFDC Medicaid under Section 1931~~. The reduction in the standard of need worked in combination with the increased support collection to cause the ineligibility. Thus, the support collection contributed to the family's ineligibility for ~~AFDC Medicaid under Section 1931~~. Neither change would have caused ineligibility by itself.

However, suppose that in this example the \$750 in support collection was raised to \$900 and the \$1004 standard of need was reduced to \$664. In this case, the increase in support collection would have no effect on eligibility for ~~AFDC Medicaid under Section 1931~~. That is because the change in the standard of need would have caused ineligibility for ~~AFDC Medicaid under Section 1931~~ even before the child support collection was raised from \$750 to \$900. Because the change in the support collection did not cause or contribute to ineligibility for ~~AFDC Medicaid under Section 1931~~, the family would not be eligible for prospective Medicaid.

3. The family must continue to have a dependent child living in the home.

The family must continue to have a child living in the home that meets the age requirement for Medicaid under Section 1931; that is, an individual under age 18 or under age 19, and who is still a full-time student in high school, GED, or equivalent program and will graduate prior to his or her 19th birthday.

Month of Ineligibility for ~~AFDC Medicaid under Section 1931~~

Families are eligible for prospective Medicaid beginning with the month of ineligibility for Medicaid under Section 1931 due to a new or increased collection of support. The month of ineligibility for Medicaid under Section 1931 is the month in which the family's income exceeds either 185% of the standard of need or the standard of need. The standard of need for Medicaid under Section 1931 is the same as the ABC standard of need.

If a family's ineligibility for ~~an AFDC grant Medicaid under Section 1931~~ is a result of the collection or increased collection of support and employment or increased earnings, review the file to determine which factor caused the ineligibility. If the collection of support was the determining factor the family will qualify for four months of continued coverage. If it is determined that earnings caused the ineligibility, the family will qualify

for up to 24 months of continued coverage under transitional Medicaid. (See Section 301.55) If a family is eligible for extended Medicaid under Transitional Medicaid as a result of earned income and is also simultaneously eligible to extended Medicaid as a result of the support collection, the family is eligible for up to 24 months of extended Medicaid. The periods of extended Medicaid run concurrently.

Family Unit

All members of the family unit who were eligible for ~~AFDC Medicaid under Section 1931~~ are eligible for the four months continued coverage. In addition, family members who enter or return to the household are eligible for prospective Medicaid if that individual would have been included in the assistance unit if the family were now applying for ~~AFDC Medicaid under Section 1931~~. Individuals under an ABC sanction are eligible for Medicaid under Section 1931 any may be found eligible for the four month extension. If a member of the family is added to an existing ~~AFDC~~ assistance unit that is receiving Medicaid under Section 1931 and the mother receives an increase in support the same month the member is added, that member is entitled to four months of continued Medicaid. A child born to the family during the four-month period will also be covered through the end of the four month period. Remember a child born to a Medicaid mother is deemed eligible for one year.

A person or family who becomes ineligible during the four-month period for reasons other than the collection or increased collection of support (such as a child who attains age 18 or a family member who leaves the household) will not be entitled to continued coverage beyond the date of ineligibility.

Prospective Medicaid ends for any individual family member who moves to another state. Coverage ends the month following the month the individual moves to the new state. Eligibility can be reinstated if the individual family moved to another state in March, the first month of prospective Medicaid, and moved back in May, the family would again be eligible for prospective coverage in May and June.

There is no requirement that a member of the family be employed throughout the four-month period.

DEPARTMENT OF LABOR**DIVISION OF INDUSTRIAL AFFAIRS**

STATUTORY AUTHORITY: 19 Delaware Code, Section 2301A(i) (19 Del. C. §2301A(i))

WHEREAS it is expedient to revise certain rules which were created pursuant to 19 *Del. C.* §2121 and 29 *Del. C.* Chapter 101, in part, because of changes in 19 *Del. C.* Chapters 21 and 23 and practice before the Board, for the purpose of securing the just, speedy and inexpensive determination of every petition;

WHEREAS the Board has considered amendments to Rules 8 and 9 and newly proposed Rules 30 and 31 after due notice and public comment;

WHEREAS these proposed amendments / rules were published in the February 1, 1998 Register.

I. Summary of Evidence and Information:

It was proposed that Rule 8 be amended to include subsection (H), which would require any party relying upon an unpublished decision to supply the Board and opposing party(ies) with a copy of the unpublished decision. There was no public comment.

It was proposed that Rule 9 be amended, as previously published in the Register, to bring the rule in conformity with the statute. There was public comment proposing that a different version of subsections (I) and (J) be adopted than what was published in the Register and public comment in support of the previously published version of subsections (I) and (J).

It was proposed that Rule 30, which would address the use of interrogatories in practice before the Board, be adopted. There was public comment urging the Board not to adopt this rule and suggesting that adopting such a rule would only slow the administration of cases before the Board. There was public comment suggesting that a standard set of interrogatories might be useful in practice before the Board.

It was proposed that Rule 31, which involves medical tests or techniques pursuant to a physical examination of an employee, be adopted. There was public comment urging the Board not to adopt this rule and suggesting that it is unnecessary and would only slow the administration of cases before the Board.

II. Findings of Fact:

Adoption of the proposed amendments to Rules 8 and 9, as published in the February 1, 1998 Register, will facilitate the just and speedy disposition of cases before

the Board. Proposed Rules 30 and 31 are not necessary and would cause unnecessary delay in the administration of cases before the Board.

III. Action:

NOW, THEREFORE, after consideration of the Public Comment, the Board, by at least a majority of the quorum, votes to decline to adopt proposed Rules 30 and 31 and to amend Rules 8 and 9, as follows:

IV. Text of Rules:**RULE NO. 8****Motions Concerning Legal Issues**

(A) Except for motions contemplated by Rule No. 10 and 11, where a motion is filed with the Department which make a legal argument, a supporting brief containing citations shall be filed with such motion. A motion may not be filed without proof that a copy of said motion has been served upon the non-moving party.

(B) An answering brief shall be filed with the Department by the non-moving party within 15 days of receipt of the supporting brief. An answering brief may not be filed without proof that a copy of said answering brief has been served upon the moving party.

(C) A reply brief may be filed with the Department by the moving party in the discretion of the moving party, but in no event will a reply brief be accepted by the Department after 7 days from the receipt by the moving party of the non-moving party's answering brief. A reply brief may not be filed without proof that a copy of said reply brief has been served upon the non-moving party.

(D) After the briefs have been filed with the Department, an oral argument may be scheduled by the Department in the Board's discretion.

(E) Motions of a procedural nature need not be accompanied by supporting briefs. No order involving a procedural matter requested by the moving party shall be issued by the Board against the non-moving party until the non-moving party has been given an opportunity to be heard on the issue.

(F) Anytime after the employer's first report of injury has been filed with the Department, the Department's scheduling officer may be notified either by oral, telephonic or written communication of the request by a party or party's legal counsel for a legal hearing. The Department's scheduling officer will have the discretion of requiring a written argument from the parties or the parties' legal counsel on the legal issue. Should one or both of the parties fail to accept the scheduling officer's decision, the parties must reduce their respective positions to written memorandums. The

memorandums will be submitted to the Department by the parties on a date chosen by the scheduling officer. The Board will review the memorandums and issue a written decision.

(G) Parties may submit a proposed stipulation order for cooperation with reasonable vocational rehabilitation to the Board for approval without a legal hearing.

(H) If an unreported or memorandum opinion, whether of the Board or of any court, is cited or relied upon by any party, whether in a written submission or during any oral presentation, a copy thereof shall be provided to the Board and the opposing party. If, during an oral presentation, the party relying on the unreported case does not have a copy of such case immediately available, copies will be provided promptly after the hearing but in no case later than the end of the next business day following the hearing.

RULE NO. 9

Formulation of Issues - Pretrial Procedure

(A) In any action, The Department of Labor shall conduct a pretrial conference. The Pretrial Scheduling Officers shall be responsible for noticing and conducting such pretrial conferences. Such conference shall be held telephonically, unless either party is unrepresented by counsel in which case, the conference may be held at the Department of Labor offices servicing the county where the accident occurred. The Scheduling Officer shall set a date and time for the hearing on the issues which are the subject of the petition convenient to all parties and counsel and subject to the provisions of 19 Del.C. 2348 (c). Hearings as to all other Petitions will be scheduled at the convenience of all parties and counsel to the extent possible. At such conference, the parties may consider:

- (1) Means and methods to simplify the issue(s);
- (2) The necessity or desirability of amendments to the papers filed or for additional papers to be filed;
- (3) The possibility of obtaining stipulations, admissions of fact or admissions of documents to avoid unnecessary proof;
- (4) The limitation on the number of expert witnesses;
- (5) Such matters as may aid in the disposition or expedition of the action.

(B) The Board may make an order which recites the action taken at the conference, the amendments allowed to the pleadings and the agreements made by the parties or on their behalf as to any of the matters considered and which limits the issues for hearing to those not disposed of by admissions or agreements of counsel. Such order when entered controls the subsequent course of the action unless modified to prevent manifest injustice.

(C) The Department shall designate the pretrial

officer to arrange for and preside over pretrial hearings. The pretrial officer will have discretionary power to see that the pretrials are conducted in an effective manner.

(D) At the time of the noticed pretrial, the following information or documentation must be provided:

(1) Names and addresses of prospective medical and lay witnesses.

(2) A complete statement of what the petitioner seeks and alleges. When a claimant seeks an order for payment of medical expenses either by petition or when raised as an issue in the pretrial conference on the employer's petition, copies of the bills shall be provided to counsel with the Petition at least 30 days before the hearing.

(3) A complete statement of defenses to be used by the opposing party.

(4) A copy of the medical report upon which a petition for benefits under 19 Del.C. 2326 is based shall be provided to opposing counsel.

(5) A clear statement of the basis for a petition under 19 Del.C. 2347.

(6) Notice of the intent to use any movie, video or still picture and either a copy of the same or information as to where the same may be viewed.

(E) Either party may modify a pretrial memorandum at any time prior to thirty (30) days before the hearing. If the thirtieth day prior to a hearing falls on a weekend or holiday, the last day to amend the pretrial shall be the last business day which is at least thirty days prior to the hearing date. Should a party wish to amend the pretrial to list additional witnesses, the party shall provide the names and addresses of such witnesses. Notice of any modification to the pretrial shall be sent to the opposing counsel or to a party directly if the party is unrepresented in a fashion insuring timely receipt of the same. The thirty day notice requirement regarding amendments to a pretrial memorandum may be waived by consent of the parties upon written stipulation or by the Pretrial Scheduling Officer or the Board upon written application. However, only the party who filed the petition which forms the subject of the pretrial memorandum may amend the petition subject to the provisions of Board Rule 26.

(F) Subject to the pretrial officer's discretion, a hearing date for a petition may be scheduled even if one or both parties fail to attend the pretrial. Only the pretrial scheduling officer can grant a continuance of a pretrial hearing.

(G) Responsibility does attach to the requesting party to arrange to have medical witness(es) present for the Board's scheduled hearing date. Such arrangements must be coordinated with and approved by the pretrial scheduling officer. Unless specifically asked for, no subpoena will be issued to expert witnesses since parties make their own arrangements for expert appearance.

(H) The pretrial officers, at their discretion, may schedule an additional pretrial hearing upon request of either party or the Board.

(I) In the absence of unusual circumstances, the party filing a petition shall file with said petition a pretrial memorandum with the petitioner's portion completed. The pretrial memorandum shall be sent to the opposing party's counsel by the Department of Labor upon the filing of an entry of appearance. In the event that the opposing party is represented, the petitioning party may send the pretrial directly to opposing counsel with notice to the Board that the same has been done.

(J) The pretrial scheduling conference shall be held on a date not later than 30 days after the date of the issuance of proper notice of a pretrial conference regarding the petition at issue. In the event that the pretrial memorandum has not yet been filed with the Department of Labor, the Board shall issue an Order compelling the submission of the same by a date certain, not to exceed fifteen (15) days.

These changes shall be effective on April 10, 1998 after publication in the Delaware Regulations.

SO ORDERED this 10th day of March, 1998.

BY:

Jesse I. Hastings, Chairman
Jerome M. Donohue, Member
Irving S. Levitt, Member
Jane E. Mitchell, Member
Richard L. Stone, Member
Karen Wright, Member

Final Rule No. 8. Motions Concerning Legal Issues

(A) Except for motions contemplated by Rule No. 10 and 11, where a motion is filed with the Department which make a legal argument, a supporting brief containing citations shall be filed with such motion. A motion may not be filed without proof that a copy of said motion has been served upon the non-moving party.

(B) An answering brief shall be filed with the Department by the non-moving party within 15 days of receipt of the supporting brief. An answering brief may not be filed without proof that a copy of said answering brief has been served upon the moving party.

(C) A reply brief may be filed with the Department by the moving party in the discretion of the moving party, but in no event will a reply brief be accepted by the Department after 7 days from the receipt by the moving party of the non-moving party's answering brief. A reply brief may not be filed without proof that a copy of said reply brief has been served upon the non-moving party.

(D) After the briefs have been filed with the Department, an oral argument may be scheduled by the Department in the Board's discretion.

(E) Motions of a procedural nature need not be accompanied by supporting briefs. No order involving a procedural matter requested by the moving party shall be issued by the Board against the non-moving party until the non-moving party has been given an opportunity to be heard on the issue.

(F) Anytime after the employer's first report of injury has been filed with the Department, the Department's scheduling officer may be notified either by oral, telephonic or written communication of the request by a party or party's legal counsel for a legal hearing. The Department's scheduling officer will have the discretion of requiring a written argument from the parties or the parties' legal counsel on the legal issue. Should one or both of the parties fail to accept the scheduling officer's decision, the parties must reduce their respective positions to written memorandums. The memorandums will be submitted to the Department by the parties on a date chosen by the scheduling officer. The Board will review the memorandums and issue a written decision.

(G) Parties may submit a proposed stipulation order for cooperation with reasonable vocational rehabilitation to the Board for approval without a legal hearing.

(H) If an unreported or memorandum opinion, whether of the Board or of any court, is cited or relied upon by any party, whether in a written submission or during any oral presentation, a copy thereof shall be provided to the Board and the opposing party. If, during an oral presentation, the party relying on the unreported case does not have a copy of such case immediately available, copies will be provided promptly after the hearing but in no case later than the end of the next business day following the hearing.

Final Rule 9. Formulation of Issues - Pretrial Procedure

~~(A) In any action, the Board may in its discretion direct the attorneys' for the parties or the claimants, if unrepresented, to appear before it for a conference to consider:~~

(A) In any action, The Department of Labor shall conduct a pretrial conference. The Pretrial Scheduling Officers shall be responsible for noticing and conducting such pretrial conferences. Such conference shall be held telephonically, unless either party is unrepresented by counsel in which case, the conference may be held at the Department of Labor offices servicing the county where the accident occurred. The Scheduling Officer shall set a date and time for the hearing on the issues which are the subject of the petition convenient to all parties and counsel and subject to the provisions of 19 Del.C. 2348

(c). Hearings as to all other Petitions will be scheduled at the convenience of all parties and counsel to the extent possible. At such conference, the parties may consider:

(1) The simplification of Means and methods to simplify the issues(s);

(2) The necessity or desirability of amendments to the papers filed or for additional papers to be filed;

(3) The possibility of obtaining stipulations; admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) Such matters as may aid in the disposition or expedition of the action.

(B) The Board may make an order which recites the action taken at the conference, the amendments allowed to the pleadings and the agreements made by the parties or on their behalf as to any of the matters considered, and which limits the issues for hearing to those not disposed of by admissions or agreements of counsel. Such order when entered controls the subsequent course of the action unless modified to prevent manifest injustice.

(C) The Board Department shall designate a Board staff member as the pretrial officer to arrange for and preside over pretrial hearings. The pretrial officer will have discretionary power to see that the pretrials are conducted in an effective manner.

~~(D) The attorney for the petitioner, or the petitioner, will be assigned a pretrial hearing date by the Board. The Board assumes petitioners are prepared to go forward with their petitions on the date of filing except in cases involving a Statute of Limitations problem. At the time of the noticed pretrial the attorneys for the parties or the claimant, if unrepresented, must be prepared with the following information: At the time of the noticed pretrial, the following information or documentation must be provided:~~

~~(1) Names and addresses of prospective medical and lay witnesses. will be supplied.~~

~~(2) The pretrial memorandum shall contain the names of all witnesses known to each party at the time of the pretrial conference and expected to be called at the time of the hearing. Witnesses can be added following the pretrial with written notice to the opposing party and the pretrial officer not later than thirty (30) days before the hearing day. (3) A Complete statement of what the petitioner seeks and alleges. When a claimant seeks an order for payment of medical expenses, either by petition or when raised as an issue in the pretrial conference on employer's petition, copies of the bills shall be provided to counsel included with the pPetition, or provided to the carrier or counsel at least 30 days before the hearing. The requirement can be waived by a Pretrial Officer.~~

~~(4 3) Complete statement of defenses to be used~~

by the opposing party.

~~(5 4) If the petitioner seeks an award under 19 Del.C. Section 2326, the petitioner must provide to the opposing party at the pretrial the medical reports upon which the petition is based. A copy of the medical report upon which a petition for benefits under 19 Del.C. 2326 is based shall be provided to opposing counsel.~~

~~(6 5) A clear statement of why a petitioner seeks to terminate a claimant's Workers' Compensation benefits must be provided at the pretrial. A clear statement of the basis for a petition under 19 Del.C. 2347.~~

~~(7) A party wishing to use a movie, video or still pictures must advise the opposing party thirty (30) days prior to the hearing.~~

~~(8) In the absence of unusual circumstances, the pretrial memorandum shall be exchanged by mail in accordance with the procedures established by the Board's secretary and submitted to the opposing party and the Board no later than three (3) working days prior to the scheduled pretrial.~~

~~(6) Notice of the intent to use any movie, video or still picture and either a copy of the same or information as to where the same may be viewed.~~

~~(E) Either party may modify a pretrial memorandum until 30 days prior to a hearing. Thereafter, modification of a pretrial memorandum can only be done by permission of the pretrial officer or the Board.~~

Either party may modify a pretrial memorandum at any time prior to thirty (30) days before the hearing. If the thirtieth day prior to a hearing falls on a weekend or holiday, the last day to amend the pretrial shall be the last business day which is at least thirty days prior to the hearing date. Should a party wish to amend the pretrial to list additional witnesses, the party shall provide the names and addresses of such witnesses. Notice of any modification to the pretrial shall be sent to the opposing counsel or to a party directly if the party is unrepresented in a fashion insuring timely receipt of the same. The thirty day notice requirement regarding amendments to a pretrial memorandum may be waived by consent of the parties upon written stipulation or by the Pretrial Scheduling Officer or the Board upon written application. However, only the party who filed the petition which forms the subject of the pretrial memorandum may amend the petition subject to the provisions of Board Rule 26.

(F) Subject to the pretrial officer's discretion, a hearing date for a petition may be scheduled at the pretrial even if one or both parties fail to attend the pretrial. Only the pretrial scheduling officer can grant a continuance of a pretrial hearing.

(G) Responsibility does attach to the requesting party to arrange to have medical witness(es) present for the Board's scheduled hearing date. Such arrangements must be coordinated with and approved by the Board's

~~Scheduling Officer~~ pretrial scheduling officer. Unless specifically asked for, no Board subpoena will be issued to expert witnesses since parties make their own arrangements for expert appearance.

(H) The pretrial officers, at their discretion, may schedule an additional pretrial hearing upon request of either party or the Board.

(I) In the absence of unusual circumstances, the party filing a petition shall file with said petition a pretrial memorandum with the petitioner's portion completed. The pretrial memorandum shall be sent to the opposing party's counsel by the Department of Labor upon the filing of an entry of appearance. In the event that the opposing party is represented, the petitioning party may send the pretrial directly to opposing counsel with notice to the Board that the same has been done.

(J) The pretrial scheduling conference shall be held on a date not later than 30 days after the date of the issuance of proper notice of a pretrial conference regarding the petition at issue. In the event that the pretrial memorandum has not yet been filed with the Department of Labor, the Board shall issue an Order compelling the submission of the same by a date certain, not to exceed fifteen (15) days.

Proposed Board Rule No. 30

~~[(A) Interrogatories shall not be permitted as a matter of course.~~

~~(B) In the event of unusual and exceptional circumstances, a party may petition the Board to permit limited interrogatories. The party shall state the specific interrogatories proposed and the unusual and exceptional circumstances supporting the petition. If, after hearing upon adequate notice, the Board finds that unusual and exceptional circumstances do not exist and denies the petition, the Board shall award expenses, including an attorney's fee, to the party opposing the petition.]~~

Proposed Board Rule No. 31

~~[(A) No employee examined under 19 Del.C. §2343 shall be required to undergo medical tests or techniques which are unnecessary, unduly invasive, impose risk, or otherwise inappropriate to an informed diagnosis. The party requesting the medical examination shall at the time of the request, advise the employee of any medical tests or techniques to be performed that may be invasive or impose risk.~~

~~(B) Any employee who believes that medical tests~~

~~or techniques are or may be unnecessary, unduly invasive, impose risk, or otherwise inappropriate to an informed diagnosis may petition the Board for an immediate hearing for the taking of testimony. If the Board grants relief to the employee, the Board shall require the opposing party to pay the costs of the proceeding, including medical witness fees and an attorney's fee.]~~

DEPARTMENT OF NATURAL RESOURCES & ENVIRONMENTAL CONTROL

DIVISION OF AIR & WASTE MANAGEMENT

Statutory Authority: 7 Delaware Code,
Section 6010 (7 Del.C. §6010)

Secretary's Order No. 98-A-0010

Re: Proposed Regulation No. 32 Transportation Conformity of the Delaware Regulations Governing the Control of Air Pollution

Date of Issuance: March 13, 1998

Effective Date of Regulatory Amendments: April 11, 1998

I. Background

In November, 1994, the Department prepared a draft regulation regarding Transportation Conformity, and a public hearing was held on the proposal. However, the regulation was never promulgated because there was a general, nationwide concern that the federal Rule lacked necessary flexibility for States to implement the requirements of the Transportation Conformity, without hampering the need for transportation mobility as expressed by the public. In response to the concern, EPA made a series of three amendments to its program. These amendments set up an extensive "stakeholders" process. This new Regulation No. 32 is a revised draft of the regulation proposed in 1994 including the incorporation of EPA's three amendments.

On February 24, 1998, a public hearing was held in the Auditorium of the DNREC Richardson and Robinson Building at 89 Kings Highway, Dover, Delaware, beginning at approximately 5:00 p.m. No one from the public attended the hearing and no written comments were submitted except a letter from EPA stating that this proposal was acceptable to it. The Hearing Officer prepared a memorandum dated March 12, 1998, submitting

his report and recommendation and that memorandum is incorporated herein by reference.

II. Findings

1. Proper notice of the hearing was provided as required by law, including publication in the Delaware Register of Regulations.

2. No members of the public appeared at the public hearing.

3. No changes were made to this proposal after it was put out to public notice.

4. This regulation should ensure that state transportation plans, programs and projects that receive federal funds or approvals are consistent with the goals of the State Implementation Plan to reduce automobile emissions which should further the policies and purposes of 7 Del. C. Chapter 60.

III. Order

In view of the above findings, it is hereby ordered that the proposed Regulation No. 32—Transportation Conformity of the Delaware Regulations Governing the Control of Air Pollution be adopted and promulgated according to the Administrative Procedures Act and, further, that the amendments be effective on the date stated hereinabove.

IV. Reasons

Adopting this new Regulations will ensure that State of Delaware transportation plans, programs and projects that get federal funding or approval conform to the goals of the State Implementation Plan to reduce automobile emissions. This will further the policies and purposes of 7 Del. C. Chapter 60.

Christophe A. G. Tulou, Secretary

Transportation Conformity Regulation
Regulation No. 32
Proposed SIP Revision

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		Section 1 - Purpose.	

The purpose of this regulation is to implement §176(c) of the Clean Air Act (CAA), as amended (42 U.S.C. 7401 et seq.), the related requirements of 23 U.S.C. 109(j), and regulations under 40 CFR Part 51 subpart T, with respect to the conformity of transportation plans, programs, and projects which are developed, funded, or approved by the United States Department of Transportation (DOT), and by metropolitan planning organizations (MPOs) or other recipients of funds under title 23 U.S.C. or the Federal Transit Laws (49 U.S.C. Chapter 53). This regulation sets forth policy, criteria, and procedures for demonstrating and assuring conformity of such activities to this applicable implementation plan developed and applicable pursuant to §110 and Part D of the CAA.

This regulation, consistent with 40 CFR Part 51, codifies and perhaps simplifies a pre-existing spirit of cooperation, and is not intended to undermine, duplicate or eliminate efforts already being undertaken within the various Federal, State and local entities involved in this process.

Hereinafter, the short title for this regulation is the Transportation Conformity Regulation.

Section 2 - Definitions.

Terms used but not defined in this regulation shall have the meaning given them by the CAA, titles 23 and 49 U.S.C., other Environmental Protection Agency (EPA) regulations, or other DOT regulations, in that order of priority.

Adopt or approve of a regionally significant project, for the purposes of Sections 6 and 30, means the first time any action necessary to authorize a project occurs, such as any policy board action necessary for the project to proceed, the issuance of administrative permits for the facility or for construction of the facility, the execution of a contract to construct the facility, any final action of a board, commission or administrator authorizing or directing employees to proceed with construction of the project, or any written decision or authorization from the MPO that the project may be adopted or approved.

Applicable implementation plan is defined in §302(q) of the CAA and means the portion (or portions) of the implementation plan, or most recent revision thereof, which has been approved under §110, or promulgated under §110(c), or promulgated or approved pursuant to regulations promulgated under §301(d) and which implements the relevant requirements of the CAA.

CAA means the Clean Air Act, as amended.

Cause or contribute to a new violation for a project means:

(1) To cause or contribute to a new violation of a standard in the area substantially affected by the project or over a region which would otherwise not be in violation of the standard during the future period in question, if the project were not implemented, or

(2) To contribute to a new violation in a manner that would increase the frequency or severity of a new violation of a standard in such area.

Clean data means air quality monitoring data determined by EPA to meet the requirements of 40 CFR part 58 that indicate attainment of the national ambient air quality standard.

Control strategy implementation plan revision is the implementation plan which contains specific strategies for controlling the emissions of and reducing ambient levels of pollutants in order to satisfy CAA requirements for demonstrations of reasonable further progress and attainment (CAA §§182(b)(1), 182(c)(2)(A), 182(c)(2)(B), 187(a)(7), 189(a)(1)(B), and 189(b)(1)(A); and §§192(a) and 192(b), for nitrogen dioxide).

DelDOT means the Delaware Department of Transportation

Department means the Delaware Department of Natural Resources and Environmental Control

Design concept means the type of facility identified by the project, e.g., freeway, expressway, arterial highway, grade-separated highway, reserved right-of-way rail transit, mixed-traffic rail transit, exclusive busway, etc.

Design scope means the design aspects which will affect the proposed facility's impact on regional emissions, usually as they relate to vehicle or person carrying capacity and control, e.g., number of lanes or tracks to be constructed or added, length of project, signalization, access control including approximate number and location of interchanges, preferential treatment for high-occupancy vehicles, etc.

DOT means the United States Department of Transportation.

Dover/Kent County MPO is the regional metropolitan planning organization for coordinating transportation planning in the Dover Urbanized area and the balance of Kent County. Members of the MPO Council include the

Delaware Department of Transportation, the Delaware Transit Corporation, a representative of the Governor of Delaware, the City of Dover, Kent County municipalities and Kent County Levy Court. Membership in the MPO is established by the MPO agreement and is subject to change.

EPA means the Environmental Protection Agency.

FHWA means the Federal Highway Administration of DOT.

FHWA/FTA project, for the purpose of this regulation, is any highway or transit project which is proposed to receive funding assistance and approval through the Federal-Aid Highway program or the Federal mass transit program, or requires Federal Highway Administration (FHWA) or Federal Transit Administration (FTA) approval for some aspect of the project, such as connection to an interstate highway or deviation from applicable design standards on the interstate system.

FTA means the Federal Transit Administration of DOT.

Forecast period with respect to a transportation plan is the period covered by the transportation plan pursuant to 23 CFR part 450.

Highway project is an undertaking to implement or modify a highway facility or highway-related program. Such an undertaking consists of all required phases necessary for implementation. For analytical purposes, it must be defined sufficiently to: (1) connect logical termini and be of sufficient length to address environmental matters on a broad scope; (2) have independent utility or significance, i.e., be usable and be a reasonable expenditure even if no additional transportation improvements in the area are made; and (3) not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

Horizon year is a year for which the transportation plan describes the envisioned transportation system according to Section 7 of this regulation.

Hot-spot analysis is an estimation of likely future localized CO and PM10 pollutant concentrations and a comparison of those concentrations to the national ambient air quality standards. Hot-spot analysis assesses impacts on a scale smaller than the entire nonattainment or maintenance area, including, for example, congested roadway intersections and highways or transit terminals, and uses an air quality dispersion model to determine the effects of emissions on air quality.

Increase the frequency or severity means to cause a location or region to exceed a standard more often or to cause a violation at a greater concentration than previously existed and/or would otherwise exist during the future period in question, if the project were not implemented.

Intermodal means the connection or interface between transportation modes such as auto, train or bus

Lapse means that the conformity determination for a transportation plan or TIP has expired, and thus there is no currently conforming transportation plan and TIP.

Maintenance area means any geographic region of the United States previously designated nonattainment pursuant to the CAA Amendments of 1990 and subsequently redesignated to attainment subject to the requirement to develop a maintenance plan under §175A of the CAA, as amended.

Maintenance plan means an implementation plan under §175A of the CAA, as amended.

Metropolitan planning organization (MPO) is that organization designated as being responsible, together with the State, for conducting the continuing, cooperative, and comprehensive planning process under 23 U.S.C. 134 and 49 U.S.C. 5303. It is the forum for cooperative transportation decision-making.

Milestone has the meaning given in §182(g)(1) and §189(c) of the CAA. A milestone consists of an emissions level and the date on which it is required to be achieved.

Motor vehicle emissions budget is that portion of the total allowable emissions defined in the submitted or approved control strategy implementation plan revision or maintenance plan for a certain date for the purpose of meeting reasonable further progress milestones or demonstrating attainment or maintenance of the NAAQS, for any criteria pollutant or its precursors, allocated to highway and transit vehicle use and emissions.

Multimodal means a transportation planning system containing multiple transportation modes.

National ambient air quality standards (NAAQS) are those standards established pursuant to §109 of the CAA.

NEPA means the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 et seq).

NEPA process completion, for the purposes of this regulation, with respect to FHWA or FTA, means the point at which there is a specific action to make a determination that a project is categorically excluded, to make a Finding of No Significant Impact, or to issue a record of decision on a Final Environmental Impact Statement under NEPA.

Nonattainment area means any geographic region of the United States which has been designated as nonattainment under §107 of the CAA for any pollutant for which a national ambient air quality standard exists.

Project means a highway project or transit project.

Protective finding means a determination by EPA that a submitted control strategy implementation plan revision contains adopted control measures or written commitments to adopt enforceable control measures that fully satisfy the emissions reductions requirements relevant to the statutory provision for which the implementation plan revision was submitted, such as reasonable further progress or attainment.

Recipient of funds designated under title 23 U.S.C. or the Federal Transit Laws means any agency at any level of State, county, city, or regional government that routinely receives title 23 U.S.C. or Federal Transit Laws funds to construct FHWA/FTA projects, operate FHWA/FTA projects or equipment, purchase equipment, or undertake other services or operations via contracts or agreements. This definition does not include private landowners or developers, or contractors or entities that are only paid for services or products created by their own employees.

Regionally significant project means a transportation project (other than an exempt project) that is on a facility which serves regional transportation needs (such as access to and from the area outside of the region, major activity centers in the region, major planned developments such as new retail malls, sports complexes, etc., or transportation terminals as well as most terminals themselves) and would normally be included in the modeling of a metropolitan area's transportation network, including at a minimum all principal arterial highways and all fixed guideway transit facilities that offer an alternative to regional highway travel.

Safety margin means the amount by which the total projected emissions from all sources of a given pollutant are less than the total emissions that would satisfy the applicable requirement for reasonable further progress, attainment, or maintenance.

Standard means a national ambient air quality standard.

Statewide transportation improvement program (STIP) means a staged, multi-year, intermodal program of transportation projects covering the State, which is consistent with the statewide transportation plan and metropolitan transportation plans, and developed pursuant to 23 CFR part 450.

Statewide transportation plan means the official intermodal statewide transportation plan that is developed through the statewide planning process for the State, developed pursuant to 23 CFR part 450.

Transit is mass transportation by bus, rail, or other conveyance which provides general or special service to the public on a regular and continuing basis. It does not include school buses or charter or sightseeing services.

Transit project is an undertaking to implement or modify a transit facility or transit-related program; purchase transit vehicles or equipment; or provide financial assistance for transit operations. It does not include actions that are solely within the jurisdiction of local transit agencies, such as changes in routes, schedules, or fares. It may consist of several phases. For analytical purposes, it must be defined inclusively enough to: (1) connect logical termini and be of sufficient length to address environmental matters on a broad scope; (2) have independent utility or independent significance, i.e., be a reasonable expenditure even if no additional transportation improvements in the area are made; and (3) not restrict consideration of alternatives for other reasonably foreseeable transportation improvements.

Transportation control measure (TCM) is any measure that is specifically identified and committed to in the applicable implementation plan that is either one of the types listed in §108 of the CAA, or any other measure for the purpose of reducing emissions or concentrations of air pollutants from transportation sources by reducing vehicle use or changing traffic flow or congestion conditions. Notwithstanding the above, vehicle technology-based, fuel-based, and maintenance-based measures which control the emissions from vehicles under fixed traffic conditions are not TCMs for the purposes of this regulation.

Transportation improvement program (TIP) means a staged, multiyear, intermodal program of transportation projects covering a metropolitan planning area which is consistent with the metropolitan transportation plan, and developed pursuant to 23 CFR part 450.

Transportation plan means the official intermodal metropolitan transportation plan that is developed

through the metropolitan planning process for the metropolitan planning area, developed pursuant to 23 CFR part 450.

Transportation project is a highway project or a transit project.

U.S.C. means the United States Code

WILMAPCO, the Wilmington Area Planning Council, as designated by the Governors of Delaware and Maryland, is the MPO for New Castle County, Delaware and Cecil County, Maryland. Within the framework of Federal law and regulation, it serves as the transportation planning coordinating agency for the two-county WILMAPCO region, and its policies are established by the WILMAPCO Council, whose members are a representative of the Governors of Delaware and Maryland; the Delaware Secretary of Transportation, the Director of the Delaware Transit Corporation, the Mayor of Wilmington, the County Executive of New Castle County, New Castle and Cecil Counties Municipalities' representatives, and Cecil County President Commissioner.

Written commitment for the purposes of this regulation means a written commitment that includes a description of the action to be taken; a schedule for the completion of the action; a demonstration that funding necessary to implement the action has been authorized by the appropriating or authorizing body; and an acknowledgment that the commitment is an enforceable obligation under the applicable implementation plan.

Section 3 - Applicability.

(a) Action applicability.

(1) Except as provided for in paragraph (c) of this section, conformity determinations are required for:

(i) The adoption, acceptance, approval or support of transportation plans and transportation plan amendments developed pursuant to 23 CFR part 450 or 49 CFR part 613 by an MPO or DOT;

(ii) The adoption, acceptance, approval or support of TIPs and TIP amendments developed pursuant to 23 CFR part 450 or 49 CFR part 613 by an MPO or DOT; and

(iii) The approval, funding, or implementation of FHWA/FTA projects.

(2) Conformity determinations are not required under this regulation for individual projects which are not FHWA/FTA projects. However, Section 22 applies to such projects if they are regionally significant.

(3) Conformity determinations for Cecil County,

Maryland shall be conducted in accordance with conformity procedures established in the Code of Maryland regulations (COMAR) and in the Maryland State Implementation Plan.

(b) Geographic Applicability. The provisions of this regulation shall apply in all nonattainment and maintenance areas for transportation-related criteria pollutants for which the area is designated nonattainment or has a maintenance plan.

(1) The provisions of this regulation apply with respect to emissions of the following criteria pollutants: ozone, carbon monoxide (CO), nitrogen dioxide (NO₂), and particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM₁₀).

(2) The provisions of this regulation apply with respect to emissions of the following precursor pollutants:

(i) Volatile organic compounds (VOC) and nitrogen oxides (NO_x) in ozone areas;

(ii) NO_x in NO₂ areas; and

(iii) VOC, NO_x, and PM₁₀ in PM₁₀ areas if the EPA Regional Administrator or the director of the State air agency has made a finding that transportation-related precursor emissions within the nonattainment area are a significant contributor to the PM₁₀ nonattainment problem and has so notified the MPO and DOT, or if the applicable implementation plan (or implementation plan submission) establishes a budget for such emissions as part of the reasonable further progress, attainment or maintenance strategy.

(3) The provisions of this regulation apply to maintenance areas for 20 years from the date EPA approves the area's request under §107(d) of the CAA for redesignation to attainment, unless the applicable implementation plan specifies that the provisions of this regulation shall apply for more than 20 years.

(c) Limitations.

(1) Projects subject to this regulation for which the NEPA process and a conformity determination have been completed by DOT may proceed toward implementation without further conformity determinations unless more than three years have elapsed since the most recent major step (NEPA process completion; start of final design; acquisition of a significant portion of the right-of-way; or approval of the plans, specifications and estimates) occurred. All phases of such projects which were considered in the conformity determination are also included, if those phases were for the purpose of funding final design, right-of-way acquisition, construction, or any combination of these phases.

(2) A new conformity determination for the project will be required if there is a significant change in project

design concept and scope, if a supplemental environmental document for air quality purposes is initiated, or if three years have elapsed since the most recent major step to advance the project occurred.

(d) Grace period for new nonattainment areas. For areas or portions of areas which have been designated attainment for either ozone, CO, PM₁₀ or NO₂ since 1990 and are subsequently redesignated to nonattainment for any of these pollutants, the provisions of this regulation shall not apply for 12 months following the date of final designation to nonattainment for such pollutant.

(e) Should any county become nonattainment for the pollutants described in Sections 17, 18, and 24, these applicable sections shall become effective twelve (12) months after notification of such nonattainment status from EPA to the State.

Section 4 - Priority.

When assisting or approving any action with air quality-related consequences, FHWA and FTA shall give priority to the implementation of those transportation portions of an applicable implementation plan prepared to attain and maintain the NAAQS. This priority shall be consistent with statutory requirements for allocation of funds among States or other jurisdictions.

Section 5 - Frequency of Conformity Determinations.

(a) Conformity determinations and conformity redeterminations for transportation plans, TIPs, and FHWA/FTA projects must be made according to the requirements of this section and the applicable implementation plan.

(b) Frequency of conformity determinations for transportation plans.

(1) Each new transportation plan must be demonstrated to conform before the transportation plan is approved by the MPO or accepted by DOT.

(2) All transportation plan revisions must be found to conform before the transportation plan revisions are approved by the MPO or accepted by DOT, unless the revision merely adds or deletes exempt projects listed in Sections 27 or 28. The conformity determination must be based on the transportation plan and the revision taken as a whole.

(3) The MPO and DOT must determine the conformity of the transportation plan no less frequently than every three years. If more than three years elapse after DOT's conformity determination

without the MPO and DOT determining conformity of the transportation plan, the existing conformity determination will lapse.

(c) Frequency of conformity determinations for transportation improvement programs.

(1) A new TIP must be demonstrated to conform before the TIP is approved by the MPO or accepted by DOT.

(2) A TIP amendment requires a new conformity determination for the entire TIP before the amendment is approved by the MPO or accepted by DOT, unless the amendment merely adds or deletes exempt projects listed in Sections 27 or 28.

(3) The MPO and DOT must determine the conformity of the TIP no less frequently than every three years. If more than three years elapse after DOT's conformity determination without the MPO and DOT determining conformity of the TIP, the existing conformity determination will lapse.

(4) After an MPO adopts a new or revised transportation plan, conformity of the TIP must be redetermined by the MPO and DOT within six months from the date of DOT's conformity determination for the transportation plan, unless the new or revised plan merely adds or deletes exempt projects listed in Sections 27 or 28. Otherwise, the existing conformity determination for the TIP will lapse.

(d) Projects. FHWA/FTA projects must be found to conform before they are adopted, accepted, approved, or funded. Conformity must be redetermined for any FHWA/FTA project if three years have elapsed since the most recent major step to advance the project (NEPA process completion; start of final design; acquisition of a significant portion of the right-of-way; or approval of the plans, specifications and estimates) occurred.

(e) Triggers for transportation plan and TIP conformity determinations. Conformity of existing transportation plans and TIPs must be redetermined within 18 months of the following, or the existing conformity determination will lapse, and no new project-level conformity determinations may be made until conformity of the transportation plan and TIP has been determined by the MPO and DOT:

(1) November 24, 1993;

(2) The date of the State's initial submission to EPA of each control strategy implementation plan or maintenance plan establishing a motor vehicle emissions budget;

(3) EPA approval of a control strategy implementation plan revision or maintenance plan which establishes or revises a motor vehicle emissions budget;

(4) EPA approval of an implementation plan revision that adds, deletes, or changes TCMs; and

(5) EPA promulgation of an implementation plan which establishes or revises a motor vehicle emissions budget or adds, deletes, or changes TCMs.

Section 6 - Consultation

(a) General.

This regulation provides procedures for interagency consultation (Federal, State, and local) and resolution of conflicts. Such consultation procedures shall be undertaken by WILMAPCO, DeIDOT and DOT with the Department and EPA before making conformity determinations, and by the Department and EPA with WILMAPCO, the Dover/Kent County MPO, DeIDOT, and DOT in developing applicable implementation plans.

(b) Interagency consultation procedures: General factors.

(1) Agency representation, roles and responsibilities.

(i) Representatives of WILMAPCO, the Dover/Kent County MPO, the Department and DeIDOT shall undertake an interagency consultation process in accordance with this section and with local or regional offices of EPA, FHWA, and FTA on the development of the implementation plan, the list of TCMs in the applicable implementation plan, the unified planning work program under 23 CFR § 450.314, the transportation plan, the TIP, any revisions to the preceding documents, and all conformity determinations required by this regulation.

(ii) The Department shall be the lead agency responsible for assuring the adequacy of the interagency consultation process with respect to the development of applicable implementation plans and control strategy implementation plan revisions and the credits associated with the list of TCMs in the applicable implementation plan. In their respective areas, WILMAPCO or the Dover/Kent County MPO shall be the lead agency responsible for preparing the final document or decision and for assuring the adequacy of the interagency consultation process with respect to the development of the unified planning work program under 23 CFR § 450.314, the transportation plan, the TIP, and any amendments or revisions thereto. In the case of non-metropolitan areas, DeIDOT shall be the lead agency responsible for preparing the final document or decision and for assuring the adequacy of the interagency consultation process with respect to the development of the Statewide transportation plan, the STIP, and any amendments or revisions thereto. The Dover/Kent County MPO and WILMAPCO shall be the lead agency responsible for preparing the final document or decision and for assuring the adequacy of the interagency consultation process with respect to any

determinations of conformity under this regulation for which the MPO is responsible.

(iii) In addition to the lead agencies identified in subparagraph (ii), other agencies entitled to participate in any interagency consultation process under this regulation include DeIDOT, the Department of Public Safety, WILMAPCO and the Dover/Kent County MPO, the Federal Highway Administration regional office and State division office, the Federal Transit Administration regional office, the US Environmental Protection Agency, the Maryland Department of the Environment, the Maryland Department of Transportation, the Department, and any local transportation agency or local government.

(iv) It shall be the role and responsibility of each lead agency in an interagency consultation process, as specified in subparagraph (ii), to confer with all other agencies identified under subparagraph (iii) with an interest in the document to be developed, provide all appropriate information to those agencies needed for meaningful input, solicit early and continuing input from those agencies, conduct the consultation process described in the applicable paragraphs of Section 6 (b), where required, assure policy-level contact with those agencies, and, (except for actions subject to Section 6 (b)(7) or (c)(1)(vii)) prior to taking any action, consider the views of each such agency and respond to those views submitted in a timely, substantive written manner prior to any final decision on such document, and assure that such views and written response are made part of the record of any decision or action. It shall be the role and responsibility of each agency specified in subparagraph (C), when not fulfilling the role and responsibilities of a lead agency, to confer with the lead agency and other participants in the consultation process, review and provide written comments on all proposed and final documents and decisions in a timely manner, attend consultation and decision meetings, assure policy-level contact with other participants, provide input on any area of substantive expertise or responsibility (such as planning assumptions, modeling, information on status of TCM implementation, and interpretation of regulatory or other requirements), and provide technical assistance to the lead agency or consultation process in accordance with this paragraph when requested.

(v) Specific roles and responsibilities of various participants in the interagency consultation process shall be as follows:

(A) The Department shall be responsible for developing:

- (I) emissions inventories,
- (II) emissions budgets,
- (III) air quality modeling,
- (IV) attainment demonstrations,

(V) control strategy implementation plan revisions,
(VI) updated motor vehicle emissions factors, and
(VII) involving the WILMAPCO, the Dover/Kent County MPO or DeIDOT continuously in the process;

(B) The Dover/Kent County MPO and/or WILMAPCO shall be responsible, for:

(I) developing transportation plans, UPWPs and TIPs,

(II) evaluating TCM impacts based on technical support provided by DeIDOT,

(III) approving transportation and socioeconomic data and planning assumptions and providing such data and planning assumptions to the Department and DeIDOT for use in air quality analysis to determine conformity of transportation plans, TIPs, and projects,

(IV) monitoring implementation of regionally significant projects as identified in the TIP;

(V) approving TCMs,

(VI) providing input to policy decisions on emissions budgets assuring the proper and timely completion of transportation modeling, regional emissions analyses and documentation of timely implementation of TCMs needed for conformity assessments.

(C) DeIDOT shall be responsible for:

(I) developing Statewide transportation plans and STIPs,

(II) providing technical comments on motor vehicle emissions inputs,

(III) distributing draft and final air quality documents to other agencies,

(IV) convening air quality technical review meetings on specific projects when requested by other agencies or as necessitated by changes in schedule or scope,

(V) provide timely demand forecasting and on-road mobile source emission inventories, and

(VI) involve WILMAPCO, the Dover/Kent County MPO and the Department continuously in the Consultation Process as described in this section;

(D) The Department of Public Safety, Division of Motor Vehicles shall be responsible for providing data such as motor vehicle registration data for use in the on-road mobile source emissions model;

(E) FHWA and FTA shall be responsible for:

(I) assuring timely action on final findings of conformity, after consultation with other agencies as provided in this section and 40 CFR § 51.402, and

(II) provide guidance on conformity and the transportation planning process to agencies in interagency consultation; and

(F) EPA shall be responsible for:

(I) reviewing and approving updated motor vehicle emissions factors, and

(II) providing guidance on conformity criteria and procedures to agencies in interagency consultation.

(2) CONSULTATION PROCESS WORK GROUP - procedures

(i) As described herein, various agencies have the primary responsibility as lead agency for the preparation, development, and/or performance of the various tasks required as part of the conformity and attainment processes. These agencies shall form a CONSULTATION PROCESS WORK GROUP (Work Group). As part of the consultation process described herein, it shall be the affirmative obligation of each such lead agency having the responsibility for preparation of a final document as set forth in this section to initiate the consultation process by notifying other participants and convening a PRODUCT DEVELOPMENT TASK FORCE (Task Force) composed of the other members of the Work Group. Such Task Force shall be chaired by the representative of the lead agency, unless the group, by consensus, selects another chair. Each such Task Force will begin consultation meetings early in the process of developing the final document, and shall prepare all drafts and final documents and major supporting documents, or appoint the representatives or agencies that will prepare such documents. The Work Group and each Task Force shall be made up of policy level representatives or their designees and shall be assisted by such technical committees or technical engineering, planning, public works, air quality and administrative staff of member agencies as the Work Group deems appropriate. The chair of each Task Force shall appoint the conveners of technical meetings and shall be responsible for the ongoing and continuous process described herein. The lead agency shall assure that all relevant documents and information are supplied to all participants in the informal and formal consultation process in a timely manner.

In the event that an agency member of the Work Group or Task Force other than the lead agency would like to convene the Work Group or Task Force, either in a formal or informal session to discuss any matter concerning or related to this regulation, said agency shall notify the lead agency of its specific request and the lead agency shall, within seven (7) days, convene a session of the Work Group or Task Force.

(ii) Regular consultation on major activities such as the development of an implementation plan revision, the development of a transportation plan, the development of a TIP, or any determination of conformity of transportation plans or TIPs, shall include meetings of

the Work Group on a regular scheduled basis as shall be determined by the consensus of the work group, but no less than on a semi-annual basis, until an attainment demonstration is approved by EPA.

(iii) At each meeting of the Work Group, the following shall be reviewed and approved:

(A) The schedule for all formal meetings;

(B) The status and schedule for delivery of all documents, materials or products required to be developed by these regulations;

(C) The status and schedule of all Standing Committee and/or Sub-Committee activities;

(D) All Public Meetings, Hearings and/or other public involvement.

(iv) The Work Group may establish Standing Sub-Committees or Sub-Committees of limited duration when the Work Group determines that such are necessary to accomplish specific objectives or tasks.

(v) As described in this section, various agencies have the primary obligation for the preparation, development, performance and/or the responsibility (legal or otherwise) to be the lead agency for the various tasks required as part of the conformity-attainment process. It shall be the affirmative responsibility of each such lead agency to involve each of the other agencies, on an informal basis and in an ongoing, continuous manner in the said preparation, development, performance, etc., as frequently as possible without detracting from said agency's ability to complete the task.

(3) Each lead agency for any Task Force or Sub-Committee, as part of the interagency consultation process under this section (including any Federal agency) shall provide each final document that is the product of such consultation process (including applicable implementation plans or implementation plan revisions, transportation plans, TIPs, and determinations of conformity), together with all supporting information, to each other agency that has participated in the consultation process within 30 calendar days of adopting or approving such document or making such determination. Any such agency may supply a checklist of available supporting information, which such other participating agencies may use to request all or part of such supporting information, in lieu of generally distributing all supporting information.

(4) A meeting that is scheduled or required for another purpose may be used for the purposes of consultation if the conformity consultation purpose is identified in the public notice for the meeting.

(c) Interagency consultation procedures: Specific processes

(1) An interagency consultation process in accordance with paragraph (b) shall be undertaken for the following:

(i) Evaluating and choosing each model (or models) and associated methods and

(ii) Determining and providing written notification to the affected agencies (i.e., by letter from the Chairman to be included in the documentation) which minor arterials and other transportation projects should be considered "regionally significant" for the purposes of regional emissions analysis (in addition to those functionally classified as principal arterial or higher or fixed guideway systems or extensions that offer an alternative to regional highway travel), and which projects should be considered to have a significant change in design concept and scope from the transportation plan or TIP, to be initiated by DeIDOT and conducted in accordance with paragraph (b)(2) of this section;

(iii) Evaluating whether projects otherwise exempted from meeting the requirements of this regulation (see Sections 27 and 28) should be treated as non-exempt in cases where potential adverse emissions impacts may exist for any reason, to be initiated by DeIDOT and conducted in accordance with paragraph (b)(2) of this section;

(iv) Making a determination, as required by Section 14(c)(1), whether past obstacles to implementation of TCMs which are behind the schedule established in the applicable implementation plan have been identified and are being overcome, and whether State and local agencies with influence over approvals or funding for TCMs are giving maximum priority to approval or funding for TCMs, to be initiated by DeIDOT and conducted in accordance with paragraph (b)(2) of this section. This consultation process shall also consider whether delays in TCM implementation necessitate revisions to the applicable implementation plan to remove TCMs or substitute TCMs or other emission reduction measures;

(v) Making a determination, as required by Section 22(b), whether a project should be included in the regional emissions analysis supporting the TIP's conformity determination, even if the project is not strictly included in the TIP for the purposes of MPO project selection or endorsement, and whether the project's design concept and scope have not changed significantly from those which were included in the regional emissions analysis, or in a manner which would significantly impact use of the facility, to be initiated by DeIDOT and conducted in accordance with paragraph (b)(2) of this section.

(vi) Identifying, as required by Section 24(d), projects located at sites in PM₁₀ nonattainment areas which have vehicle and roadway emission and dispersion characteristics which are essentially identical to those at sites which have violations verified by monitoring, and therefore require quantitative PM₁₀ hot-spot analysis, to

be initiated by DelDOT and conducted in accordance with paragraph (b)(2);

(vii) Notification of transportation plan or TIP revisions or amendments which merely add or delete exempt projects listed in Section 27, to be initiated by WILMAPCO, the Dover/Kent County MPO, or DelDOT in their respective areas, and conducted in accordance with paragraph (b)(2) of this section, other than the requirement that such notice be provided prior to final action;

(viii) Determining what forecast of vehicle miles traveled (VMT) to use in establishing or tracking emissions budgets, developing transportation plans, TIPs, or applicable implementation plans, or making conformity determinations, to be initiated by DelDOT and conducted in accordance with paragraph (b)(2) of this section;

(ix) Determining what constitutes "reasonable professional practice" for the purposes of Sections 23 and 24(b), within the context thereof, to be initiated by DelDOT and conducted in accordance with paragraph (b)(2) of this section.

(x) Determining whether the project sponsor or MPO has demonstrated that the requirements of Sections 19, 24 and 25 are satisfied without a particular mitigation or control measure, as provided in Section 26(d), to be initiated by the Department and conducted in accordance with paragraph (b)(2) of this section;

(xi) Any decision made under paragraph (c)(1) of this section shall be conveyed in writing to all member agencies.

(2) An interagency consultation process in accordance with paragraph (b) of this section shall be undertaken for the following:

(i) Evaluating events which will require new conformity determinations in addition to those triggering events established in Section 5, to be initiated by WILMAPCO, the Dover/Kent County MPO, or DelDOT in their respective areas, and conducted in accordance with paragraph (b)(2) of this section;

(ii) Consulting on emissions analysis for transportation activities which cross the borders of MPOs, or nonattainment areas, to be initiated by WILMAPCO, the Dover/Kent County MPO, or DelDOT in their respective areas, and conducted in accordance with paragraph (b)(2) of this section.

(3) Where the metropolitan planning area does not include the entire nonattainment or maintenance area, an interagency consultation process in accordance with paragraph (b) of this section involving the MPO and the State Department of Transportation shall be undertaken for cooperative planning and analysis for purposes of determining conformity of all projects outside the metropolitan area and within the nonattainment or maintenance area, to be initiated by WILMAPCO and/or

the Dover/Kent County MPO in their respective areas, and conducted in accordance with paragraph (b)(2) of this section.

(4) Regionally significant project - policy and procedures

(i) An interagency consultation process in accordance with paragraph (b) and including recipients of funds designated under title 23 U.S.C. or the Federal Transit Act shall be undertaken to assure that plans for construction of regionally significant projects which are not FHWA/FTA projects (including projects for which alternative locations, design concept and scope, or the no-build option are still being considered), including all those by recipients of funds designated under title 23 U.S.C. or the Federal Transit Act are disclosed to the MPO on a regular basis, and are included in the TIP.

(ii) The sponsor of any such regionally significant project, and any agency that is responsible for taking action(s) on any such project (or otherwise) shall disclose such project to the MPO in a timely manner. Such disclosure shall be made not later than the first occasion on which any of the following actions is sought: any policy board action necessary for the project to proceed, the issuance of administrative permits for the facility or for construction of the facility, the execution of a contract to design or construct the facility, the execution of any indebtedness for the facility, any final action of a board, commission or administrator authorizing or directing employees to proceed with design, permitting or construction of the project, or the execution of any contract to design or construct or any approval needed for any facility that is dependent on the completion of the regionally significant project. To help assure timely disclosure, the sponsor of any potential regionally significant project shall disclose to the MPO annually, not later than June 1 for the TIP currently being developed each year, each project for which alternatives have been identified through the NEPA process, and in particular, any preferred alternative that may be a regionally significant project.

(iii) In the case of any such regionally significant project that has not been disclosed to the MPO and other interested agencies participating in the consultation process in a timely manner, such regionally significant project shall not be considered to be included in the regional emissions analysis supporting the currently conforming TIP's conformity determination and not to be consistent with the motor vehicle emissions budget in the applicable implementation plan, for the purposes of Section 22.

(5) An interagency consultation process in accordance with paragraph (b) of this section involving the MPO and other recipients of funds designated under title 23 U.S.C. or the Federal Transit Act shall be

undertaken for developing assumptions regarding the location and design concept and scope of projects which are disclosed to the MPO as required by paragraph (c)(4) of this section but whose sponsors have not yet decided these features, in sufficient detail to perform the regional emissions analysis according to the requirements of Section 23, to be initiated by DelDOT and conducted in accordance with paragraph (b)(2) of this section.

(6) An interagency consultation process in accordance with paragraph (b) of this section shall be undertaken for the design, schedule, and funding of research and data collection efforts related to regional transportation model development (such as household/travel transportation surveys), to be initiated by DelDOT and conducted in accordance with paragraph (b)(2) of this section.

(d) Submittal process for determinations and amendments

Conformity is an affirmative responsibility of the Federal agency supporting the action. This final determination will be based on information developed by WILMAPCO, the Dover/Kent County MPO, or DelDOT in their respective areas, but FHWA/FTA will make an independent determination.

To accomplish this determination, the following procedures must be followed:

(1) The completed air quality conformity determination, necessary supporting documentation and the TIP will be submitted to the FHWA Division Office and the FTA Regional Office. The FHWA Division Office will forward a copy of the conformity determination and TIP (including both highway and transit projects) to the EPA Regional Office for review and comment. EPA will respond in writing, to the FTA Regional Office and FHWA Division Office, as soon as possible but not later than 30 days from the date of the FHWA transmittal.

(2) EPA comments will be resolved by FHWA and FTA, in concert with EPA, with WILMAPCO, the Dover/Kent County MPO, or DelDOT in their respective areas, as necessary.

(3) FHWA and FTA will jointly prepare correspondence to make the conformity finding. Joint conformity findings will be addressed to WILMAPCO (with a copy to DelDOT), to the Dover/Kent County MPO (with a copy to DelDOT), or to DelDOT in their respective areas, with copies to EPA and FTA. The findings of FTA and FHWA together constitute the DOT conformity findings.

(4) The FHWA Division Office will send a copy of the signed conformity determination and the TIPs to the Regional Office.

(5) In the event that WILMAPCO, the Dover/Kent

County MPO, or DelDOT in their respective areas, wishes to amend the TIP to add projects that are exempt from the conformity analysis requirement, FHWA or FTA or both, if necessary, will concur in the amendment and re-affirm the original DOT conformity finding by letter. This re-affirmation letter will reference the date(s) of the original FHWA and FTA findings. In cases where the amendment involves projects that are not exempt, a new conformity analysis and determination will be required from WILMAPCO, the Dover/Kent County MPO, or DelDOT in their respective areas, and will, in turn, require a new DOT conformity finding.

(6) TIP amendments from non-attainment areas that require a new or revised conformity determination (i.e., addition of new exempt projects or scope changes to existing exempt projects in the TIP) require an FHWA/FTA conformity determination prior to being added to the TIP and STIP.

(7) For TIP actions which do not involve transit projects, the FTA will prepare a letter of acknowledgment and concurrence on the draft conformity finding, indicating that the TIP action in question does not contain any projects in FTA's area of responsibility. Similarly for TIP actions which do not involve highway projects, the FHWA will prepare a letter of acknowledgment and concurrence on the draft conformity finding, indicating that the TIP action in question does not contain any projects in FHWA's area of responsibility. In either event, the issuance of the signed version of the draft conformity finding letter will constitute the DOT conformity finding for the TIP action in question.

(e) Department concurrence.

(1) It is the responsibility of the Department to evaluate any final conformity determination made by WILMAPCO, the Dover/Kent County MPO or DelDOT in their respective areas. The Department must concur with this determination within 14 days of the date after the agency initiates public notice in any such final determination of conformity. A determination of non-concurrence must be in accordance with Sections 10 - 19. If the Department does not take action within 14 days of such notice of public notice, WILMAPCO, the Dover/Kent County MPO or DelDOT, in their respective areas, may proceed with the final determination.

(2) Any conflict among State agencies or between State agencies and either WILMAPCO or the Dover/Kent County MPO shall be escalated to the Governor if the conflict cannot be resolved by the heads of the involved agencies within 30 days of the Department finding of non-concurrence. In the first instance, such agencies shall make every effort to resolve any difference, including personal meetings between the heads of such agencies or their policy-level representatives, to the extent possible.

(3) The Governor may delegate the role of hearing any such appeal under this subsection and of deciding whether to concur in the conformity determination to another official or agency within the State, but not to the head or staff of the Department, DelDOT, a State transportation commission or board, any agency that has responsibility for only one of these functions, WILMAPCO or the Dover/Kent County MPO.

(f) Public consultation procedures.

Agencies making conformity determinations (MPOs, DelDOT, etc. as appropriate) on transportation plans, programs, and projects shall establish and continuously implement a proactive public involvement process which provides opportunity for public review and comment prior to taking formal action on a conformity determination for all transportation plans and TIPs consistent with the requirements of 23 CFR part 450, including §§ 450.316(b)(1), 450.322(c), and 450.324(c) as in effect on the date of adoption of this regulation. In addition, any such agency must specifically address in writing all public comments that known plans for a regionally significant project which is not receiving FHWA or FTA funding or approval have not been properly reflected in the emissions analysis supporting a proposed conformity finding for a transportation plan or TIP. Any such agency shall also provide opportunity for public involvement in conformity determinations for projects to the extent otherwise required by law (such as NEPA). The opportunity for public involvement provided under this subsection shall include reasonable access to information, emissions data, analyses, models and modeling assumptions used to perform a conformity determination, and the obligation of any such agency to consider and respond to significant comments. No transportation plan, TIP, or Project may be found to conform unless the determination of conformity has been subject to a public involvement process in accordance with this subsection, without regard to whether the DOT has certified any process under 23 CFR part 450.

Section 7 - Content of Transportation Plans

(a) Transportation plans adopted after January 1, 1995, in New Castle and Kent Counties.

The transportation plan must specifically describe the transportation system envisioned for certain future years which shall be called horizon years.

(1) The agency or organization developing the transportation plan, after consultation in accordance with Section 6, may choose any years to be horizon years, subject to the following restrictions:

(i) Horizon years may be no more than 10 years

apart.

(ii) The first horizon year may be no more than 10 years from the base year used to validate the transportation demand planning model.

(iii) If the attainment year is in the time span of the transportation plan, the attainment year must be a horizon year.

(iv) The last horizon year must be the last year of the transportation plan's forecast period.

(2) For these horizon years:

(i) The transportation plan shall quantify and document the demographic and employment factors influencing expected transportation demand, including land use forecasts (whether separate or incorporated into other factors), in accordance with implementation plan provisions and Section 6;

(ii) The highway and transit system shall be described in terms of the regionally significant additions or modifications to the existing transportation network which the transportation plan envisions to be operational in the horizon years. Additions and modifications to the highway network shall be sufficiently identified to indicate intersections with existing regionally significant facilities, and to determine their effect on route options between transportation analysis zones. Each added or modified highway segment shall also be sufficiently identified in terms of its design concept and design scope to allow modeling of travel times under various traffic volumes, consistent with the modeling methods for area-wide transportation analysis in use by the MPO. Transit facilities, equipment, and services envisioned for the future shall be identified in terms of design concept, design scope, and operating policies that are sufficient for modeling of their transit ridership. Additions and modifications to the transportation network shall be described sufficiently to show that there is a reasonable relationship between expected land use and the envisioned transportation system; and

(iii) Other future transportation policies, requirements, services, and activities, including intermodal activities, shall be described.

(b) Moderate areas reclassified to serious. Ozone or CO nonattainment areas which are reclassified from moderate to serious and have an urbanized population greater than 200,000 must meet the requirements of paragraph

(a) of this section within two years from the date of reclassification.

(c) Transportation plans for other areas. Transportation plans for other areas must meet the requirements of paragraph (a) of this section at least to the extent it has been the previous practice of the MPO to prepare plans which meet those requirements. Otherwise, the transportation system envisioned for the future must be

sufficiently described within the transportation plans so that a conformity determination can be made according to the criteria and procedures of Sections 10 through 20.

(d) Savings. The requirements of this section supplement other requirements of applicable law or regulation governing the format or content of transportation plans.

Section 8 - Relationship of Transportation Plan and TIP Conformity with the NEPA Process.

The degree of specificity required in the transportation plan and the specific travel network assumed for air quality modeling do not preclude the consideration of alternatives in the NEPA process or other project development studies. Should the NEPA process result in a project with design concept and scope significantly different from that in the transportation plan or TIP, the project must meet the criteria in Sections 10 through 20 for projects not from a TIP before NEPA process completion.

Section 9 - Fiscal Constraints for Transportation Plans and Tips

Transportation plans and TIPs must be fiscally constrained consistent with DOT's metropolitan planning regulations at 23 CFR part 450 in order to be found in conformity.

Section 10 - Criteria and Procedures for Determining Conformity of Transportation Plans, Programs, and Projects: General

(a) In order for each transportation plan, program, and FHWA/FTA project to be found to conform, the MPO and DOT must demonstrate that the applicable criteria and procedures in this regulation are satisfied, and the MPO and DOT must comply with all applicable conformity requirements of implementation plans and of court orders for the area which pertain specifically to conformity. The criteria for making conformity determinations differ based on the action under review (transportation plans, TIPs, and FHWA/FTA projects), the relevant pollutant(s), and the status of the implementation plan.

(b) The following table indicates the criteria and procedures in Sections 10 through 20 which apply for transportation plans, TIPs, and FHWA/FTA projects. Paragraphs (c) through (f) of this section explain when the budget, emission reduction, and hot spot tests are required for each pollutant. Paragraph (g) of this section addresses isolated rural nonattainment and maintenance areas.

Table 1. Conformity Criteria

ALL ACTIONS AT ALL TIMES

Section 11 Latest planning assumptions
Section 12 Latest emissions model
Section 13 Consultation

TRANSPORTATION PLAN

Section 14(b) TCMs
Sections 19 or 20 Emissions budget OR Emission reduction

TIP

Section 14(c) TCMs
Sections 19 or 20 Emissions budget OR Emission reduction

PROJECT (FROM A CONFORMING PLAN AND TIP)

Section 15 Currently conforming plan and TIP
Section 16 Project from a conforming plan and TIP
Section 17 CO and PM₁₀ hot spots
Section 18 PM₁₀ control measures

PROJECT (NOT FROM A CONFORMING PLAN AND TIP)

Section 14(d) TCMs
Section 15 Currently conforming plan and TIP
Section 16 CO and PM₁₀ hot spots
Section 18 PM₁₀ control measures
Sections 19 or 20 Emissions budget OR Emission reduction

(c) Ozone nonattainment and maintenance areas. In addition to the criteria listed in table 1 that are required to be satisfied at all times, in ozone nonattainment and maintenance areas conformity determinations must include a demonstration that the budget and/or emission reduction tests are satisfied as described in the following paragraphs.

(1) In ozone nonattainment and maintenance areas the budget test must be satisfied as required by Section 19 for conformity determinations made:

(i) 45 days after a control strategy implementation plan revision or maintenance plan has been submitted to EPA, unless EPA has declared the motor vehicle emissions budget inadequate for transportation conformity purposes; or

(ii) After EPA has declared that the motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan is adequate for transportation conformity purposes.

(2) In ozone nonattainment areas that are required to submit a control strategy implementation plan revision (usually moderate and above areas), the emission

reduction tests must be satisfied as required by Section 20 for conformity determinations made:

(i) During the first 45 days after a control strategy implementation plan revision or maintenance plan has been submitted to EPA, unless EPA has declared a motor vehicle emissions budget adequate for transportation conformity purposes; or

(ii) If EPA has declared the motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan inadequate for transportation conformity purposes, and there is no previously established motor vehicle emissions budget in the approved implementation plan or a previously submitted control strategy implementation plan revision or maintenance plan.

(3) An ozone nonattainment area must satisfy the emission reduction test for NO_x, as required by Section 20, if the implementation plan or plan submission that is applicable for the purposes of conformity determinations is a 15% plan or Phase I attainment demonstration that does not include a motor vehicle emissions budget for NO_x. The implementation plan will be considered to establish a motor vehicle emissions budget for NO_x if the implementation plan or plan submission contains an explicit NO_x motor vehicle emissions budget that is intended to act as a ceiling on future NO_x emissions, and the NO_x motor vehicle emissions budget is a net reduction from NO_x emissions levels in 1990.

(4) Ozone nonattainment areas that have not submitted a maintenance plan and that are not required to submit a control strategy implementation plan revision (usually marginal and below areas) must satisfy one of the following requirements:

(i) The emission reduction tests required by Section 20; or

(ii) The State shall submit to EPA an implementation plan revision that contains motor vehicle emissions budget(s) and an attainment demonstration, and the budget test required by Section 19 must be satisfied using the submitted motor vehicle emissions budget(s) (as described in paragraph (c)(1) of this section).

5) Notwithstanding paragraphs (c)(1) and (c)(2) of this section, moderate and above ozone nonattainment areas with three years of clean data that have not submitted a maintenance plan and that EPA has determined are not subject to the Clean Air Act reasonable further progress and attainment demonstration requirements must satisfy one of the following requirements:

(i) The emission reduction tests as required by Section 20;

(ii) The budget test as required by Section 19, using the motor vehicle emissions budgets in the submitted control strategy implementation plan (subject to the timing requirements of paragraph (c)(1) of this

section); or

(iii) The budget test as required by Section 19, using the motor vehicle emissions of ozone precursors in the most recent year of clean data as motor vehicle emissions budgets, if such budgets are established by the EPA rulemaking that determines that the area has clean data.

(d) CO nonattainment and maintenance areas. In addition to the criteria listed in Table 1 that are required to be satisfied at all times, in CO nonattainment and maintenance areas conformity determinations must include a demonstration that the hot spot, budget and/or emission reduction tests are satisfied as described in the following paragraphs.

(1) FHWA/FTA projects in CO nonattainment or maintenance areas must satisfy the hot spot test required by Section 17(a) at all times. Until a CO attainment demonstration or maintenance plan is approved by EPA, FHWA/FTA projects must also satisfy the hot spot test required by Section 17(b).

(2) In CO nonattainment and maintenance areas the budget test must be satisfied as required by Section 19 for conformity determinations made:

(i) 45 days after a control strategy implementation plan revision or maintenance plan has been submitted to EPA, unless EPA has declared the motor vehicle emissions budget inadequate for transportation conformity purposes; or

(ii) After EPA has declared that the motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan is adequate for transportation conformity purposes.

(3) Except as provided in paragraph (4) below, in CO nonattainment areas the emission reduction tests must be satisfied as required by Section 20 for conformity determinations made:

(i) During the first 45 days after a control strategy implementation plan revision or maintenance plan has been submitted to EPA, unless EPA has declared a motor vehicle emissions budget adequate for transportation conformity purposes; or

(ii) If EPA has declared the motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan inadequate for transportation conformity purposes, and there is no previously established motor vehicle emissions budget in the approved implementation plan or a previously submitted control strategy implementation plan revision or maintenance plan.

(4) CO nonattainment areas that have not submitted a maintenance plan and that are not required to submit an attainment demonstration (e.g., moderate CO areas with a design value of 12.7 ppm or less or not classified CO

areas) must satisfy one of the following requirements:

(i) The emission reduction tests required by Section 20; or

(ii) The State shall submit to EPA an implementation plan revision that contains motor vehicle emissions budget(s) and an attainment demonstration, and the budget test required by Section 19 must be satisfied using the submitted motor vehicle emissions budget(s) (as described in paragraph (d)(2) of this section).

(e) PM_{10} nonattainment and maintenance areas. In addition to the criteria listed in Table 1 that are required to be satisfied at all times, in PM_{10} nonattainment and maintenance areas conformity determinations must include a demonstration that the hot spot, budget and/or emission reduction tests are satisfied as described in the following paragraphs.

(1) FHWA/FTA projects in PM_{10} nonattainment or maintenance areas must satisfy the hot spot test required by Section 17 (a).

(2) In PM_{10} nonattainment and maintenance areas the budget test must be satisfied as required by Section 19 for conformity determinations made:

(i) 45 days after a control strategy implementation plan revision or maintenance plan has been submitted to EPA, unless EPA has declared the motor vehicle emissions budget inadequate for transportation conformity purposes; or

(ii) After EPA has declared that the motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan is adequate for transportation conformity purposes.

(3) In PM_{10} nonattainment areas the emission reduction tests must be satisfied as required by Section 20 for conformity determinations made:

(i) During the first 45 days after a control strategy implementation plan revision or maintenance plan has been submitted to EPA, unless EPA has declared a motor vehicle emissions budget adequate for transportation conformity purposes;

(ii) If EPA has declared the motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan inadequate for transportation conformity purposes, and there is no previously established motor vehicle emissions budget in the approved implementation plan or a previously submitted control strategy implementation plan revision or maintenance plan; or

(iii) If the submitted implementation plan revision is a demonstration of impracticability under CAA § 189(a)(1)(B)(ii) and does not demonstrate attainment.

(f) NO_2 nonattainment and maintenance areas. In

addition to the criteria listed in Table 1 that are required to be satisfied at all times, in NO_2 nonattainment and maintenance areas conformity determinations must include a demonstration that the budget and/or emission reduction tests are satisfied as described in the following paragraphs.

(1) In NO_2 nonattainment and maintenance areas the budget test must be satisfied as required by Section 19 for conformity determinations made:

(i) 45 days after a control strategy implementation plan revision or maintenance plan has been submitted to EPA, unless EPA has declared the motor vehicle emissions budget inadequate for transportation conformity purposes; or

(ii) After EPA has declared that the motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan is adequate for transportation conformity purposes.

(2) In NO_2 nonattainment areas the emission reduction tests must be satisfied as required by Section 20 for conformity determinations made:

(i) During the first 45 days after a control strategy implementation plan revision or maintenance plan has been submitted to EPA, unless EPA has declared a motor vehicle emissions budget adequate for transportation conformity purposes; or

(ii) If EPA has declared the motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan inadequate for transportation conformity purposes, and there is no previously established motor vehicle emissions budget in the approved implementation plan or a previously submitted control strategy implementation plan revision or maintenance plan.

(g) Isolated rural nonattainment and maintenance areas. This paragraph applies to any nonattainment or maintenance area (or portion thereof) which does not have a metropolitan transportation plan or TIP and whose projects are not part of the emissions analysis of any MPO's metropolitan transportation plan or TIP. This paragraph does not apply to "donut" areas which are outside the metropolitan planning boundary and inside the nonattainment/maintenance area boundary.

(1) FHWA/FTA projects in all isolated rural nonattainment and maintenance areas must satisfy the requirements of Sections 11, 12, 13, 14(d), 17 and 18. Until EPA approves the control strategy implementation plan or maintenance plan for a rural CO nonattainment or maintenance area, FHWA/FTA projects must also satisfy the requirements of Section 17(b).

(2) Isolated rural nonattainment and maintenance areas are subject to the budget and/or emission reduction tests as described in paragraphs (c)-(f) of this section,

with the following modifications:

(i) When the requirements of Section 19 and 20 apply to isolated rural nonattainment and maintenance areas, references to "transportation plan" or "TIP" should be taken to mean those projects in the statewide transportation plan or statewide TIP which are in the rural nonattainment or maintenance area.

(ii) In isolated rural nonattainment and maintenance areas that are subject to Section 19, FHWA/FTA projects must be consistent with motor vehicle emissions budget(s) for the years in the timeframe of the attainment demonstration or maintenance plan. For years after the attainment year (if a maintenance plan has not been submitted) or after the last year of the maintenance plan, FHWA/FTA projects must satisfy one of the following requirements:

(A) Section 19;

(B) Section 20 (including regional emissions analysis for NO_x in all ozone nonattainment and maintenance areas, notwithstanding Section 20 (d)(2)); or

(C) As demonstrated by the air quality dispersion model or other air quality modeling technique used in the attainment demonstration or maintenance plan, the FHWA/FTA project, in combination with all other regionally significant projects expected in the area in the timeframe of the statewide transportation plan, must not cause or contribute to any new violation of any standard in any areas; increase the frequency or severity of any existing violation of any standard in any area; or delay timely attainment of any standard or any required interim emission reductions or other milestones in any area. Control measures assumed in the analysis must be enforceable.

(iii) The choice of requirements in paragraph (g)(2)(ii) of this section and the methodology used to meet the requirements of paragraph (g)(2)(ii)(C) of this section must be determined through the interagency consultation process required in Section 6 (c)(1)(vii) through which the relevant recipients of title 23 U.S.C. or Federal Transit Laws funds, the local air quality agency, the State air quality agency, and the State department of transportation should reach consensus about the option and methodology selected. EPA and DOT must be consulted through this process as well. In the event of unresolved disputes, conflicts may be escalated to the Governor consistent with the procedure in Section 6 (d), which applies for any State air agency comments on a conformity determination.

Section 11 - Criteria and Procedures: Latest Planning Assumptions.

(a) The conformity determination, with respect to all

other applicable criteria in Sections 12 through 20, must be based upon the most recent planning assumptions in force at the time of the conformity determination. The conformity determination must satisfy the requirements of paragraphs (b) through (f) of this section.

(b) Assumptions must be derived from the estimates of current and future population, employment, travel, and congestion most recently developed by the MPO or other agency authorized to make such estimates and approved by the MPO. The conformity determination must also be based on the latest assumptions about current and future background concentrations.

(c) The conformity determination for each transportation plan and TIP must discuss how transit operating policies (including fares and service levels) and assumed transit ridership have changed since the previous conformity determination.

(d) The conformity determination must include reasonable assumptions about transit service and increases in transit fares and road and bridge tolls over time.

(e) The conformity determination must use the latest existing information regarding the effectiveness of the TCMs and other implementation plan measures which have already been implemented.

(f) Key assumptions shall be specified and included in the draft documents and supporting materials used for the interagency and public consultation required by Section 6.

Section 12 - Criteria and Procedures: Latest Emissions Model.

(a) The conformity determination must be based on the latest emission estimation model available. This criterion is satisfied if the most current version of the motor vehicle emissions model specified by EPA for use in the preparation or revision of implementation plans in that State or area is used for the conformity analysis. Where EMFAC is the motor vehicle emissions model used in preparing or revising the applicable implementation plan, new versions must be approved by EPA before they are used in the conformity analysis.

(b) EPA will consult with DOT to establish a grace period following the specification of any new model.

(1) The grace period will be no less than three months and no more than 24 months after notice of availability is published in the Federal Register.

(2) The length of the grace period will depend on the

degree of change in the model and the scope of re-planning likely to be necessary by MPOs in order to assure conformity. If the grace period will be longer than three months, EPA will announce the appropriate grace period in the Federal Register.

(c) Transportation plan and TIP conformity analyses for which the emissions analysis was begun during the grace period or before the Federal Register notice of availability of the latest emission model may continue to use the previous version of the model. Conformity determinations for projects may also be based on the previous model if the analysis was begun during the grace period or before the Federal Register notice of availability, and if the final environmental document for the project is issued no more than three years after the issuance of the draft environmental document.

Section 13 - Criteria and Procedures: Consultation.

THIS SECTION IS NOT APPLICABLE TO OR REQUIRED BY THE STATE OF DELAWARE AND WILL NOT BE INCLUDED IN THE ADOPTED VERSION OF THIS REGULATION.

For the Reader's information: Conformity must be determined according to the consultation procedures in this regulation and in the applicable implementation plan, and according to the public involvement procedures established in compliance with 23 CFR part 450. Until the implementation plan revision required by 40 CFR §51.390 is fully approved by EPA, the conformity determination must be made according to Section 6 (a)(2) and (e) and the requirements of 23 CFR part 450.

Section 14 - Criteria and Procedures: Timely Implementation of TCMs.

(a) The transportation plan, TIP, or any FHWA/FTA project which is not from a conforming plan and TIP must provide for the timely implementation of TCMs from the applicable implementation plan.

(b) For transportation plans, this criterion is satisfied if the following two conditions are met:

(1) The transportation plan, in describing the envisioned future transportation system, provides for the timely completion or implementation of all TCMs in the applicable implementation plan which are eligible for funding under title 23 U.S.C. or the Federal Transit Laws, consistent with schedules included in the applicable implementation plan.

(2) Nothing in the transportation plan interferes with the implementation of any TCM in the applicable

implementation plan.

(c) For TIPs, this criterion is satisfied if the following conditions are met:

(1) An examination of the specific steps and funding source(s) needed to fully implement each TCM indicates that TCMs which are eligible for funding under title 23 U.S.C. or the Federal Transit Laws are on or ahead of the schedule established in the applicable implementation plan, or, if such TCMs are behind the schedule established in the applicable implementation plan, the MPO and DOT have determined that past obstacles to implementation of the TCMs have been identified and have been or are being overcome, and that all State and local agencies with influence over approvals or funding for TCMs are giving maximum priority to approval or funding of TCMs over other projects within their control, including projects in locations outside the nonattainment or maintenance area.

(2) If TCMs in the applicable implementation plan have previously been programmed for Federal funding but the funds have not been obligated and the TCMs are behind the schedule in the implementation plan, then the TIP cannot be found to conform if the funds intended for those TCMs are reallocated to projects in the TIP other than TCMs, or if there are no other TCMs in the TIP, if the funds are reallocated to projects in the TIP other than projects which are eligible for Federal funding intended for air quality improvement projects, e.g., the Congestion Mitigation and Air Quality Improvement Program.

(3) Nothing in the TIP may interfere with the implementation of any TCM in the applicable implementation plan.

(d) For FHWA/FTA projects which are not from a conforming transportation plan and TIP, this criterion is satisfied if the project does not interfere with the implementation of any TCM in the applicable implementation plan.

Section 15 - Criteria and Procedures: Currently Conforming Transportation Plan and TIP.

There must be a currently conforming transportation plan and currently conforming TIP at the time of project approval.

(a) Only one conforming transportation plan or TIP may exist in an area at any time; conformity determinations of a previous transportation plan or TIP expire once the current plan or TIP is found to conform by DOT. The conformity determination on a transportation plan or TIP will also lapse if conformity is not determined according to the frequency requirements specified in Section 5.

(b) This criterion is not required to be satisfied at the time of project approval for a TCM specifically included in the applicable implementation plan, provided that all other relevant criteria of this regulation are satisfied.

Section 16 - Criteria and Procedures: Projects From a Plan and TIP.

(a) The project must come from a conforming plan and program. If this criterion is not satisfied, the project must satisfy all criteria in Table 1 for a project not from a conforming transportation plan and TIP. A project is considered to be from a conforming transportation plan if it meets the requirements of paragraph (b) of this section and from a conforming program if it meets the requirements of paragraph (c) of this section. Special provisions for TCMs in an applicable implementation plan are provided in paragraph (d) of this section.

(b) A project is considered to be from a conforming transportation plan if one of the following conditions applies:

(1) For projects which are required to be identified in the transportation plan in order to satisfy Section 7, the project is specifically included in the conforming transportation plan and the project's design concept and scope have not changed significantly from those which were described in the transportation plan, or in a manner which would significantly impact use of the facility; or

(2) For projects which are not required to be specifically identified in the transportation plan, the project is identified in the conforming transportation plan, or is consistent with the policies and purpose of the transportation plan and will not interfere with other projects specifically included in the transportation plan.

(c) A project is considered to be from a conforming program if the following conditions are met:

(1) The project is included in the conforming TIP and the design concept and scope of the project were adequate at the time of the TIP conformity determination to determine its contribution to the TIP's regional emissions, and the project design concept and scope have not changed significantly from those which were described in the TIP; and

(2) If the TIP describes a project design concept and scope which includes project-level emissions mitigation or control measures, written commitments to implement such measures must be obtained from the project sponsor and/or operator as required by Section 26 (a) in order for the project to be considered from a conforming program. Any change in these mitigation or control measures that would significantly reduce their effectiveness constitutes a change in the design concept and scope of the project.

(d) TCMs. This criterion is not required to be satisfied for TCMs specifically included in an applicable implementation plan.

Section 17 - Criteria And Procedures: Localized CO and PM₁₀ Violations (Hot Spots).

(a) This paragraph applies at all times. The FHWA/FTA project must not cause or contribute to any new localized CO or PM₁₀ violations or increase the frequency or severity of any existing CO or PM₁₀ violations in CO and PM₁₀ nonattainment and maintenance areas. This criterion is satisfied if it is demonstrated that no new local violations will be created and the severity or number of existing violations will not be increased as a result of the project. The demonstration must be performed according to the consultation requirements of Section 6 (c)(1)(i) and the methodology requirements of Section 24.

(b) This paragraph applies for CO nonattainment areas as described in Section 10 (d)(1). Each FHWA/FTA project must eliminate or reduce the severity and number of localized CO violations in the area substantially affected by the project (in CO nonattainment areas). This criterion is satisfied with respect to existing localized CO violations if it is demonstrated that existing localized CO violations will be eliminated or reduced in severity and number as a result of the project. The demonstration must be performed according to the consultation requirements of Section 6 (c)(1)(i) and the methodology requirements of Section 24.

Section 18 - Criteria And Procedures: Compliance with PM₁₀ Control Measures.

The FHWA/FTA project must comply with PM₁₀ control measures in the applicable implementation plan. This criterion is satisfied if the project-level conformity determination contains a written commitment from the project sponsor to include in the final plans, specifications, and estimates for the project those control measures (for the purpose of limiting PM₁₀ emissions from the construction activities and/or normal use and operation associated with the project) that are contained in the applicable implementation plan.

Section 19 - Criteria and Procedures: Motor Vehicle Emissions Budget.

(a) The transportation plan, TIP, and project not from a conforming transportation plan and TIP must be consistent with the motor vehicle emissions budget(s) in the applicable implementation plan (or implementation

plan submission). This criterion applies as described in Section 10 (c)-(g). This criterion is satisfied if it is demonstrated that emissions of the pollutants or pollutant precursors described in paragraph (c) of this section are less than or equal to the motor vehicle emissions budget(s) established in the applicable implementation plan or implementation plan submission.

(b) Consistency with the motor vehicle emissions budget(s) must be demonstrated for each year for which the applicable (and/or submitted) implementation plan specifically establishes motor vehicle emissions budget(s), for the last year of the transportation plan's forecast period, and for any intermediate years as necessary so that the years for which consistency is demonstrated are no more than ten years apart, as follows:

(1) Until a maintenance plan is submitted:

(i) Emissions in each year (such as milestone years and the attainment year) for which the control strategy implementation plan revision establishes motor vehicle emissions budget(s) must be less than or equal to that year's motor vehicle emissions budget(s); and

(ii) Emissions in years for which no motor vehicle emissions budget(s) are specifically established must be less than or equal to the motor vehicle emissions budget(s) established for the most recent prior year. For example, emissions in years after the attainment year for which the implementation plan does not establish a budget must be less than or equal to the motor vehicle emissions budget(s) for the attainment year.

(2) When a maintenance plan has been submitted:

(i) Emissions must be less than or equal to the motor vehicle emissions budget(s) established for the last year of the maintenance plan, and for any other years for which the maintenance plan establishes motor vehicle emissions budgets. If the maintenance plan does not establish motor vehicle emissions budgets for any years other than the last year of the maintenance plan, the demonstration of consistency with the motor vehicle emissions budget(s) must be accompanied by a qualitative finding that there are no factors which would cause or contribute to a new violation or exacerbate an existing violation in the years before the last year of the maintenance plan. The interagency consultation process required by Section 6 shall determine what must be considered in order to make such a finding;

(ii) For years after the last year of the maintenance plan, emissions must be less than or equal to the maintenance plan's motor vehicle emissions budget(s) for the last year of the maintenance plan; and

(iii) If an approved control strategy implementation plan has established motor vehicle emissions budgets for years in the time frame of the transportation plan, emissions in these years must be less

than or equal to the control strategy implementation plan's motor vehicle emissions budget(s) for these years.

(c) Consistency with the motor vehicle emissions budget(s) must be demonstrated for each pollutant or pollutant precursor in Section 3 (b) for which the area is in nonattainment or maintenance and for which the applicable implementation plan (or implementation plan submission) establishes a motor vehicle emissions budget.

(d) Consistency with the motor vehicle emissions budget(s) must be demonstrated by including emissions from the entire transportation system, including all regionally significant projects contained in the transportation plan and all other regionally significant highway and transit projects expected in the nonattainment or maintenance area in the timeframe of the transportation plan.

(1) Consistency with the motor vehicle emissions budget(s) must be demonstrated with a regional emissions analysis that meets the requirements of Sections 23 and 6 (c)(1)(i).

(2) The regional emissions analysis may be performed for any years in the timeframe of the transportation plan provided they are not more than ten years apart and provided the analysis is performed for the attainment year (if it is in the timeframe of the transportation plan) and the last year of the plan's forecast period. Emissions in years for which consistency with motor vehicle emissions budgets must be demonstrated, as required in paragraph (b) of this section, may be determined by interpolating between the years for which the regional emissions analysis is performed.

(e) Motor Vehicle emissions budgets in submitted control strategy implementation plan revisions and submitted maintenance plans.

(1) Consistency with the motor vehicle emissions budgets in submitted control strategy implementation plan revisions or maintenance plans must be demonstrated if EPA has declared the motor vehicle emissions budget(s) adequate for transportation conformity purposes, or beginning 45 days after the control strategy implementation plan revision or maintenance plan has been submitted (unless EPA has declared the motor vehicle emissions budget(s) inadequate for transportation conformity purposes). However, submitted implementation plans do not supersede the motor vehicle emissions budgets in approved implementation plans for the period of years addressed by the approved implementation plan.

(2) If EPA has declared an implementation plan submission's motor vehicle emissions budget(s)

inadequate for transportation conformity purposes, the inadequate budget(s) shall not be used to satisfy the requirements of this section. Consistency with the previously established motor vehicle emissions budget(s) must be demonstrated. If there are no previous approved implementation plans or implementation plan submissions with motor vehicle emissions budgets, the emission reduction tests required by Section 20 must be satisfied.

(3) If EPA declares an implementation plan submission's motor vehicle emissions budget(s) inadequate for transportation conformity purposes more than 45 days after its submission to EPA, and conformity of a transportation plan or TIP has already been determined by DOT using the budget(s), the conformity determination will remain valid. Projects included in that transportation plan or TIP could still satisfy Sections 15 and 16, which require a currently conforming transportation plan and TIP to be in place at the time of a project's conformity determination and that projects come from a conforming transportation plan and TIP.

(4) EPA will not find a motor vehicle emissions budget in a submitted control strategy implementation plan revision or maintenance plan to be adequate for transportation conformity purposes unless the following minimum criteria are satisfied:

(i) The submitted control strategy implementation plan revision or maintenance plan was endorsed by the Governor (or his or her designee) and was subject to a State public hearing;

(ii) Before the control strategy implementation plan or maintenance plan was submitted to EPA, consultation among federal, State, and local agencies occurred; full implementation plan documentation was provided to EPA; and EPA's stated concerns, if any, were addressed;

(iii) The motor vehicle emissions budget(s) is clearly identified and precisely quantified;

(iv) The motor vehicle emissions budget(s), when considered together with all other emissions sources, is consistent with applicable requirements for reasonable further progress, attainment, or maintenance (whichever is relevant to the given implementation plan submission);

(v) The motor vehicle emissions budget(s) is consistent with and clearly related to the emissions inventory and the control measures in the submitted control strategy implementation plan revision or maintenance plan; and

(vi) Revisions to previously submitted control strategy implementation plans or maintenance plans explain and document any changes to previously submitted budgets and control measures; impacts on point and area source emissions; any changes to established safety margins (see Section 2 for definition); and reasons

for the changes (including the basis for any changes related to emission factors or estimates of vehicle miles traveled).

(5) Before determining the adequacy of a submitted motor vehicle emissions budget, EPA will review the State's compilation of public comments and response to comments that are required to be submitted with any implementation plan. EPA will document its consideration of such comments and responses in a letter to the State indicating the adequacy of the submitted motor vehicle emissions budget.

(6) When the motor vehicle emissions budget(s) used to satisfy the requirements of this section are established by an implementation plan submittal that has not yet been approved or disapproved by EPA, the MPO and DOT's conformity determinations will be deemed to be a statement that the MPO and DOT are not aware of any information that would indicate that emissions consistent with the motor vehicle emissions budget will cause or contribute to any new violation of any standard; increase the frequency or severity of any existing violation of any standard; or delay timely attainment of any standard or any required interim emission reductions or other milestones.

Section 20 - Criteria and Procedures: Emission Reductions in Areas without Motor Vehicle Emissions Budgets.

(a) The transportation plan, TIP, and project not from a conforming transportation plan and TIP must contribute to emissions reductions. This criterion applies as described in Section 10 (c) - (g). It applies to the net effect of the action (transportation plan, TIP, or project not from a conforming transportation plan and TIP) on motor vehicle emissions from the entire transportation system.

(b) This criterion may be met in moderate and above ozone nonattainment areas that are subject to the reasonable further progress requirements of Clean Air Act § 182(b)(1) and in moderate with design value greater than 12.7 ppm and serious CO nonattainment areas if a regional emissions analysis that satisfies the requirements of Section 23 and paragraphs (e) through (h) of this section demonstrates that for each analysis year and for each of the pollutants described in paragraph (d) of this section:

(1) The emissions predicted in the "Action" scenario are less than the emissions predicted in the "Baseline" scenario, and this can be reasonably expected to be true in the periods between the analysis years; and

(2) The emissions predicted in the "Action" scenario are lower than 1990 emissions by any nonzero amount.

(c) This criterion may be met in PM₁₀ and NO₂ nonattainment areas; marginal and below ozone nonattainment areas and other ozone nonattainment areas that are not subject to the reasonable further progress requirements of Clean Air Act § 182(b)(1); and moderate with design value less than 12.7 ppm and below CO nonattainment areas if a regional emissions analysis that satisfies the requirements of Section 23 and paragraphs (e) through (h) of this section demonstrates that for each analysis year and for each of the pollutants described in paragraph (d) of this section, one of the following requirements is met:

(1) The emissions predicted in the "Action" scenario are less than the emissions predicted in the "Baseline" scenario, and this can be reasonably expected to be true in the periods between the analysis years; or

(2) The emissions predicted in the "Action" scenario are not greater than baseline emissions. Baseline emissions are those estimated to have occurred during calendar year 1990, unless the conformity implementation plan revision required by 40 CFR §51.390 defines the baseline emissions for a PM₁₀ area to be those occurring in a different calendar year for which a baseline emissions inventory was developed for the purpose of developing a control strategy implementation plan.

(d) Pollutants. The regional emissions analysis must be performed for the following pollutants:

(1) VOC in ozone areas;

(2) NOx in ozone areas, unless the EPA Administrator determines that additional reductions of NOx would not contribute to attainment;

(3) CO in CO areas;

(4) PM₁₀ in PM₁₀ areas;

(5) Transportation-related precursors of PM₁₀ in PM₁₀ nonattainment and maintenance areas if the EPA Regional Administrator or the director of the State air agency has made a finding that such precursor emissions from within the area are a significant contributor to the PM₁₀ nonattainment problem and has so notified the MPO and DOT; and

(6) NOx in NO₂ areas.

(e) Analysis years. The regional emissions analysis must be performed for analysis years that are no more than ten years apart. The first analysis year must be no more than five years beyond the year in which the conformity determination is being made. The last year of transportation plan's forecast period must also be an analysis year.

(f) "Baseline" scenario. The regional emissions analysis required by paragraphs (b) and (c) of this section must estimate the emissions that would result from the

"Baseline" scenario in each analysis year. The "Baseline" scenario must be defined for each of the analysis years. The "Baseline" scenario is the future transportation system that will result from current programs, including the following (except that exempt projects listed in Section 27 and projects exempt from regional emissions analysis as listed in Section 28 need not be explicitly considered):

(1) All in-place regionally significant highway and transit facilities, services and activities;

(2) All ongoing travel demand management or transportation system management activities; and

(3) Completion of all regionally significant projects, regardless of funding source, which are currently under construction or are undergoing right-of-way acquisition (except for hardship acquisition and protective buying); come from the first year of the previously conforming transportation plan and/or TIP; or have completed the NEPA process.

(g) "Action" scenario. The regional emissions analysis required by paragraphs (b) and (c) of this section must estimate the emissions that would result from the "Action" scenario in each analysis year. The "Action" scenario must be defined for each of the analysis years. The "Action" scenario is the transportation system that would result from the implementation of the proposed action (transportation plan, TIP, or project not from a conforming transportation plan and TIP) and all other expected regionally significant projects in the nonattainment area. The "Action" scenario must include the following (except that exempt projects listed in Section 27 and projects exempt from regional emissions analysis as listed in Section 28 need not be explicitly considered):

(1) All facilities, services, and activities in the "Baseline" scenario;

(2) Completion of all TCMs and regionally significant projects (including facilities, services, and activities) specifically identified in the proposed transportation plan which will be operational or in effect in the analysis year, except that regulatory TCMs may not be assumed to begin at a future time unless the regulation is already adopted by the enforcing jurisdiction or the TCM is identified in the applicable implementation plan;

(3) All travel demand management programs and transportation system management activities known to the MPO, but not included in the applicable implementation plan or utilizing any Federal funding or approval, which have been fully adopted and/or funded by the enforcing jurisdiction or sponsoring agency since the last conformity determination;

(4) The incremental effects of any travel demand management programs and transportation system

management activities known to the MPO, but not included in the applicable implementation plan or utilizing any Federal funding or approval, which were adopted and/or funded prior to the date of the last conformity determination, but which have been modified since then to be more stringent or effective;

(5) Completion of all expected regionally significant highway and transit projects which are not from a conforming transportation plan and TIP; and

(6) Completion of all expected regionally significant non-FHWA/FTA highway and transit projects that have clear funding sources and commitments leading toward their implementation and completion by the analysis year.

(h) Projects not from a conforming transportation plan and TIP. For the regional emissions analysis required by paragraphs (b) and (c) of this section, if the project which is not from a conforming transportation plan and TIP is a modification of a project currently in the plan or TIP, the 'Baseline' scenario must include the project with its original design concept and scope, and the 'Action' scenario must include the project with its new design concept and scope.

Section 21 - Consequences of Control Strategy Implementation Plan Failures.

(a) Disapprovals.

(1) If EPA disapproves any submitted control strategy implementation plan revision (with or without a protective finding), the conformity status of the transportation plan and TIP shall lapse on the date that highway sanctions as a result of the disapproval are imposed on the nonattainment area under § 179(b)(1) of the Clean Air Act. No new transportation plan, TIP, or project may be found to conform until another control strategy implementation plan revision fulfilling the same Clean Air Act requirements is submitted and conformity to this submission is determined.

(2) If EPA disapproves a submitted control strategy implementation plan revision without making a protective finding, then beginning 120 days after such disapproval, only projects in the first three years of the currently conforming transportation plan and TIP may be found to conform. This means that beginning 120 days after disapproval without a protective finding, no transportation plan, TIP, or project not in the first three years of the currently conforming plan and TIP may be found to conform until another control strategy implementation plan revision fulfilling the same Clean Air Act requirements is submitted and conformity to this submission is determined. During the first 120 days following EPA's disapproval without a protective finding, transportation plan, TIP, and project conformity

determinations shall be made using the motor vehicle emissions budget(s) in the disapproved control strategy implementation plan, unless another control strategy implementation plan revision has been submitted and its motor vehicle emissions budget(s) applies for transportation conformity purposes, pursuant to Section 10.

(3) In disapproving a control strategy implementation plan revision, EPA would give a protective finding where a submitted plan contains adopted control measures or written commitments to adopt enforceable control measures that fully satisfy the emissions reductions requirements relevant to the statutory provision for which the implementation plan revision was submitted, such as reasonable further progress or attainment.

(b) Failure to submit and incompleteness. In areas where EPA notifies the State, MPO, and DOT of the State's failure to submit a control strategy implementation plan or submission of an incomplete control strategy implementation plan revision (either of which initiates the sanction process under Clean Air Act § 179 or § 110(m)), the conformity status of the transportation plan and TIP shall lapse on the date that highway sanctions are imposed on the nonattainment area for such failure under § 179(b)(1) of the Clean Air Act, unless the failure has been remedied and acknowledged by a letter from the EPA Regional Administrator.

(c) Federal implementation plans. If EPA promulgates a Federal implementation plan that contains motor vehicle emissions budget(s) as a result of a State failure, the conformity lapse imposed by this section because of that State failure is removed.

Section 22 -Requirements for Adoption or Approval of Projects by Recipients of Funds Designated Under Title 23 U.S.C. or the Federal Transit Laws.

(a) Except as provided in paragraph (b) of this section, no recipient of Federal funds designated under title 23 U.S.C. or the Federal Transit Laws shall adopt or approve a regionally significant highway or transit project, regardless of funding source, unless the recipient finds that the requirements of one of the following paragraphs are met:

(1) The project was included in the first three years of the most recently conforming transportation plan and TIP (or the conformity determination's regional emissions analyses), even if conformity status is currently lapsed; and the project's design concept and scope has not changed significantly from those analyses; or

(2) There is a currently conforming transportation

plan and TIP, and a new regional emissions analysis including the project and the currently conforming transportation plan and TIP demonstrates that the transportation plan and TIP would still conform if the project were implemented (consistent with the requirements of Sections 19 and/or Section 20 for a project not from a conforming transportation plan and TIP).

(b) In isolated rural nonattainment and maintenance areas subject to Section 10 (g), no recipient of Federal funds designated under title 23 U.S.C. or the Federal Transit Laws shall adopt or approve a regionally significant highway or transit project, regardless of funding source, unless the recipient finds that the requirements of one of the following paragraphs are met:

(1) The project was included in the regional emissions analysis supporting the most recent conformity determination for the portion of the statewide transportation plan and TIP which are in the nonattainment or maintenance area, and the project's design concept and scope has not changed significantly; or

(2) A new regional emissions analysis including the project and all other regionally significant projects expected in the nonattainment or maintenance area demonstrates that those projects in the statewide transportation plan and statewide TIP which are in the nonattainment or maintenance area would still conform if the project were implemented (consistent with the requirements of Sections 19 and/or 20 for projects not from a conforming transportation plan and TIP).

Section 23 -Procedures for Determining Regional Transportation-Related Emissions.

(a) General requirements.

(1) The regional emissions analysis required by Sections 19 and 20 for the transportation plan, TIP, or project not from a conforming plan and TIP must include all regionally significant projects expected in the nonattainment or maintenance area. The analysis shall include FHWA/FTA projects proposed in the transportation plan and TIP and all other regionally significant projects which are disclosed to the MPO as required by Section 6. Projects which are not regionally significant are not required to be explicitly modeled, but vehicle miles traveled (VMT) from such projects must be estimated in accordance with reasonable professional practice. The effects of TCMs and similar projects that are not regionally significant may also be estimated in accordance with reasonable professional practice.

(2) The emissions analysis may not include for emissions reduction credit any TCMs or other measures in the applicable implementation plan which have been

delayed beyond the scheduled date(s) until such time as their implementation has been assured. If the measure has been partially implemented and it can be demonstrated that it is providing quantifiable emission reduction benefits, the emissions analysis may include that emissions reduction credit.

(3) Emissions reduction credit from projects, programs, or activities which require a regulatory action in order to be implemented may not be included in the emissions analysis unless:

(i) The regulatory action is already adopted by the enforcing jurisdiction;

(ii) The project, program, or activity is included in the applicable implementation plan;

(iii) The control strategy implementation plan submission or maintenance plan submission that establishes the motor vehicle emissions budget(s) for the purposes of Section 19 contains a written commitment to the project, program, or activity by the agency with authority to implement it; or

(iv) EPA has approved an opt-in to a Federally enforced program, EPA has promulgated the program (if the control program is a Federal responsibility, such as vehicle tailpipe standards), or the Clean Air Act requires the program without need for individual State action and without any discretionary authority for EPA to set its stringency, delay its effective date, or not implement the program.

(4) Emissions reduction credit from control measures that are not included in the transportation plan and TIP and that do not require a regulatory action in order to be implemented may not be included in the emissions analysis unless the conformity determination includes written commitments to implementation from the appropriate entities.

(i) Persons or entities voluntarily committing to control measures must comply with the obligations of such commitments.

(ii) The conformity implementation plan revision required in CFR 40 §51.390 of this chapter must provide that written commitments to control measures that are not included in the transportation plan and TIP must be obtained prior to a conformity determination and that such commitments must be fulfilled.

(5) A regional emissions analysis for the purpose of satisfying the requirements of Section 20 must make the same assumptions in both the "Baseline" and "Action" scenarios regarding control measures that are external to the transportation system itself, such as vehicle tailpipe or evaporative emission standards, limits on gasoline volatility, vehicle inspection and maintenance programs, and oxygenated or reformulated gasoline or diesel fuel.

(6) The ambient temperatures used for the regional emissions analysis shall be consistent with those used to

establish the emissions budget in the applicable implementation plan. All other factors, for example the fraction of travel in a hot stabilized engine mode, must be consistent with the applicable implementation plan, unless modified after interagency consultation according to Section 6 (c)(1)(i) to incorporate additional or more geographically specific information or represent a logically estimated trend in such factors beyond the period considered in the applicable implementation plan.

(7) Reasonable methods shall be used to estimate nonattainment or maintenance area VMT on off-network roadways within the urban transportation planning area, and on roadways outside the urban transportation planning area.

(b) Regional emissions analysis in serious, severe, and extreme ozone nonattainment areas and serious CO nonattainment areas must meet the requirements of paragraphs (b)(1) through (3) of this section if their metropolitan planning area contains an urbanized area population over 200,000.

(1) By January 1, 1997, estimates of regional transportation-related emissions used to support conformity determinations must be made at a minimum using network-based travel models according to procedures and methods that are available and in practice and supported by current and available documentation. These procedures, methods, and practices are available from DOT and will be updated periodically. Agencies must discuss these modeling procedures and practices through the interagency consultation process, as required by Section 6 (c)(1)(i). Network-based travel models must at a minimum satisfy the following requirements:

(i) Network-based travel models must be validated against observed counts (peak and off-peak, if possible) for a base year that is not more than 10 years prior to the date of the conformity determination. Model forecasts must be analyzed for reasonableness and compared to historical trends and other factors, and the results must be documented;

(ii) Land use, population, employment, and other network-based travel model assumptions must be documented and based on the best available information;

(iii) Scenarios of land development and use must be consistent with the future transportation system alternatives for which emissions are being estimated. The distribution of employment and residences for different transportation options must be reasonable;

(iv) A capacity-sensitive assignment methodology must be used, and emissions estimates must be based on a methodology which differentiates between peak and off-peak link volumes and speeds and uses speeds based on final assigned volumes;

(v) Zone-to-zone travel impedances used to

distribute trips between origin and destination pairs must be in reasonable agreement with the travel times that are estimated from final assigned traffic volumes. Where use of transit currently is anticipated to be a significant factor in satisfying transportation demand, these times should also be used for modeling mode splits; and

(vi) Network-based travel models must be reasonably sensitive to changes in the time(s), cost(s), and other factors affecting travel choices.

(2) Reasonable methods in accordance with good practice must be used to estimate traffic speeds and delays in a manner that is sensitive to the estimated volume of travel on each roadway segment represented in the network-based travel model.

(3) Highway Performance Monitoring System (HPMS) estimates of vehicle miles traveled (VMT) shall be considered the primary measure of VMT within the portion of the nonattainment or maintenance area and for the functional classes of roadways included in HPMS, for urban areas which are sampled on a separate urban area basis. For areas with network-based travel models, a factor (or factors) may be developed to reconcile and calibrate the network-based travel model estimates of VMT in the base year of its validation to the HPMS estimates for the same period. These factors may then be applied to model estimates of future VMT. In this factoring process, consideration will be given to differences between HPMS and network-based travel models, such as differences in the facility coverage of the HPMS and the modeled network description. Locally developed count-based programs and other departures from these procedures are permitted subject to the interagency consultation procedures of Section 6 (c)(1)(i).

(c) In all areas not otherwise subject to paragraph (b) of this section, regional emissions analyses must use those procedures described in paragraph (b) of this section if the use of those procedures has been the previous practice of the MPO. Otherwise, areas not subject to paragraph (b) of this section may estimate regional emissions using any appropriate methods that account for VMT growth by, for example, extrapolating historical VMT or projecting future VMT by considering growth in population and historical growth trends for VMT per person. These methods must also consider future economic activity, transit alternatives, and transportation system policies.

(d) PM₁₀ from construction-related fugitive dust.

(1) For areas in which the implementation plan does not identify construction-related fugitive PM₁₀ as a contributor to the nonattainment problem, the fugitive PM₁₀ emissions associated with highway and transit project construction are not required to be considered in

the regional emissions analysis.

(2) In PM_{10} nonattainment and maintenance areas with implementation plans which identify construction-related fugitive PM_{10} as a contributor to the nonattainment problem, the regional PM_{10} emissions analysis shall consider construction-related fugitive PM_{10} and shall account for the level of construction activity, the fugitive PM_{10} control measures in the applicable implementation plan, and the dust-producing capacity of the proposed activities.

(e) Reliance on previous regional emissions analysis.

(1) The TIP may be demonstrated to satisfy the requirements of Sections 19 or 20 without new regional emissions analysis if the regional emissions analysis already performed for the plan also applies to the TIP. This requires a demonstration that:

(i) The TIP contains all projects which must be started in the TIP's timeframe in order to achieve the highway and transit system envisioned by the transportation plan;

(ii) All TIP projects which are regionally significant are included in the transportation plan with design concept and scope adequate to determine their contribution to the transportation plan's regional emissions at the time of the transportation plan's conformity determination; and

(iii) The design concept and scope of each regionally significant project in the TIP is not significantly different from that described in the transportation plan.

(2) A project which is not from a conforming transportation plan and a conforming TIP may be demonstrated to satisfy the requirements of Sections 19 or 20 without additional regional emissions analysis if allocating funds to the project will not delay the implementation of projects in the transportation plan or TIP which are necessary to achieve the highway and transit system envisioned by the transportation plan, and if the project is either:

(i) not regionally significant; or

(ii) included in the conforming transportation plan (even if it is not specifically included in the latest conforming TIP) with design concept and scope adequate to determine its contribution to the transportation plan's regional emissions at the time of the transportation plan's conformity determination, and the design concept and scope of the project is not significantly different from that described in the transportation plan.

Section 24 -Procedures for Determining Localized CO and PM_{10} Concentrations (Hot-Spot Analysis).

(a) CO hot-spot analysis.

(1) The demonstrations required by Section 17 must be based on quantitative analysis using the applicable air quality models, data bases, and other requirements specified in 40 CFR part 51 Appendix W ("Guideline on Air Quality Models (Revised)" (1988), supplement A (1987) and supplement B (1993), EPA publication no. 450/2-78-027R). These procedures shall be used in the following cases, unless different procedures developed through the interagency consultation process required in Section 6 and approved by the EPA Regional Administrator are used:

(i) For projects in or affecting locations, areas, or categories of sites which are identified in the applicable implementation plan as sites of violation or possible violation;

(ii) For projects affecting intersections that are at Level-of-Service D, E, or F, or those that will change to Level-of-Service D, E, or F because of increased traffic volumes related to the project;

(iii) For any project affecting one or more of the top three intersections in the nonattainment or maintenance area with highest traffic volumes, as identified in the applicable implementation plan; and

(iv) For any project affecting one or more of the top three intersections in the nonattainment or maintenance area with the worst level of service, as identified in the applicable implementation plan.

(2) In cases other than those described in paragraph (a)(1) of this section, the demonstrations required by Section 17 may be based on either:

(i) Quantitative methods that represent reasonable and common professional practice; or

(ii) A qualitative consideration of local factors, if this can provide a clear demonstration that the requirements of Section 17 are met.

(b) PM_{10} hot-spot analysis.

(1) The hot-spot demonstration required by Section 17 must be based on quantitative analysis methods for the following types of projects:

(i) Projects which are located at sites at which violations have been verified by monitoring;

(ii) Projects which are located at sites which have vehicle and roadway emission and dispersion characteristics that are essentially identical to those of sites with verified violations (including sites near one at which a violation has been monitored); and

(iii) New or expanded bus and rail terminals and transfer points which increase the number of diesel vehicles congregating at a single location.

(2) Where quantitative analysis methods are not required, the demonstration required by Section 17 may be based on a qualitative consideration of local factors.

(3) The identification of the sites described in paragraph (b)(1)(i) and (ii) of this section, and other cases where quantitative methods are appropriate, shall be determined through the interagency consultation process required in Section 6. DOT may choose to make a categorical conformity determination on bus and rail terminals or transfer points based on appropriate modeling of various terminal sizes, configurations, and activity levels.

(4) The requirements for quantitative analysis contained in paragraph (b) of this section will not take effect until EPA releases modeling guidance on this subject and announces in the Federal Register that these requirements are in effect.

(c) General requirements.

(1) Estimated pollutant concentrations must be based on the total emissions burden which may result from the implementation of the project, summed together with future background concentrations. The total concentration must be estimated and analyzed at appropriate receptor locations in the area substantially affected by the project.

(2) Hot-spot analyses must include the entire project, and may be performed only after the major design features which will significantly impact concentrations have been identified. The future background concentration should be estimated by multiplying current background by the ratio of future to current traffic and the ratio of future to current emission factors.

(3) Hot-spot analysis assumptions must be consistent with those in the regional emissions analysis for those inputs which are required for both analyses.

(4) PM₁₀ or CO mitigation or control measures shall be assumed in the hot-spot analysis only where there are written commitments from the project sponsor and/or operator to implement such measures, as required by Section 26 (a).

(5) CO and PM₁₀ hot-spot analyses are not required to consider construction-related activities which cause temporary increases in emissions. Each site which is affected by construction-related activities shall be considered separately, using established "Guideline" methods. Temporary increases are defined as those which occur only during the construction phase and last five years or less at any individual site.

Section 25 -Using the Motor Vehicle Emissions Budget in the Applicable Implementation Plan (or Implementation Plan Submission).

(a) In interpreting an applicable implementation plan (or implementation plan submission) with respect to its motor vehicle emissions budget(s), the MPO and DOT

may not infer additions to the budget(s) that are not explicitly intended by the implementation plan (or submission). Unless the implementation plan explicitly quantifies the amount by which motor vehicle emissions could be higher while still allowing a demonstration of compliance with the milestone, attainment, or maintenance requirement and explicitly states an intent that some or all of this additional amount should be available to the MPO and DOT in the emissions budget for conformity purposes, the MPO may not interpret the budget to be higher than the implementation plan's estimate of future emissions. This applies in particular to applicable implementation plans (or submissions) which demonstrate that after implementation of control measures in the implementation plan:

(1) Emissions from all sources will be less than the total emissions that would be consistent with a required demonstration of an emissions reduction milestone;

(2) Emissions from all sources will result in achieving attainment prior to the attainment deadline and/or ambient concentrations in the attainment deadline year will be lower than needed to demonstrate attainment; or

(3) Emissions will be lower than needed to provide for continued maintenance.

(b) If an applicable implementation plan submitted before November 24, 1993, demonstrates that emissions from all sources will be less than the total emissions that would be consistent with attainment and quantifies that "safety margin," the State may submit an implementation plan revision which assigns some or all of this safety margin to highway and transit mobile sources for the purposes of conformity. Such an implementation plan revision, once it is endorsed by the Governor and has been subject to a public hearing, may be used for the purposes of transportation conformity before it is approved by EPA.

(c) A conformity demonstration shall not trade emissions among budgets which the applicable implementation plan (or implementation plan submission) allocates for different pollutants or precursors, or among budgets allocated to motor vehicles and other sources, unless the implementation plan establishes appropriate mechanisms for such trades.

(d) If the applicable implementation plan (or implementation plan submission) estimates future emissions by geographic subarea of the nonattainment area, the MPO and DOT are not required to consider this to establish subarea budgets, unless the applicable implementation plan (or implementation plan submission) explicitly indicates an intent to create such subarea budgets for the purposes of conformity.

(e) If a nonattainment area includes more than one MPO, the implementation plan may establish motor vehicle emissions budgets for each MPO, or else the MPOs must collectively make a conformity determination for the entire nonattainment area.

Section 25 - Enforceability of Design Concept and Scope and Project-Level Mitigation and Control Measures.

(a) Prior to determining that a transportation project is in conformity, the MPO, other recipient of funds designated under title 23 U.S.C. or the Federal Transit Laws, FHWA, or FTA must obtain from the project sponsor and/or operator written commitments to implement in the construction of the project and operation of the resulting facility or service any project-level mitigation or control measures which are identified as conditions for NEPA process completion with respect to local PM₁₀ or CO impacts. Before a conformity determination is made, written commitments must also be obtained for project-level mitigation or control measures which are conditions for making conformity determinations for a transportation plan or TIP and are included in the project design concept and scope which is used in the regional emissions analysis required by Sections 19 and 20 or used in the project-level hot-spot analysis required by Section 17.

(b) Project sponsors voluntarily committing to mitigation measures to facilitate positive conformity determinations must comply with the obligations of such commitments.

(c) The implementation plan revision required in 40 CFR §51.390 shall provide that written commitments to mitigation measures must be obtained prior to a positive conformity determination, and that project sponsors must comply with such commitments.

(d) If the MPO or project sponsor believes the mitigation or control measure is no longer necessary for conformity, the project sponsor or operator may be relieved of its obligation to implement the mitigation or control measure if it can demonstrate that the applicable hot-spot requirements of Section 17, emission budget requirements of Section 19, and emission reduction requirements of Section 20 are satisfied without the mitigation or control measure, and so notifies the agencies involved in the interagency consultation process required under Section 6. The MPO and DOT must find that the transportation plan and TIP still satisfy the applicable requirements of Sections 19 and/or 20, and that the project still satisfies the requirements of Section 17, and therefore that the conformity determinations for the transportation plan, TIP, and project are still valid.

This finding is subject to the applicable public consultation requirements in Section 6 (e) for conformity determinations for projects.

Section 27 - Exempt Projects.

Notwithstanding the other requirements of this regulation, highway and transit projects of the types listed in Table 2 are exempt from the requirement to determine conformity. Such projects may proceed toward implementation even in the absence of a conforming transportation plan and TIP. A particular action of the type listed in Table 2 is not exempt if the MPO in consultation with other agencies (see Section 6 (c)(1)(iii)), the EPA, and the FHWA (in the case of a highway project) or the FTA (in the case of a transit project) concur that it has potentially adverse emissions impacts for any reason. States and MPOs must ensure that exempt projects do not interfere with TCM implementation.

Table 2. - Exempt Projects

SAFETY

Railroad/highway crossing.
 Hazard elimination program.
 Safer non-Federal-aid system roads.
 Shoulder improvements.
 Increasing sight distance.
 Safety improvement program.
 Traffic control devices and operating assistance other than signalization projects.
 Railroad/highway crossing warning devices.
 Guardrails, median barriers, crash cushions.
 Pavement resurfacing and/or rehabilitation.
 Pavement marking demonstration.
 Emergency relief (23 U.S.C. 125).
 Fencing.
 Skid treatments.
 Safety roadside rest areas.
 Adding medians.
 Truck climbing lanes outside the urbanized area.
 Lighting improvements.
 Widening narrow pavements or reconstructing bridges (no additional travel lanes).
 Emergency truck pullovers.

MASS TRANSIT

Operating assistance to transit agencies.
 Purchase of support vehicles.
 Rehabilitation of transit vehicles¹.
 Purchase of office, shop, and operating equipment for existing facilities.
 Purchase of operating equipment for vehicles (e.g.,

radios, fareboxes, lifts, etc.).

Construction or renovation of power, signal, and communications systems.

Construction of small passenger shelters and information kiosks.

Reconstruction or renovation of transit buildings and structures (e.g., rail or bus buildings, storage and maintenance facilities, stations, terminals, and ancillary structures).

Rehabilitation or reconstruction of track structures, track, and trackbed in existing rights-of-way.

Purchase of new buses and rail cars to replace existing vehicles or for minor expansions of the fleet¹.

Construction of new bus or rail storage/maintenance facilities categorically excluded in 23 CFR part 771.

AIR QUALITY

Continuation of ride-sharing and van-pooling promotion activities at current levels.

Bicycle and pedestrian facilities.

OTHER

Specific activities which do not involve or lead directly to construction, such as:

Planning and technical studies.

Grants for training and research programs.

Planning activities conducted pursuant to titles 23 and 49 U.S.C.

Federal-aid systems revisions.

Engineering to assess social, economic, and environmental effects of the proposed action or alternatives to that action.

Noise attenuation.

Emergency or hardship advance land acquisitions (23 CFR 712.204(d)).

Acquisition of scenic easements.

Plantings, landscaping, etc.

Sign removal.

Directional and informational signs.

Transportation enhancement activities (except rehabilitation and operation of historic transportation buildings, structures, or facilities).

Repair of damage caused by natural disasters, civil unrest, or terrorist acts, except projects involving substantial functional, locational or capacity changes.

¹In PM₁₀ nonattainment or maintenance areas, such projects are exempt only if they are in compliance with control measures in the applicable implementation plan.

Section 28 -Projects Exempt from Regional Emissions Analyses.

Notwithstanding the other requirements of this regulation, highway and transit projects of the types listed in Table 3

are exempt from regional emissions analysis requirements.

The local effects of these projects with respect to CO or PM₁₀ concentrations must be considered to determine if a hot-spot analysis is required prior to making a project-level conformity determination. These projects may then proceed to the project development process even in the absence of a conforming transportation plan and TIP. A particular action of the type listed in Table 3 is not exempt from regional emissions analysis if the MPO in consultation with other agencies (see Section 6 (c)(1)(iii)), the EPA, and the FHWA (in the case of a highway project) or the FTA (in the case of a transit project) concur that it has potential regional impacts for any reason.

Table 3. - Projects Exempt from Regional Emissions Analyses

Intersection channelization projects.

Intersection signalization projects at individual intersections.

Interchange reconfiguration projects.

Changes in vertical and horizontal alignment.

Truck size and weight inspection stations.

Bus terminals and transfer points.

Section 29 -Traffic Signal Synchronization Projects.

Traffic signal synchronization projects may be approved, funded, and implemented without satisfying the requirements of this regulation. However, all subsequent regional emissions analyses required by Section 19 and 20 for transportation plans, TIPs, or projects not from a conforming plan and TIP must include such regionally significant traffic signal synchronization projects.

DEPARTMENT OF NATURAL RESOURCES & ENVIRONMENTAL CONTROL AIR QUALITY MANAGEMENT SECTION

Statutory Authority: 7 Delaware Code,
Chapter 60 (7 Del.C. Ch. 60)

Secretary's Order No. 98-A-0006

Re: Proposed Plan for the Regulation of Air Emissions from Municipal Solid Waste Landfills and Proposed Regulation No. 20, Section 28, New Source Performance Standards for Municipal Solid Waste

Date of Issuance: February 20, 1998

Effective Date of Regulatory Amendments: April 11, 1998

I. Background

On Thursday, October 23, 1997, a public hearing was held in the DNREC Auditorium of the DNREC Richardson and Robinson Building at 89 Kings Highway, Dover, Delaware, beginning at approximately 6:00 p.m. The public hearing concerned Delaware's proposed state plan for Municipal Solid Waste Landfills and a proposed new Regulation No. 20, Section 28, entitled New Source Performance Standards for Municipal Solid Waste Landfills to the Delaware Regulations Governing the Control of Air Pollution. The purpose of the regulation is to require control of landfill gas emissions from municipal solid waste landfills. EPA has determined that landfill gas has adverse effects on both public health and the environment. Landfill gas is produced by the biological decomposition of waste and contains methane, carbon dioxide, and more than 100 different non-methane organic compounds including volatile organic compounds, hazardous air pollutants and odorous compounds. The effects of these compounds include ground-level ozone formation, cancer and non-cancer health effects, odor, methane migration, fire hazard potential and global warming.

The Department has proposed adopting the U.S. Environmental Protection Agency's Subpart WWW "New Source Performance Standards for Municipal Solid Waste Landfills" of Title 40, part 60 of the Code of Federal Regulations and to expand the applicability of this subpart to apply to both new and existing municipal solid waste landfills. Thus, the new regulation would affect all municipal solid waste landfills, open or closed, that commence construction, reconstruction or modification on or after May 30, 1991, or that have accepted waste after November 8, 1987, or that have additional capacity available to accept waste. All municipal solid waste landfills that have a size of 2.5 million megagrams or larger and a non-methane organic compound emission rate of 50 megagrams or more per year will be required to install a gas collection and control system. The landfill gases will be collected through the use of vertical and horizontal wells and then routed to a control system consisting of either a flare, boiler or alternative combustion device, or a treatment center. This regulation would require monitoring, recordkeeping, testing and reporting of the collection and control system to be submitted to the Department to demonstrate compliance. This regulation will affect three existing municipal solid waste landfills that are operated by the Delaware Solid Waste Authority. U.S. EPA was the sole commentator concerning this proposal. The AQMB addressed each of EPA's comments in its Response Document submitted to the Hearing Officer after the hearing and provided a thorough discussion on each

issue, including recommended changes in the proposed regulations where warranted. That document is incorporated herein by reference. It is thorough and well reasoned, and I believe that its recommendations should be incorporated herein. In addition, the Hearing Officer prepared a Memorandum dated January 26, 1998, acknowledging the thoroughness of AQMB's Response Document which memorandum is also incorporated herein.

II. Findings

1. Proper notice of the hearing was provided as required by law, including publication in the Delaware Register of Regulations.

2. A public workshop was held in addition to the public hearing to help educate the potential regulated community and the public concerning this proposal.

3. No members of the public appeared at the public hearing.

4. The only comments received concerning the proposal were from the U.S. EPA whose concerns are thoroughly addressed in the record.

5. No significant changes were made to this proposal after it was put out to public notice and the only changes were made in response to comments from EPA.

6. This is an adoption of a federal program and this action should further the policies and purposes of 7 Del. C. Chapter 60.

III. Order

In view of the above findings, it is hereby ordered that the Proposed Plan for the Regulation of Air Emissions from Municipal Solid Waste Landfills and proposed Regulation No. 20, Section 28 - New Source Performance Standards for Municipal Solid Waste Landfills with the recommended changes referenced in the AQMB's November 20, 1997 Response Document be adopted in the manner and form required by the Administrative Procedures Act and, further, that the amendments be effective on the date stated hereinabove.

IV. Reasons

This will adopt a federal program and will further the policies and purposes of 7 Del. C. Chapter 60 by regulating emitters of air pollutants.

Christophe A. G. Tulou, Secretary

Section 28 - Standards of Performance for Municipal Solid Waste Landfills

The provisions of Subpart WWW - Standards of Performance for Municipal Solid Waste Landfills, of Part 60,

Title 40 of the Code of Federal Regulations, as set forth in Vol. 61, No. 49, pp. 9919-99[44][29], of the Federal Register, dated March 12, 1996, are hereby adopted by reference with the following changes:

(a) Wherever the word "Administrator" appears it shall be replaced by the word "Department", with the exception of section 60.750(b).

(b) Any subsection or appendix [(including Appendix A - Reference Methods)] that is referenced in the text of the preceding adoption is also adopted by reference as it appears in Title 40 of the Code of Federal Regulations.

(c) 60.750(a) shall be replaced with the following language: "The provisions of this subpart apply to each municipal solid waste landfill, open or closed, that commenced construction, reconstruction, or modification on or after May 30, 1991 or that has accepted waste after November 8, 1987 or that has additional capacity available to accept waste."

(d) 60.752(a) shall be replaced with the following language: "Each owner or operator of an MSW landfill having a design capacity less than 2.5 million megagrams by mass or 2.5 million cubic meters by volume shall submit an initial design capacity report to the Department as provided in 60.757(a). The landfill may calculate design capacity in either megagrams or cubic meters for comparison with the exemption values. Any density conversions shall be documented and submitted with the report. For purposes of Regulation 30 permitting, a landfill with a design capacity less than 2.5 million megagrams or 2.5 million cubic meters does not require an operating permit under Regulation 30, provided it is not a major source as defined in Regulation 30. Submittal of the initial design capacity report shall fulfill the requirements of this subpart except as provided for in paragraphs (a)(1) and (a)(2) of this section."

(e) 60.752(b) shall be replaced with the following language: "Each owner or operator of an MSW landfill having a design capacity equal to or greater than 2.5 million megagrams or 2.5 million cubic meters, shall either comply with paragraph (b)(2) of this section or calculate an NMOC emission rate for the landfill using the procedures specified in 60.754. The NMOC emission rate shall be recalculated annually, except as provided in 60.757(b)(1)(ii) of this subpart. The owner or operator of an MSW landfill subject to this subpart with a design capacity greater than or equal to 2.5 million megagrams or 2.5 million cubic meters is subject to Regulation 30. When a landfill is closed, and either never needed control or meets the conditions for control system removal specified in 60.752(b)(2)(v) of this subpart, a Regulation 30 operating permit is no longer required."

(f) 60.752(b)(2)(ii) shall be replaced with the following language: "Install a collection and control system within 18 months of the submittal of the design plan under paragraph (b)(2)(i) of this section for municipal solid waste landfills that commenced construction, reconstruction, or modification on or after May 30, 1991, and [by] [as expeditiously as practicable but not later than] September 30, 1998 for all other subject municipal solid waste landfills, that effectively captures the gas generated within the landfill."

(g) 60.753(g) shall be replaced with the following language: "If monitoring demonstrates that the operational requirement in paragraphs (b), (c), or (d) of this section are not met, corrective action shall be taken as specified in 60.755(a)(3) through (5) or 60.755(c) of this subpart. If corrective actions are taken as specified in 60.755, the monitored exceedance is not a violation of the operational requirements in this section."

(h) Delete 60.754(c).

(i) Add new section 60.757(a)(1)(iv) as follows: "For a subject municipal solid waste landfill not constructed, reconstructed, or modified on or after May 30, 1991, the initial design capacity report shall be submitted the earlier of the date specified in a State construction or operating permit, if applicable, or within 90 days from the effective date of this regulation."

(j) 60.757(b)(1)(i) shall be replaced with the following language: "The initial NMOC emission rate report shall be submitted with the initial design capacity report required in paragraph (a) of this section. Subsequent NMOC emission rate reports shall be submitted annually thereafter, except as provided for in paragraphs (b)(1)(ii) and (b)(3) of this section."

DEPARTMENT OF NATURAL RESOURCES & ENVIRONMENTAL CONTROL

DIVISION OF FISH & WILDLIFE

Statutory Authority: 7 Delaware Code,

Section 903 (e)(2)(a)(3) (7 Del.C. 903(e)(2)(a)(3))

In Re: Amendment to Tidal Finfish Regulation No. 12 Atlantic Sturgeon Order No. 98-F-008

ORDER

SUMMARY OF EVIDENCE AND INFORMATION

The stock of Atlantic sturgeon is depressed. Very few, if any, mature sturgeon have been observed in the Delaware River in the last decade.

The Atlantic States Marine Fishery Commission requested Delaware impose a moratorium on the Atlantic sturgeon fishery. This would mean that all Atlantic Coastal States have a moratorium on the possession of Atlantic sturgeon. A moratorium is the Atlantic States Marine Fishery Commission's preferred position rather than having the Atlantic sturgeon listed as threatened or endangered under the Endangered Species Act.

FINDINGS OF FACT

The Atlantic sturgeon has been over exploited since the early 1900's. It is a very slow maturing fish, taking twenty years to reach maturity at approximately seven feet in length.

Delaware is the only remaining Atlantic Coastal State without a moratorium on the possession of Atlantic sturgeon.

No one in Delaware is currently fishing for Atlantic sturgeon.

CONCLUSIONS

The Atlantic sturgeon should be completely protected until its population is restored as defined in the Atlantic Sturgeon Fishery Management Plan approved by the Atlantic States Marine Fisheries Commission. A moratorium on the possession of Atlantic sturgeon or part thereof is warranted.

ORDER

It is hereby ordered, this 25th day of February, 1998 that an amendment to Tidal Finfish Regulation No. 12, a copy of which is attached hereto, is adopted pursuant to 7 Del. C. § 903 (e)(2)(a) and is supported by the Department's findings on the evidence and testimony received. This order shall become effective on May 1, 1998.

Christophe A.G. Tulou, Secretary

Amend Tidal Finfish Regulations No.12, **ATLANTIC STURGEON SIZE LIMITS**, by striking it in its entirety and substituting in lieu thereof the following:

TIDAL FINFISH REGULATION 12. ATLANTIC STURGEON ~~SIZE LIMITS~~. MORATORIUM ON POSSESSIONS.

a) ~~Notwithstanding the provisions of '929(b)(5), Chapter 9, Title 7, Delaware Code or unless otherwise authorized, it shall be unlawful for any person to possess any Atlantic sturgeon, (Acipenser oxyrinchus), that measures less than eighty-four (84) inches total length.~~

a) It shall be unlawful for any person to [harvest,] possess, [or] and ~~for harvest~~ any Atlantic Sturgeon, Acipenser oxyrinchus or part thereof.

b) It shall be unlawful for any person to attempt to [harvest,] possess, [or] and ~~for harvest~~ any Atlantic sturgeon or part thereof."

GOVERNOR'S APPOINTMENTS

1657

BOARD/COMMISSION OFFICE	APPOINTEE	TERM OF OFFICE
Alliance for Adolescent Pregnancy Prevention Advisory Board	Ms. Terry Schooley Dr. David Greenberg	Pleasure of the Governor Pleasure of the Governor
Associate Judge of Family Court	Ms. Chandlee Johnson Kuhn, Esq.	2/27/10
Board of Audiologists, Speech Pathologists & Hearing Aid Dispensers	Mr. Charles M. Murrell	4/30/00
Board of Cosmetology & Barbering	Mr. Preston L. Dyer	11/14/00
Board of Examiners of Private Investigators & Security Agencies	Mr. Larry Slover	1/15/01
Board of Medical Practice	Ms. Catherine T. Hickey	2/13/01
Combined Charitable Solicitation Campaign Committee	Ms. Donna Speed	5/30/99
Commission for the Purchase of Products and Service for the Blind	Mr. Martin E. Mullane	3/06/02
Commission on National and Community Service	Mr. Lorenzo V. Croze Mr. Joseph J. Duffy Mr. James C. Logulo Mr. Theodore Van Name	3/06/01 3/06/01 3/06/01 3/06/01
Committee on Employment of People with Disabilities	Ms. Carol E. Barnett Ms. Rosanna Heffron	3/06/01 3/06/01
Committee on Massage/Bodywork Practitioners	Ms. Phyllis E. Mikell	3/06/01
Council on Aging and Adults with Physical Disabilities	Mr. Albert Madora Mr. Albert J. Miller Ms. Gerane G. Pippel Dr. Patricia Turner-Debnam	3/06/01 3/06/01 3/06/01 3/06/01
Council on Correction	Ms. Judy Cherry	2/2/01

GOVERNOR'S APPOINTMENTS

BOARD/COMMISSION OFFICE	APPOINTEE	TERM OF OFFICE
Council on Hispanic Affairs	Mr. Jaime Figueras	3/06/01
	Mr. Gonzalo Martinez	3/06/01
	Mr. Ruben Martinez	5/6/00
	Mr. Joseph E. Miro	1/21/01
	Ms. Maria Christina Navarro	5/6/00
	Dr. Francisco Rodriguez	5/6/00
	Ms. Sharon Saez	3/06/01
	Mr. Samuel Torres	5/6/00
	Dr. Juan Villamarin	5/6/00
Council on Long Term Care Facilities	Ms. Gail Davis	2/13/01
	Mr. Gary W. Downes	8/10/98
Council on Mental Retardation	Dr. Timothy F. Brooks	3/06/01
Council on Real Estate Appraisers	Ms. Joyce R. Teis	3/06/01
Council on State Service Centers	Ms. Ilona Holland	3/06/01
	Ms. Alberta Morris	3/06/01
	Ms. Ellen P. Williams	3/06/01
	Mr. H. Rodney Sharp, III	3/06/01
Council on Volunteer Services	Ms. Bernice Edwards	11/14/99
Deferred Compensation Council	Mr. Oliver J. Gumbs	3/06/01
Delaware Bicycle Council	Sgt. Kirk A. Phillips	1/15/01
Delaware Board of Examiners for Nursing Home Administrators	Ms. Patricia McLaughlin	3/06/01
Delaware Board of Nursing	Ms. Judith A. Schanel	3/06/01
	Ms. Deanna M. Scudo	8/02/99
	Ms. Sarah H. Seger	8/10/98
Delaware Commission for Women	Ms. Patricia Andrews	2/27/01
	Mr. Brian J. Bartley	2/27/01
Delaware Greenway and Trails Council	Ms. Kathleen S. Maxted	10/27/98

GOVERNOR'S APPOINTMENTS

1659

BOARD/COMMISSION OFFICE	APPOINTEE	TERM OF OFFICE
Delaware Health Care Commission Chairman	Honorable Gregg C. Sylvester, M.D.,	Pleasure of the Governor
Delaware Private Industry Council	Mr. Clifford Crouch Mr. Duane L. Wayman II	12/30/00 12/30/00
Delaware Workforce Development Council	Honorable Gregg C. Sylvester, M.D.	Pleasure of the Governor
Diamond State Port Corporation Advisory Board	Mr. Pat Cook Ms. Mary A. Thomas	2/27/00 2/27/00
Foster Care Review Board	Mr. Joseph M. Asher	3/06/00
Governor's Task Force on School Libraries	Mr. Henry James Decker Ms. Sandra Millard Mr. Robert Sutton	7/12/99 7/12/99 2/13/01
Interagency Coordinating Council	Ms. Gwendoline B. Angalet Dr. Louis Bartoshesky Dr. Martha A. Brooks Dr. Michael Gamel-McCormick Mrs. Susan E. Herscher Ms. Anne Lawton The Honorable Jane Maroney Mr. Bruce L. Orr Mrs. Angela C. Sipple Mr. Barry A. Sipple	3/06/01 1/15/01 3/06/01 3/06/01 3/06/01 3/06/01 3/06/01 3/06/01 3/06/01 3/06/01
Juvenile Justice Advisory Group	Mr. Brian D. Shirey, Chairperson	Pleasure of the Governor
Merit Employees Relations Board	Mr. John W. Pitts	2/13/01
Pesticide Advisory Committee	Mr. John G. Townsend IV	7/27/98
State Board of Social Work Examiners	Ms. Janet Tovo	3/06/01
State Committee of Dietetics/ Nutritionists	Ms. Marianne B. Carter	1/15/01

GOVERNOR'S APPOINTMENTS

BOARD/COMMISSION OFFICE	APPOINTEE	TERM OF OFFICE
State Examining Board of Physical Therapists	Ms. Faith K. Hannagan	1/15/01
State Fire Prevention Commission	Mr. Joseph W. Hojnicky Mr. Kenneth H. McMahon	9/25/98 2/27/04

**DEPARTMENT OF
ADMINISTRATIVE SERVICES
DIVISION OF PROFESSIONAL REGULATION
BOARD OF EXAMINERS IN OPTOMETRY**

NOTICE - PUBLIC HEARING

The Delaware Board of Examiners in Optometry proposes to revise its rules and regulations in accordance with 24 Del. C., section 2104.

A public hearing will be held on Thursday, May 7, 1998 at 6:30 p.m. in the Cannon Building, Conference Room A, 861 Silver Lake Boulevard, Dover, Delaware.

Anyone desiring a copy of the proposed rules and regulations may obtain same from the Board Office, Division of Professional Regulation, Cannon Building, Suite 203, P.O. Box 1401, Dover, Delaware 19903. Written comments should be submitted to the Board Office at the above address on or before May 7, 1998. Those individuals wishing to make oral comments at the public hearing are requested to notify the Board Office at (302)739-4522, ext. 203.

**DEPARTMENT OF
ADMINISTRATIVE SERVICES
DIVISION OF PROFESSIONAL REGULATION
BOARD OF FUNERAL SERVICES**

Statutory Authority: 24 Delaware Code, Section 3105(a)(1) (24 Del.C. 3105(a)(1))

The Board of Funeral Services, pursuant to the authority of Title 24, Delaware Code, subsection 3105 (a) (1) proposes to revise the current Rules and Regulations.

A Public Hearing will be held on the proposed revisions to the Rules and Regulations on Wednesday, May 20, 1998, at 10:00 a.m. at the Cannon Building, 861 Silver Lake Boulevard, Public Service Commission Hearing Room, first floor, Dover, DE 19903. The Board will receive and consider input in writing from interested persons on the proposed revisions to the Rules and Regulations. Final date to submit written comments shall be at the above scheduled public hearing. Anyone wishing to obtain a copy of the proposed revisions or to make comments at the public hearing should notify Gayle Melvin at the above address or by calling (302) 739-4522

Ext. 211. A copy of the proposed rules and regulations is also published in the Delaware Register of Regulation published April 1, 1998.

**DEPARTMENT OF
ADMINISTRATIVE SERVICES
DIVISION OF PROFESSIONAL REGULATION
BOARD OF EXAMINERS OF PRIVATE
INVESTIGATORS & PRIVATE SECURITY AGENCIES**

Statutory Authority: 24 Delaware Code, Section 1304(b)(3) (24 Del.C. 1304(b)(3))

Notice is hereby given that the Board of Examiners of Private Investigators and Private Security Agencies, in accordance with Del. Code Title 24 chapter 13 proposes to amend Adopted Rules 11/04/1994-1 - Firearm's Policy; 11/04/1994-3 - Personnel Rosters and Job Assignments; 11/04/1994-5 - Uniforms, Patches, Badges, Seals, Vehicular Markings; and to adopt Rule 04/23/1998-11 - Use Of Animals. Any persons wishing to present views may either submit them in writing or attend a public hearing scheduled for 10:00am on Thursday, April 23, 1998 at the Delaware State Police Headquarters Conference Room, 1441 North DuPont Highway in Dover, Delaware.

DEPARTMENT OF EDUCATION

Statutory Authority: 14 Delaware Code, Section 122(d) (14 Del.C. 122(d))

THE REGULARLY SCHEDULED MEETING OF THE STATE BOARD OF EDUCATION WILL BE HELD ON THURSDAY, APRIL 16, 1998 AT 11:00 A.M.

**DEPARTMENT OF HEALTH &
SOCIAL SERVICES
DIVISION OF SOCIAL SERVICES**

**PUBLIC NOTICE
DIVISION OF SOCIAL SERVICES
A BETTER CHANCE / FOOD STAMP PROGRAMS**

The Delaware Health and Social Services / Division of Social Services / *A Better Chance* and Food Stamp Programs are proposing to implement policy changes in the Division of

Social Services' Manual. These regulations are contained in Public Law 104-193, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Public Law 105-33, the Balanced Budget Act of 1997, Section 702(b) of Public Law 102-367, the Job Training Reform Amendments of 1992, Section 456(e) of Public Law 102-550, Housing and Community Development Act of 1992, Section 22 of Public Law 93-531 (25 USCS 640d-22), and Division of Social Services' Manual sections 3015, 7004.3, 9030.1, and 9506.

Any person who wishes to make written suggestions, compilations of data, testimony, briefs or other written materials concerning the proposed new regulations must submit same to the Director, Division of Social Services, P. O. Box 906, New Castle, DE, by April 30, 1998.

The action concerning the determination of whether to adopt the proposed regulations will be based upon the results of Department and Division staff analysis and the consideration of the written materials filed by other interested persons.

DEPARTMENT OF HEALTH & SOCIAL SERVICES

DIVISION OF SOCIAL SERVICES

Statutory Authority: 31 Delaware Code,
Section 505 (31 **Del.C.** 505)

PUBLIC NOTICE

Medicaid / Medical Assistance Program

In compliance with the State's Administrative Procedures Act (APA - Title 29, Chapter 101 of the Delaware Code) and with 42CFR §447.205, and under the authority of Title 31 of the Delaware Code, Chapter 5, Section 505, the Delaware Department of Health and Social Services (DHSS) / Division of Social Services / Medicaid Program is amending its outpatient hospital provider manual to remove procedural sections from the policy portion of the manual. These will now appear in appendices.

Comments, written suggestions, compilations of data, testimony, briefs or other written materials concerning this change must be received by mail no later than May 1, 1998, at the Medicaid Administrative Office, Lewis Bldg., Herman M. Holloway, Sr. Health & Social Services Campus, 1901 N. DuPont Hwy., New Castle, DE 19720, attention Thelma Mayer. Materials filed thereafter will not be considered except where good cause for lateness is demonstrated. Copies of all written submissions filed with the Medicaid office will be available for public inspection in the Medicaid Administrative Office at the address given above. Please call

(302) 577-4880, extension 131, for an appointment if you wish to review the materials. Individuals with disabilities who wish to participate in these proceedings, or review the materials submitted, should contact the Division to discuss auxiliary aids or services needed to facilitate such review or participation. Such contact may be in person, in writing or by telephone by using the Telecommunications Relay Service, or otherwise.

DEPARTMENT OF HEALTH & SOCIAL SERVICES

DIVISION OF PUBLIC HEALTH

OFFICE OF HEALTH FACILITIES

LICENSING AND CERTIFICATION

Statutory Authority: 16 Delaware Code,
Section 122 (16 **Del.C.** 122)

The Office of Health Facilities Licensing and Certification, Division of Public Health of the Department of Health and Social Services, will hold a public hearing to discuss proposed Delaware Regulations for Adult Day Care Facilities. These proposed regulations describe licensing requirements and procedures and general and special requirements of facilities desiring to establish, conduct or maintain an Adult Care Facility in this State. Adult Day Care Facilities Regulations apply to any program that provides health, social and related support services for four or more functionally impaired adults who reside in the community and are in need of these services as determined by a pre-admission assessment. The services are provided to adults for a period of less than 12 hours during the day.

This public hearing will be held April 21, 1998 at 9:00 AM in Room 309, Jesse S. Cooper Building, Federal and Water Streets, Dover, Delaware.

Copies of the proposed regulations are available for review by calling the following locations:

Office of Health Facilities Licensing and Certification
Three Mill Road, Suite 308
Wilmington, DE 19806
Telephone: (302) 577-6666

Office of Health Facilities Licensing and Certification
Jesse S. Cooper Building
Federal and Water Streets
Dover, DE 19901
Telephone: (302) 739-6610

Anyone wishing to present their oral comments at this hearing should contact Ms. Vanette Seals at (302) 577-6666 by April 17, 1998. Anyone wishing to submit written

comments as a supplement to, or in lieu of oral testimony should submit such comments by May 4, 1998 to:

Jeffrey Beamen, Hearing Officer
Division of Public Health
PO Box 637
Dover, DE 19903

**DEPARTMENT OF HEALTH &
SOCIAL SERVICES**

DIVISION OF SOCIAL SERVICES

Statutory Authority: 31 Delaware Code,
Section 505 (31 **Del.C.** 505)

Medicaid / Medical Assistance Program

Comments, written suggestions, compilations of data, testimony, briefs or other written materials concerning this change must be received by mail no later than May 1, 1998, at the Medicaid Administrative Office, Lewis Bldg., Herman M. Holloway, Sr. Health & Social Services Campus, 1901 N. DuPont Hwy., New Castle, DE 19720, attention Thelma Mayer. Materials filed thereafter will not be considered except where good cause for lateness is demonstrated. Copies of all written submissions filed with the Medicaid office will be available for public inspection in the Medicaid Administrative Office at the address given above. Please call (302) 577-4880, extension 131, for an appointment if you wish to review the materials. Individuals with disabilities who wish to participate in these proceedings, or review the materials submitted, should contact the Division to discuss auxiliary aids or services needed to facilitate such review or participation. Such contact may be in person, in writing or by telephone by using the Telecommunications Relay Service, or otherwise.

In compliance with the State's Administrative Procedures Act (APA - Title 29, Chapter 101 of the Delaware Code) and with 42CFR §447.205, and under the authority of Title 31 of the Delaware Code, Chapter 5, Section 505, the Delaware Department of Health and Social Services (DHSS) / Division of Social Services / Medicaid Program is amending its DMAP eligibility manual to revise the definition of a budget unit to assure compliance with Federal rules.

**DEPARTMENT OF NATURAL
RESOURCES & ENVIRONMENTAL
CONTROL**

DIVISION OF AIR & WASTE MANAGEMENT

Statutory Authority: 7 Delaware Code,
Chapter 60 (7 **Del.C.** Ch. 60)

1. TITLE OF THE REGULATIONS:

**REGULATION 38 - EMISSION STANDARDS FOR
HAZARDOUS AIR POLLUTANTS FOR SOURCE
CATEGORIES**

2. BRIEF SYNOPSIS OF THE SUBJECT, SUBSTANCE
AND ISSUES:

The Department is proposing to, through Regulation 38, adopt by reference the National Emission Standards for Hazardous Air Pollutants for Source Categories found at 40 CFR Part 63 Subpart B Sections 63.40 through 63.44. These sections carry out the case-by-case MACT (maximum achievable control technology) determination requirements of section 112(g)(2)(B) of the Clean Air Act Amendments of 1990.

Any owner or operator planning to construct a new or to reconstruct an existing major source of hazardous air pollutants is currently required to apply for and receive a construction permit before commencing construction or reconstruction. The proposed amendment will require such owner or operator to also, when no federally-promulgated Part 63 emission limitation exists, submit an application requesting the Department to review and make a final and effective case-by-case MACT determination. The proposed amendment provides guidance and procedures for obtaining this case-by-case determination, which shall ensure that the emissions from the planned construction or reconstruction are controlled to a level that is no less stringent than the emission control which is achieved in practice by the best-controlled similar source.

3. POSSIBLE TERMS OF THE AGENCY ACTION:
None

4. STATUTORY BASIS OR LEGAL AUTHORITY TO
ACT: 7 Delaware Code, Chapter 60

5. OTHER REGULATIONS THAT MAY BE AFFECTED
BY THE PROPOSAL: None

6. NOTICE OF PUBLIC COMMENT:

The public hearing on the proposed amendment to Regulation 38 will be held on Monday, April 27, 1998, beginning at 6:00 p.m. in the Richardson and Robbins Auditorium, 89 Kings Highway, Dover, DE.

7. PREPARED BY:

James R. Snead (302) 323-4542 March 12, 1998

**DEPARTMENT OF NATURAL
RESOURCES &
ENVIRONMENTAL CONTROL
DIVISION OF AIR & WASTE MANAGEMENT
AIR QUALITY MANAGEMENT SECTION**
Statutory Authority: 7 Delaware Code,
Chapter 60 (7 Del.C. Ch. 60)

1. TITLE OF THE REGULATIONS

Development of the Phase II Ozone Attainment Demonstration for Kent and New Castle Counties as a Revision to the State Implementation Plan

2. BRIEF SYNOPSIS OF THE SUBJECT, SUBSTANCE, AND ISSUES

Under a March 2, 1995 EPA policy memorandum from Mary D. Nichols, Assistant Administrator of Air and Radiation, states with ozone non-attainment areas were given the option of dividing their ozone attainment demonstrations into two State Implementation Plan (SIP) submissions. The Phase I submission must contain all control strategies and associated regulations to meet rate-of-progress requirements through 1999. The Phase II submission must contain photochemical dispersion modeling results and a plan to get the non-attainment area(s) into attainment by the Clean Air Act deadline (2005 for Kent and New Castle Counties). Delaware opted into this two-phase approach in May of 1995. Delaware made its Phase I submission in December of 1997. Development of the Phase II submission for Kent and New Castle Counties is now complete.

3. POSSIBLE TERMS OF THE AGENCY ACTION

N/A

4. STATUTORY BASIS OR LEGAL AUTHORITY TO ACT

7 Del. C., Chapter 60 Section 6010 Clean Air Act Amendments of 1990

5. OTHER REGULATIONS THAT MAY BE AFFECTED BY THE PROPOSAL

None

6. NOTICE OF PUBLIC COMMENT who, when, where, what and why

The public hearing will be held on Tuesday, April 21, 1998, 6:30 PM, in the Priscilla Building second floor conference room located at 156 South State Street, Dover, Delaware, 19901. The draft Plan may be inspected at the Offices of the Department of Natural Resources and Environmental Control located at 156 South State Street, Dover; 715 Grantham Lane, New Castle; or 422 North DuPont Highway, Suite 1, Georgetown. For further information, please contact Mr. Alfred Deramo in Dover at (302) 739-4791.

Statements and testimony may be presented orally or in written form before the hearing. It is requested that those interested in presenting statements register in advance by mail. Written statements may be presented prior to the hearing and should be addressed to:

Air Quality Management Section
Division of Air and Waste Management
156 South State Street
Dover, DE 19901

7. PREPARED BY: Alfred R. Deramo, Program Manager(302) 739-4791 March 9, 1998
