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# Delaware Register of Regulations

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Issue Date: August 1, 2009

Volume 13 - Issue 2, Pages 144 - 317

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## IN THIS ISSUE:

### Regulations:

- Emergency
- Errata
- Proposed
- Final

### General Notices

- Calendar of Events &  
Hearing Notices



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 July 15, 2009.

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# INFORMATION ABOUT THE DELAWARE REGISTER OF REGULATIONS

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## 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The *Delaware Register* will publish any regulations that are proposed to be adopted, amended or repealed and any emergency regulations promulgated.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
  - Agency Hearing and Meeting Notices
  - Other documents considered to be in the public interest.
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## CITATION TO THE DELAWARE REGISTER

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

12 **DE Reg.** 761-775 (12/01/08)

Refers to Volume 12, pages 761-775 of the *Delaware Register* issued on December 1, 2008.

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## SUBSCRIPTION INFORMATION

The cost of a yearly subscription (12 issues) for the *Delaware Register of Regulations* is \$135.00. Single copies are available at a cost of \$12.00 per issue, including postage. For more information contact the Division of Research at 302-744-4114 or 1-800-282-8545 in Delaware.

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other interested parties may participate in the process by which administrative regulations are adopted, amended or repealed, and may initiate the process by which the validity and applicability of regulations is determined.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

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# INFORMATION ABOUT THE DELAWARE REGISTER OF REGULATIONS

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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.

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*.

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## CLOSING DATES AND ISSUE DATES FOR THE DELAWARE REGISTER OF REGULATIONS

ISSUE DATE	CLOSING DATE	CLOSING TIME
September 1	August 17	4:30 p.m.
October 1	September 15	4:30 p.m.
November 1	October 15	4:30 p.m.
December 1	November 16	4:30 p.m.
January 1	December 15	4:30 p.m.

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**DEPARTMENT OF HEALTH AND SOCIAL SERVICES**  
**DIVISION OF SOCIAL SERVICES**

Statutory Authority: 31 Delaware Code, Section 512 (31 Del.C. §512)

**PLEASE NOTE:** This proposed regulation is being republished because the introductory language was not published in the July issue of the Register.

**PUBLIC NOTICE**

In compliance with the State's Administrative Procedures Act (APA - Title 29, Chapter 101 of the **Delaware Code**) and under the authority of Title 31 of the **Delaware Code**, Chapter 5, Section 512, Delaware Health and Social Services (DHSS) / Division of Social Services is proposing to amend administrative policies in the Division of Social Services Manual (DSSM).

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 Sharon L. Summers, Policy, Program & Development Unit, Division of Social Services, 1901 North DuPont Highway, P.O. Box 906, New Castle, Delaware 19720-0906 or by fax to (302) 255-4425 by July 31, 2009.

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

**SUMMARY OF PROPOSED CHANGE**

The proposed change described below amends administrative policies in the Division of Social Services Manual (DSSM) regarding Civil Rights Program requirements.

**Statutory Authority**

- 45 CFR Part 80, Title VI of the Civil Rights Act of 1964

**Summary of Proposed Change**

DSSM 1006.6: The rule is being removed as part of a project to clarify and simplify the Division of Social Services (DSS) policy manual. This rule is not needed. DSS publicizes its Civil Rights Program on its application and other printed material. Posters about Civil Rights are located in every DSS office location statewide.

**DSS PROPOSED REGULATION #09-22**

**REVISION:**

**~~1006.6 Civil Rights Program and Public Relations~~**

~~The general public, including citizens interested in public welfare and civil rights, will be informed as widely as possible of the Civil Rights Program of the Division.~~

~~Informational releases will be given to the daily newspapers in Wilmington, and to the weekly or daily newspapers in the rest of the State. Similar information will be given to all radio stations in Delaware and, if acceptable, to the television station in Wilmington.~~

~~Organizations interested in learning more about the Civil Rights Program of the Division will be furnished speakers from the administrative staff of the Department on request to the Director.~~

~~Posters will be displayed in all offices of the Division notifying all persons that assistance and services are provided by the Division to all eligible persons without regard to race, color, national origin, sex, religious creed, age, disability, political beliefs, or retaliation. RESERVED~~

**11 DE Reg. 325 (09/01/07)**

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**Symbol Key**

Arial 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.

**Emergency Regulations**

Under 29 **Del.C.** §10119 an agency may promulgate a regulatory change as an Emergency under the following conditions:

**§ 10119. Emergency regulations.**

If an agency determines that an imminent peril to the public health, safety or welfare requires the adoption, amendment or repeal of a regulation with less than the notice required by § 10115, the following rules shall apply:

- (1) The agency may proceed to act without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable;
- (2) The order adopting, amending or repealing a regulation shall state, in writing, the reasons for the agency's determination that such emergency action is necessary;
- (3) The order effecting such action may be effective for a period of not longer than 120 days and may be renewed once for a period not exceeding 60 days;
- (4) When such an order is issued without any of the public procedures otherwise required or authorized by this chapter, the agency shall state as part of the order that it will receive, consider and respond to petitions by any interested person for the reconsideration or revision thereof; and
- (5) The agency shall submit a copy of the emergency order to the Registrar for publication in the next issue of the Register of Regulations. (60 Del. Laws, c. 585, § 1; 62 Del. Laws, c. 301, § 2; 71 Del. Laws, c. 48, § 10.)

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**DEPARTMENT OF AGRICULTURE  
THOROUGHBRED RACING COMMISSION**

Statutory Authority: 3 Delaware Code, Section 10005; 29 Delaware Code,  
Section 4815(b)(3)(c)(3)  
(3 **Del.C.** §10005; 29 **Del.C.** §4815(b)(3)(c)(3))  
3 **DE Admin. Code** 1001

At its public meeting on June 23, 2009, the Delaware Thoroughbred Racing Commission (the "Commission") having determined that an imminent peril to the public health safety or welfare exists and acting pursuant to the provisions of 29 Del.C. §10119 and 3 Del.C. §10103(c), adopted the following emergency regulation:

**1001 Thoroughbred Racing Rules and Regulations*****(Break in Continuity of Sections)*****14.20 Toe Grabs.**

Notwithstanding any house rule of a Commission licensee to the contrary, toe grabs up to a height of no greater than 4 millimeters shall be permitted for racing on dirt."

This Emergency Regulation is to take effect immediately and shall be effective for 120 days unless earlier terminated by the Commission.

Adopted and Effective this 23rd day of June, 2009.

BY ORDER OF THE DELAWARE THOROUGHBRED RACING COMMISSION

Bernard J. Daney, Chairman



This rule in no way affects the 2 millimeter limit house rule pertaining to graded stakes events.  
Amended this 14th day of July, 2009.

BY ORDER OF THE DELAWARE THOROUGHBRED RACING COMMISSION  
Bernard J. Daney, Chairman

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**DEPARTMENT OF INSURANCE**

Statutory Authority: 18 Delaware Code, Sections 312 and 1113;  
(18 Del.C. §311, §1113)  
18 DE Admin. Code 1212

**1212 Valuation of Life Insurance Policies****EXTENSION OF EMERGENCY ORDER**

WHEREAS an emergency order placing into effect proposed changes to Regulation 1212 was published on February 17, 2009; and

WHEREAS the said order was set to expire on June 26, 2009; and

WHEREAS it is necessary to provide for an extension of the emergency regulation so that the Department can better determine the need to finalize and adopt the proposed amendments, pursuant to the Delaware Administrative Procedures Act; and

WHEREAS it is appropriate for the Department of Insurance to allow for additional public comment on the regulation as proposed and published on March 1, 2009;

NOW THEREFORE, pursuant to 29 Del. C. § 10119, Emergency Regulation 1212 as it appears in 12 DE Reg. 1135-1146 (3/1/09) shall be and is hereby extended until August 25, 2009 or until the proposed amendments to Regulation 1212 are adopted in final form, whichever shall first occur. Any person can file written comments, suggestions, briefs, and compilations of data or other materials concerning the proposed amendment. Any written submission in response to this notice and relevant to the proposed change must be received by the Department of Insurance no later than 4:30 p.m. Monday, August 3, 2009 by delivering said comments to Mitch Crane, Esquire, c/o Delaware Department of Insurance, 841 Silver Lake Boulevard, Dover, DE 19904, or sent by fax to 302.739.2021 or emailed to [mitch.crane@state.de.us](mailto:mitch.crane@state.de.us).

IT IS SO ORDERED this 26<sup>th</sup> day of June, 2009.

Karen Weldin Stewart, CIR-ML  
Insurance Commissioner

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**DEPARTMENT OF INSURANCE**

Statutory Authority: 18 Delaware Code, Sections 312 and 1113;  
(18 **Del.C.** §311, §1113)  
18 **DE Admin. Code** 1215

**1215 Recognition of Preferred Mortality Tables for use in Determining Minimum Reserve Liabilities****EXTENSION OF EMERGENCY ORDER**

WHEREAS an emergency order placing into effect proposed changes to Regulation 1215 was published on February 17, 2009; and

WHEREAS the said order was set to expire on June 26, 2009; and

WHEREAS it is necessary to provide for an extension of the emergency regulation so that the Department can better determine the need to finalize and adopt the proposed amendments, pursuant to the Delaware Administrative Procedures Act; and

WHEREAS it is appropriate for the Department of Insurance to allow for additional public comment on the regulation as proposed and published on March 1, 2009;

NOW THEREFORE, pursuant to 29 **Del. C.** § 10119, Emergency Regulation 1215 as it appears in 12 **DE Reg.** 1146-1149 (3/1/09) shall be and is hereby extended until August 25, 2009 or until the proposed amendments to Regulation 1215 are adopted in final form, whichever shall first occur. Any person can file written comments, suggestions, briefs, and compilations of data or other materials concerning the proposed amendment. Any written submission in response to this notice and relevant to the proposed change must be received by the Department of Insurance no later than 4:30 p.m. Monday, August 3, 2009 by delivering said comments to Mitch Crane, Esquire, c/o Delaware Department of Insurance, 841 Silver Lake Boulevard, Dover, DE 19904, or sent by fax to 302.739.2021 or emailed to [mitch.crane@state.de.us](mailto:mitch.crane@state.de.us).

IT IS SO ORDERED this 26<sup>th</sup> day of June, 2009.

Karen Weldin Stewart, CIR-ML  
Insurance Commissioner

**Symbol Key**

Arial 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.

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**DELAWARE RIVER BASIN COMMISSION****PUBLIC NOTICE OF PROPOSED RULEMAKING AND PUBLIC HEARING**

Proposed Amendments to the Water Quality Regulations, Water Code and Comprehensive Plan to Revise the Human Health Water Quality Criteria for PCBs in the Delaware Estuary, to Apply the PCB Human Health Water Quality Criterion to Delaware Bay, and to Provide for the Use of Compliance Schedules to Implement Stream Quality Objectives Established by the Commission

The Delaware River Basin Commission ("DRBC" or "Commission") is a federal interstate compact agency charged with managing the water resources of the Delaware River Basin without regard to political boundaries. Its commissioners are the governors of the four Basin states - New Jersey, New York, Pennsylvania and Delaware - and a federal representative, the North Atlantic Division Commander of the U.S. Army Corps of Engineers. The Commission is not subject to the requirements of the Delaware Administrative Procedures Act. This notice is published by the Commission for information purposes.

**Summary:** The Commission will hold a **public hearing** to receive comments on proposed amendments to the Commission's Water Quality Regulations, Water Code and Comprehensive Plan to revise the human health water quality criteria for polychlorinated biphenyls (PCBs) in the Delaware Estuary (DRBC Water Quality Management Zones 2 through 5), extend application of the DRBC's PCB human health water quality criterion to Delaware Bay (DRBC Water Quality Zone 6) and provide for the use of compliance schedules where implementation of a stream quality objective established by the Commission requires a reduction of the pollutant concentration or loading of a discharge to Basin waters.

**Background:** The current DRBC water quality criteria for PCBs in the Delaware Estuary were established in 1996. They pre-date the collection of site-specific bioaccumulation data for the Delaware Estuary and Bay and site-specific fish-consumption data for Zones 2 through 4 that are relevant to the development of human health water quality criteria. They are also inconsistent with current U.S. Environmental Protection Agency (EPA) guidance for the development of such criteria, and they vary by water quality zone. One consequence of the current varied criteria is that in order to ensure that the current water quality criterion of 7.9 picograms per liter in the downstream

portion of Zone 5 can be achieved, the allowable PCB loading to Zones 2 and 3, where the applicable criterion currently is 44.4 picograms per liter, must be even lower than would be required if the proposed uniform criterion were in place. DRBC currently has no PCB water quality criteria for the Delaware Bay, a shared interstate water for which the states of New Jersey and Delaware have established a criterion of 64 picograms per liter.

By Resolution No. 2003-11 on March 19, 2003 the Commission directed its executive director to initiate rulemaking on a proposal to revise the Commission's human health water quality criteria, including those for PCBs, to reflect site-specific data on fish consumption, site-specific bioaccumulation factors, and current EPA guidance on development of human health criteria. Rulemaking was delayed, however, pending the completion of an effort by the Commission's Toxics Advisory Committee (TAC) to revise the criterion for PCBs and a separate effort to develop recommendations for achieving reductions in PCB loadings to the river that could be issued in conjunction with the criterion.

Rigorously applying the most current available data and methodology, including site-specific data on fish consumption, site-specific bioaccumulation factors, and the current EPA methodology for the development of human health criteria for toxic pollutants (see EPA-822-B-00-004, October 2000), the TAC in July 2005 completed development of a revised human health water quality criterion for PCBs for the Delaware Estuary and Bay of 16 picograms per liter. Accordingly, by Resolution No. 2005-19 on December 7, 2005, the Commission directed the executive director to proceed with rulemaking to establish the new criterion in DRBC Water Quality Zones 2 through 6.

Elevated levels of PCBs in the tissues of fish caught in the Delaware Estuary and Bay currently prevent the attainment of the designated uses "maintenance and propagation of resident fish and other aquatic life" (Zone 2, Zone 5 below River Mile 70 and Zone 6), "passage of anadromous fish" (Zones 2 through 6), and "maintenance of resident fish and other aquatic life" (Zones 3, 4 and 5 above River Mile 70). (See DRBC Water Quality Regulations (WQR), Art. 3, sec's 3.30.2 B.2, 3.30.3 B.2, 3.30.4 B.2, 3.30.5 B.2 and 3.30.6 B.2 for Zones 2 through 6, respectively). These uses are commonly referred to collectively as "fishable" and are deemed to include human consumption of resident fish. Accordingly, these waters are listed by the bordering states as impaired under Section 303(d) of the Clean Water Act (CWA), which requires that a total maximum daily load (TMDL) be established for them. A TMDL expresses the maximum amount of a pollutant that a water body can receive and still attain water quality standards. Once the load is calculated, it is allocated to all sources in the watershed - point and nonpoint - which may not discharge loads in excess of the share allocated to them in order to achieve and maintain the water quality standards. EPA established TMDLs for PCBs in December of 2003 for the Delaware Estuary and in December of 2006 for the Delaware Bay ("Stage 1 TMDLs"). It is anticipated that EPA will establish revised TMDLs ("Stage 2 TMDLs") for the Delaware Estuary and Bay to attain the revised PCB human health water quality criterion if approved.

When the Commission directed the executive director in 2005 to initiate rulemaking on updated PCB criteria, in accordance with a recommendation of the TAC, it also asked her to work with state regulatory agencies and EPA (collectively, "co-regulators") to develop recommendations for implementing criteria for bioaccumulative toxic pollutants such as PCBs that would be "consistent with the existing Clean Water Act National Pollutant Discharge Elimination System (NPDES) framework while . . . reflecting principles of adaptive management" and to solicit public comment on these recommendations (DRBC Resolution No. 2005-19 par's. 3-4). It is expected that Stage 2 TMDLs issued by EPA will include as an appendix a TMDL implementation plan developed by DRBC and its co-regulators. The implementation plan, which will take the form of a guidance document, will explain how the load allocations assigned by the TMDL to nonpoint sources and the wasteload allocations assigned to point sources can be achieved consistent with the Clean Water Act and principles of adaptive management.

According to the 2003 and 2006 TMDLs, actual loadings of PCBs to the Delaware Estuary and Bay respectively are in some cases orders of magnitude above those needed to allow attainment of the designated use. The EPA's 2003 Delaware Estuary TMDL report projects that "due to the scope and complexity of the problem that has been defined through these TMDLs, achieving the estuary water quality standards for PCBs will take decades." (EPA 2003, Executive Summary, p. xiii). As required by Section 4.30.9 of the DRBC Water Quality Regulations, adopted by DRBC Resolution No. 2005-9 on May 18, 2005, the largest point source dischargers of PCBs to the Delaware Estuary and Bay have already undertaken pollutant minimization plans designed to locate the sources of PCBs entering their wastewater and stormwater systems and contain or remove them. The TMDL implementation plan developed by the co-regulators recognizes that many point source dischargers already have reduced their PCB loadings in an effort to meet their TMDL wasteload allocations assigned by the Stage 1 TMDLs.

Some point source dischargers are expected to achieve their required reductions soon; however, others will require an extended period of time, including in some instances decades, to achieve the PCB loading reductions needed to meet their assigned wasteload allocations. The implementation plan developed by the co-regulators will accommodate these dischargers through the use of compliance schedules consistent with the Clean Water Act and applicable regulations. It is understood that those dischargers who cannot achieve their wasteload allocations within a single five-year permit cycle notwithstanding good faith efforts to do so as soon as possible will be given additional time, even if this requires compliance schedules extending well beyond a single five-year permit cycle.

#### Subjects on Which Comment is Expressly Solicited

Public comment is solicited on all aspects of the proposed rule. Without limiting the foregoing, the Commission has identified certain subject matters on which it expressly seeks comment. First, comments are solicited on the assumptions applied in developing the criterion, including the appropriate cancer risk level. (See Resolution No. 2005-19, par. 2). In accordance with current DRBC regulations, that level is 10-6, or one additional cancer in every one million humans exposed for 70 years. (See DRBC WQR, §3.10.3 D.4). The assumptions applied in developing the revised PCB criterion of 16 picograms per liter are set forth in a basis and background document that is available on the DRBC website, DRBC.net. The second area on which the Commission expressly seeks comment is best approaches for implementing water quality criteria for bioaccumulative pollutants consistent with the NPDES framework and principles of adaptive management. (See Resolution No. 2005-19, par. 4). The third is the implementation plan developed by the co-regulators, which is posted on the Commission's website, DRBC.net.

**Dates:** Two **informational meetings** will be held in late September, 2009 on the proposed revised human health water quality criterion for PCBs and accompanying implementation plan. The exact locations and dates will be posted on the Commission's website, DRBC.net, on or before August 17, 2009.

The **public hearing** will be held at 1:30 p.m. on Thursday, October 8, 2009 at the Commission's office building located at 25 State Police Drive, West Trenton, NJ. As Internet mapping tools are inaccurate for this location, please use the driving directions posted on the Commission's website. The hearing will continue until all those wishing to testify have had an opportunity to do so. Persons wishing to testify at the hearing are asked to register in advance by phoning Ms. Paula Schmitt at 609-883-9500, ext. 224.

**Written comments** will be accepted and must be received by 5:00 p.m. on Monday, October 19, 2009. Written comments may be submitted as follows: if by email, to paula.schmitt@drbc.state.nj.us; if by fax, to Commission Secretary at 609-883-9522; if by U.S. Mail, to Commission Secretary, DRBC, P.O. Box 7360, West Trenton, NJ 08628-0360. In all cases, please include the commenter's name, address and affiliation, if any, in the comment document and "PCB Rulemaking" in the subject line.

**Further Information:** The basis and background document and the co-regulators' implementation plan for the proposed criterion will be available on the DRBC website, DRBC.net, on or before August 17, 2009. The dates, times and locations for the informational meetings to take place in late September will be posted on the website by the same date.

Please contact Commission Secretary Pamela M. Bush, 609-883-9500 ext. 203 with questions about the proposed rule or the rulemaking process.

PAMELA M. BUSH, ESQ.  
Commission Secretary

Text of proposed amendments:

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It is proposed to amend the Comprehensive Plan, Articles 3 and 4 of the Water Quality Regulations (WQR) and Article 3 of the Water Code (WC) as set forth below. Editor's instructions are denoted by underscore thus. Deleted text is denoted by brackets [thus] and added text is denoted by boldface thus.

Amend Section 3.10.3 D. of Article 3 of the WQR and WC as follows:

### 3.10.3 Stream Quality Objectives

\* \* \* \*

D. Human Health Objectives for Toxic Pollutants. It is the policy of the Commission to designate numerical stream quality objectives for the protection of human health for the Delaware River Estuary (Zones 2 through 5) which correspond to the designated uses of each zone. **It is also the policy of the Commission to designate a stream quality objective for the protection of human health from carcinogenic effects for PCBs in Delaware Bay (Zone 6).**

Stream quality objectives for protection from both carcinogenic and systemic effects are herein established on a pollutant-specific basis for:

\* \* \*

Other toxic substances for which any of the three Estuary states have adopted criteria or standards may also be considered for the development of stream quality objectives.

\* \* \*

6. A rate of ingestion of water of 2.0 liters per day is assumed in calculating objectives for river zones where the designated uses include public water supplies after reasonable treatment. [A] **For toxic pollutants other than PCBs, a rate of ingestion of fish of 6.5 grams per day (equivalent to consuming a ½ pound portion every 35 days) is assumed in calculating freshwater stream quality objectives for human health[. A]; and a rate of ingestion of fish of 37 grams per day (equivalent to consuming a ½ pound portion every 6 days) is assumed in calculating marine stream quality objectives for human health. For PCBs in Zones 2 through 6, a rate of ingestion of fish of 17.5 grams per day (equivalent to consuming a ½ pound portion every 13 days) is assumed in calculating both freshwater and marine stream quality objectives.**

\* \* \*

Amend Table 6 of Section 3.30 of Article 3 of the WQR and WC as follows:

For the parameter "PCBs (Total)", in the column headed "Freshwater Objectives (ug/l): Fish & Water Ingestion." remove the number "0.0000444" and insert "**0.000016**"; in the column headed "Freshwater Objectives (ug/l): Fish Ingestion Only," remove the number "0.0000448" and insert "**0.000016**"; and in the column headed "Marine Objectives (ug/l): Fish Ingestion Only," remove the number "0.0000079" and insert "**0.000016**".

Amend Section 3.30.6 C. of Article 3 of the WQR and WC by the addition of a new subsection 3.30.6 C.11. as follows:

3.30.6 Zone 6

\* \* \* \*

C. Stream Quality Objectives.

\* \* \*

**11. Toxic Pollutants. The applicable marine stream quality objective for PCBs for the protection of human health from carcinogenic effects is 0.000016 ug/l.**

\* \* \*

Amend Section 4.20.2 of Article 4 of the WQR as follows:

4.20.2 Additional Specifications. [The Standards have set limits for most of the significant and commonly used indicators which are pertinent to water quality management in the Basin. When a need arises, or upon application to the Commission, additional indicators and limits will be defined.]

Redesignate subsection 4.20.2 A. of Article 4 of the WQR as 4.20.2 B. and insert new language at Section 4.20.2 A. as follows:

**A. Schedules of Compliance. Where implementation of a stream quality objective established by the Commission requires a reduction of the pollutant concentration or loading of a discharge to Basin waters, the Commission and/or environmental agency of the signatory party may establish a schedule of compliance ("compliance schedule") subject to the following:**

**1. Where the U.S. Environmental Protection Agency (EPA) or a state agency authorized by EPA to issue NPDES permits under the Clean Water Act issues a NPDES permit governing the discharge, then the compliance schedule shall be consistent with the Clean Water Act and applicable federal regulations; and**

**2. in all other instances, the compliance schedule issued by the Commission or the environmental agency of the signatory party shall obligate the discharger to attain as soon as reasonably possible in the judgment of the agency issuing such schedule the concentration or loading required to implement the stream quality objective.**

**B[A]. Background, Total Dissolved Solids. The following background levels of total dissolved solids shall be utilized for the specified zones of the Delaware River:**

\* \* \*

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## DEPARTMENT OF INSURANCE

Statutory Authority: 18 Delaware Code, Sections 314 and 1111 (18 Del.C. §§314 and 1111)  
18 DE Admin. Code 607

### PUBLIC NOTICE

INSURANCE COMMISSIONER KAREN WELDIN STEWART, CIR-ML hereby gives notice of intent to adopt amendments to Department of Insurance Regulation 607 relating to Defensive Driving Courses. The docket number for this proposed amendment is 1145.

The purpose of the proposed amendment to regulation 607 is to update the existing regulation with respect to course content, requirements for course and instructor certification, on-line course attendance verification, proof of course completion and notifications to the Division of Motor Vehicles. The text of the proposed amendment is reproduced in the August 2009 edition of the Delaware Register of Regulations. The text can also be viewed at the Delaware Insurance Commissioner's website at: <http://www.delawareinsurance.gov/departments/documents/ProposedRegs/ProposedRegs.shtml>.

The Department of Insurance does not plan to hold a public hearing on the proposed changes. Any person can file written comments, suggestions, briefs, compilations of data or other materials concerning the proposed amendments. Any written submission in response to this notice and relevant to the proposed changes must be received by the Department of Insurance no later than 4:00 p.m., Tuesday September 8, 2009, and should be addressed to Mitch Crane, Esquire, Delaware Department of Insurance, 841 Silver Lake Boulevard, Dover, DE 19904, or sent by fax to 302.739.2021 or email to [mitch.crane@state.de.us](mailto:mitch.crane@state.de.us).

## 607 Defensive Driving Course Discount (Automobiles and Motorcycles)

### 1.0 Purpose and Authority

The purpose of this Regulation is to provide a discount applicable to total premiums for persons who voluntarily attend and complete a Defensive Driving Course and to provide criteria for Defensive Driving Courses, Providers and Instructors. This Regulation is adopted pursuant to 18 **Del.C.** §314, and 18 **Del.C.** §2503 and promulgated in accordance with the procedures specified in the Administrative Procedures Act, 29 **Del.C.** Ch. 101.

**2 DE Reg. 989 (12/1/98)**

### 2.0 Definitions

“**Classroom courses**” for the purpose of this regulation means a defensive driving program conducted with students and instructors in a location common to all. These courses may include the use of audio or visual aides or materials.

“**Department**” means the Delaware Insurance Department.

“**On-line courses**” for the purpose of this regulation means instruction provided online or offline through the use of a computer (or digital reader) including the use of CD- ROMS or similar pre-recorded media or websites.

“**Providers**” means corporate sponsor for any course as well as the individual who signs the application for the course.

**9 DE Reg. 1244 (2/1/06)**

### 3.0 Minimum Requirements

A Defensive Driving Course Discount shall be applied to the total premiums for bodily injury liability coverage, property damage liability coverage, and personal injury protection coverage provided:

3.1 The automobile, motor home, or motorcycle is individually owned or jointly owned by husband and wife or by members of the same household and is classified and rated as a private passenger automobile, motor home, or motorcycle; and

3.2 The driver who customarily operates the automobile, motor home, or motorcycle has a certificate certifying voluntary attendance and successful completion within the last 36 months from the date of application of a motor vehicle accident prevention course or motorcycle rider course, as appropriate, which is approved by the Department.

**2 DE Reg 989 (12/1/98)**

**9 DE Reg 1244 (2/1/06)**



# PROPOSED REGULATIONS

## 4.0 Application

- 4.1 A 10% discount shall be applied with respect to the applicable premium(s) for each automobile, motor home, or motorcycle insured under a policy if all operators named on the policy as insureds complete the course. If fewer than all the operators covered as principal or occasional drivers complete the course, then the discount shall be a fraction of 10%. The fraction shall be the number of operators completing the course, divided by the total number operators. The discount shall begin at the inception date of the policy or the first renewal date following application by the insured and shall terminate at the policy ~~expiration~~ renewal date subsequent to the expiration of three years since completion of the course.
- 4.2 An insured who has received a defensive driving discount as outlined in section 4.1 above may take, and must then complete, a refresher defensive driving course ~~within the ninety days prior to the three year expiration date thereof or within two years thereof to receive a 15% discount for an additional three year period as outlined in section 4.1 above. Discounts shall not overlap. The discount may be applied as a multiplier or on an additive basis compatible with the rating system in use by the company. An insured who completes a refresher course within the ninety days prior to the three year expiration date shall receive a 15% discount effective the next renewal date. An insured who completes the refresher course after the expiration of the three year period shall lose the 10% or 15% discount on the expiration date, but shall receive the 15% discount effective on the date of completion of the refresher course, if said completion is within two years of the expiration date.~~

**2 DE Reg. 989 (12/1/98)**

## 5.0 Implementation

- 5.1 The discount may be applied as a multiplier or on an additive basis compatible with the rating system in use by the company.
- 5.2 All courses certified by this Department as of September 1, 2004~~9~~ shall apply for re-certification under the provisions of section 7~~6~~ of this regulation on or before January 1, 2005~~11~~. ~~All courses not certified by this Department prior to September 1, 2004 shall apply for certification under the provisions of section 7 of this regulation.~~

**9 DE Reg. 1244 (2/1/06)**

## 6.0 Certification Criteria for Defensive Driving Programs and Providers

~~Each course provider shall:~~

- 6.1 Each provider of a defensive driving course that seeks certification by the Department shall submit to the Department for approval the following materials:
- 6.1.1 All written instructor materials, testing materials and curricula utilized for classroom instruction.
- 6.1.2 All written materials provided to students in connection with classroom instruction.
- 6.1.3 Identity and qualifications of all instructors.
- 6.1.4 All curricula and testing material used in connection with an on-line course.
- 6.1.5 All materials available to students in connection with an on-line course.
- 6.1.6 All testing and grading criteria used in an on-line course.
- 6.1.7 Identity and qualifications of persons available to answer student questions respecting content and technical support for an on-line course.
- 6.1~~2~~ ~~Submit to the Department for approval written instructor and student materials for any defensive driving course to be offered. On-line courses shall provide free site access to the Department for purposes of verification of compliance. Department Defensive Driving personnel shall have access to audit classroom courses at no cost, but with no credit. The course materials for each defensive driving course shall include, at a minimum, the following:~~
- 6.1~~2~~.1 ~~The definition of Information provided within the course will include, at a minimum, State of Delaware traffic laws, defensive driving and the collision prevention techniques/theory serving as the basis for the course.~~

- 6.42.2 A discussion of vehicle safety devices, including the requirement for and use of seat belts, child restraint devices and their proper use and relationship to a child's age and size, including the correct placement of a child in a vehicle. Vehicle air bag systems ~~shall be explained in detail~~ with special attention to proper passenger seating and proper use of anti-lock braking systems and how they compare to standard braking systems;
- 6.42.3 A discussion of driving situations as they relate to the condition of the driver, driver characteristics, use of alcohol and legal/illegal drugs, including a discussion of Delaware law on drinking and driving and the use of drugs, as well as Delaware "Zero Tolerance" for drivers under 21;
- 6.42.4 A discussion of the factors affecting driving and how they pertain to driving defensively, including, but not limited to:
- 6.42.4.1 The condition of the driver, the vehicle, the road, sun glare, weather, such as rain, fog, sleet, hail and snow, and lighting;
  - 6.42.4.2 Distractions such as use of cellular telephones while driving, adjusting radios, audio and video tapes and compact discs, and DVDs, talking with a passenger, reading, and eating, billboards, and other roadside distractions;
- 6.42.5 A discussion, including specific requirements of Delaware law where applicable, of pertinent driving situations, including stopping distances, proper following distances, proper intersection driving, roundabouts, stopping at railroad crossings, right-of-way and traffic devices, pavement line markings, blind spots, as well as situations involving passing and being passed and ~~how to protect against~~ head-on collisions; and
- 6.42.6 Consideration of the hazards and techniques of various driving situations such, as but not limited to, city, highway, expressway and rural driving, proper use of exit and entrance ramps, driving in parking lots ~~and a discussion of Delaware law concerning school buses.~~
- 6.42.7 A discussion of aggressive driving including but not limited to identifying an aggressive driver and providing appropriate defensive driving techniques. Discussion shall also include ~~identifying how to identify~~ oneself as an aggressive driver and the appropriate manner to respond.
- 6.2.8 Speed limits
- 6.2.9 School buses
- 6.2.10 Emergency vehicle right of way
- 6.2.11 Turn signals
- 6.2.12 Headlight usage
- 6.2.13 A discussion of the 10% and 15% premium discounts as well as the 3 point DMV credit.
- 6.2.14 A discussion of how and when the insured will receive the course completion certificate and how the 3 point credit is provided to the DMV.
- 6.23 Require instructors in classroom courses to present information in a manner consistent with the approved curriculum and otherwise in accordance with the standards set forth herein.
- 6.34 Require on-line courses, as well as other courses available other than in a classroom, to provide toll free telephone lines staffed by knowledgeable customer service personnel who can assist with content based questions during normal business hours which shall appear in bold large lettering on the website prior to the course sign up page at all times during which the course is accessible online. ~~For courses which are accessible offline, the provider must provide toll free telephone access at such times and for such hours as~~ The set hours must shall be approved submitted to the Department for prior approval by the Department.
- 6.45 Require that each student receives a minimum of six hours of classroom or on-line time for the initial course and three hours of classroom or on-line time for the ~~refresher advanced (renewal) courses.~~ Each classroom hour shall consist of not less than an average of 50 minutes of instructional time devoted to the presentation of course curriculum. Online courses shall be structured to provide the same learning time as required for classroom and shall submit to the Department any materials necessary to demonstrate their ability to comply with the minimum time requirement set forth in this section. A minimum of three hours must be devoted to the requirements in 6.1 through 6.2.14.

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# PROPOSED REGULATIONS

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- 6.56 Require that registration shall be completed prior to the beginning of any type of instruction and shall not be counted as instructional time.
- 6.67 Require its instructors in classroom courses to be in the classroom with the students during any and all periods of instructional time.
- 6.78 Require instructors in classroom courses to maintain an atmosphere appropriate for class-work.
- 6.89 Material required to be covered by this Regulation shall be discussed by the instructor in a classroom situation and be included as on screen information in an on-line course. Changes in such material shall be submitted to the Department for pre-approval before utilization in the classroom.
- 6.910 Supply students who complete a defensive driving course and who have presented a valid Delaware driver's license and/or government issued photo identification with a certificate of completion that includes, at a minimum, the name of the student, the date of the class, the name of the defensive driving course provider, with contact information and the course sponsor's authorized signature.
- 6.910.1 All online courses shall be required to obtain the student's driver's license number as part of the student identification information prior to permitting the student access to the course materials and have each student complete an online affidavit with a verification that they are the person who took the course and who is receiving the completion certificate and credit and that they understand that making a false unsworn falsification is a violation of 11 Del.C. §1233 of the Delaware Crimes Code, subjecting a violator to fine, imprisonment, or both.
- ~~6.9-2 No online course provider shall issue a certificate of completion online or offline. All such providers shall appoint an agent or agents in Delaware with an address and telephone number easily accessible by all students who shall personally compare the online identification information with the information on the student's Delaware driver's license and/or government issued photo identification prior to the hand delivery of a certification of completion as described in section 6.9.~~
- 6.101 All courses shall provide all students with a copy of a letter provided by the Department informing the student how to provide comment or file a complaint regarding a defensive driving course. This letter shall be in hard copy form for classroom courses. On-line courses shall place the letter with registration on-line and/or shall provide a hard copy with the certificate of completion.
- 6.142 Notify the Division of Motor Vehicles of each student's successful completion of the course in the manner and form required by the Division. Said notification shall be made within fourteen days of the student's course completion.
- 6.13 Each provider of a defensive driving course shall utilize and maintain either its own proprietary teaching or testing materials, or teaching and testing material properly obtained by a third party under a written license agreement. An on-line course provider may not submit an original course application for a course previously approved by the Department and owned or licensed to another course provider. This section shall not limit the ability of an approved on-line course provider to have independent licensing agreements with other entities.
- 6.14 Each provider of a defensive driving course shall maintain requisite staffing, facilities, and resources necessary to process student payments, provide competent instruction, administer effective testing, issue timely completion certificates and provide proper notice to the Division of Motor Vehicles regarding credit earned from successful completion of the course.

## 7.0 Complaints, Hearings, De-certification, Suspension and Probationary Status

- 7.1 The following procedure shall be followed for the investigation of complaints against course providers and/or instructors certified under section 6.0 of this Regulation (the term "course provider" as used in section 7.0 of this Regulation shall include individual instructors as may be appropriate in the context of this section):
- 7.1.1 Any person who desires to file a complaint against any course provider must do so in writing.
- 7.1.2 The complaint shall state the name of the course provider and the facts that allegedly constitute the basis for the complaint. If either of these elements is missing from the complaint, the Department may, in its discretion, dismiss the complaint without further notice or a hearing.

- 7.1.3 The Department, upon determining that the complaint is complete as provided in section 7.1.2 above, shall, within 15 days of the receipt of the complaint, assign a docket number to the complaint and shall transmit a copy of the complaint by certified mail, receipted email or other receipted delivery service to the course provider named in the complaint at the course provider's address of record in the Department's files. The named course provider may file an answer to the complaint within 20 calendar days with the Department.
- 7.1.4 The Department shall assign a staff member to investigate the complaint and the course provider's response.
- 7.1.5 The staff member, as part of the investigation, shall provide a report of the staff member's findings and recommendations to the Commissioner or ~~his~~ the Commissioner's designee for further action as may be appropriate under this section. The report shall list the evidence reviewed, the witnesses interviewed and cite the law or regulation alleged to have been violated and the facts to support such finding. The report shall contain a written recommendation either to take such action as may be authorized by this section or to dismiss the complaint.
- 7.1.6 A dismissal of the complaint shall be without prejudice and no further action shall be taken by the Department. The Department shall provide a written notification of the Department's action and the basic reason(s) therefor to the complainant and to the course provider.
- 7.2 Upon a recommendation for further action under section 7.1 of this Regulation, the Commissioner shall determine whether the course provider should be warned (with or without conditions), placed on probation (with or without conditions) for not more than 90 days, suspended for a period not to exceed 6 months, or to be permanently decertified for one or more violations of this Regulation. For purposes of the enforcement of this Regulation and the protection of the public, progressive discipline is not required.
- 7.3 Upon making a determination as provided for in section 7.2 of this Regulation, the Department shall provide written notice to the course provider by certified mail, receipted email or other receipted delivery service. A copy of the notice shall be provided to the complainant. The notice shall include the following:
- 7.3.1 a summary of the complaint;
  - 7.3.2 a summary of the information obtained in the investigation;
  - 7.3.3 findings of fact and/or law; and
  - 7.3.4 the sanction to be imposed by the Department.
- 7.4 Upon receipt of the notice provided for in section 7.3 of this Regulation, the course provider shall have the rights to a hearing and appeal as provided for in 18 **Del.C.** §§323-28.
- 7.5 Nothing in section 7.0 of this Regulation shall preclude the course provider from entering into a consent agreement with the Department.
- 7.6 A course provider or instructor who receives a warning or is placed on probation and does not show proof of compliance with the conditions of the warning or probation within the time set forth in the consent agreement or order ~~may~~ shall be subject to suspension or decertification.
- 7.7 In addition to the other provisions of this Regulation, a course provider may be placed on probation, suspended or decertified for any one or more of the following:
- 7.7.1 Falsification of information on, or accompanying, the Application for Certification/Re-certification;
  - 7.7.2 Falsification of, or failure to keep and provide, adequate student records and information as required herein; or
  - 7.7.3 Falsification of, or failure to keep and provide, adequate financial records and documents as required.
  - 7.7.4 Failure to comply with the course content requirements set forth in 6.0 above.

**9 DE Reg. 1244 (2/1/06)****8.0 Certification Process for Defensive Driving Instructors**

- 8.1 Basic Requirements. Each instructor shall:

# PROPOSED REGULATIONS

- 8.1.1 ~~Be at least 18 years of age a licensed driver for a minimum of thirty-six months;~~
- 8.1.2 Be a high school graduate or have a G.E.D.;
- 8.1.3 Provide a certified copy of his or her driving record showing he or she holds a valid driver's license with no more than four (4) points, no suspensions or revocations in the past two years; and
- 8.1.4 Have no felony convictions during the past four years and no criminal convictions evidencing moral turpitude. The Department may require a criminal history background check of all applicants for an instructor's certification.
- 8.1.5 Submit the Application for Certification with documentation showing that the applicant has:
- 8.1.5.1 a minimum of 9 hours of inservice training classes taught by a certified instructor;
- 8.1.5.2 a maximum of 3 of those 9 hours may be satisfied by observing a certified instructor teaching an actual class;
- 8.1.5.3 a minimum of 6 hours of trainee instructor class presentations observed by a provider-certified instructor.
- 8.2 Re-certification. Every ~~two~~ three years each instructor shall:
- 8.2.1 Submit evidence that he or she has taught the certified course a minimum of 12 hours the previous calendar year;
- 8.2.2 Submit evidence that he or she attended an in-service update training seminar, or other training session, as provided by, or specified by, a certified defensive driving course sponsor; and
- 8.2.3 Submit a form as prescribed by the Department certifying that he or she continues to meet the requirements of an instructor as outlined in this Regulation.
- 8.2.4 Submit a certified copy of his or her driving record.
- 8.3 ~~The above-described submissions shall be filed not later than January 31st of the year in which re-certification is desired. The Department shall accept requests for re-certification not earlier than November 15th of the preceding year and make reasonable efforts to act on such requests within 30 days of receipt thereof three months prior to the expiration date of the then-current certification. Instructors whose certification have expired shall not instruct any courses until they have been recertified.~~
- 8.4 The Department may provide procedural guidelines and directives through the use of bulletins and/or circular letters through the Commissioner's website from time to time as may be appropriate.

## 9.0 Course Recertification

- 9.1 Course certifications shall expire three years after approval or of the effective date of this Regulation, whichever date occurs later. Course providers shall submit applications for recertification no earlier than 6 months prior to expiration. Course providers that submit recertification applications no later than ninety days prior to the expiration date shall be deemed approved until the Department has acted on the application. In all other cases course certification shall expire on the three year anniversary date and those courses shall be decertified until such time as approval is granted.

## 910.0 Effective Date

~~This regulation shall become effective on February 11, 2006~~ January 1, 2010 for providers approved prior to September 1, 2009. All courses applying for approval after September 1, 2009 shall meet the requirements of this regulation prior to approval. The procedural guidelines set forth in this regulation shall govern the disposition of any matter pending before the Defensive Driving Credentials Committee as of the effective date of this regulation.

**2 DE Reg. 989 (12/01/98)**

**9 DE Reg. 1244 (2/1/06)**

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## DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

### DIVISION OF AIR AND WASTE MANAGEMENT

Statutory Authority: 7 Delaware Code, Chapter 60 (7 Del.C. Ch. 60)  
7 DE Admin. Code 1138

#### REGISTER NOTICE

SAN # 2009-07

**1. Title of the Regulations:**

Amendment to Regulation 1138 Emission Standards for Hazardous Air Pollutants for Source Categories

**2. Brief Synopsis of the Subject, Substance and Issues:**

Under Section 112(k) of the 1990 Clean Air Act Amendments, Congress mandated that the EPA identify 30 or more hazardous air pollutants (HAPs) that posed the greatest threat to public health in urban areas, to identify the small area sources that emit those pollutants and to develop regulations to reduce the emission of HAPs. In 1999, the EPA identified 33 HAPs that posed the greatest threat to public health and has, since that time, identified over 60 new area source categories for which regulations are being developed.

In July 2008, the EPA promulgated another of these area source category standards that will affect existing and future Delaware sources; the area source standard for plating and polishing operations under 40 CFR Part 63 Subpart WWWWWW.

Delaware is proposing to amend Regulation 1138 by adding a new Section 10 that covers plating and polishing operations. The purpose of this proposed amendment is to provide increased protection for Delaware citizens against a variety of potential adverse health effects linked to a long term exposure to cadmium, chromium, lead, manganese, or nickel compounds. In addition, all of these compounds, except the manganese compounds, are classified as known or probable human carcinogen by the EPA. The proposed amendment will provide greater consistency between Delaware's air toxics standards and the recently promulgated federal standard (40 CFR Part 63 Subpart WWWWWW) on which this proposed amendment is heavily based. In addition, this amendment proposes to include more health protective requirements that currently exist in similar air standards found in Regulation 1138 and other Delaware air regulations.

**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:**

Statements and testimony may be presented either orally or in writing at a public hearing to be held on Tuesday, August 25, 2009 beginning at 6:00 PM in the main conference room at the DNREC Air Quality Management Office, 715 Grantham Lane (first building on right after turning off Rt. 9), New Castle, DE. Interested parties may submit comments in writing to: Jim Snead, DNREC Air Quality Management Section, 715 Grantham Lane, New Castle, DE 19720.

**7. Prepared By:**

James R. Snead

(302) 323-4542

james.snead@state.de.us

June 22, 2009

**1138 Emission Standards for Hazardous Air Pollutants for Source Categories***(Break in Continuity of Sections)***10.0 ~~[Reserved]~~ Emission Standards for Hazardous Air Pollutants for Area Source Plating and Polishing Operations**

40/11/08 11/11/09

**10.1 Applicability.**

10.1.1 The provisions of 10.0 of this regulation apply to each plating and polishing operation that is an area source of hazardous air pollutant (HAP) emissions and meets the criteria in 10.1.1.1 through 10.1.1.3 of this regulation.

10.1.1.1 A plating and polishing operation is any operation that is engaged in one or more of the processes listed in 10.1.1.1.1 through 10.1.1.1.6 of this regulation.

10.1.1.1.1 Non-chromium electroplating.

10.1.1.1.2 Electroless plating.

10.1.1.1.3 Other non-electrolytic metal coating processes, such as chromate conversion coating, nickel acetate sealing, sodium dichromate sealing, and manganese phosphate coating. Thermal spraying is also a non-electrolytic metal coating process.

10.1.1.1.4 Dry mechanical polishing of finished metals or formed products after plating.

10.1.1.1.5 Electroforming.

10.1.1.1.6 Electropolishing.

10.1.1.2 An area source of HAP emissions is a source of hazardous air pollutants (HAPs) that is not a major source of HAP emissions, is not located at a major source of HAP emissions, and is not part of a major source of HAP emissions. A major source of HAP emissions is any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in aggregate, 10 tons per year or more of any HAP or 25 tons per year or more of any combination of HAPs.

10.1.1.3 The plating and polishing operation uses or has emissions of one or more plating and polishing metal HAPs, which means any compound of any of the following metals: cadmium, chromium, lead, manganese, and nickel. With the exception of lead, plating and polishing metal HAPs also include any of these metals in their elemental form.

**10.1.2 [Reserved]**

10.1.3 The provisions of 10.0 of this regulation apply to each new, reconstructed, or existing affected source. The affected source is each process tank or other operation specified in 10.1.3.1 through 10.1.3.3 of this regulation.

10.1.3.1 Each process tank that contains one or more of the plating and polishing metal HAPs and is used for non-chromium electroplating, electroforming, electropolishing, electroless plating, or other non-electrolytic metal coating processes, such as chromate conversion coating, nickel acetate sealing, sodium dichromate sealing, and manganese phosphate coating.

10.1.3.2 Each thermal spraying operation that applies one or more of the plating and polishing metal HAPs.

10.1.3.3 Each dry mechanical polishing operation that emits one or more of the plating and polishing metal HAPs.

10.1.4 An affected source is existing if the owner or operator commenced construction or reconstruction of the affected source on or before March 14, 2008.

- 10.1.5 An affected source is new if the owner or operator commenced construction or reconstruction of the affected source after March 14, 2008.
- 10.1.6 The provisions of 10.0 of this regulation do not apply to any of the process tanks or other operations specified in 10.1.6.1 through 10.1.6.6 of this regulation.
- 10.1.6.1 Process tanks that are subject to the requirements of 6.0 of this regulation.
  - 10.1.6.2 Research and development process tanks.
  - 10.1.6.3 Process tanks that are used strictly for educational purposes.
  - 10.1.6.4 Thermal spraying operations conducted to repair surfaces.
  - 10.1.6.5 Dry mechanical polishing operations conducted to restore the original finish to a surface.
  - 10.1.6.6 Any plating or polishing operation that does not use any material that contains cadmium, chromium, lead, or nickel in amounts of 0.1% or more by weight or does not use any material that contains manganese in amounts of 1.0% or more by weight, as reported on the Material Safety Data Sheet for the material.
- 10.1.7 The owner or operator of an area source subject to 10.0 of this regulation is exempt from the obligation to obtain a Title V operating permit under 7 **DE Admin. Code** 1130 of State of Delaware "Regulations Governing the Control of Air Pollution", if the owner or operator is not required to obtain a Title V operating permit under 3.1 of 7 **DE Admin. Code** 1130 for a reason other than the owner or operator's status as an area source under 10.0. Notwithstanding the previous sentence, the owner or operator shall continue to comply with the provisions of 10.0.

## 10.2 Definitions.

Unless defined below, all terms in 10.0 of this regulation have the meaning given them in the Act or in 3.2 of this regulation.

"**Batch electrolytic process tank**" means a tank used for an electrolytic process in which a part or group of parts, typically mounted on racks or placed in barrels, is immersed in an electrolytic process tank bath as a single unit (i.e., as a batch) for a predetermined period of time, during which none of the parts are removed from the tank and no other parts are added to the tank, and after which the part or parts are removed from the tank as a unit.

"**Bath**" means the liquid contents of a process tank that is used for metal coating operations located at a plating and polishing operation.

"**Capture system**" means the collection of components used to capture gases and fumes released from one or more emission points and then to transport the captured gas stream to a control device. A capture system may include, but is not limited to, the following components as applicable to a given capture system design: duct intake devices, hoods, enclosures, ductwork, dampers, manifolds, plenums, and fans.

"**Cartridge filter**" means a type of control device that uses perforated metal cartridges containing a pleated paper or non-woven fibrous filter media to remove particulate matter (PM) from a gas stream by sieving and other mechanisms. Cartridge filters can be designed with single use cartridges, which are removed and disposed after reaching capacity, or continuous use cartridges, which typically are cleaned by means of a pulse-jet mechanism.

"**Composite mesh pad**" means a type of control device similar to a mesh pad mist eliminator except that the device is designed with multiple pads in series that are woven with layers of material of varying fiber diameters, which produce a coalescing effect on the droplets or PM that impinge upon the pads.

"**Continuous electrolytic process tank**" means a tank used for an electrolytic process and in which a continuous metal strip or other type of continuous substrate is fed into and removed from the tank continuously. This process is also called reel-to-reel electrolytic plating.

"**Control device**" means equipment used to collect or reduce the quantity of a pollutant that is emitted to the air. The control device receives emissions that are transported from the process by the capture system.

"**Control system**" means the combination of a capture system and a control device. The overall control efficiency of any control system is a combination of the ability to capture the air emissions



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(i.e., the capture efficiency) and the control device efficiency. Consequently, it is important to achieve good capture to ensure good overall control efficiency.

**"Cyanide electrolytic process tank"** means an electrolytic process tank used for cyanide electrolytic processes.

**"Cyanide electrolytic process"** means an electrolytic process that uses cyanide as a major bath ingredient, that operates at pH of 12 or more, and that uses or emits any of the plating and polishing metal HAPs. The cyanide in the bath works to dissolve the metal HAP added as a cyanide compound (e.g., cadmium cyanide) and creates free cyanide in solution, which helps to corrode the anode. These tanks are self-regulating to a pH of 12 due to the caustic nature of the cyanide bath chemistry. The cyanide in the bath is a major bath constituent and not an additive; however, the self-regulating chemistry of the bath causes the bath to act as if wetting agents/fume suppressants are being used and to ensure an optimum electroplating process. All cyanide electroplating baths at pH greater than or equal to 12 have cyanide-metal complexes in solution. The metal HAP to be plated is not emitted because it is either bound in the metal-cyanide complex or reduced at the cathode to elemental metal, and plated onto the immersed parts. Cyanide baths are not intentionally operated at pH less 12 since unfavorable electroplating conditions would occur in the tank.

**"Deviation"** means any instance in which an affected source or an owner or operator of an affected source:

- "Fails to meet any requirement or obligation established in 10.0 of this regulation including, but not limited to, any equipment standard (including emission and operating limit), management practice, or operation and maintenance requirement;
- "Fails to meet any term or condition that is adopted to implement an applicable requirement in 10.0 of this regulation and that is included in the operating permit for any affected source required to obtain such a permit; or
- "Fails to meet any equipment standard (including emission and operating limit), management practice, or operation and maintenance requirement in 10.0 of this regulation during startup, shutdown, or malfunction.

**"Dry mechanical polishing"** means a process used for removing defects from or smoothing the surface of finished metals or formed products after electroplating with any of the plating and polishing metal HAPs using hard-faced abrasive wheels or belts and where no liquids or fluids are used to trap the removed metal particles.

**"Electroforming"** means an electrolytic process that uses or emits any of the plating and polishing metal HAPs that is used for fabricating metal parts. This process is essentially the same as electroplating except that the plated substrate or mandrel is removed, leaving only the metal plate. In electroforming, the metal plate is self-supporting and generally thicker than in electroplating.

**"Electroless plating"** means a process that uses or emits any of the plating and polishing metal HAPs in which metallic ions in a tank bath are reduced to form a metal coating at the surface of a catalytic substrate without the use of external electrical energy. Electroless plating is also called non-electrolytic plating.

**"Electrolytic process"** means a process that uses or emits any of the plating and polishing metal HAPs in which metallic ions in a tank bath are reduced to form a metal coating on or to remove a metal coating from the surface of parts or products using electrical energy.

**"Electrolytic process tank"** means a process tank in which electrolytic processes occur. This term does not include tanks containing solutions that are used to rinse or wash parts prior to placing the parts in the electrolytic process tank or subsequent to removing the parts from the electrolytic process tank. This term also does not include thermal spraying or dry mechanical polishing.

**"Electroplating"** means an electrolytic process that uses or emits any of the plating and polishing metal HAPs in which metal ions in a tank bath are reduced onto the surface of the work piece (the cathode) via an electrical current. The metal ions in the tank bath are usually replenished by the dissolution of metal from solid metal anodes fabricated of the same metal being plated, or by direct

replenishment of the tank bath with metal salts or oxides. Electroplating is also called electrolytic plating.

"**Electropolishing**" means an electrolytic process that uses or emits any of the plating and polishing metal HAPs in which a work piece is attached to an anode immersed in a bath, and the metal substrate is dissolved electrolytically, thereby removing the surface contaminant. Electropolishing is also called electrolytic polishing.

"**Fabric filter**" means a type of control device used for collecting PM by filtering a gas stream through a filter or filter media. A fabric filter is also known as a baghouse.

"**Flash or short-term electrolytic process tank**" means an electrolytic process tank in which flash or short-term electroplating occurs.

"**Flash or short-term electroplating**" means an electrolytic process that uses or emits any of the plating and polishing metal HAPs and that is used no more than three cumulative minutes per hour or no more than one cumulative hour per day.

"**HAP**" means any air pollutant listed in or pursuant to Section 112(b) of the Act. HAPs are also called air toxics. The five plating and polishing metal HAPs are listed in Section 112(b).

"**High efficiency particulate air (HEPA) filter**" means a type of control device that uses a filter composed of a mat of randomly arranged fibers and is designed to remove at least 99.97% of airborne particles that are 0.3 micrometers or larger in diameter.

"**Mesh pad mist eliminator**" means a type of control device that uses layers of interlocked filaments densely packed between two supporting grids to remove liquid droplets and PM from the gas stream through inertial impaction and direct interception.

"**Metal coating operation**" means any process performed either in a process tank that contains liquids or as part of a spraying operation that applies one or more plating and polishing metal HAPs to parts or products used in manufacturing. These processes include, but are not limited to, non-chromium electroplating, electroforming, electropolishing, other non-electrolytic metal coating processes, such as chromate conversion coating, nickel acetate sealing, sodium dichromate sealing, and manganese phosphate coating, and thermal spraying.

"**Non-chromium electroplating**" means an electroplating process that uses or emits any of the plating and polishing metal HAPs that is not subject to the provisions of 6.0 of this regulation.

"**Non-cyanide electrolytic process**" means an electrolytic process that uses or emits any of the plating and polishing metal HAPs performed without cyanide in the tank. This process does not use cyanide in the process tank and operate at pH values less than 12. This process uses electricity and adds or removes metals such as plating and polishing metal HAPs from parts or products used in manufacturing.

"**Non-cyanide electrolytic process tank**" means a tank used for non-cyanide electrolytic processes.

"**Packed-bed scrubber**" means a type of control device that includes a single or double packed-bed that contains packing media on which PM and droplets impinge and are removed from the gas stream. The packed-bed section of the scrubber is followed by a mist eliminator to remove any water entrained from the packed-bed section.

"**Permanent thermal spraying**" means a thermal spraying operation that is not a temporary thermal spraying operation.

"**Plating and polishing operation**" means an operation that uses or emits any of the plating and polishing metal HAPs and is engaged in one or more of the following:

- "Non-chromium electroplating;
- "Electroforming;
- "Electropolishing;
- "Electroless plating;
- "Other non-electrolytic metal coating processes, such as chromate conversion coating, nickel acetate sealing, sodium dichromate sealing, and manganese phosphate coating;
- "Thermal spraying; or

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• "Dry mechanical polishing of finished metals or formed products after plating."  
"Plating and polishing metal HAPs" means compounds of any of the following metals: cadmium, chromium, lead, manganese, and nickel, or any of these metals in the elemental form, with the exception of lead. Any material that does not contain cadmium, chromium, lead, or nickel in amounts greater than or equal to 0.1% by weight and does not contain manganese in amounts greater than or equal to 1.0% by weight, as reported on the Material Safety Data Sheet for the material, is not considered to be a plating and polishing metal HAP.

"PM" means solids or particulate matter that is emitted into the air.

"Research and development process tank" means any process tank that is used for conducting research and development for new processes and products and is not used to manufacture products for commercial sale, except in a de minimis manner.

"Surface cover" means a solid structure or combination of structures, made of an impervious material that is designed to cover at least 75% of the open surface area of a continuous electrolytic process tank.

"Tank cover" means a solid structure made of an impervious material that is designed to cover the entire open surface of a batch electrolytic process tank or a flash or short-term electrolytic process tank.

"Temporary thermal spraying" means a thermal spraying operation that uses or emits any of the plating and polishing metal HAPs that lasts no more than one hour in duration during any one day, and that is conducted in situ. Thermal spraying that is conducted in a dedicated thermal spray booth or structure is not considered to be temporary thermal spraying.

"Thermal spraying" means a process that uses or emits any of the plating and polishing metal HAPs in which a metallic coating is applied by projecting molten or semi-molten metal particles onto a substrate. Commonly used thermal spraying methods include high velocity oxy-fuel spraying, flame spraying, electric arc spraying, plasma arc spraying, and detonation gun spraying. This process is also called metal spraying or flame spraying.

"Water curtain" means a type of control device that draws a gas stream through a continuous curtain of moving water to collect and remove suspended PM from the gas stream.

"Wetting agent/fume suppressant" means any chemical agent that reduces or suppresses fumes or mists from an electrolytic process tank by reducing the surface tension of the tank bath.

## 10.3 Compliance dates.

10.3.1 The owner or operator of an existing affected source shall be in compliance with the applicable provisions of 10.0 of this regulation by no later than July 1, 2010.

10.3.2 The owner or operator of a new or reconstructed affected source that has an initial startup on or before July 1, 2008 shall be in compliance with the applicable provisions of 10.0 of this regulation by no later than November 11, 2009.

10.3.3 The owner or operator of a new or reconstructed affected source that has an initial startup after July 1, 2008 shall be in compliance with the applicable provisions of 10.0 of this regulation immediately upon startup or November 11, 2009, whichever is later.

## 10.4 Standards.

10.4.1 The owner or operator of an affected non-cyanide electrolytic process tank shall be in compliance with the requirements in 10.4.1.1, 10.4.1.2, or 10.4.1.3 of this regulation.

10.4.1.1 The owner or operator shall use a wetting agent/fume suppressant in the tank bath of the affected process tank in compliance with the requirements in 10.4.1.1.1 through 10.4.1.1.3 of this regulation.

10.4.1.1.1 The owner or operator shall initially add the wetting agent/fume suppressant to the tank bath according to the manufacturer's specifications and instructions.

10.4.1.1.2 When replenishing the tank bath, the owner or operator shall add the wetting agent/fume suppressant to the other bath chemistry ingredients in the same proportion as in the original make-up of the tank bath.

- 10.4.1.1.3 If the wetting agent/fume suppressant is incorporated into the other bath chemistry ingredients, it is not necessary to add additional wetting agent/fume suppressant to the tank bath to comply with 10.0 of this regulation.
- 10.4.1.2 The owner or operator shall operate a capture system that collects the emissions from the affected process tank and transports the emissions to a composite mesh pad, packed-bed scrubber, or mesh pad mist eliminator in compliance with the requirements in 10.4.1.2.1 and 10.4.1.2.2 of this regulation.
  - 10.4.1.2.1 The owner or operator shall operate the capture system and control device according to the manufacturer's specifications and operating instructions.
  - 10.4.1.2.2 The owner or operator shall, at all times, keep the manufacturer's specifications and operating instructions in a location at the facility where they can be easily accessed by the operators.
- 10.4.1.3 The owner or operator shall cover the affected process tank surface in compliance with the requirements in 10.4.1.3.1 or 10.4.1.3.2 of this regulation.
  - 10.4.1.3.1 For batch electrolytic process tanks, the owner or operator shall use a tank cover over all of the effective surface area of the process tank for at least 95% of the electrolytic process operating time.
  - 10.4.1.3.2 For continuous electrolytic process tanks, the owner or operator shall use a surface cover over at least 75% of the surface area of the process tank, whenever the electrolytic process tank is in operation.
- 10.4.2 The owner or operator of an affected flash or short-term electrolytic process tank shall be in compliance with the requirements in 10.4.2.1 or 10.4.2.2 of this regulation.
  - 10.4.2.1 The owner or operator shall limit flash or short-term electroplating to no more than one cumulative hour per day or three cumulative minutes per hour of electroplating time.
  - 10.4.2.2 The owner or operator shall use a tank cover over all of the effective surface area of the process tank for at least 95% of the electrolytic process operating time.
- 10.4.3 The owner or operator of an affected process tank that is used both for flash or short-term electroplating and for electrolytic processing of longer duration (i.e., processing that does not meet the definition of flash or short-term electroplating in 10.2 of this regulation) shall be in compliance with the requirements in 10.4.1 or 10.4.2 of this regulation, whichever applies to the process operation.
- 10.4.4 The owner or operator of an affected cyanide electrolytic process tank shall measure and record the pH of the tank bath upon startup. No additional pH measurements are required.
- 10.4.5 The owner or operator of an affected dry mechanical polishing operation shall operate a capture system that collects particulate matter (PM) emissions from the affected dry mechanical polishing operation and transports the emissions to a cartridge, fabric, or high efficiency particulate air (HEPA) filter in compliance with the requirements in 10.4.5.1 and 10.4.5.2 of this regulation.
  - 10.4.5.1 The owner or operator shall operate the capture system and control device according to the manufacturer's specifications and operating instructions.
  - 10.4.5.2 The owner or operator shall, at all times, keep the manufacturer's specifications and operating instructions in a location at the facility where they can be easily accessed by the operators.
- 10.4.6 The owner or operator of an affected thermal spraying operation shall be in compliance with the applicable requirements in 10.4.6.1 through 10.4.6.3 of this regulation.
  - 10.4.6.1 For existing permanent thermal spraying operations, the owner or operator shall operate a capture system that collects PM emissions from the affected thermal spraying operation and transports the PM emissions to a water curtain, fabric filter, or HEPA filter in compliance with the requirements in 10.4.6.1.1 and 10.4.6.1.2 of this regulation.
    - 10.4.6.1.1 The owner or operator shall operate the capture system and control device according to the manufacturer's specifications and operating instructions.

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- 10.4.6.1.2 The owner or operator shall, at all times, keep the manufacturer's specifications and operating instructions in a location at the facility where they can be easily accessed by the operators.
- 10.4.6.2 For new or reconstructed permanent thermal spraying operations, the owner or operator shall operate a capture system that collects PM emissions from the affected thermal spraying operation and transports the PM emissions to a fabric or HEPA filter in compliance with the requirements in 10.4.6.2.1 and 10.4.6.2.2 of this regulation.
- 10.4.6.2.1 The owner or operator shall operate the capture system and control device according to the manufacturer's specifications and operating instructions.
- 10.4.6.2.2 The owner or operator shall, at all times, keep the manufacturer's specifications and operating instructions in a location at the facility where they can be easily accessed by the operators.
- 10.4.6.3 For temporary thermal spraying operations, the owner or operator shall be in compliance with the requirements in 10.4.6.3.1 and 10.4.6.3.2 of this regulation.
- 10.4.6.3.1 The owner or operator shall limit temporary thermal spraying operations to no more than one hour during any one day.
- 10.4.6.3.2 The owner or operator shall document the amount of time the thermal spraying operations occur during each day and where the thermal spraying is conducted.
- 10.4.7 Except for the owner or operator of a dry mechanical polishing operation, the owner or operator of an affected source subject to the provisions of 10.0 of this regulation shall implement the applicable management practices in 10.4.7.1 through 10.4.7.13 of this regulation.
- 10.4.7.1 Minimize tank bath agitation when removing any parts from the process tank, as practicable, except when necessary to meet part quality requirements.
- 10.4.7.2 Maximize the draining of tank bath solution back into the process tank by extending drip time when removing parts from the process tank, by using drain boards or drip shields, or by withdrawing parts slowly from the process tank, as practicable.
- 10.4.7.3 Optimize the design of barrels, racks, and parts to minimize drag out of tank bath solution (such as by using slotted barrels and tilted racks or by designing parts with flow-through holes to allow the tank bath solution to drip back into the tank), as practicable.
- 10.4.7.4 Use tank covers, if already owned and available at the facility, whenever practicable.
- 10.4.7.5 Minimize or reduce heating of tank baths, as practicable (e.g., when doing so would not interrupt production or adversely affect part quality).
- 10.4.7.6 Perform regular repair, maintenance, and preventive maintenance of racks, barrels, and other equipment associated with affected sources, as practicable.
- 10.4.7.7 Minimize tank bath contamination through the prevention or quick recovery of dropped parts, the use of distilled/de-ionized water, the use of water filtration, the pre-cleaning of parts to be plated, and the thorough rinsing of pre-treated parts to be plated, as practicable.
- 10.4.7.8 Maintain quality control of chemicals, as practicable.
- 10.4.7.9 Maintain quality control of chemical and other bath ingredient concentrations in the process tanks, as practicable.
- 10.4.7.10 Perform general good housekeeping through regular sweeping or vacuuming and periodic wash downs, as practicable.
- 10.4.7.11 Minimize spills and overflow of process tanks, as practicable.
- 10.4.7.12 Use a squeegee system in continuous or reel-to-reel process tanks, as practicable.
- 10.4.7.13 Perform regular inspections to identify leaks and opportunities for pollution prevention.
- 10.4.8 The owner or operator of an affected source, who uses a control system to comply with 10.4.1.2, 10.4.5, 10.4.6.1, or 10.4.6.2 of this regulation, shall develop and implement a written startup, shutdown, and malfunction plan that describes, in detail, procedures for operating and maintaining the affected source during periods of startup, shutdown, and malfunction and a program of

corrective actions for malfunctioning process, control device, and monitoring equipment used to comply with 10.0 of this regulation. At a minimum, this plan shall include the following:

- 10.4.8.1 The specifications for each control device including minimum and maximum differential pressure drop readings that define the proper operating ranges.
- 10.4.8.2 The monitoring frequency for each control device.
- 10.4.8.3 The scheduled dates for performing inspections on each control device.
- 10.4.8.4 The routine maintenance schedule and procedures for each control device developed in accordance with the manufacturer's recommendations.
- 10.4.8.5 The operational plan that describes, in detail, a program of corrective actions to be taken when monitoring results are outside proper operating ranges.
- 10.4.8.6 The required recordkeeping requirements associated with the startup, shutdown, and malfunction plan.
- 10.4.8.7 The schedule for review and update of the startup, shutdown, and malfunction plan.

## 10.5 Monitoring requirements.

The owner or operator of an affected source, who uses a control system to comply with 10.4.1.2, 10.4.5, 10.4.6.1, or 10.4.6.2 of this regulation, shall install, maintain, and operate a pressure drop monitoring device to measure the differential pressure drop across each control device during all times that the affected process tank or other operation is operating. The differential pressure drop shall be recorded at least once per day. If a differential pressure drop is observed outside of the operating range specified by the control device manufacturer, the owner or operator shall take immediate corrective action. The owner or operator shall also record the incident and the corrective actions taken.

## 10.6 Initial compliance demonstration.

To demonstrate initial compliance, the owner or operator of an affected source subject to the provisions of 10.0 of this regulation shall be in compliance with the applicable requirements in 10.6.1 through 10.6.12 of this regulation.

10.6.1 The owner or operator of an affected non-cyanide electrolytic process tank, who uses a wetting agent/fume suppressant to comply with 10.4.1.1 of this regulation, shall demonstrate initial compliance according to 10.6.1.1 through 10.6.1.4 of this regulation.

10.6.1.1 The owner or operator shall add the wetting agent/fume suppressant to the tank bath according to the manufacturer's specifications and instructions.

10.6.1.2 The owner or operator shall state in the notification of compliance status that the wetting agent/fume suppressant has been added to the tank bath according to the manufacturer's specifications and instructions.

10.6.1.3 The owner or operator shall implement the applicable management practices in 10.4.7 of this regulation.

10.6.1.4 The owner or operator shall state in the notification of compliance status that the applicable management practices in 10.4.7 of this regulation have been implemented, as practicable.

10.6.2 The owner or operator of an affected non-cyanide electrolytic process tank, who uses a control system to comply with 10.4.1.2 of this regulation, shall demonstrate initial compliance according to 10.6.2.1 through 10.6.2.6 of this regulation.

10.6.2.1 The owner or operator shall install a control system designed to collect emissions from the affected process tank and transport the emissions to a composite mesh pad, packed-bed scrubber, or mesh pad mist eliminator.

10.6.2.2 The owner or operator shall, at all times, follow the manufacturer's specifications and operating instructions for the control system.

10.6.2.3 The owner or operator shall, at all times, keep the manufacturer's operating instructions in a location at the facility where they can be easily accessed by the operators.

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- 10.6.2.4 The owner or operator shall state in the notification of compliance status that a control system has been installed and operated according to the manufacturer's specifications and operating instructions.
- 10.6.2.5 The owner or operator shall implement the applicable management practices in 10.4.7 of this regulation.
- 10.6.2.6 The owner or operator shall state in the notification of compliance status that the applicable management practices in 10.4.7 of this regulation have been implemented, as practicable.
- 10.6.3 The owner or operator of an affected batch electrolytic process tank, who uses a tank cover to comply with 10.4.1.3.1 of this regulation, shall demonstrate initial compliance according to 10.6.3.1 through 10.6.3.4 of this regulation.

  - 10.6.3.1 The owner or operator shall install a tank cover on the process tank.
  - 10.6.3.2 The owner or operator shall state in the notification of compliance status that the process tank is operated with the tank cover in place at least 95% of the electrolytic process operating time.
  - 10.6.3.3 The owner or operator shall implement the applicable management practices in 10.4.7 of this regulation.
  - 10.6.3.4 The owner or operator shall state in the notification of compliance status that the applicable management practices in 10.4.7 of this regulation have been implemented, as practicable.
- 10.6.4 The owner or operator of an affected continuous electrolytic process tank, who uses a surface cover to comply with 10.4.1.3.2 of this regulation, shall demonstrate initial compliance according to 10.6.4.1 through 10.6.4.4 of this regulation.

  - 10.6.4.1 The owner or operator shall install a surface cover on the process tank.
  - 10.6.4.2 The owner or operator shall state in the notification of compliance status that the process tank is operated with a surface cover that covers at least 75% of the surface area of the process tank, whenever the electrolytic process tank is in operation.
  - 10.6.4.3 The owner or operator shall implement the applicable management practices in 10.4.7 of this regulation.
  - 10.6.4.4 The owner or operator shall state in the notification of compliance status that the applicable management practices in 10.4.7 of this regulation have been implemented, as practicable.
- 10.6.5 The owner or operator of an affected flash or short-term electrolytic process tank, who limits the electroplating time to comply with 10.4.2.1 of this regulation, shall demonstrate initial compliance according to 10.6.5.1 through 10.6.5.3 of this regulation.

  - 10.6.5.1 The owner or operator shall state in the notification of compliance status that the flash or short-term electroplating is limited to no more than one cumulative hour per day or three cumulative minutes per hour of electroplating time.
  - 10.6.5.2 The owner or operator shall implement the applicable management practices in 10.4.7 of this regulation.
  - 10.6.5.3 The owner or operator shall state in the notification of compliance status that the applicable management practices in 10.4.7 of this regulation have been implemented, as practicable.
- 10.6.6 The owner or operator of an affected flash or short-term electrolytic process tank, who uses a tank cover to comply with 10.4.2.2 of this regulation, shall demonstrate initial compliance according to 10.6.6.1 through 10.6.6.4 of this regulation.

  - 10.6.6.1 The owner or operator shall install a tank cover on the process tank.
  - 10.6.6.2 The owner or operator shall state in the notification of compliance status that the process tank is operated with the tank cover in place at least 95% of the electrolytic process operating time.

- 10.6.6.3 The owner or operator shall implement the applicable management practices in 10.4.7 of this regulation.
- 10.6.6.4 The owner or operator shall state in the notification of compliance status that the applicable management practices in 10.4.7 of this regulation have been implemented, as practicable.
- 10.6.7 The owner or operator of an affected cyanide electrolytic process tank shall demonstrate initial compliance according to 10.6.7.1 through 10.6.7.3 of this regulation.
- 10.6.7.1 The owner or operator shall state in the notification of compliance status that the pH of the tank bath is measured upon startup according to the requirements of 10.4.4 of this regulation.
- 10.6.7.2 The owner or operator shall implement the applicable management practices in 10.4.7 of this regulation.
- 10.6.7.3 The owner or operator shall state in the notification of compliance status that the applicable management practices in 10.4.7 of this regulation have been implemented, as practicable.
- 10.6.8 The owner or operator of an affected dry mechanical polishing operation shall demonstrate initial compliance according to 10.6.8.1 through 10.6.8.4 of this regulation.
- 10.6.8.1 The owner or operator shall install a control system that is designed to collect PM emissions from the dry mechanical polishing operation and transport the PM emissions to a cartridge, fabric, or HEPA filter.
- 10.6.8.2 The owner or operator, at all times, shall follow the manufacturer's specifications and operating instructions for the control system.
- 10.6.8.3 The owner or operator shall, at all times, keep the manufacturer's specifications and operating instructions in a location at the facility where they can be easily accessed by the operators.
- 10.6.8.4 The owner or operator shall state in the notification of compliance status that a control system has been installed and operated according to the manufacturer's specifications and operating instructions.
- 10.6.9 The owner or operator of an existing affected permanent thermal spraying operation shall demonstrate initial compliance according to 10.6.9.1 through 10.6.9.6 of this regulation.
- 10.6.9.1 The owner or operator shall install a control system that is designed to collect PM emissions from the thermal spraying operation and transport the PM emissions to a water curtain, fabric filter, or HEPA filter.
- 10.6.9.2 The owner or operator shall, at all times, follow the manufacturer's specifications and operating instructions for the control system.
- 10.6.9.3 The owner or operator shall, at all times, keep the manufacturer's specifications and operating instructions in a location at the facility where they can be easily accessed by the operators.
- 10.6.9.4 The owner or operator shall state in the notification of compliance status that a control system has been installed and operated according to the manufacturer's specifications and operating instructions.
- 10.6.9.5 The owner or operator shall implement the applicable management practices in 10.4.7 of this regulation.
- 10.6.9.6 The owner or operator shall state in the notification of compliance status that the applicable management practices in 10.4.7 of this regulation have been implemented, as practicable.
- 10.6.10 The owner or operator of a new or reconstructed affected permanent thermal spraying operation shall demonstrate initial compliance according to 10.6.10.1 through 10.6.10.6 of this regulation.
- 10.6.10.1 The owner or operator shall install a control system that is designed to collect PM emissions from the thermal spraying operation and transport the PM emissions to a fabric or HEPA filter.



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- 10.6.10.2 The owner or operator shall, at all times, follow the manufacturer's specifications and operating instructions for the control system.
  - 10.6.10.3 The owner or operator shall, at all times, keep the manufacturer's specifications and operating instructions in a location at the facility where they can be easily accessed by the operators.
  - 10.6.10.4 The owner or operator shall state in the notification of compliance status that a control system has been installed and operated according to the manufacturer's specifications and operating instructions.
  - 10.6.10.5 The owner or operator shall implement the applicable management practices in 10.4.7 of this regulation.
  - 10.6.10.6 The owner or operator shall state in the notification of compliance status that the applicable management practices in 10.4.7 of this regulation have been implemented, as practicable.
- 10.6.11 The owner or operator of an affected temporary thermal spraying operation shall demonstrate initial compliance according to 10.6.11.1 through 10.6.11.3 of this regulation.
- 10.6.11.1 The owner or operator shall state in the notification of compliance status that the temporary thermal spraying operation is limited to no more than one hour during any one day.
  - 10.6.11.2 The owner or operator shall implement the applicable management practices in 10.4.7 of this regulation.
  - 10.6.11.3 The owner or operator shall state in the notification of compliance status that the applicable management practices in 10.4.7 of this regulation have been implemented, as practicable.
- 10.6.12 Except as otherwise provided for in 10.6.1 through 10.6.11 of this regulation, the owner or operator of an affected source subject to the provisions of 10.0 of this regulation shall demonstrate initial compliance according to 10.6.12.1 through 10.6.12.2 of this regulation.
- 10.6.12.1 The owner or operator shall implement the applicable management practices in 10.4.7 of this regulation.
  - 10.6.12.2 The owner or operator shall state in the notification of compliance status that the applicable management practices in 10.4.7 of this regulation have been implemented, as practicable.
- 10.7 Ongoing compliance demonstration.  
To demonstrate continuous compliance, the owner or operator of an affected source subject to the provisions of 10.0 of this regulation shall be in compliance with the applicable requirements in 10.7.1 through 10.7.13 of this regulation.
- 10.7.1 The owner or operator shall always operate and maintain the affected source, including the control system, according to the manufacturer's specifications and operating instructions.
  - 10.7.2 The owner or operator shall prepare an annual compliance certification report according to the requirements in 10.9 of this regulation and keep the annual compliance certification reports in a readily-accessible location for inspector review.
  - 10.7.3 The owner or operator of an affected non-cyanide electrolytic process tank, who uses a wetting agent/fume suppressant to comply with 10.4.1.1 of this regulation, shall demonstrate continuous compliance according to 10.7.3.1 through 10.7.3.5 of this regulation.
    - 10.7.3.1 The owner or operator shall record that the wetting agent/fume suppressant was added to the tank bath in the original make-up of the process tank.
    - 10.7.3.2 For process tanks where the wetting agent/fume suppressant is a separately purchased ingredient from the other bath chemistry ingredients, the owner or operator shall demonstrate continuous compliance according to 10.7.3.2.1 and 10.7.3.2.2 of this regulation.

- 10.7.3.2.1 When replenishing the tank bath, the owner or operator shall add the wetting agent/fume suppressant to the other bath chemistry ingredients in the same proportion as in the original make-up of the tank bath.
- 10.7.3.2.2 The owner or operator shall record each addition of the wetting agent/fume suppressant to the tank bath.
- 10.7.3.3 The owner or operator shall state in the annual compliance certification report that the wetting agent/fume suppressant has been added to the tank bath according to the manufacturer's specifications and instructions.
- 10.7.3.4 The owner or operator shall implement the applicable management practices in 10.4.7 of this regulation, whenever the process tank is in operation.
- 10.7.3.5 The owner or operator shall state in the annual compliance certification report that the applicable management practices in 10.4.7 of this regulation have been implemented, as practicable.
- 10.7.4 The owner or operator of an affected non-cyanide electrolytic process tank, who uses a control system to comply with 10.4.1.2 of this regulation, shall demonstrate continuous compliance according to 10.7.4.1 through 10.7.4.7 of this regulation.
  - 10.7.4.1 The owner or operator shall operate and maintain the control system according to the manufacturer's specifications and operating instructions.
  - 10.7.4.2 The owner or operator shall, at all times, keep the manufacturer's specifications and operating instructions in a location at the facility where they can be easily accessed by the operators.
  - 10.7.4.3 Following any malfunction or failure of the capture system or control device to operate properly, the owner or operator shall take immediate corrective action to return the equipment to proper operation according to the manufacturer's specifications and operating instructions.
  - 10.7.4.4 The owner or operator shall record the results of all control system inspections, any deviations from proper operation, and any corrective action taken.
  - 10.7.4.5 The owner or operator shall state in the annual compliance certification report that the control system has been operated and maintained according to the manufacturer's specifications and operating instructions.
  - 10.7.4.6 The owner or operator shall implement the applicable management practices in 10.4.7 of this regulation, whenever the process tank is in operation.
  - 10.7.4.7 The owner or operator shall state in the annual compliance certification report that the applicable management practices in 10.4.7 of this regulation have been implemented, as practicable.
- 10.7.5 The owner or operator of an affected batch electrolytic process tank, who uses a tank cover to comply with 10.4.1.3.1 of this regulation, shall demonstrate continuous compliance according to 10.7.5.1 through 10.7.5.5 of this regulation.
  - 10.7.5.1 The owner or operator shall operate the process tank with the tank cover in place at least 95% of the electrolytic process operating time.
  - 10.7.5.2 The owner or operator shall record the times that the process tank is operated and the times that the tank cover is in place on a daily basis.
  - 10.7.5.3 The owner or operator shall state in the annual compliance certification report that the process tank has been operated with the tank cover in place at least 95% of the electrolytic process operating time.
  - 10.7.5.4 The owner or operator shall implement the applicable management practices in 10.4.7 of this regulation, whenever the process tank is in operation.
  - 10.7.5.5 The owner or operator shall state in the annual compliance certification report that the applicable management practices in 10.4.7 of this regulation have been implemented, as practicable.

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- 10.7.6 The owner or operator of an affected continuous electrolytic process tank, who uses a surface cover to comply with 10.4.1.3.2 of this regulation, shall demonstrate continuous compliance according to 10.7.6.1 and 10.7.6.4 of this regulation.
- 10.7.6.1 The owner or operator shall operate the process tank with a surface cover that covers at least 75% of the surface area of the process tank, whenever the electrolytic process tank is in operation.
  - 10.7.6.2 The owner or operator shall state in the annual compliance certification report that the process tank has been operated with a surface cover that covers at least 75% of the surface area of the process tank, whenever the electrolytic process tank is in operation.
  - 10.7.6.3 The owner or operator shall implement the applicable management practices in 10.4.7 of this regulation, whenever the process tank is in operation.
  - 10.7.6.4 The owner or operator shall state in the annual compliance certification report that the applicable management practices in 10.4.7 of this regulation have been implemented, as practicable.
- 10.7.7 The owner or operator of an affected flash or short-term electrolytic process tank, who limits the electroplating time to comply with 10.4.2.1 of this regulation, shall demonstrate continuous compliance according to 10.7.7.1 through 10.7.7.5 of this regulation.
- 10.7.7.1 The owner or operator shall limit flash or short-term electroplating to no more than one cumulative hour per day or three cumulative minutes per hour of electroplating time.
  - 10.7.7.2 The owner or operator shall record the times that the process tank is operated each day.
  - 10.7.7.3 The owner or operator shall state in the annual compliance certification report that flash or short-term electroplating has been limited to no more than one cumulative hour per day or three cumulative minutes per hour of electroplating time.
  - 10.7.7.4 The owner or operator shall implement the applicable management practices in 10.4.7 of this regulation, whenever the process tank is in operation.
  - 10.7.7.5 The owner or operator shall state in the annual compliance certification report that the applicable management practices in 10.4.7 of this regulation have been implemented, as practicable.
- 10.7.8 The owner or operator of an affected flash or short-term electrolytic process tank, who uses a tank cover to comply with 10.4.2.2 of this regulation, shall demonstrate continuous compliance according to 10.7.8.1 through 10.7.8.5 of this regulation.
- 10.7.8.1 The owner or operator shall operate the process tank with the tank cover in place at least 95% of the electrolytic process operating time.
  - 10.7.8.2 The owner or operator shall record the times that the process tank is operated and the times that the tank cover is in place on a daily basis.
  - 10.7.8.3 The owner or operator shall state in the annual compliance certification report that the process tank has been operated with the tank cover in place at least 95% of the electrolytic process operating time.
  - 10.7.8.4 The owner or operator shall implement the applicable management practices in 10.4.7 of this regulation, whenever the process tank is in operation.
  - 10.7.8.5 The owner or operator shall state in the annual compliance certification report that the applicable management practices in 10.4.7 of this regulation have been implemented, as practicable.
- 10.7.9 The owner or operator of an affected cyanide electrolytic process tank shall demonstrate continuous compliance according to 10.7.9.1 and 10.7.9.4 of this regulation.
- 10.7.9.1 The owner or operator shall measure and record the pH of the tank bath upon startup.
  - 10.7.9.2 The owner or operator shall state in the annual compliance certification report that the pH has been measured upon startup.
  - 10.7.9.3 The owner or operator shall implement the applicable management practices in 10.4.7 of this regulation, whenever the process tank is in operation.

- 10.7.9.4 The owner or operator shall state in the annual compliance certification report that the applicable management practices in 10.4.7 of this regulation have been implemented, as practicable.
- 10.7.10 The owner or operator of an affected dry mechanical polishing operation shall demonstrate continuous compliance according to 10.7.10.1 through 10.7.10.5 of this regulation.
- 10.7.10.1 The owner or operator shall operate and maintain the control system according to the manufacturer's specifications and operating instructions.
- 10.7.10.2 The owner or operator shall, at all times, keep the manufacturer's specifications and operating instructions in a location at the facility where they can be easily accessed by the operators.
- 10.7.10.3 Following any malfunction or failure of the capture system or control device to operate properly, the owner or operator shall take immediate corrective action to return the equipment to proper operation according to the manufacturer's specifications and operating instructions.
- 10.7.10.4 The owner or operator shall record the results of all control system inspections, any deviations from proper operation, and any corrective action taken.
- 10.7.10.5 The owner or operator shall state in the compliance certification report that the control system has been operated and maintained according to the manufacturer's specifications and operating instructions.
- 10.7.11 The owner or operator of an affected permanent thermal spraying operation shall demonstrate continuous compliance according to 10.7.11.1 through 10.7.11.7 of this regulation.
- 10.7.11.1 The owner or operator shall operate and maintain the control system according to the manufacturer's specifications and operating instructions.
- 10.7.11.2 The owner or operator shall, at all times, keep the manufacturer's specifications and operating instructions in a location at the facility where they can be easily accessed by the operators.
- 10.7.11.3 Following any malfunction or failure of the capture system or control device to operate properly, the owner or operator shall take immediate corrective action to return the equipment to proper operation according to the manufacturer's specifications and operating instructions.
- 10.7.11.4 The owner or operator shall record the results of all control system inspections, any deviations from proper operation, and any corrective action taken.
- 10.7.11.5 The owner or operator shall state in the compliance certification report that the control system has been operated and maintained according to the manufacturer's specifications and operating instructions.
- 10.7.11.6 The owner or operator shall implement the applicable management practices in 10.4.7 of this regulation, whenever conducting thermal spraying operations.
- 10.7.11.7 The owner or operator shall state in the annual compliance certification report that the applicable management practices in 10.4.7 of this regulation have been implemented, as practicable.
- 10.7.12 The owner or operator of an affected temporary thermal spraying operation shall demonstrate continuous compliance according to 10.7.12.1 through 10.7.12.3 of this regulation.
- 10.7.12.1 The owner or operator shall state in the notification of compliance status that the temporary thermal spraying operation has been limited to no more than one hour during any one day.
- 10.7.12.2 The owner or operator shall implement the applicable management practices in 10.4.7 of this regulation, whenever conducting thermal spraying operations.
- 10.7.12.3 The owner or operator shall state in the annual compliance certification report that the applicable management practices in 10.4.7 of this regulation have been implemented, as practicable.

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10.7.13 Except as otherwise provided for in 10.7.3 through 10.7.12 of this regulation, the owner or operator of an affected source subject to the provisions of 10.0 of this regulation shall demonstrate continuous compliance according to 10.7.13.1 and 10.7.13.2 of this regulation.

10.7.13.1 The owner or operator shall implement the applicable management practices in 10.4.7 of this regulation during all times that the affected process tank or other operation is operating.

10.7.13.2 The owner or operator shall state in the annual compliance certification report that the applicable management practices in 10.4.7 of this regulation have been implemented, as practicable.

### 10.8 Notification requirements.

10.8.1 The owner or operator of an affected source subject to the provisions of 10.0 of this regulation shall submit an initial notification in accordance with 10.8.1.1 through 10.8.1.2 of this regulation by the applicable date in 10.8.1.3 or 10.8.1.4 of this regulation.

10.8.1.1 The initial notification shall include the information specified in 10.8.1.1.1 through 10.8.1.1.4 of this regulation.

10.8.1.1.1 The name and address of the owner or operator;

10.8.1.1.2 The address (i.e., physical location) of the affected source;

10.8.1.1.3 An identification of the relevant standard (i.e., 10.0 of 7 **DE Admin. Code** 1138) that is the basis of the notification and the affected source's compliance date; and

10.8.1.1.4 A brief description of the nature, size, design, and method of operation of the affected source and an identification of the types of emission points within the affected source subject to the relevant standard and types of plating and polishing metal HAPs emitted.

10.8.1.2 The initial notification shall include a description of the compliance method (e.g., use of wetting agent/fume suppressant, tank cover, surface cover, control system or timing) for each affected source.

10.8.1.3 The owner or operator of an affected source that started up on or before July 1, 2008 shall submit an initial notification not later November 11, 2009.

10.8.1.4 The owner or operator of an affected source that started up after July 1, 2008 shall submit an initial notification not later than 120 calendar days after startup of the affected source or November 11, 2009, whichever is later.

10.8.2 The owner or operator of an affected source subject to the provisions of 10.0 of this regulation shall submit a notification of compliance status in accordance with 10.8.2.1 and 10.8.2.2 of this regulation.

10.8.2.1 The notification of compliance status shall be submitted before the close of business on the compliance date specified in 10.3 of this regulation.

10.8.2.2 The notification of compliance status shall include the items in 10.8.2.2.1 through 10.8.2.2.4 of this regulation.

10.8.2.2.1 Listing of affected sources and the plating and polishing metal HAPs used in, or emitted by, those sources.

10.8.2.2.2 Methods used to comply with the applicable standards and management practices in 10.4 of this regulation.

10.8.2.2.3 Description of the capture system and control device, if used to be in compliance with the applicable standards in 10.4 of this regulation.

10.8.2.2.4 Statement by the owner or operator of the affected source as to whether the source is in compliance with the applicable standards, management practices, or other requirements in 10.0 of this regulation.

### 10.9 Reporting requirements.

10.9.1 The owner or operator of an affected source subject to the provisions of 10.0 of this regulation shall prepare an annual compliance certification report according to 10.9.1.1 through 10.9.1.12 of

this regulation. These reports do not need to be submitted unless a deviation from the requirements of 10.0 has occurred during the reporting year, in which case, the annual compliance certification report shall be submitted along with the deviation report.

- 10.9.1.1 The owner or operator of an affected non-cyanide electrolytic process tank that is subject to the requirements in 10.4.1.1 of this regulation shall state in the annual compliance certification report that the wetting agent/fume suppressant has been added to the tank bath according to the manufacturer's specifications and instructions.
- 10.9.1.2 The owner or operator of an affected non-cyanide electrolytic process tank that is subject to the requirements in 10.4.1.2 of this regulation shall state in the annual compliance certification report that the control system has been operated and maintained according to the manufacturer's specifications and operating instructions.
- 10.9.1.3 The owner or operator of an affected batch electrolytic process tank that is subject to the requirements in 10.4.1.3.1 of this regulation shall state in the annual compliance certification report that process tank has been operated with the tank cover in place at least 95% of the electrolytic process operating time.
- 10.9.1.4 The owner or operator of an affected continuous electrolytic process tank that is subject to the requirements in 10.4.1.3.2 of this regulation shall state in the annual compliance certification report that the process tank has been operated with a surface cover that covers at least 75% of the surface area of the process tank, whenever the electrolytic process tank is in operation.
- 10.9.1.5 The owner or operator of an affected flash or short-term electrolytic process tank that is subject to the requirements in 10.4.2.1 of this regulation shall state in the annual compliance certification report that flash or short-term electroplating has been limited to no more than one cumulative hour per day or three cumulative minutes per hour of electroplating time.
- 10.9.1.6 The owner or operator of an affected flash or short-term electrolytic process tank that is subject to the requirements in 10.4.2.2 of this regulation shall state in the annual compliance certification report that the process tank has been operated with the tank cover in place at least 95% of the electrolytic process operating time.
- 10.9.1.7 The owner or operator of an affected cyanide electrolytic process tank that is subject to the requirements in 10.4.4 of this regulation shall state in the annual compliance certification report that the pH of the tank bath has been measured upon startup.
- 10.9.1.8 The owner or operator of an affected dry mechanical polishing operation that is subject to the requirements in 10.4.5 of this regulation shall state in the annual compliance certification report that the control system has been operated and maintained according to the manufacturer's specifications and operating instructions.
- 10.9.1.9 The owner or operator of an affected permanent thermal spraying operation that is subject to the requirements in 10.4.6.1 or 10.4.6.2 of this regulation shall state in the annual compliance certification report that the control system has been operated and maintained according to the manufacturer's specifications and operating instructions.
- 10.9.1.10 The owner or operator of an affected temporary thermal spraying operation that is subject to the requirements in 10.4.6.3 of this regulation shall state in the annual compliance certification report that the temporary thermal spraying operation has been limited to no more than one hour during any one day.
- 10.9.1.11 The owner or operator of an affected process tank or other operation that is subject to the management practices in 10.4.7 of this regulation shall state in the annual compliance certification report that the applicable management practices have been implemented, as practicable.
- 10.9.1.12 Each annual compliance certification report shall be prepared no later than January 31 of the year immediately following the reporting period and shall be kept in a readily-accessible location for inspector review. If a deviation has occurred during the reporting

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period, the annual compliance certification report shall be submitted along with the deviation report.

10.9.2 If any deviations from the applicable compliance requirements in 10.0 of this regulation occurred during the reporting period, the owner or operator of an affected source shall report the deviations and the corrective actions taken. The owner or operator shall submit the deviation and the annual compliance certification reports to the Department. The reports shall be postmarked or delivered to the Department no later than January 31 of the year immediately following the reporting period.

### 10.10 Recordkeeping requirements.

10.10.1 The owner or operator of an affected source subject to the provisions of 10.0 of this regulation shall keep the records specified in 10.10.1.1 through 10.10.1.10 of this regulation.

10.10.1.1 A copy of any initial notification, notification of compliance status, and deviation report that the owner or operator submitted and all documentation supporting those notifications and reports.

10.10.1.2 A copy of the annual compliance certification report and all documentation supporting those reports.

10.10.1.3 Records of the daily differential pressure drop observations required in 10.5 of this regulation.

10.10.1.4 The inspection records for the control devices and monitoring equipment, to document that the inspection and maintenance required by the startup, shutdown, and malfunction plan in 10.4.8 of this regulation have taken place. The record can take the form of a checklist and should identify the control device and associated monitoring equipment inspected, the date of inspection, a brief description of the working condition of the control device during the inspection, and any actions taken to correct deficiencies found during the inspection.

10.10.1.5 The records of the occurrence, duration and cause (if known) of each startup, shutdown, or malfunction of an affected process tank or other operation.

10.10.1.6 The records of the occurrence, duration, and cause (if known) of each malfunction of a required control system and associated monitoring equipment.

10.10.1.7 The records of actions taken during periods of malfunction when such actions are inconsistent with the provisions of the startup, shutdown, and malfunction plan in 10.4.8 of this regulation.

10.10.1.8 Records of all required maintenance performed on the control system and associated monitoring equipment.

10.10.1.9 Other records, which may take the form of checklists, necessary to demonstrate conformance with the provisions of the startup, shutdown, and malfunction plan in 10.4.8 of this regulation.

10.10.1.10 The records required to demonstrate continuous compliance with each applicable standard and management practice that applies to the owner or operator in accordance with 10.7 of this regulation.

10.10.2 The owner or operator shall keep each record for a minimum of 5 years following the date of each occurrence, measurement, maintenance, corrective action, report, or record. The owner or operator shall keep each record onsite for at least 2 years after the date of each occurrence, measurement, maintenance, corrective action, report, or record. The owner or operator may keep the records offsite for the remaining 3 years.

10.10.3 The owner or operator shall maintain files of all information (including all reports and notifications) required by 10.0 of this regulation recorded in a form suitable and readily available for expeditious inspection and review. Such files may be maintained on microfilm, on a computer, on computer floppy disks, on magnetic tape disks, or on microfiche.

### 10.11 Applicability of general provisions.

The owner or operator of an affected sources subject to the provisions of 10.0 of this regulation shall also be in compliance with the provisions in 3.0 of this regulation that are applicable to 10.0, as specified in Table 10-1 of this regulation.

10.12 [Reserved]

Table 10-1 - Applicability of 3.0 to 10.0 of this Regulation

<u>General</u>		
<u>Provision</u>	<u>Applies to</u>	
<u>Reference</u>	<u>10.0</u>	<u>Comment</u>
<u>3.1.1.1</u>	<u>Yes</u>	<u>Additional terms defined in 10.2 of this regulation; when overlap between 3.0 and 10.0 of this regulation occurs, 10.0 takes precedence.</u>
<u>3.1.1.2 - 3.1.1.3</u>	<u>Yes</u>	
<u>3.1.1.4</u>	<u>Yes</u>	<u>10.0 of this regulation clarifies the applicability of each provision in 3.0 of this regulation to sources subject to 10.0.</u>
<u>3.1.1.5</u>	<u>No</u>	<u>Reserved.</u>
<u>3.1.1.6</u>	<u>Yes</u>	
<u>3.1.1.7 - 3.1.1.9</u>	<u>No</u>	<u>Reserved.</u>
<u>3.1.1.10 - 3.1.1.12</u>	<u>Yes</u>	
<u>3.1.1.13 - 3.1.1.14</u>	<u>No</u>	<u>Reserved.</u>
<u>3.1.2.1 - 3.1.2.3</u>	<u>Yes</u>	
<u>3.1.3.1</u>	<u>Yes</u>	<u>10.0 of this regulation clarifies the applicability of each paragraph in 3.0 of this regulation to sources subject to 10.0.</u>
<u>3.1.3.2</u>	<u>Yes</u>	<u>10.1.7 of this regulation exempts area sources from the obligation to obtain Title V operating permits.</u>
<u>3.1.3.3 - 3.1.3.4</u>	<u>No</u>	<u>Reserved.</u>
<u>3.1.3.5</u>	<u>Yes</u>	
<u>3.1.4</u>	<u>No</u>	<u>Reserved.</u>
<u>3.1.5</u>	<u>Yes</u>	
<u>3.2</u>	<u>Yes</u>	<u>Additional terms defined in 10.2 of this regulation; when overlap between 3.0 and 10.0 of this regulation occurs, 10.0 takes precedence.</u>
<u>3.3</u>	<u>Yes</u>	
<u>3.4.1.1 - 3.4.1.2</u>	<u>Yes</u>	
<u>3.4.1.3 - 3.4.1.5</u>	<u>No</u>	<u>Reserved.</u>
<u>3.4.2 - 3.4.2.2</u>	<u>Yes</u>	
<u>3.4.2.3</u>	<u>No</u>	<u>Reserved.</u>
<u>3.4.3</u>	<u>Yes</u>	
<u>3.5.1 - 3.5.2.1</u>	<u>Yes</u>	
<u>3.5.2.2</u>	<u>No</u>	<u>Reserved.</u>
<u>3.5.2.3 - 3.5.2.4</u>	<u>Yes</u>	
<u>3.5.2.5</u>	<u>No</u>	<u>Reserved.</u>
<u>3.5.2.6</u>	<u>Yes</u>	
<u>3.5.3</u>	<u>No</u>	<u>Reserved.</u>
<u>3.5.4.1.1 - 3.5.4.1.2.8</u>	<u>Yes</u>	
<u>3.5.4.1.2.9</u>	<u>No</u>	<u>Reserved.</u>
<u>3.5.4.1.2.10 - 3.5.4.4</u>	<u>Yes</u>	
<u>3.5.5</u>	<u>Yes</u>	



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3.5.6 - 3.5.6.1.1	Yes	
3.5.6.1.2 - 3.5.6.1.4	No	Reserved.
3.5.6.2	Yes	
3.6.1	Yes	
3.6.2 - 3.6.2.5	Yes	
3.6.2.6	No	Reserved.
3.6.2.7	Yes	
3.6.3.1 - 3.6.3.2	Yes	
3.6.3.3 - 3.6.3.4	No	Reserved.
3.6.3.5	Yes	
3.6.4	No	Reserved.
3.6.5 - 3.6.5.1	Yes	
3.6.5.2	No	Reserved.
3.6.5.3	Yes	However, 10.4.8 of this regulation specifies the minimum contents of the startup, shutdown, and malfunction plan.
3.6.6 - 3.6.6.2.2	Yes	
3.6.6.2.3	No	10.0 of this regulation does not require performance testing.
3.6.6.2.4 - 3.6.6.3	Yes	
3.6.7	Yes	
3.6.8	No	10.0 of this regulation does not contain any opacity or visible emission standards.
3.6.9 - 3.6.9.6.1.2.1	Yes	
3.6.9.6.1.2.2	No	Reserved.
3.6.9.6.1.2.3 - 3.6.9.6.1.2.4	Yes	
3.6.9.6.1.3 - 3.6.9.6.1.4	No	Reserved.
3.6.9.6.2 - 3.6.9.14	Yes	
3.6.9.15	No	Reserved.
3.6.9.16	Yes	
3.6.10	Yes	
3.7	No	10.0 of this regulation does not require performance testing.
3.8 - 3.8.5	No	10.5 of this regulation specifies the monitoring requirements.
3.8.6	Yes	
3.8.7	No	10.5 of this regulation specifies the monitoring requirements.
3.9.1 - 3.9.1.4	Yes	
3.9.1.4.1	No	Reserved.
3.9.1.4.2 - 3.9.2.2.5	Yes	Except that 10.8.1 of this regulation specifies the initial notification requirements.
3.9.2.3	No	Reserved.
3.9.2.4 - 3.9.2.4.1	Yes	
3.9.2.4.2 - 3.9.2.4.4	No	Reserved.
3.9.2.4.5 - 3.9.4	Yes	
3.9.5 - 3.9.7	No	
3.9.8 - 3.9.8.3	Yes	Except that 10.8.2 of this regulation specifies the notification of compliance status requirements.
3.9.8.4	No	Reserved.

<u>3.9.8.5 - 3.9.10</u>	<u>Yes</u>	
<u>3.10.1 - 3.10.1.4</u>	<u>Yes</u>	
<u>3.10.1.4.1</u>	<u>No</u>	<u>Reserved.</u>
<u>3.10.1.4.2 - 3.10.1.7</u>	<u>Yes</u>	
<u>3.10.2.1 - 3.10.2.2.5</u>	<u>Yes</u>	
<u>3.10.2.2.6 - 3.10.2.2.13</u>	<u>No</u>	
<u>3.10.2.2.14</u>	<u>Yes</u>	
<u>3.10.2.3</u>	<u>Yes</u>	
<u>3.10.3</u>	<u>No</u>	
<u>3.10.4.1</u>	<u>Yes</u>	
<u>3.10.4.2 - 3.10.4.4</u>	<u>No</u>	
<u>3.10.4.5</u>	<u>Yes</u>	<u>Except that 10.9 of this regulation specifies reporting requirements under the requirements for the annual compliance certification report and the deviation report.</u>
<u>3.10.5</u>	<u>No</u>	
<u>3.10.6</u>	<u>Yes</u>	
<u>3.11</u>	<u>No</u>	<u>10.0 of this regulation does not require flares.</u>
<u>3.12</u>	<u>Yes</u>	
<u>3.13</u>	<u>Yes</u>	
<u>3.14</u>	<u>Yes</u>	
<u>3.15</u>	<u>Yes</u>	

**\*Please Note: As the rest of the sections were not amended, they are not being published. A copy of the regulation is available at:**

**Regulation 1138 Emission Standards for Hazardous Air Pollutants for Source Categories**

## DIVISION OF AIR AND WASTE MANAGEMENT

Statutory Authority: 7 Delaware Code, Chapter 60 (7 **Del.C.** Ch. 60)  
7 **DE Admin. Code** 1301

### REGISTER NOTICE

SAN # 2008-25

**1. Title of the Regulations:**

*Delaware Regulations Governing Solid Waste (DRGSW)*

**2. Brief Synopsis of the Subject, Substance and Issues:**

There are four amendments to update and enhance various sections of the solid waste regulations. The first amendment strikes one redundant requirement for siting new industrial landfill cells in section 6.1.3.8 of the DRGSW. The second amendment updates an exclusion for temporary debris from the Delaware Emergency Management Agency at Transfer Stations in section 10.1.2.6. The third amendment updates and clarifies Financial Assurance criteria in section 4.1.11. The fourth amendment clarifies one exception for transporters in section 7.2.1. These four amendments will help improve understanding and implementation of the solid waste requirements.

**3. Possible Terms of the Agency Action:**

None

**4. Statutory Basis or Legal Authority to Act:**

Amendments to DRGSW are proposed and amended in accordance with the provisions found at 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 amendments to DRGSW will be held on Thursday, August 20<sup>th</sup> starting at 6:00 p.m. in the Richardson and Robbins Auditorium, 89 Kings Highway, Dover, DE.

**7. Prepared By:**

Bill Davis, Environmental Scientist, Solid and Hazardous Waste Management - (302) 739-9403

## 1301 Regulations Governing Solid Waste

### *(Break in Continuity of Sections)*

**4.0 Permit Requirements And Administrative Procedures**

4.1 General Provisions

4.1.1 Permit required

4.1.1.1 No person shall engage in the construction, operation, material alteration, or closure of a solid waste facility, unless exempted from these regulations under Section 2.3, without first having obtained a permit from the Department.

4.1.1.2 No person that is subject to the requirements of Section 7.2 or 7.3 of these regulations shall transport solid waste in or through the State of Delaware without first having obtained an appropriate solid waste transporter's permit from the Department.

4.1.1.3 Permittees shall abide by the conditions of their permit issued by the Department.

4.1.2 Public notice; hearing

Within 60 days after receipt of a completed application and all other required information, the Department will give public notice and the opportunity for a public hearing as provided in 7 **Del.C.** Ch. 60. The cost of the advertisement shall be borne by the applicant. A 15 day comment period will follow the publication date of each public notice. If no meritorious adverse public comments are received during this period, and the Secretary does not deem a public hearing to be in the best interest of the State, the Department will enter into the permit approval/denial phase. If a meritorious request for a hearing is received during the comment period, or if the Secretary deems a hearing to be in the best interest of the State, a public hearing will be held as provided in 7 **Del.C.** §6004 and 6006.

4.1.3 Approval/denial

The Department shall act upon an application for a permit within 60 days after the close of the public notice comment period or upon receipt of the hearing officer's report if a hearing was required. When a final determination is made on an application, the Department shall issue a permit or send a letter of denial to the applicant explaining the reasons for the denial.

4.1.4 Suspension, revocation of permit

A permit may be revoked or suspended for violation of any condition of the permit or any requirement of this regulation, after notice and opportunity for hearing in accordance with 7 **Del.C.** Ch. 60.

#### 4.1.5 Duration of permit

A permit will be issued for a specific duration which will be determined by the Department.

4.1.5.1 Solid waste facility operating permits (landfills, resource recovery facilities, transfer stations, incinerators) shall not be issued for periods greater than 10 years.

4.1.5.2 Post-closure permits shall be valid and enforceable throughout the entire post-closure period.

#### 4.1.6 Permit renewal

Any person wishing to renew an existing permit that is to expire shall, not less than 180 days prior to the expiration date of the existing permit, submit to the Department, a permit renewal application form with all supporting documentation and appropriate fees as required by these regulations.

In the event that the permittee submits a timely application, (not less than 180 days prior to the expiration date of the existing permit) and the Department, through no fault of the permittee, is unable to make a final determination on the application before the expiration date of the existing permit, the Department may, at its discretion, grant an extension of that permit. If the Department issues an extension, all conditions of the permit will remain in effect, for a period of time which will be determined by the Department.

#### 4.1.7 Modification of permit

4.1.7.1 A permittee may request modifications to a permit. All such requests must be submitted in writing to the Department.

4.1.7.2 The Department may initiate modification of a permit if it finds that the existing permit conditions either are not adequate or are not necessary to protect human health and the environment.

4.1.7.3 Public notice and opportunity for hearing in accordance with paragraph 4.1.2 of this Section shall be accomplished for all major modifications proposed for the permit. In the event a hearing is requested or deemed necessary by the Secretary, only the permit conditions subject to the modification shall be reopened for public comment.

4.1.7.4 Public notice shall not be required for minor modifications to the permit. Minor modifications are those which if granted would not result in any increased impact or risk to the environment or to the public health. Minor modifications include:

4.1.7.4.1 Changes in operation or design which do not involve pollution control devices or procedures.

4.1.7.4.2 Improvements to approved pollution control devices or procedures.

4.1.7.4.3 Administrative changes.

4.1.7.4.4 A change in monitoring or reporting frequency.

4.1.7.4.5 The correction of typographical errors.

4.1.7.4.6 Other permit modifications deemed minor by the Department.

#### 4.1.8 Transfer of a permit.

Until the permit has been transferred in accordance with this section of the regulations, the current permittee shall remain liable for compliance with all solid waste permit requirements, including liability for financial assurance, closure and post-closure care. The following submittals are required in order to complete a permit transfer.

4.1.8.1 At least 60 days prior to the proposed transfer, the current permittee shall submit their written request for transfer of the permit. The permittee shall submit the request to the Department and include the following:

4.1.8.1.1 Written notification of the proposed transfer to include the scope and schedule of the transfer and the company name, address, phone number, and point of contact information for the prospective transferee.

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## PROPOSED REGULATIONS

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- 4.1.8.1.2 A written agreement between the current permittee and the prospective transferee, signed by both parties and containing a specific date upon which assets transfer will occur. The agreement must reference the specific solid waste permit for which transfer is sought and state both the current permittee's and the prospective transferee's desire for transfer of the permit. The agreement shall acknowledge that the current permittee is responsible for compliance with all permit requirements until the permit has been transferred to the transferee in accordance with the requirements of this section. The agreement shall acknowledge that the transferee will not interfere with the current permittee's ability to comply with the solid waste permit so long as the current permittee remains responsible for compliance with that permit.
- 4.1.8.1.3 Demonstration that financial assurance requirements will continue to be met by the current permittee until the permit transfer has been completed, including provisions for providing financial assurance in the event that the solid waste permit cannot be transferred by the time company assets are transferred.
- 4.1.8.2 At least 60 days prior to the proposed transfer, the prospective transferee shall submit a letter of intent to the Department and include the following:
  - 4.1.8.2.1 A description of the transferee's training and experience with the permitted activity and a demonstration that the prospective transferee will be able to comply with applicable statutes, regulations, permit conditions and other requirements to which the current permittee is subject.
  - 4.1.8.2.2 A written agreement between the current permittee and the prospective transferee, signed by both parties and containing a specific date upon which assets transfer will occur. The agreement must reference the specific solid waste permit for which transfer is sought and state both the current permittee's and the prospective transferee's desire for transfer of the permit. The agreement shall acknowledge that the current permittee is responsible for compliance with all permit requirements until the permit has been transferred to the transferee in accordance with the requirements of this section. The agreement shall acknowledge that the transferee will not interfere with the current permittee's ability to comply with the solid waste permit so long as the current permittee remains responsible for compliance with that permit.
  - 4.1.8.2.3 The environmental permit application background statement required by 7 **Del.C.** Chapter 79.
  - 4.1.8.2.4 Demonstration that the prospective transferee has satisfied the financial assurance requirements imposed by these regulations. For additional information on financial assurance requirements see section 4.1.11 of these regulations.
- 4.1.8.3 In the event that the transfer of the permit can not be completed because of either the current permittee's or the prospective transferee's failure to provide the submittals required in 4.1.8.1 and 4.1.8.2 above, the current permittee shall either:
  - 4.1.8.3.1 close the facility in accordance with the closure requirements contained in the solid waste facility permit and these regulations, or
  - 4.1.8.3.2 continue to maintain control of, and responsibility for the facility in compliance with the conditions of the permit and these regulations, including, but not limited to the requirements for financial assurance, operations, recordkeeping, reporting, monitoring, closure, post closure care, and corrective actions if needed.
- 4.1.9 Enforcement
  - 4.1.9.1 The Department reserves the right to inspect any site, or any vehicle intended for use in the transportation of solid waste, before issuing a solid waste permit for the site or the transporter.
  - 4.1.9.2 The Department may, at any reasonable time, enter any permitted solid waste facility or inspect any vehicle being used in the transportation of solid waste in order to verify compliance with the permit and these regulations.

4.1.9.3 The Department may require such reports, interviews, tests or other information necessary for the evaluation of permit applications and the verification of compliance with the permit and these regulations.

4.1.9.4 Any person using land, or allowing the use of land, for the storage, processing, or disposal of solid waste who violates a requirement of this regulation shall be subject to the provisions of Sections 6005, 6013, 6018, and 6025(c) of 7 Del.C. Ch. 60.

#### 4.1.10 Replacement of Contaminated Water Supplies

If the Department determines, based on information obtained by or submitted to the Department or the Division of Public Health, that any drinking water supply well has become contaminated as a result of the construction or operation of a solid waste facility, the owner or operator of the facility will be required to construct and maintain, at his or her expense, a permanent alternative water supply of comparable quantity and quality to the source before it was contaminated. Such a determination will be subject to the review procedures contained in 7 Del.C. Ch. 60.

#### 4.1.11 Financial Assurance Criteria

##### 4.1.11.1 Applicability and effective date

The requirements of this section apply to owners and operators of all solid waste facilities, except owners or operators who are State or Federal Government entities whose debts and liabilities are the debts and liabilities of the State or the United States.

##### 4.1.11.2 Financial Assurance for Closure, Post-Closure Care, and Corrective Action

4.1.11.2.1 The owner or operator of a solid waste facility must provide assurance that the financial costs associated with closure, post-closure care, and corrective action can be met throughout the life of the facility until released from these requirements by the Department after demonstrating successful completion of compliance with the requirements for each of these activities.

4.1.11.2.2 Records documenting compliance with the Financial Assurance Criteria of this Part shall be made available upon the request of the Department.

4.1.11.2.3 The language of the financial assurance mechanisms listed in this section must satisfy the following criteria:

4.1.11.2.2-8-13.1 They must ensure that the amount of funds assured is sufficient to cover the costs of closure, post-closure care, and corrective action for known releases when needed.

4.1.11.2.2-8-23.2 They must ensure that funds will be available in a timely fashion when needed.

4.1.11.2.2-8-33.3 They must be obtained by the owner or operator by the effective date of these requirements or prior to the initial receipt of solid waste, whichever is later, in the case of closure and post-closure care, and no later than 120 days after the corrective action remedy has been selected, until the owner or operator is released from the financial assurance requirements.

4.1.11.2.33.4 They must be legally valid, binding, and enforceable under State law.

4.1.11.2.43.5 Upon request by the Department, the applicant or permittee shall provide a third party review of the financial assurance documents submitted. The third party review must certify to the Department that the financial assurance documents as submitted by the applicant or permittee meet the requirements of Section 4.1.11.2.2 of these regulations, and be sealed and signed by a Certified Public Accountant duly registered in Delaware, or other professional acceptable to the Department.

4.1.11.2.53.6 The application shall not be deemed complete until and unless the applicant has complied with Section 4.1.11.2.4 of these regulations as specified above.

4.1.11.2.24 The mechanisms used to demonstrate financial assurance under this section must ensure that the funds necessary to meet the costs of closure, post-closure care, and

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corrective action for known releases will be available whenever they are needed. Owners or operators must choose from the options specified in paragraphs (a) through (i) of this section, and comply with any conditions noted therein.

### 4.1.11.2.24.1 Trust Fund

Condition 1: The trustee must be an entity which has the authority to act as a trustee and whose trust operations are regulated and examined by a Federal or State of Delaware agency or an agency of the State in which the fund is established.

Condition 2: ~~The trust agreement shall be worded as prescribed by the Department. The wording of the trust agreement must be identical to the wording specified in Appendix A, except that instructions in brackets shall be replaced with the relevant information and the brackets deleted. The trust agreement shall be accompanied by a formal certification of acknowledgement.~~

Condition 3: The trust fund, when established, shall be funded for the full required amount of coverage, or funded for part of the required amount of coverage and used in combination with other mechanisms that provide the remaining required coverage.

Condition ~~34~~: The owner or operator shall submit the receipt from the trustee for the initial payment into the trust fund as well as the originally signed duplicate of the trust agreement for Department approval prior to receiving solid waste, or in the case of an existing facility, prior to the cancellation of the existing financial assurance mechanism.

Condition ~~45~~: Pay-in periods and amounts for all solid waste facilities shall be in accordance with those specified in 40 CFR Part 258.74, subsections (a)(2),(a)(3), (a)(4) and (a)(6) or otherwise acceptable to the Department.

Condition ~~56~~: Schedule A, attached to the trust agreement, shall list the facility name and address and the current cost estimate. Schedule A must relate the trust agreement to the specific facility and obligation(s) being assured and shall be updated at least annually to account for inflation or other increases to the cost estimate. Costs reflected in Schedule A shall not be reduced without the written consent of the Department.

Condition ~~67~~: Schedule B, attached to the trust agreement, shall list the property or money that the fund consists of initially. Property must consist of cash or securities acceptable to the trustee. Other property (e.g., real estate) is not an acceptable payment into the trust fund.

Condition ~~78~~: Exhibit A, attached to the trust agreement, shall list the persons designated by the Grantor to sign orders, requests, and instructions to the trustee.

Condition ~~89~~: ~~Annual valuation~~. Annually, the trustee shall furnish to the Department and to the owner or operator, a statement confirming the value of the trust fund. Any securities in the trust fund shall be valued at market value as of no more than 60 days prior to the date the statement is submitted to the Department. If possible, the statement should be submitted during the month that Schedule A is adjusted annually.

Condition ~~910~~: The trustee shall make payments from the fund only as the Department directs to provide for the payment for the costs of corrective action, closure, and/or post-closure care.

Condition ~~1011~~: After beginning closure, post-closure care, or corrective action, an owner or operator or other person authorized in accordance with Condition 7 may request reimbursements for partial expenditures by submitting itemized bills to the Secretary. The owner or operator may request reimbursements for partial closure, post-closure care, or corrective action only if sufficient funds are remaining in the trust fund to cover the maximum costs of completing the activities

for which the trust agreement was established. Within 60 days after receiving bills for reimbursable closure, post-closure care, or corrective action activities, the Secretary will instruct the trustee to make reimbursements in those amounts as the Secretary specifies in writing. Reimbursements will be allowed only if the Secretary determines that the partial or final expenditures are in accordance with the approved closure, post closure care, or corrective action plan or are otherwise justified. If the Secretary has reason to believe that the maximum cost of closure over the remaining life of the facility will be significantly greater than the value of the trust fund, he/she may withhold reimbursements of such amounts as he/she deems prudent. If the Secretary does not instruct the trustee to make such reimbursements, he/she will provide the owner or operator with a detailed written statement of reasons.

~~Condition 4112: Amendments.~~ The trust agreement may be amended by an instrument in writing executed by the grantor, the trustee, and the Department, or by the trustee and the Department if the grantor ceases to exist.

~~Condition 4213: Irrevocability and termination.~~ Subject to Condition 11, the trust agreement shall be irrevocable and shall continue until terminated at the written agreement of the grantor, the trustee, and the Department, or by the trustee and the Department if the grantor ceases to exist.

#### 4.1.11.2.24.2 Surety Bond for Payment or Performance

Condition 1: At a minimum, the surety company issuing the bond must be listed in Circular 570 of the U.S. Department of Treasury as qualified in the state where the bond was executed.

Condition 2: The surety's underwriting limit must be at least as great as the amount of the surety bond.

~~Condition 3: The surety bond shall be worded as prescribed by the Department.~~  
The wording of the surety bond must be identical to the wording specified in Appendix B, except that instructions in brackets shall be replaced with the relevant information and the brackets deleted.

~~Condition 54: Standby trust fund.~~ The owner or operator must establish a standby trust fund, and the standby trust fund must meet the requirements of these regulations except that initial and annual payments are not required. Updates of Schedule A, and annual valuation reporting will not be required until payment is made into the trust fund. Payments made under the terms of the surety bond shall be deposited by the issuing institution directly into the standby trust fund.

Condition 5: The wording of the standby trust fund must be identical to the wording specified in Appendix G, except that instructions in brackets shall be replaced with the relevant information and the brackets deleted.

~~Condition 6: The payment surety bond may not be used for corrective actions.~~

~~Condition 46:~~ The owner or operator shall submit the bond and standby trust fund for Department approval prior to receiving solid waste, or in the case of an existing facility, prior to the cancellation of the existing financial assurance mechanism.

Condition 7: Under the terms of the bond, the surety may cancel the bond by sending notice of cancellation to the Secretary of the Department, to the Solid and Hazardous Waste Management Branch, and to the owner and operator at least 120 days in advance of cancellation. If the Surety cancels the bond, the owner or operator must obtain alternate financial assurance. The Department may draw on the surety bond if the owner or operator has not provided alternative financial assurance within 90 days after receipt by the Solid Waste Management Branch of a notice of cancellation from the surety.

Condition 8: The owner or operator may cancel the surety bond if the Department provides its written consent to do so. The Department will provide such written



consent when the owner substitutes alternate financial assurance as specified in these regulations or the bonded activity has been completed in accordance with these regulations.

Condition 9: The surety shall become liable on the bond when the owner or operator has failed to fulfill the closure, post-closure care or corrective action activities as required. Upon notification by the Department that the owner or operator has failed to perform closure or post-closure care guaranteed by a payment bond, the surety shall place funds in the amount guaranteed for the facility into the standby trust fund. Upon notification that the owner or operator has failed to perform closure, post-closure care, or corrective action as guaranteed by a performance bond, the surety shall either perform the activities guaranteed by the bond or place funds in the amount guaranteed for the facility into the standby trust fund.

#### 4.1.11.2.24.3 Letter of Credit

Condition 1: The issuing financial institution must be an entity which has the authority to issue letters of credit and whose letter of credit operations are regulated and examined by a Federal or State of Delaware agency.

Condition 2: ys The wording of the letter of credit must be identical to the wording specified in Appendix C, except that instructions in brackets shall be replaced with the relevant information and the brackets deleted.

Condition 3: ~~Accompanying letter.~~ The owner or operator shall also submit an accompanying letter referring to the letter of credit by number and listing the following information: complete name and address of facility, issuing institution and date, and amount and purpose of funds assured.

Condition 4: The owner or operator must establish a standby trust fund, and the standby trust fund must meet the requirements of these regulations except that initial and annual payments are not required. Updates of Schedule A, and annual valuation reporting will not be required until payment is made into the trust fund. Payments made under the terms of the surety bond shall be deposited by the issuing institution directly into the standby trust fund.

Condition 5: The wording of the standby trust fund must be identical to the wording specified in Appendix G, except that instructions in brackets shall be replaced with the relevant information and the brackets deleted.

Condition 46: The owner or operator shall submit the letter of credit and accompanying letter for Department approval prior to receiving solid waste, or in the case of an existing facility, prior to the cancellation of the existing financial assurance mechanism.

Condition 57: The letter of credit must be irrevocable and issued for a period of at least one year. The letter of credit must provide that the expiration date will be automatically extended for a period of at least one year unless, at least 120 days before the current expiration date, the issuing institution notifies the Secretary of the Department, the Solid and Hazardous Waste Management Branch, and the owner or operator of a decision not to extend the expiration date.

Condition 68: Once the issuing financial institution notifies the Solid and Hazardous Waste Management Branch of its intent not to extend the Letter of Credit, the owner or operator must, within 90 days, provide alternate financial assurance. The Department may draw on the letter of credit if the owner or operator has not provided alternative financial assurance within 90 days.

Condition 79: Following a determination by the Secretary of the Department that the owner or operator has failed to perform closure, post-closure care, or corrective action when required to do so, the Department may draw on the letter of credit.

**4.1.11.2.24.4 Insurance**

Condition 1: The insurer must be licensed to transact the business of insurance in one or more states or be eligible to provide insurance as an excess or surplus lines insurer in one or more states.

Condition 2: Captive insurance companies and risk retention groups can not be used to satisfy the requirements of this section.

Condition 3: Insurance is not an allowable mechanism for demonstrating financial responsibility for corrective action.

Condition 4: ~~The policy must guarantee that the funds will be available whenever needed and that the insurer will be responsible for paying out funds to authorized persons. The owner or operator shall submit a certificate of insurance utilizing a form provided by the Department, as found in Appendix D of these Regulations, worded exactly as shown, except that instructions in brackets shall be replaced with the relevant information and the brackets deleted.~~

Condition 5: ~~The policy must allow assignment to a successor owner or operator. Assignment may be conditional upon consent of the insurer provided that such consent is not unreasonably refused.~~

Condition 6: ~~The policy must provide that the insurer may not cancel, terminate or fail to renew the policy except for failure to pay the premium. The automatic renewal of the policy must, at a minimum, provide the insured with the option of renewal at the face amount of the expiring policy.~~

Condition 7: ~~If the owner or operator fails to pay the premium, the insurer may cancel the policy by sending notice of cancellation by certified mail to the Secretary of the Department, to the Solid and Hazardous Waste Management Branch, and to the owner or operator of the facility, at least 120 days in advance of the cancellation and date of expiration. Cancellation, termination, or failure to renew may not occur and the policy will remain in full force and effect in the event that on or before the date of expiration, the Secretary of the Department deems the facility abandoned; or the permit is terminated or revoked or a new permit is denied; or closure is ordered by the Secretary of the Department, or a U.S. District Court or other court of competent jurisdiction; or the owner or operator is named as debtor in a voluntary or involuntary proceeding under Title 11 (Bankruptcy) USC; or the premium due is paid.~~

Condition ~~85~~: Prior to requesting reimbursement from the insurer, owners or operators shall submit justification and documentation of the reimbursable expenses to the Department for its consent.

Condition ~~96~~: A copy of the policy shall be submitted to the Department for its approval prior to receiving solid waste, or in the case of an existing facility, prior to the cancellation of the existing financial assurance mechanism.

**4.1.11.2.24.5 Local Government Financial Test and Guarantee**

Condition 1: Financial tests and guarantees shall not be used for assuring funds for post-closure periods or corrective actions.

Condition 2: ~~Guarantees shall be worded as specified by the Department. The Owner or Operator shall submit a guarantee agreement, utilizing a form provided by the Department, as found in Appendix E of these Regulations, except that instruction in brackets are to be replaced with relevant information and the brackets deleted.~~

Condition 3: A local government is not eligible to assure its obligations by this mechanism if it:

- a) is currently in default of any outstanding general obligation bonds; or

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b) has any general obligation bonds rated lower than Baa as issued by Moody's or BBB as issued by Standard and Poor's; or

c) operated at a deficit equal to five percent or more of total annual revenue in each of the past two fiscal years; or

d) received an adverse opinion, disclaimer of opinion, or other qualified opinion from the independent certified public accountant (or appropriate state agency) auditing its financial statement, and the Department deems the reason for the qualification as significant.

Condition 4: ~~Bond Rating/Financial Ratio Alternatives~~. The local government must meet one of the following two financial tests: a) If the local government has outstanding, rated, general obligation bonds that are not secured by insurance, a letter of credit, or other collateral or guarantee, it must have a current rating of Aaa, Aa, A, or Baa, as issued by Moody's, or AAA, AA, A, or BBB as issued by Standard and Poor's on all such general obligation bonds; or b) Based upon the most recently audited annual financial statement, a ratio of cash plus marketable securities to total expenditures greater than or equal to 0.05, and a ratio of annual debt service to total expenditures less than or equal to 0.20.

Condition 5: The total costs being assured through a financial test must not exceed 43 percent of the local government's total annual revenue. If the local government assures other environmental obligations through financial tests; including those associated with UIC facilities under 40 CFR 144.62, underground storage tank facilities under 40 CFR Part 280, PCB storage facilities under 40 CFR Part 761, and hazardous waste treatment, storage, and disposal facilities under 40 CFR Parts 264 and 265; it must add those costs to the closure costs it seeks to assure under this mechanism.

Condition 6: ~~Public Notice~~. The local government shall place a reference to the closure costs assured through the financial test into its next comprehensive annual financial report (CAFR).

Condition 7: ~~Accountant's Opinion~~. A Certified Public Accountant's opinion of the local government's financial statements for the most recent fiscal year must also be included in the initial financial assurance package and annually no later than 90 days after the close of the local government's fiscal year. The opinion must be unqualified and demonstrate that the local government has prepared its financial statements in accordance with the requirements of the General Accounting Standards Board Statement 18.

Condition 8: ~~Chief Financial Officer Letter~~. The Chief Financial Officer must include a letter demonstrating that the local government has complied with Conditions 3, 4, 5, and 6. The CFO letter shall be submitted to the Department as part of the initial financial assurance package and annually no later than 90 days after the close of the local government's fiscal year.

Condition 9: If, at the end of any fiscal year, the local government fails to meet the financial test criteria required by conditions 3, 4, or 5, then the local government shall send, within 90 days, by certified mail, notice to the Secretary of the Department and to the Solid and Hazardous Waste Management Branch, that they intend to provide alternate financial assurance as required by these regulations. The local government shall, within 210 days following the close of the fiscal year, obtain alternative financial assurance that meets the requirements of these regulations.

Condition 10: The guarantee, approved by the Department, must be effective prior to the initial receipt of waste or in the case of an existing facility, prior to the cancellation of the existing financial assurance mechanism.

Condition 11: The guarantee shall remain in force unless the local government sends notice of cancellation by certified mail to the Secretary of the Department and to the Solid and Hazardous Waste Management Branch. Such notice shall be given at least 120 days in advance of the cancellation. Within 90 days of receipt of this notice of cancellation by the Solid and Hazardous Waste Management Branch, the local government shall provide alternative financial assurance acceptable to the Department.

4.1.11.2.24.6 Corporate Financial Test and Guarantee

Condition 1: Financial tests and guarantees shall not be used for assuring funds for post-closure periods or corrective actions.

Condition 2: ~~Guarantees shall be worded as prescribed by the Department. The owner or operator shall submit a guarantee agreement, utilizing a form provided by the Department, as found in Appendix F of these Regulations, except that instruction in brackets are to be replaced with relevant information and the brackets deleted.~~

Condition 3: A resolution agreeing to the terms and conditions of the guarantee and signed by the guarantor's board of directors shall be attached to the guarantee.

Condition 4: The guarantor must be the direct or higher tier parent company of the owner or operator, or a firm whose parent corporation is also the parent corporation of the owner or operator.

Condition 5: ~~Minimum size requirement.~~ The guarantor must have a tangible net worth equal to the sum of the costs they seek to assure through a financial test, plus \$10 million. The costs that the guarantor seeks to assure are equal to the current cost estimates for closure, post-closure care, corrective action, and any other environmental obligation assured by a financial test and/or corporate guarantee by the guarantor (including other landfills or solid waste facilities; PCB storage facilities; underground storage tanks; hazardous waste treatment, storage, disposal facilities; or underground injection control program facilities).

Condition 6: ~~Bond Rating/Financial Ratio Alternatives.~~ Guarantors must meet one of the following three financial tests:

a) A most recent bond rating no lower than Baa as issued by Moody's or BBB as issued by Standard and Poor's.

b) A leverage ratio of less than 1.5 based on the ratio of total liabilities to tangible net worth.

c) A profitability ratio of greater than 0.10 based on the sum of the net income plus depreciation, depletion and amortization, minus \$10 million, to total liabilities.

Condition 7: Domestic Assets Requirement. Guarantors must have assets in the United States at least equal to the costs they seek to assure through a financial test (costs include those reported for Condition 5).

Condition 8: ~~Chief Financial Officer letter.~~ The Chief Financial Officer must include a letter demonstrating that the guarantor has complied with Conditions 4, 5, 6, and 7. The CFO letter shall be submitted to the Department as part of the initial financial assurance package and annually no later than 90 days after the close of the guarantor's fiscal year.

Condition 9: ~~Accountant's Opinion.~~ A Certified Public Accountant's opinion of the guarantor's financial statements for the most recent fiscal year must also be included in the initial financial assurance package and annually no later than 90 days after the close of the guarantor's fiscal year. The opinion must be unqualified (not modified by conditions or reservations) and demonstrate that the firm has prepared its financial statements in accordance with generally accepted accounting principals for corporations.

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Condition 10: ~~Special Report~~. In the event that the CFO does not use financial test figures directly from the annual statements provided to the Securities and Exchange Commission, then a special report from an independent accountant shall be required. In the report, the Certified Public Accountant must confirm that the data used in the CFO letter was appropriately derived from the audited, year-end financial statements.

Condition 11: ~~Incapacity~~. The guarantor shall notify the Secretary of the Department and the Solid and Hazardous Waste Management Branch by certified mail of the commencement of a voluntary or involuntary proceeding under Title 11 Bankruptcy, USC, naming the guarantor, owner or operator of the facility as debtor, within 10 days after commencement of the proceeding.

Condition 12: If, at the end of any fiscal year, the guarantor fails to meet the financial test criteria required by conditions 5, 6, or 7, then the guarantor shall send, within 90 days, by certified mail, notice to the Secretary of the Department, to the Solid and Hazardous Waste Management Branch, and to the owner or operator, that guarantor intends to provide alternate financial assurance as required by these regulations. Within 120 days of such fiscal year, the guarantor shall establish such financial assurance unless the owner or operator has done so.

Condition 13: Within 30 days of being notified by the Department that a determination has been made that the guarantor no longer meets the requirements stated in Conditions 5, 6, or 7, the guarantor shall establish alternate financial assurance in accordance with these regulations.

Condition 14: The guarantee, approved by the Department, must be effective prior to the initial receipt of waste or in the case of an existing facility, prior to the cancellation of the existing financial assurance mechanism.

4.1.11.2.24.7 Department-Approved Mechanism.

4.1.11.2.24.8 State Assumption of Responsibility.

4.1.11.2.4.9 Use of Multiple Financial Mechanisms (any combination of the options listed above).

### 4.1.11.3 Cost Estimate for Closure

4.1.11.3.1 The owner or operator must submit to the Department a detailed written estimate, in current dollars, of the cost of closing the facility that is consistent with the closure plan developed in accordance with the closure requirements for that type of facility. The estimate must equal the maximum cost of closure at any time during the active life of the facility. The owner or operator shall also notify the Secretary in writing that the estimate has been placed in the records to be maintained at the facility.

4.1.11.3.2 Until final closure of the facility, the owner or operator must annually adjust the closure cost estimate for inflation, facility expansions, and any other applicable requirements which impact the cost of closure.

4.1.11.3.3 The owner or operator must increase the cost estimate and the amount of financial assurance provided for closure if changes to the closure plan or facility conditions increase the maximum cost of closure at any time during the remaining active life.

4.1.11.3.4 The Department may approve reduction in the amount of financial assurance provided for closure if the latest cost estimate is significantly less than the maximum cost of the current closure plan. The owner or operator must submit to the Secretary in writing the justification for the reduction of the closure cost estimate and the amount of financial assurance. Any changes in the amount of financial assurance must also be placed in the records to be maintained at the facility.

### 4.1.11.4 Cost Estimate for Post-Closure Care

- 4.1.11.4.1 The owner or operator of a solid waste facility for which post-closure care is required must demonstrate financial assurance for the cost of thirty (30) years of post-closure care. The owner or operator must submit to the Department a detailed written estimate, in current dollars, of the cost of hiring a third party to conduct post-closure care for the solid waste facility in compliance with the post-closure plan. This estimate must be based on the most expensive costs of post-closure care during the post-closure care period. The owner or operator must also notify the Department in writing that the estimate has been placed in the records to be maintained at the facility.
- 4.1.11.4.2 During the active life of the solid waste facility and during the post-closure care period, the owner or operator must annually adjust the post-closure cost estimate for inflation and other applicable factors.
- 4.1.11.4.3 The owner or operator must increase the post-closure care cost estimate and the amount of financial assurance provided if changes in the post-closure plan or solid waste facility conditions increase the maximum costs of post-closure care.
- 4.1.11.4.4 The Secretary may approve the reduction of the post-closure cost estimate and the amount of financial assurance provided if the latest cost estimate is significantly less than the maximum costs of post-closure care remaining over the post-closure care period. The owner or operator must submit to the Secretary in writing the justification for the reduction of the post-closure cost estimate. Any changes in the amount of financial assurance must also be placed in the records to be maintained at the facility.
- 4.1.11.5 Cost Estimate for Corrective Action**
- 4.1.11.5.1 An owner or operator of a solid waste facility required to undertake a corrective action program must submit to the Secretary in writing a detailed written estimate, in current dollars, of the cost of hiring a third party to perform the corrective action. The corrective action cost estimate must account for the total costs of corrective action activities as described in the corrective action plan for the entire corrective action period. The owner or operator must also notify the Secretary that the cost estimate has been placed in the records to be maintained at the facility.
- 4.1.11.5.2 The owner or operator must annually adjust the estimate for inflation and any other applicable factors until the corrective action program is completed.
- 4.1.11.5.3 The owner or operator must increase the corrective action cost estimate and the amount of financial assurance provided if changes in the corrective action program or facility conditions increase the maximum costs of corrective action.
- 4.1.11.5.4 The Secretary may approve reduction of the amount of the corrective action cost estimate and the amount of financial assurance provided if the cost estimate exceeds the maximum remaining costs of corrective action. The owner or operator must submit to the Secretary in writing the justification for the reduction of the corrective action cost estimate. The owner or operator must also notify the Secretary in writing that the amended amount of financial assurance has been placed in the records to be maintained at the facility.

***(Break in Continuity of Sections)***

**6.0 Industrial Landfills**

(NOTE: This section applies to those landfills that dispose of only industrial and/or dry waste.)

**6.1 Siting**

- 6.1.1 Industrial landfill facilities shall be located only in areas where the potential for degradation of the quality of air, land, and water is minimal.
- 6.1.2 All industrial landfill facilities shall be constructed to at least minimum design requirements as contained in Section 6.2. More stringent designs will be required where deemed necessary by the Department for the protection of ground water resources.

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- 6.1.3 No new cell of an industrial landfill shall be located in an area such that solid waste would at any time be deposited:
- 6.1.3.1 Within the 100 year flood plain.
  - 6.1.3.2 In an area that may cause or contribute to the degradation of any state or federally regulated wetlands unless the owner or operator can demonstrate to the satisfaction of the appropriate wetlands regulatory agency that:
    - 6.1.3.2.1 there is no impact to any regulated wetlands on the site, or
    - 6.1.3.2.2 any impact will be mitigated as required.
  - 6.1.3.3 Within one mile of any state or federal wildlife refuge, wildlife area, or park, unless specifically exempted from this requirement by the Department.
  - 6.1.3.4 So as to be in conflict with any locally adopted land use plan or zoning requirement.
  - 6.1.3.5 Within the wellhead protection area of a public water supply well or well field.
  - 6.1.3.6 In areas where valuable aquifers would be threatened by contaminant releases, unless viable alternatives have been dismissed and stringent design measures have been incorporated to minimize the possibility and magnitude of releases.
  - 6.1.3.7 Within 200 feet of the facility boundary unless otherwise approved by the Department.
  - 6.1.3.8 In an area that is environmentally unique or valuable.

***(Break in Continuity of Sections)***

## 7.0 Transporters

- 7.1 General Provisions (applicable to all persons transporting solid waste in Delaware)
- 7.1.1 No person shall transport solid waste, without first having obtained a permit from the Department, unless specifically exempted by these Regulations. Refer to Section 4 of these Regulations, PERMIT REQUIREMENTS AND ADMINISTRATIVE PROCEDURES.
  - 7.1.2 Any vehicle used to transport solid waste shall be so constructed or loaded as to prevent its contents from dropping, sifting, leaking, or otherwise escaping therefrom, in accordance with 21 **Del.C.** 4371
  - 7.1.3 The transporter will be responsible for all costs of cleaning up a discharge of solid waste from the vehicle.
  - 7.1.4 Compliance with these regulations does not release a transporter from the obligation of complying with any other applicable laws, regulations or ordinances.  
Additional waste transporter regulations may apply to transporters of special wastes, e.g. infectious waste. Refer to Section 11 of these Regulations, SPECIAL WASTES MANAGEMENT.
  - 7.1.5 Each vehicle used to transport solid waste and required to have a transporter's permit must carry a copy of the permit in the vehicle. The permit must be presented upon request to any law enforcement officer or any representative of the Department.
  - 7.1.6 A written request to transfer a permit must be received 90 days prior to the date of the proposed transfer. For permit transfer procedures, refer to Section 4.1.8 of these Regulations, PERMITTING.
  - 7.1.7 Permitted solid waste transporters shall not use agents or subcontractors who do not hold permits for transporting solid waste.
- 7.2 Provisions Applicable To Transporters (Except For Transporters Of Only Dry Waste) Required To Have A Solid Waste Transporter's Permit
- 7.2.1 Applicability  
Section 7.2 applies to all transportation activities in Delaware except the following:
    - 7.2.1.1 Transportation of source separated materials for reuse or recycling, provided that the materials remain separate throughout the journey and are not recombined for transport.

- 7.2.1.2 Transportation of household waste generated in a Delaware residence and transported by the generator of the household waste in a vehicle having a gross vehicle weight less than or equal to 26,000 (twenty-six thousand) pounds.
- 7.2.1.3 On-site transportation of solid waste (i.e., the point of generation and the point of treatment or disposal are on the same site and the vehicle transporting the solid waste will not at any time leave the site).
- 7.2.1.4 Transportation of solid waste in a vehicle having a gross vehicle weight less than or equal of 26,000 (twenty-six thousand) pounds. (This exclusion shall not apply to the transportation of infectious waste or waste containing asbestos.) For information concerning infectious waste vehicle requirements, refer to Section 11 of these Regulations SPECIAL WASTES MANAGEMENT, Part 1, - Infectious Waste.
- 7.2.1.5 Transportation of dry waste only (this activity is subject to the provisions of Subsection 7.3).
- 7.2.1.6 Transportation of solid waste generated on a farm in Delaware and transported by the generator of the waste (this exclusion shall not apply to the transportation of infectious waste, petroleum-hydrocarbon contaminated soils, or waste containing asbestos).

## 7.2.2 Instruction and Training

All drivers of solid waste transportation vehicles, and all of the transporter's employees who may handle solid waste subject to these regulations, shall receive instruction in how to perform transportation duties in a way that ensures compliance with all applicable regulations and requirements. The instruction shall include, but not necessarily be limited to, the following:

- 7.2.2.1 Knowledge of current DOT Motor Carrier Safety Regulations.
- 7.2.2.2 Safe vehicle operations to avoid creating hazards to human health, safety, welfare, or the environment.
- 7.2.2.3 Knowledge of proper handling procedures for the type of solid waste being transported.
- 7.2.2.4 Familiarity with the approved accidental discharge containment plan.
- 7.2.2.5 Familiarity with the conditions of the solid waste transporter's permit.  
It shall be the responsibility of the transporter to ensure that all drivers and other employees that may handle solid waste receive instruction as described above as frequently as necessary to maintain a level of knowledge that will ensure safe operation of the vehicle during transportation of the solid waste and proper management of an accidental discharge. A description of the driver training program shall be included with the permit application.

## 7.2.3 Vehicle Requirements

- 7.2.3.1 All vehicles used in the transportation of solid waste shall be operated and maintained so as to be in compliance with all state and federal regulations and not present a hazard to human health or the environment through unsafe vehicle conditions. The permittee is responsible for the operation and maintenance of all vehicles including leased vehicles operated under his/her permit.
- 7.2.3.2 All vehicles must carry safety and emergency equipment in accordance with applicable DOT regulations to ensure protection of the public and the environment.
- 7.2.3.3 All vehicles must carry spill containment materials appropriate to the type of solid waste being transported.
- 7.2.3.4 Each vehicle engaged in the transportation of solid waste must be fully enclosed or covered to prevent the discharge or release of solid waste to the environment.
- 7.2.3.5 The transporter's name shall be prominently displayed on both sides of the vehicle in figures at least three inches high and of a color that contrasts with the color of the vehicle.
- 7.2.3.6 The transporters' permit number shall be prominently displayed on both sides and the rear of the vehicle in figures at least three inches high and of a color that contrasts with the color of the vehicle.



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## PROPOSED REGULATIONS

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### 7.2.4 Proof of Financial Responsibility

Proof of financial responsibility for sudden and accidental discharges shall be maintained by the transporter. This financial responsibility may be established by any one or a combination of the following:

#### 7.2.4.1 Automobile liability insurance

7.2.4.1.1 For-hire carriers in interstate commerce shall at all times maintain insurance coverage that is in compliance with 49 CFR Part 387 and shall submit a Certificate of Insurance with MCS-90 endorsement demonstrating compliance with this regulation.

7.2.4.1.2 Transporters who transport bulk liquid or bulk gaseous industrial waste, shall at all times maintain commercial automobile liability insurance with a combined single limit of at least \$750,000 with MCS-90 endorsement and shall submit a Certificate of Insurance with MCS-90 endorsement demonstrating compliance with this regulation.

7.2.4.1.3 Transporters who transport infectious waste in interstate commerce shall at all times maintain commercial automobile liability insurance with a combined single limit of at least \$1,000,000 with MCS-90 endorsement. Transporters who transport infectious waste in intrastate commerce shall at all times maintain commercial automobile liability insurance with a combined single limit of at least \$750,000 with MCS-90 endorsement. Infectious waste transporters shall submit a Certificate of Insurance with MCS-90 endorsement demonstrating compliance with this regulation.

7.2.4.1.4 All other carriers shall at all times maintain commercial automobile liability insurance with a combined single limit of at least \$350,000 and shall submit a Certificate of Insurance demonstrating compliance with this regulation.

7.2.4.2 Self insurance equal to or exceeding the above automobile liability insurance limits, and approved by the Department.

7.2.4.3 Other proof of financial responsibility approved by the Department.

### 7.2.5 Management of Accidental Discharges

7.2.5.1 All applicants for a permit to transport solid waste shall submit to the Department a plan for the prevention, control, and cleanup of accidental discharges of the solid waste. No permit will be issued to a transporter until such a plan has been submitted to and approved by the Department.

7.2.5.2 A copy of the plan shall be maintained in each vehicle engaged in the transportation of solid waste.

7.2.5.3 All accidental discharges of solid waste from a vehicle shall be immediately and completely remediated. If the solid waste cannot be immediately and completely remediated, or if it has the potential to cause damage to the environment or to public health, the discharge shall be immediately reported to the Department. (Accidental discharges of infectious waste are regulated under Section 11, Part 1)

7.2.5.4 The transporter will be responsible for all costs of remediating a discharge of solid waste from the vehicle.

### 7.2.6 Recordkeeping

The following records must be retained by the transporter for at least three years:

7.2.6.1 The solid waste transporter's permit.

7.2.6.2 Documentation of the training provided to drivers.

7.2.6.3 Insurance documents sufficient to demonstrate compliance with Section 7.2.4 of these regulations.

7.2.6.4 Records of spills or releases of solid waste that exceed five (5) pounds or one (1) cubic foot that occur during the transportation of solid waste in Delaware, and descriptions of the remedial actions taken.

7.2.6.5 The transporter's annual report required under Section 7.2.7.

### 7.2.7 Reporting and Documentation

7.2.7.1 Each transporter that picks up and/or deposits solid waste in Delaware shall submit an annual report on a form provided by the Department, summarizing information from the preceding calendar year. This report shall be submitted to the Department by April 1 of the year following the year covered by the report. The information contained in the report shall include, but not be limited to, the following:

7.2.7.1.1 Types and weights of solid waste transported in, into, or out of the state.

7.2.7.1.2 Actual amounts of solid waste by weight and type delivered to each destination when transported to or from facilities equipped with truck scales. Amounts may be estimated only when truck scales are not available during the waste transportation process.

7.2.7.1 Any vehicle transporting solid waste through Delaware shall carry documentation indicating the state in which the solid waste was picked up, the date on which it was picked up, and the state in which it will be deposited.

*(Break in Continuity of Sections)*

## 10.0 Transfer Stations

### 10.1 General Provisions

#### 10.1.1 Applicability

10.1.1.1 This section applies to all solid waste transfer stations in Delaware. Additional requirements may apply to transfer stations handling special solid wastes, such as infectious waste.

10.1.1.2 Compliance with these regulations does not release the owner or operator of a transfer station from the obligation of complying with any other applicable laws, regulations, or ordinances.

#### 10.1.2 Exclusions

The following types of facilities are not considered to be transfer stations:

10.1.2.1 Facilities that accept only source separated materials for the purpose of recycling those materials.

10.1.2.2 Facilities permitted as materials recovery facilities.

10.1.2.3 Small load collection areas located at permitted landfill sites.

10.1.2.4 Individual dumpsters used for waste generated on site (e.g., at shopping centers, apartment complexes or commercial establishments).

10.1.2.5 Compaction equipment being used exclusively for solid waste generated on site (e.g., in office or apartment complexes, industrial facilities, or shopping centers).

10.1.2.6 Temporary debris collection and reduction sites established by Delaware Emergency Management Authority (DEMA) as the result of a natural or man-made disaster event. The exclusion shall apply provided the sites are established in accordance with the applicable DEMA Debris Management Plan, and meet the substantive requirements of this section. The exclusion shall last no longer than ninety (90) days from the start of accumulation of wastes at the temporary debris collection and reduction site, unless written approval for a longer period is granted by the Department. A written record shall be required to document accumulation of debris at each site.

*(Break in Continuity of Sections)*

## **APPENDIX A to Section 4.1.11 (Relating to Financial Assurance)**

### **TRUST AGREEMENT**

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# PROPOSED REGULATIONS

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Trust Agreement, the "Agreement," entered into as of [date] by and between [name of owner or operator], a [name of State] [insert "corporation," "partnership," "association," or "proprietorship"], the "Grantor," and [name of corporate trustee], [insert 'incorporate in the State of \_\_\_\_\_' or "a national bank'], the "Trustee."

Whereas, the Delaware Department of Natural Resources and Environmental Control (the "Department") has established certain regulations applicable to the Grantor, requiring that an owner or operator of [insert type of operation] shall provide assurance that funds will be available when needed for closure and/or post-closure care of the [insert type of operation],

Whereas, the Grantor has elected to establish a trust to provide all or part of such financial assurance for the facilities identified herein,

Whereas, the Grantor, acting through its duly authorized officers, has selected the Trustee to be the trustee under this agreement, and the Trustee is willing to act as trustee,

Now, therefore, the Grantor and the Trustee agree as follows:

## Section 1. Definitions. As used in this Agreement:

(a) The term "Grantor" means the owner or operator who enters into this Agreement and any successors or assigns of the Grantor.

(b) The term "Trustee" means the Trustee who enters into this Agreement and any successor Trustee.

(c) The term "Secretary" means the chief administrator and head of the Delaware Department of Natural Resources and Environmental Control and any successor.

Section 2. Identification of Facilities and Cost Estimates. This agreement pertains to the [insert type of operation] and cost estimates identified on attached Schedule A [on Schedule A, for each facility list the EPA Identification Number, name, address, and the current closure and/or post-closure cost estimates, or portions thereof, for which financial assurance is demonstrated by this Agreement].

Section 3. Establishment of Fund. The Grantor and the Trustee hereby establish a trust fund, the "Fund" for the benefit of the Department. The Grantor and the Trustee intend that no third party have access to the Fund except as herein provided. The Fund is established initially as consisting of the property, which is acceptable to the Trustee, described in Schedule B attached hereto. Such property and any other property subsequently transferred to the Trustee is referred to as the Fund, together with all earnings and profits thereon, less any payments or distributions made by the Trustee pursuant to this Agreement. The Fund shall be held by the Trustee, IN TRUST, as hereinafter provided. The Trustee shall not be responsible nor shall it undertake any responsibility for the amount or adequacy of, nor any duty to collect from the Grantor, any payments necessary to discharge any liabilities of the Grantor established by the Department.

Section 4. Payment for Closure and Post Closure Care. The Trustee shall make payments from the Fund as the Department shall direct, in writing, to provide for the payment of the costs of closure and/or post-closure care of the [insert type of operation] covered by this Agreement in accordance with the activities specified in Schedule A and the Delaware Regulations Governing Solid Waste applicable to closure and post-closure. The Trustee shall reimburse to the Grantor or other persons as specified by the Department from the Fund for closure and post-closure expenditures in such amounts as the Department shall direct in writing. In addition, the Trustee shall refund the Grantor such amounts as the Department specifies in writing. The Department shall direct reimbursements in accordance with the procedures set forth in the Delaware Regulations Governing Solid Waste. Upon refund, such funds shall no longer constitute part of the Fund as defined herein.

Section 5. Payments Comprising the Fund. Payments made to the Trustee for the Fund shall consist of cash or securities acceptable to the Trustee.

Section 6. Trustee Management. The Trustee shall invest and reinvest the principal and income of the Fund and keep the Fund invested as a single fund, without distinction between principal and income, in accordance with general investment policies and guidelines which the Grantor may communicate in writing to the Trustee from time

to time, subject, however, to the provisions of this section. In investing, reinvesting, exchanging, selling, and managing the Fund, the Trustee shall discharge his duties with respect to the trust fund solely in the interest of the beneficiary and with the care, skill, prudence, and diligence under the circumstances then prevailing which persons of prudence, acting in a like capacity and familiar with such matters, would use in the conduct of an enterprise of a like character and with like aims; except that:

i. Securities or other obligations of the Grantor, or any other owner or operator of the [insert type of operation], or any of their affiliates as defined in the Investment Company Act of 1940, as amended, 15 U.S.C. 80a-2.(a), shall not be acquired or held, unless they are securities or other obligations of the Federal or a State government;

ii. The Trustee is authorized to invest the Fund in time or demand deposits of the Trustee, to the extent insured by an agency of the Federal or State government; and

iii. The Trustee is authorized to hold cash awaiting investment or distribution uninvested for a reasonable time and without liability for the payment of interest thereon.

Section 7. Commingling and Investment. The Trustee is expressly authorized in its discretion:

a. To transfer from time to time any or all of the assets of the Fund to any common, commingled, or collective trust fund created by the Trustee in which the Fund is eligible to participate, subject to all the provisions thereof, to be commingled with the assets of other trusts participating therein; and

b. To purchase shares in any investment company registered under the Investment Company Act of 1940, 15 U.S.C. 80a-1 et seq., including one which may be created, managed, underwritten, or to which investment advice is rendered or the shares of which are sold by the Trustee. The Trustee may vote such shares in its discretion.

Section 8. Express Powers of Trustee. Without in any way limiting the powers and discretion conferred upon the Trustee by the other provisions of this Agreement or by law, the Trustee is expressly authorized and empowered:

(a) To sell, exchange, convey, transfer, or otherwise dispose of any property held by it, by public or private sale. No person dealing with the Trustee shall be bound to see to the application of the purchase money or to inquire into the validity or expediency of any such sale or other disposition;

(b) To make, execute, acknowledge, and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;

(c) To register any securities held in the Fund in its own name or in the name of a nominee and to hold any security in bearer form or in book entry, or to combine certificates representing such securities with certificates of the same issue held by the Trustee in other fiduciary capacities, or to deposit or arrange for the deposit of such securities in a qualified central depository even though, when so deposited, such securities may be merged and held in bulk in the name of the nominee of such depository with other securities deposited therein by another person, or to deposit or arrange for the deposit of any securities issued by the United State Government, or any agency or instrumentality thereof, with a Federal Reserve bank, but the books and records of the Trustee shall at all times show that all such securities are part of the Fund;

(d) To deposit any cash in the Fund in interest-bearing accounts maintained or savings certificates issued by the Trustee, in its separate corporate capacity, or in any other banking institution affiliated with the Trustee, to the extent insured by an agency of the Federal or State government; and

(e) To compromise or otherwise adjust all claims in favor of or against the Fund.

Section 9. Taxes and Expenses. All taxes of any kind that may be assessed or levied against or in respect of the Fund and all brokerage commissions incurred by the Fund shall be paid from the Fund. All other expenses incurred by the Trustee in connection with the administration of this Trust, including fees for legal services rendered to the Trustee, the compensation of the Trustee to the extent not paid directly by the Grantor, and all other proper charges and disbursements of the Trustee shall be paid from the Fund.

Section 10. Valuation and Adjustment. The Trustee shall annually, at least 30 days prior to the anniversary date of establishment of the Fund, furnish to the Grantor and to the Department's Solid & Hazardous Waste Management Branch a statement confirming the value of the Trust. Any securities in the Fund shall be valued at market value as

of no more than 60 days prior to the anniversary date of establishment of the Fund. The failure of the Grantor to object in writing to the Trustee within 90 days after the statement has been furnished to the Grantor and the Department shall constitute a conclusively binding assent by the Grantor, barring the Grantor from asserting any claim or liability against the Trustee with respect to matter disclosed in the statement.

Section 11. Advice of Counsel. The Trustee may from time to time consult with counsel, who may be counsel to the Grantor, with respect to any question arising as to the construction of this Agreement or any action to be taken hereunder. The Trustee shall be fully protected, to the extent permitted by law, in acting upon the advice of counsel.

Section 12. Trustee Compensation. The Trustee shall be entitled to reasonable compensation for its services as agreed upon in writing from time to time with the Grantor.

Section 13. Successor Trustee. The Trustee may resign or the Grantor may replace the Trustee, but such resignation or replacement shall not be effective until the Grantor has appointed a successor trustee and this successor accepts the appointment. The successor trustee shall have the same powers and duties as those conferred upon the Trustee hereunder. Upon the successor trustee's acceptance of the appointment, the Trustee shall assign, transfer, and pay over to the successor trustee the funds and properties then constituting the Fund. If for any reason the Grantor cannot or does not act in the event of the resignation of the Trustee, the Trustee may apply to a court of competent jurisdiction for the appointment of a successor trustee or for instructions. The successor trustee shall specify the date on which it assumes administration of the trust in a writing sent to the Grantor, the Department's Solid & Hazardous Waste Management Branch, and the present Trustee by certified mail 10 days before such change becomes effective. Any expenses incurred by the Trustee as a result of any of the acts contemplated by this section shall be paid as provided in Section 9.

Section 14. Instructions to the Trustee. All orders, requests, and instructions by the Grantor to the Trustee shall be in writing signed by such persons as are designated in the attached Exhibit A or such other designees as the Grantor may designate by amendment to Exhibit A. The Trustee shall be fully protected in acting without inquiry in accordance with the Grantor's orders, requests, and instructions. All orders, requests and instructions by the Department to the Trustee shall be in writing, signed by the Secretary or the manager of the Department's Solid & Hazardous Waste Management Branch, and the Trustee shall act and shall be fully protected in acting in accordance with such orders, requests and instructions. The Trustee shall have the right to assume, in the absence of written notice to the contrary, that no event constituting a change or a termination of the authority of any person to act on behalf of the Grantor or the Department hereunder has occurred. The Trustee shall have no duty to act in the absence of such orders, requests, and instructions from the Grantor and/or Department, except as provided for herein.

Section 15. Notice of Nonpayment. The Trustee shall notify the Grantor and the Department's Solid & Hazardous Waste Management Branch by certified mail within 10 days following the expiration of the 30-day period after the anniversary of the establishment of the Trust, if no payment is received from the Grantor during that period. After the pay-in period is completed, the Trustee shall not be required to send a notice of nonpayment.

Section 16. Amendment of agreement. This Agreement may be amended by an instrument in writing executed by the Grantor, the Trustee, and the Department, or by the Trustee and the Department if the Grantor ceases to exist.

Section 17. Irrevocability and Termination. Subject to the right of the parties to amend this Agreement as provided in Section 16, this Trust shall be irrevocable and shall continue until terminated at the written agreement of the Grantor, the Trustee, and Department, or by the Trustee and the Department, if the Grantor ceases to exist. Upon termination of the Trust, all remaining trust property, less final trust administration expenses, shall be delivered to the Grantor.

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Section 18. Immunity and Indemnification. The Trustee shall not incur personal liability of any nature in connection with any act or omission, made in good faith, in the administration of this Trust, or in carrying out any directions by the Grantor or the Department issued in accordance with this Agreement. The Trustee shall be indemnified and saved harmless by the Grantor or from the Trust Fund, or both, from and against any personal liability to which the Trustee may be subjected by reason of any act or conduct in its official capacity, including all expenses reasonably incurred in its defense in the event of the Grantor fails to provide such defense.

Section 19. Choice of Law. This Agreement shall be administered, construed, and enforced according to the laws of the State of Delaware.

Section 20. Interpretation. As used in this Agreement, words in the singular include the plural and words in the plural include the singular. The descriptive headings for each Section of the Agreement shall not affect the interpretation or the legal efficacy of this Agreement.

Section 21. Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

In witness Whereof the parties have caused this Agreement to be executed by their respective officers duly authorized and their corporate seals to be hereunto affixed and attested as of the date first above written.

[Signature of Grantor]

[Title]

Attest:

[Title]

[Seal]

[Signature of Trustee]

Attest:

[Title]

[Seal]

## CERTIFICATION OF ACKNOWLEDGMENT

State of \_\_\_\_\_

County of \_\_\_\_\_

On this [date], before me personally came [owner or operator] to me known, who, being by me duly sworn, did depose and say that she/he resides at [address], that she/he is [title] of [corporation], the corporation described in and which executed the above instrument; that she/he knows the seal of said corporation; that the seal affixed to such instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that she/he signed her/his name thereto by like order.

[Signature of Notary Public]

## APPENDIX B to Section 4.1.11 (Relating to Financial Assurance)

### PERFORMANCE BOND

Date bond executed: \_\_\_\_\_

Effective date: \_\_\_\_\_

Principal: [Legal name and business address of owner or operator]

# PROPOSED REGULATIONS

Type of organization: [insert "individual," "joint venture," "partnership", or "corporation"]

State of incorporation: \_\_\_\_\_

Surety(ies): [name(s) and business address(es)]

Name, address, and closure and/or post closure amount(s) for each facility guaranteed by this bond (indicate closure and post-closure amounts separately): \_\_\_\_\_

Total penal sum of bond: \$ \_\_\_\_\_

Surety's bond number: \_\_\_\_\_

Know All Persons By These Presents, That we, the Principal and Surety(ies) hereto are firmly bound to the Department of Natural Resources and Environmental Control, an agency of the State of Delaware, (hereinafter called DNREC), in the above penal sum for the payment of which we bind ourselves, our heirs, executors, administrators, successors, and assigns jointly and severally; provided that, where the Surety(ies) are corporation acting as co-sureties, we the Sureties, bind ourselves in such sum "jointly and severally" only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes each Surety binds itself, jointly and severally with the Principal, for the payment of such sum only as is set forth opposite the name of such Surety, but if no limit of liability is indicated, the limit of liability shall be the full amount of the penal sum.

Whereas said Principal is required, under the State Statute, to have a [insert "permit in order to own or operate each solid waste management facility identified above" or "Recycling Approval, hereinafter called BUD in order to own or operate each recycling facility identified above"], and

Whereas said Principal is required to provide financial assurance for closure, or closure and post-closure care as a condition of the [insert "permit" or "BUD"], and

Whereas said Principal shall establish a standby trust as is required when a surety bond is used to provide such financial assurance;

Now, therefore, the conditions of this obligation are such that if the Principal shall faithfully perform closure, whenever required to do so, of each facility for which this bond guarantees closure, in accordance with the closure plan and other requirements of the [insert "permit" or "BUD"] as such plan and [insert "permit" or "BUD"] may be amended, pursuant to all applicable laws, statutes, rules, and regulations as such laws, statutes, rules, and regulations may be amended.

And, if the Principal shall faithfully perform post-closure care of each facility for which this bond guarantees post-closure care, in accordance with the post-closure plan and other requirements of the [insert "permit" or "BUD"] as such plan and [insert "permit" or "BUD"] may be amended, pursuant to all applicable laws, statutes, rules and regulations as such laws, statutes, rules, and regulations may be amended.

Or, if the Principal shall provide alternate financial assurance as specified in Section 4.1.11 of the State of Delaware Regulations Governing Solid Waste, and obtain the DNREC Secretary's written approval of such assurance, within 90 days after the date notice of cancellation is received by both the Principal and the DNREC Secretary from the Surety(ies), then this obligation shall be null and void, otherwise it is to remain in full force and effect.

The Surety(ies) shall become liable on this bond obligation only when the Principal has failed to fulfill the conditions described above. Upon notification by the DNREC Secretary that the Principal has been found in violation of the closure requirements, for a facility for which this bond guarantees performance of closure, the Surety (ies) shall either perform closure in accordance with the closure plan and other [insert "permit" or "BUD"] requirements or place the closure amount guaranteed for the facility into the standby trust fund as directed by the DNREC Secretary.

Upon notification by the DNREC Secretary that the Principal has been found in violation of the post-closure requirements for a facility for which this bond guarantees performance of post-closure care, the Surety (ies) shall either perform post-closure care in accordance with the post-closure plan and other [insert "permit" or "BUD"] requirements or place in post-closure amount guaranteed for the facility into the standby trust fund as directed by the DNREC Secretary.

Upon notification by the DNREC Secretary that the Principal has failed to provide alternate financial assurance as specified in Section 4.1.11 of the State of Delaware Regulations Governing Solid Waste, and obtain written approval of such assurance from the DNREC Secretary during the 90 days following receipt by both the Principal

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and the DNREC Secretary of a notice of cancellation of the bond, the Surety(ies) shall place funds in the amount guaranteed for the facility(ies) into the standby trust fund as directed by the DNREC secretary.

The surety(ies) hereby waive(s) notification of amendments to closure plans, permits, approvals, applicable laws, statutes, rules, and regulations and agrees that no such amendment shall in any way alleviate its (their) obligation on this bond.

The liability of the Surety(ies) shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments shall amount in the aggregate to the penal sum of the bond, but in no event shall the obligation of the Surety(ies) hereunder exceed the amount of said penal sum.

The Surety(ies) may cancel the bond by sending notice of cancellation by certified mail to the owner or operator and to the DNREC Secretary, provided, however, that cancellation shall not occur during the 120 days beginning on the date of receipt of the notice of cancellation by both the Principal and the DNREC Secretary as evidenced by the return receipts.

The principal may terminate this bond by sending written notice to the Surety(ies), provided, however, that no such notice shall become effective until the Surety(ies) receive(s) written authorization for termination of the bond by the DNREC Secretary.

Principal and Surety(ies) hereby agree to adjust the penal sum of the bond yearly so that it guarantees a new closure and/or post closure amount, provided that the penal sum does not increase by more than 20 percent in any one year, and no decrease in the penal sum takes place without the written permission of the DNREC Secretary.

In Witness Whereof, The Principal and Surety(ies) have executed this Performance Bond and have affixed their seals on the date set forth above.

Principal

[Signature(s)]

[Name(s)]

[Title(s)]

[Corporate Seal]

Corporate Surety(ies)

[Name and address]

State of incorporation: \_\_\_\_\_

Liability limit: \$ \_\_\_\_\_

[Signature(s)]

[Names(s) and Title(s)]

[Corporate Seal]

[For every co-surety, provide signature(s), corporate seal, and other information in the same manner as for Surety above.]

Bond premium: \$ \_\_\_\_\_

**APPENDIX C to Section 4.1.11 (Relating to Financial Assurance)**

IRREVOCABLE STANDBY LETTER OF CREDIT

NUMBER \_\_\_\_\_

ISSUE DATE: \_\_\_\_\_

BENEFICIARY: The Secretary of the Department of Natural Resources and Environmental Control, State of Delaware, 89 Kings Highway, Dover DE 19901 (All correspondence regarding this letter of credit must be submitted through the Department's Solid & Hazardous Waste Management Branch for administration).



PROPOSED REGULATIONS

APPLICANT:

Issuance Date: \_\_\_\_\_ Expiration Date: \_\_\_\_\_

Dear Sir or Madam:

We hereby establish our irrevocable standby letter of credit number \_\_\_\_\_ in your favor, at the request and for the account of [owner's or operator's name and address], up to the aggregate amount of [in words] U.S. dollars \$--, available upon presentation of:

- 1. your sight draft, bearing reference to this letter of credit no. \_\_\_\_\_ and,
- 2. your signed statement reading as follows: "I certify that the amount of the draft is payable pursuant to regulations issued under authority of Title 7 of the Delaware Code, Chapter 60.

This letter of credit is effective as of [date] and shall expire on [date at least 1 year later], but such expiration date shall be automatically extended for a period of one year on [date] and on each successive expiration date, unless at least 120 days before the current expiration date, we notify (1)you, (2) the Solid & Hazardous Waste Management Branch, and (3) [owner's or operator's name] by nationally recognized overnight courier service or upon receipt if delivered personally, that we have decided not to extend this letter of credit beyond the current expiration date. In the event you are so notified, any unused portion of the credit shall be available, upon presentation of your sight draft, for 120 days or until the letter of credit has expired, whichever is later.

Whenever this letter of credit is drawn on under and in compliance with the terms of this credit, we shall duly honor such draft upon presentation to us, and we shall deposit the amount of the draft directly into the standby trust fund of [owner's or operator's name] in accordance with your instructions.

This standby letter of credit is subject to the International Standby Practices (ISP98), International Chamber of Commerce Publication No. 590 and subsequent revisions thereof.

Very truly yours,

[signature]  
[typed name and title]  
[institution]  
[telephone number]

**APPENDIX D to Section 4.1.11 (Relating to Financial Assurance)**

CERTIFICATE OF INSURANCE FOR CLOSURE OR POST-CLOSURE CARE

Name and Address of Insurer (herein called the Insurer): \_\_\_\_\_

Name and Address of Insured (herein called the "Insured"): \_\_\_\_\_

Facilities Covered: [List for each facility: Name, address, and the amount of insurance for closure and/or the amount for post-closure care (these amounts for all facilities covered must total the face amount shown below).]

Face Amount: \_\_\_\_\_  
Policy Number: \_\_\_\_\_  
Effective Date: \_\_\_\_\_

The Insurer hereby certifies that it has issued to the Insured the policy of insurance identified above to provide financial assurance for [insert "closure" or "closure and post-closure care" or "post-closure care"] for the facilities

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identified above. The Insurer further warrants that such policy conforms in all respects with the requirements of the Delaware Regulations Governing Solid Waste Section 4.1.11, as applicable and as such regulations were constituted on the date shown immediately below. It is agreed that any provision of the policy inconsistent with such regulations is hereby amended to eliminate such inconsistency.

The Insurer further certifies the following with respect to the insurance:

a.) Bankruptcy or insolvency of the insured shall not relieve the "Insurer" of its obligations under the policy to which this certificate applies.

b.) The "Insurer" is liable for the payment of amounts within any deductible applicable to the policy, with a right of reimbursement by the insured for any such payment made by the "Insurer."

c.) Whenever requested by the Secretary of the State of Delaware Department of Natural Resources and Environmental Control, the Insurer agrees to furnish to the Secretary a duplicate original of the policy listed above, including all endorsements thereon.

d.) Cancellation or any other Termination of the insurance by the "Insurer", except for non-payment of premium or misrepresentation by the insured shall be effective only upon written notice and only after the expiration of 60 days after a copy of such written notice is received by the insured.

e.) [Insert for claims-made policies]: The insurance covers claims otherwise covered by the policy that are report to the "Insurer" within six months of the effective date of the cancellation or non-renewal of the policy except where the new or renewed policy has the same retroactive date or a retroactive date earlier than that of the prior policy, and which arise out of any covered Occurrence that commenced after the policy retroactive date, if applicable, and prior to such policy renewal or Termination date. Claims reported during such extended reporting period are subject to the terms, conditions, limits, including limits of liability, and exclusions of the policy.

I hereby certify that the wording of this instrument is identical to the wording in Appendix D and that the "Insurer" is licensed to transact the business of insurance, or eligible to provide insurance as an excess or surplus line insurer, in one or more States.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature of authorized representative of Insurer

\_\_\_\_\_  
Name of authorized representative

\_\_\_\_\_  
Title of authorized representative

\_\_\_\_\_  
Address of authorized representative

## **APPENDIX E to Section 4.1.11 (Relating to Financial Assurance)**

### **LOCAL GOVERNMENT GUARANTEE FOR CLOSURE**

Guarantee made this [date] by the [owner or operator], a municipality incorporated under the laws of the State of Delaware, herein referred to as Guarantor, to the Department of Natural Resources and Environmental Control, an agency of the State of Delaware, Obligee. This guarantee is made on behalf of the [owner or operator, facility name, and address], to the State of Delaware, Department of Natural Resources and Environmental Control (DNREC).

Recitals:

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# PROPOSED REGULATIONS

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1. Guarantor meets or exceeds the financial test criteria and agrees to comply with the reporting requirements for Guarantors as specified in the Delaware Regulations Governing Solid Waste (DRGSW), Section 4.1.11.2.2.5.
2. [Owner or operator] owns or operates the following solid waste management facility covered by this guarantee: [List each facility: name and address].
3. "Closure plans" as used below refer to the plans maintained as required by the DRGSW section for the closure of facilities as identified above.
4. For value received from the Principal Debtor, Guarantor guarantees to DNREC that in the event that Principal Debtor fails to perform closure of the Facility in accordance with the closure plan, other permit or interim status requirements, and all other legal requirements for closure of solid waste facilities, then the Guarantor shall perform or pay a third party to perform closure of the Facility and all other legal requirements for closure of a solid waste facility; or the Guarantor shall establish a fully funded trust fund as specified in Section 4.1.11.2.2.1 of the DRGSW, in the name of Principal Debtor in the amount of the current closure cost estimates as required by Section 4.1.11.3 of the DRGSW.
5. Guarantor agrees that if, at the end of any fiscal year before termination of this guarantee, the Guarantor fails to meet the financial test criteria, Guarantor shall send within 90 days, by certified mail, notice to the Secretary of DNREC (Secretary), to the DNREC Solid and Hazardous Waste Management Branch that he intends to provide alternate financial assurance as specified in the DRGSW, in the name of [owner or operator]. Within 120 days after the end of such fiscal year, the Guarantor shall establish such financial assurance unless [owner or operator] has done so.
6. The Guarantor agrees to provide an updated financial test and supporting documents required by Section 4.1.11.2.2.5 of the DRGSW to DNREC annually, no later than 90 days after the close of the Guarantor's fiscal year. Supporting documents shall include as a minimum: Guarantor's Chief Financial Officer letter, accountant's opinion, and annual financial report. In the event that the CFO does not use financial test figures directly from the annual statements provided to the Securities and Exchange Commission, supporting documents shall include a Special Report from an independent accountant approved by the DNREC.
7. The Guarantor agrees to notify the Secretary of the DNREC Solid and Hazardous Waste Management Branch of voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code, naming Guarantor as debtor, within 10 days after commencement of the proceeding.
8. Guarantor agrees that if Guarantor no longer meets the financial test criteria or is otherwise disallowed by DNREC from providing this Guarantee, Guarantor, within 30 days after being notified by the Secretary of the DNREC Solid and Hazardous Waste Management Branch of a determination that Guarantor no longer meets the financial test criteria or that he is disallowed from continuing as a Guarantor of closure, he shall establish alternate financial assurance as specified in the DRGSW, as applicable, in the name of [owner or operator] unless [owner or operator] has done so.
9. Guarantor agrees to remain bound under this guarantee notwithstanding any or all of the following: amendment or modification of the closure, amendment or modification of the permit, the extension or reduction of the time of performance of closure, or any other modification or alteration of an obligation of the owner or operator pursuant to the DRGSW.
10. Guarantor agrees to remain bound under this guarantee for so long as [owner or operator] must comply with the applicable financial assurance requirements of the DRGSW for the above-listed facilities, except as provided in paragraph 10 of this agreement.
11. Guarantor may send notice of intent to terminate this Guarantee, by certified mail to the Secretary of DNREC, the Solid & Hazardous Waste Management Branch, and to Principal Debtor, provided that this Guarantee shall not terminate unless and until Principal Debtor obtains, and the DNREC approves in its sole discretion, alternate closure financial assurance coverage complying with the DRGSW.
12. Guarantor expressly waives notice of acceptance of this guarantee by the Solid and Hazardous Waste Management Branch or by [owner or operator]. Guarantor also expressly waives notice of amendments or modifications of the closure plan and of amendments or modifications of the facility permit(s) or modifications of other applicable law.
13. This Guarantee shall also bind successors of Guarantor.
14. This Guarantee shall be governed by the laws of the State of Delaware.

15. Guarantor acknowledges that the consideration received for making this Guarantee includes the benefit to Principal Debtor in complying or attempting to comply with the DRGSW. This Guarantee does not include any promise by or duty upon DNREC, and shall not be construed to require DNREC to take any action, issue any regulatory approvals or permits, or expend any funds. Nothing in this Guarantee shall be construed as a waiver of sovereign immunity or any other defense.

16. It is mutually understood that this Guarantee is to bind the party who signs it, whether it is or will be signed by the other party.

17. Guarantor's Board of Directors agrees to all of the terms and conditions of this Guarantee and have so stated in [name of guaranteeing entity] Board of Directors Resolution [title and/or number and date], a signed, certified copy of which is attached.

\_\_\_\_\_  
Effective Date

\_\_\_\_\_  
[Name of Guarantor]

\_\_\_\_\_  
[Authorized signature for Guarantor]

\_\_\_\_\_  
[Name of person signing]

\_\_\_\_\_  
[Title of person signing]

\_\_\_\_\_  
Signature of witness or notary

## **APPENDIX F to Section 4.1.11 (Relating to Financial Assurance)**

### **CORPORATE GUARANTEE FOR CLOSURE**

Guarantee made this [date] by the [owner or operator], a business entity organized under the laws of the State of Delaware, herein referred to as Guarantor, to the Department of Natural Resources and Environmental Control, an agency of the State of Delaware, Obligee. This guarantee is made on behalf of the [owner or operator, facility name, and address], to the State of Delaware, Department of Natural Resources and Environmental Control (DNREC).

#### Recitals:

1. Guarantor meets or exceeds the financial test criteria and agrees to comply with the reporting requirements for Guarantors as specified in the Delaware Regulations Governing Solid Waste (DRGSW), Section 4.1.11.2.2.6.

2. [Owner or operator] owns or operates the following solid waste management facility covered by this guarantee: [List each facility: name and address].

3. "Closure plans" as used below refer to the plans maintained as required by the DRGSW section for the closure of facilities as identified above.

4. For value received from the Principal Debtor, Guarantor guarantees to DNREC that in the event that Principal Debtor fails to perform closure of the Facility in accordance with the closure plan, other permit or interim status requirements, and all other legal requirements for closure of solid waste facilities, then the Guarantor shall perform or pay a third party to perform closure of the Facility and all other legal requirements for closure of a solid waste facility; or the Guarantor shall establish a fully funded trust fund as specified in Section 4.1.11.2.2.1 of the

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## PROPOSED REGULATIONS

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DRGSW, in the name of Principal Debtor in the amount of the current closure cost estimates as required by Section 4.1.11.3 of the DRGSW.

5. Guarantor agrees that if, at the end of any fiscal year before termination of this guarantee, the Guarantor fails to meet the financial test criteria, Guarantor shall send within 90 days, by certified mail, notice to the Secretary of DNREC (Secretary), to the DNREC Solid and Hazardous Waste Management Branch that he intends to provide alternate financial assurance as specified in the DRGSW, in the name of [owner or operator]. Within 120 days after the end of such fiscal year, the Guarantor shall establish such financial assurance unless [owner or operator] has done so.

6. The Guarantor agrees to provide an updated financial test and supporting documents required by Section 4.1.11.2.2.6 of the DRGSW to DNREC annually, no later than 90 days after the close of the Guarantor's fiscal year. Supporting documents shall include as a minimum: Guarantor's Chief Financial Officer letter, accountant's opinion, and annual financial report. In the event that the CFO does not use financial test figures directly from the annual statements provided to the Securities and Exchange Commission, supporting documents shall include a Special Report from an independent accountant approved by the DNREC.

7. The Guarantor agrees to notify the Secretary of the DNREC Solid and Hazardous Waste Management Branch of voluntary or involuntary proceeding under Title 11 (Bankruptcy), U.S. Code, naming Guarantor as debtor, within 10 days after commencement of the proceeding.

8. Guarantor agrees that if Guarantor no longer meets the financial test criteria or is otherwise disallowed by DNREC from providing this Guarantee, Guarantor, within 30 days after being notified by the Secretary of the DNREC Solid and Hazardous Waste Management Branch of a determination that Guarantor no longer meets the financial test criteria or that he is disallowed from continuing as a Guarantor of closure, he shall establish alternate financial assurance as specified in the DRGSW, as applicable, in the name of [owner or operator] unless [owner or operator] has done so.

9. Guarantor agrees to remain bound under this guarantee notwithstanding any or all of the following: amendment or modification of the closure, amendment or modification of the permit, the extension or reduction of the time of performance of closure, or any other modification or alteration of an obligation of the owner or operator pursuant to the DRGSW.

10. Guarantor agrees to remain bound under this guarantee for so long as [owner or operator] must comply with the applicable financial assurance requirements of the DRGSW for the above-listed facilities, except as provided in paragraph 10 of this agreement.

11. Guarantor may send notice of intent to terminate this Guarantee, by certified mail to the Secretary of DNREC, the Solid & Hazardous Waste Management Branch, and to Principal Debtor, provided that this Guarantee shall not terminate unless and until Principal Debtor obtains, and the DNREC approves in its sole discretion, alternate closure financial assurance coverage complying with the DRGSW.

12. Guarantor expressly waives notice of acceptance of this guarantee by the Solid and Hazardous Waste Management Branch or by [owner or operator]. Guarantor also expressly waives notice of amendments or modifications of the closure plan and of amendments or modifications of the facility permit(s) or modifications of other applicable law.

13. This Guarantee shall also bind successors of Guarantor.

14. This Guarantee shall be governed by the laws of the State of Delaware.

15. Guarantor acknowledges that the consideration received for making this Guarantee includes the benefit to Principal Debtor in complying or attempting to comply with the DRGSW. This Guarantee does not include any promise by or duty upon DNREC, and shall not be construed to require DNREC to take any action, issue any regulatory approvals or permits, or expend any funds. Nothing in this Guarantee shall be construed as a waiver of sovereign immunity or any other defense.

16. It is mutually understood that this Guarantee is to bind the party who signs it, whether it is or will be signed by the other party.

17. Guarantor's Board of Directors agrees to all of the terms and conditions of this Guarantee and have so stated in [name of guaranteeing entity] Board of Directors Resolution [title and/or number and date], a signed, certified copy of which is attached.

\_\_\_\_\_  
Effective Date

\_\_\_\_\_  
[Name of Guarantor]

\_\_\_\_\_  
[Authorized signature for Guarantor]

\_\_\_\_\_  
[Name of person signing]

\_\_\_\_\_  
[Title of person signing]

\_\_\_\_\_  
Signature of witness or notary

## **APPENDIX G to Section 4.1.11 (Relating to Financial Assurance)**

### **STANDBY TRUST AGREEMENT**

Standby Trust Agreement, the "Agreement," entered into as of [date] by and between [name of owner or operator], a [name of State] [insert "corporation," "partnership," "association," or "proprietorship"], the "Grantor," and [name of corporate trustee], [insert 'incorporate in the State of " " or "a national bank']', the "Trustee."

Whereas, the Delaware Department of Natural Resources and Environmental Control (the "Department") has established certain regulations applicable to the Grantor, requiring that an owner or operator of [insert type of operation] shall provide assurance that funds will be available when needed for closure and/or post-closure care of the [insert type of operation].

Whereas, the Grantor has elected to establish [insert either "a guarantee," "surety bond," or "letter of credit"] to provide all or part of such financial assurance for the facilities identified herein,

Whereas, the Grantor, acting through its duly authorized officers, has selected the Trustee to be the trustee under this agreement, and the Trustee is willing to act as trustee,

Now, therefore, the Grantor and the Trustee agree as follows:

Section 1. Definitions. As used in this Agreement:

(a) The term "Grantor" means the owner or operator who enters into this Agreement and any successors or assigns of the Grantor.

(b) The term "Trustee" means the Trustee who enters into this Agreement and any successor Trustee.

(c) The term "Secretary" means the chief administrator and head of the Delaware Department of Natural Resources and Environmental Control and any successor.

Section 2. Identification of Facilities and Cost Estimates. This agreement pertains to the [insert type of operation] and cost estimates identified on attached Schedule A [on Schedule A, for each facility list the EPA Identification Number, name, address, and the current closure and/or post-closure cost estimates, or portions thereof, for which financial assurance is demonstrated by this Agreement].

Section 3. Establishment of Fund. The Grantor and the Trustee hereby establish a trust fund, the "Fund" for the benefit of the Department. The Grantor and the Trustee intend that no third party have access to the Fund except as herein provided. The Fund is established initially as consisting of the property, which is acceptable to the Trustee, described in Schedule B attached hereto. Such property and any other property subsequently transferred to the Trustee is referred to as the Fund, together with all earnings and profits thereon, less any payments or distributions made by the Trustee pursuant to this Agreement. The Fund shall be held by the Trustee, IN TRUST, as hereinafter provided. The Trustee shall not be responsible nor shall it undertake any responsibility for the

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## PROPOSED REGULATIONS

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amount or adequacy of, nor any duty to collect from the Grantor, any payments necessary to discharge any liabilities of the Grantor established by the Department.

Section 4. Payment for Closure and Post Closure Care. The Trustee shall make payments from the Fund as the Department shall direct, in writing, to provide for the payment of the costs of closure and/or post-closure care of the [insert type of operation] covered by this Agreement in accordance with the activities specified in Schedule A and the Delaware Regulations Governing Solid Waste applicable to closure and post-closure. The Trustee shall reimburse to the Grantor or other persons as specified by the Department from the Fund for closure and post-closure expenditures in such amounts as the Department shall direct in writing. In addition, the Trustee shall refund the Grantor such amounts as the Department specifies in writing. The Department shall direct reimbursements in accordance with the procedures set forth in the Delaware Regulations Governing Solid Waste. Upon refund, such funds shall no longer constitute part of the Fund as defined herein.

Section 5. Payments Comprising the Fund. Payments made to the Trustee for the Fund shall consist of cash or securities acceptable to the Trustee.

Section 6. Trustee Management. The Trustee shall invest and reinvest the principal and income of the Fund and keep the Fund invested as a single fund, without distinction between principal and income, in accordance with general investment policies and guidelines which the Grantor may communicate in writing to the Trustee from time to time, subject, however, to the provisions of this section. In investing, reinvesting, exchanging, selling, and managing the Fund, the Trustee shall discharge his duties with respect to the trust fund solely in the interest of the beneficiary and with the care, skill, prudence, and diligence under the circumstances then prevailing which persons of prudence, acting in a like capacity and familiar with such matters, would use in the conduct of an enterprise of a like character and with like aims; except that:

i. Securities or other obligations of the Grantor, or any other owner or operator of the [insert type of operation], or any of their affiliates as defined in the Investment Company Act of 1940, as amended, 15 U.S.C. 80a-2.(a), shall not be acquired or held, unless they are securities or other obligations of the Federal or a State government;

ii. The Trustee is authorized to invest the Fund in time or demand deposits of the Trustee, to the extent insured by an agency of the Federal or State government; and

iii. The Trustee is authorized to hold cash awaiting investment or distribution uninvested for a reasonable time and without liability for the payment of interest thereon.

Section 7. Commingling and Investment. The Trustee is expressly authorized in its discretion:

a. To transfer from time to time any or all of the assets of the Fund to any common, commingled, or collective trust fund created by the Trustee in which the Fund is eligible to participate, subject to all the provisions thereof, to be commingled with the assets of other trusts participating therein; and

b. To purchase shares in any investment company registered under the Investment Company Act of 1940, 15 U.S.C. 80a-1 et seq., including one which may be created, managed, underwritten, or to which investment advice is rendered or the shares of which are sold by the Trustee. The Trustee may vote such shares in its discretion.

Section 8. Express Powers of Trustee. Without in any way limiting the powers and discretion conferred upon the Trustee by the other provisions of this Agreement or by law, the Trustee is expressly authorized and empowered:

(a) To sell, exchange, convey, transfer, or otherwise dispose of any property held by it, by public or private sale. No person dealing with the Trustee shall be bound to see to the application of the purchase money or to inquire into the validity or expediency of any such sale or other disposition;

(b) To make, execute, acknowledge, and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;

(c) To register any securities held in the Fund in its own name or in the name of a nominee and to hold any security in bearer form or in book entry, or to combine certificates representing such securities with certificates of

the same issue held by the Trustee in other fiduciary capacities, or to deposit or arrange for the deposit of such securities in a qualified central depository even though, when so deposited, such securities may be merged and held in bulk in the name of the nominee of such depository with other securities deposited therein by another person, or to deposit or arrange for the deposit of any securities issued by the United State Government, or any agency or instrumentality thereof, with a Federal Reserve bank, but the books and records of the Trustee shall at all times show that all such securities are part of the Fund;

(d) To deposit any cash in the Fund in interest-bearing accounts maintained or savings certificates issued by the Trustee, in its separate corporate capacity, or in any other banking institution affiliated with the Trustee, to the extent insured by an agency of the Federal or State government; and

(e) To compromise or otherwise adjust all claims in favor of or against the Fund.

Section 9. Taxes and Expenses. All taxes of any kind that may be assessed or levied against or in respect of the Fund and all brokerage commissions incurred by the Fund shall be paid from the Fund. All other expenses incurred by the Trustee in connection with the administration of this Trust, including fees for legal services rendered to the Trustee, the compensation of the Trustee to the extent not paid directly by the Grantor, and all other proper charges and disbursements of the Trustee shall be paid from the Fund.

Section 10. Valuation and Adjustment. The Trustee shall annually, at least 30 days prior to the anniversary date of establishment of the Fund, furnish to the Grantor and to the Department's Solid & Hazardous Waste Management Branch a statement confirming the value of the Trust. Any securities in the Fund shall be valued at market value as of no more than 60 days prior to the anniversary date of establishment of the Fund. The failure of the Grantor to object in writing to the Trustee within 90 days after the statement has been furnished to the Grantor and the Department shall constitute a conclusively binding assent by the Grantor, barring the Grantor from asserting any claim or liability against the Trustee with respect to matter disclosed in the statement.

Section 11. Advice of Counsel. The Trustee may from time to time consult with counsel, who may be counsel to the Grantor, with respect to any question arising as to the construction of this Agreement or any action to be taken hereunder. The Trustee shall be fully protected, to the extent permitted by law, in acting upon the advice of counsel.

Section 12. Trustee Compensation. The Trustee shall be entitled to reasonable compensation for its services as agreed upon in writing from time to time with the Grantor.

Section 13. Successor Trustee. The Trustee may resign or the Grantor may replace the Trustee, but such resignation or replacement shall not be effective until the Grantor has appointed a successor trustee and this successor accepts the appointment. The successor trustee shall have the same powers and duties as those conferred upon the Trustee hereunder. Upon the successor trustee's acceptance of the appointment, the Trustee shall assign, transfer, and pay over to the successor trustee the funds and properties then constituting the Fund. If for any reason the Grantor cannot or does not act in the event of the resignation of the Trustee, the Trustee may apply to a court of competent jurisdiction for the appointment of a successor trustee or for instructions. The successor trustee shall specify the date on which it assumes administration of the trust in a writing sent to the Grantor, the Department's Solid & Hazardous Waste Management Branch, and the present Trustee by certified mail 10 days before such change becomes effective. Any expenses incurred by the Trustee as a result of any of the acts contemplated by this section shall be paid as provided in Section 9.

Section 14. Instructions to the Trustee. All orders, requests, and instructions by the Grantor to the Trustee shall be in writing signed by such persons as are designated in the attached Exhibit A or such other designees as the Grantor may designate by amendment to Exhibit A. The Trustee shall be fully protected in acting without inquiry in accordance with the Grantor's orders, requests, and instructions. All orders, requests and instructions by the Department to the Trustee shall be in writing, signed by the Secretary or the manager of the Department's Solid & Hazardous Waste Management Branch, and the Trustee shall act and shall be fully protected in acting in



## PROPOSED REGULATIONS

accordance with such orders, requests and instructions. The Trustee shall have the right to assume, in the absence of written notice to the contrary, that no event constituting a change or a termination of the authority of any person to act on behalf of the Grantor or the Department hereunder has occurred. The Trustee shall have no duty to act in the absence of such orders, requests, and instructions from the Grantor and/or Department, except as provided for herein.

Section 15. Amendment of agreement. This Agreement may be amended by an instrument in writing executed by the Grantor, the Trustee, and the Department, or by the Trustee and the Department if the Grantor ceases to exist.

Section 16. Irrevocability and Termination. Subject to the right of the parties to amend this Agreement as provided in Section 16, this Trust shall be irrevocable and shall continue until terminated at the written agreement of the Grantor, the Trustee, and Department, or by the Trustee and the Department, if the Grantor ceases to exist. Upon termination of the Trust, all remaining trust property, less final trust administration expenses, shall be delivered to the Grantor.

Section 17. Immunity and Indemnification. The Trustee shall not incur personal liability of any nature in connection with any act or omission, made in good faith, in the administration of this Trust, or in carrying out any directions by the Grantor or the Department issued in accordance with this Agreement. The Trustee shall be indemnified and saved harmless by the Grantor or from the Trust Fund, or both, from and against any personal liability to which the Trustee may be subjected by reason of any act or conduct in its official capacity, including all expenses reasonably incurred in its defense in the event of the Grantor fails to provide such defense.

Section 18. Choice of Law. This Agreement shall be administered, construed, and enforced according to the laws of the State of Delaware.

Section 19. Interpretation. As used in this Agreement, words in the singular include the plural and words in the plural include the singular. The descriptive headings for each Section of the Agreement shall not affect the interpretation or the legal efficacy of this Agreement.

Section 20. Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

In witness Whereof the parties have caused this Agreement to be executed by their respective officers duly authorized and their corporate seals to be hereunto affixed and attested as of the date first above written.

[Signature of Grantor]

[Title]

Attest:

[Title]

[Seal]

[Signature of Trustee]

Attest:

[Title]

[Seal]

CERTIFICATION OF ACKNOWLEDGMENT

State of \_\_\_\_\_

County of \_\_\_\_\_

On this [date], before me personally came [owner or operator] to me known, who, being by me duly sworn, did depose and say that she/he resides at [address], that she/he is [title] of [corporation], the corporation described in and which executed the above instrument; that she/he knows the seal of said corporation; that the seal affixed to such instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that she/he signed her/his name thereto by like order.

[Signature of Notary Public]

**\*Please Note: As the rest of the sections were not amended, they are not being published. A copy of the regulation is available at:**

**1301 Regulations Governing Solid Waste (DRGSW)**

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## DIVISION OF WATER RESOURCES

Statutory Authority: 7 Delaware Code, Section 6010 (7 Del.C. §6010)  
7 DE Admin. Code 7401

### REGISTER NOTICE

#### 1. Brief Synopsis of the Subject, Substance and Issues:

The amended Surface Water Quality Standards presented here are the result of a comprehensive review of the Standards that started with DNREC Start Action Notice #2008-24, approved on October 29, 2008. Department staff started a review of factors affecting human health criteria, EPA documents and staff recommendations, a draft markup of proposed amended Water Quality Standards was prepared in advance of a workshop held January 7, 2009 at the DNREC auditorium. Department staff kept interested parties abreast of developments and the workshop using a combination of e-mail notices, internet postings of documents and relevant links, and notices published in 2 newspapers of statewide circulation. Preceding and during the workshop, additional written comments were requested, received and considered for inclusion in the proposed Standards presented here. To ensure compliance with the Clean Water Act and satisfy EPA requirements, the State of Delaware, in accordance with 7 Del.C. §6010, will amend the State of Delaware Surface Water Quality Standards (as amended July 11, 2004).

#### 2. Possible Terms of the Agency Action:

N/A

#### 3. Statutory Basis or Legal Authority to Act:

7 Del.C. Section 6010

#### 4. List of Other Regulations That May be Impacted or Affected by the Proposal:

Regulations Governing the Control of Water Pollution

#### 5. Notice of Public Comment:

The Department of Natural Resources and Environmental Control, Division of Water Resources, will conduct a public hearing on September 2, 2009 beginning at 5 p.m., in the auditorium of the Richardson and Robbins Building, 89 Kings Highway, Dover, Delaware, to hear testimony and receive comments on the proposed amendments to the State of Delaware Surface Water Quality Standards, (as amended July 11, 2004).

Additional information, copies of the regulation and supporting documents are available on the internet at this URL: <http://www.dnrec.state.de.us/DNREC2000/Divisions/Water/WaterQuality/Standards.htm>. To request a copy

# PROPOSED REGULATIONS

of the proposed revisions to the regulations, please contact David Wolanski at the Watershed Assessment Section at (302) 739-9939 or by email at [david.wolanski@state.de.us](mailto:david.wolanski@state.de.us).

The procedures for public hearings are established in 7 Del.C. §6006 and 29 Del.C. §10117. Inquiries regarding the public hearing should be directed to Robert Haynes at (302) 739-9039. Statements and testimony may be presented orally or in written form at the hearing. It is requested that those interested in presenting statements register in advance by mail or email. The deadline for inclusion of written comments in the hearing record will be announced at the time of the hearing; this deadline will be no earlier than 4:30 p.m. September 11, 2009. Written statements may be presented prior to the hearing and should be addressed to: Robert Haynes, Hearing Officer, DNREC, 89 Kings Highway, Dover, DE 19901. If available, electronic versions of written or oral statements emailed to David Wolanski at [david.wolanski@state.de.us](mailto:david.wolanski@state.de.us) will expedite preparation of a response to comments document after the hearing.

## 7401 Surface Water Quality Standards

### 1.0 Intent

- 1.1 It is the policy of the Department to maintain within its jurisdiction surface waters of the State of satisfactory quality consistent with public health and public recreation purposes, the propagation and protection of fish and aquatic life, and other beneficial uses of the water.
- 1.2 Where conflicts develop between stated surface water uses, stream criteria, or discharge criteria, designated uses for each segment shall be paramount in determining the required stream criteria, which, in turn, shall be the basis of specific discharge limits or other necessary controls.
- 1.3 Where existing facilities operating under a permit from this Department are required to reduce pollution concentrations or loadings due to the implementation of these surface water quality standards, a reasonable schedule for compliance may be granted in accordance with standards or requirements established in applicable statutes and regulations.
- 1.4 The Department intends to develop an agency-wide program to assess, manage, and communicate human health cancer risks from the major categories of environmental pollution under its jurisdiction. As a result of this activity, it may be necessary to adjust the upper bound worst case risk management level stated in Section 4.5.9.3.2.1 4.6.3.3.2.1.

### *(Break of Continuity of Sections)*

### 3.0 Stream Basins & Designated Uses

The designated uses applicable to the various stream basins represent the categories of beneficial use of waters of the state which must be maintained and protected through application of appropriate criteria.

Basins and waterbodies as illustrated in Figure 1		Public Water Supply Source	Industrial Water Supply	Primary Contact Recreation	Secondary Contact Recreation	Fish, Aquatic Life & Wildlife**	Cold Water Fish (Put-and-Take)	Agricultural Water Supply	ERES Waters*	Harvestable Shellfish Waters
#	Name									
1	Naamans Creek	-	x	x	x	x	-	(a)	-	-
2	Shellpot Creek	-	x	x	x	x	-	(a)	-	-
3	Brandywine Creek	(a)	x	x	x	x	(b)	(a)	(h)	-
4	Red Clay Creek	x	x	x	x	x	(e)	x	q	-
5	White Clay Creek	(a)	x	x	x	x	(f)	(a)	(g)	-
6	Christina River	(a)	x	x	x	x	(c)	(a)	-	-

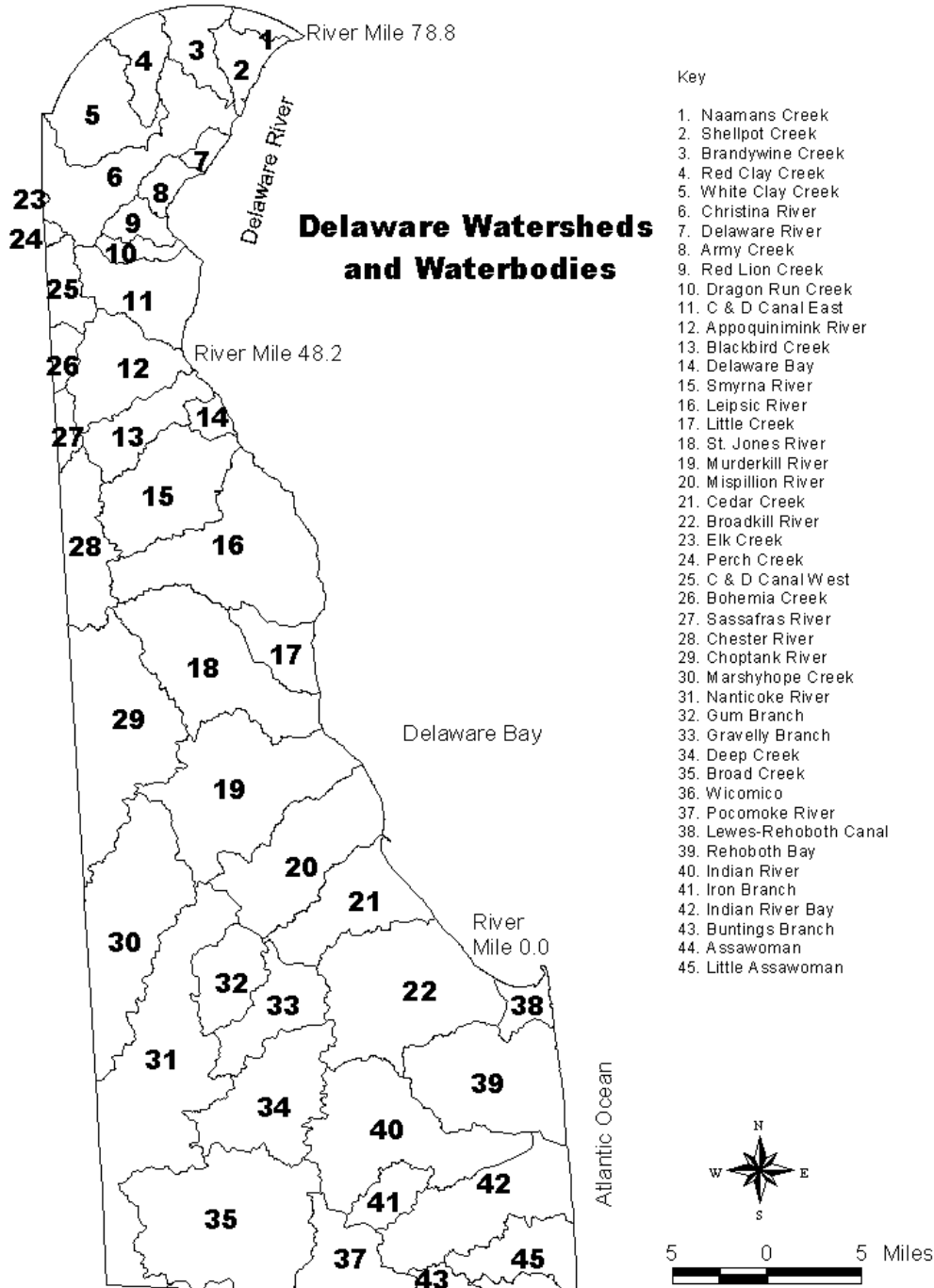
# PROPOSED REGULATIONS

7	Delaware River	-	-	x	x	x	-	(a)	-	-
8	Army Creek	-	-	x	x	x	-	(a)	-	-
9	Red Lion Creek	(a)(i)	x	x	x	x	-	(a)	-	-
10	Dragon Run Creek	(a)	x	x	x	x	-	(a)	-	-
11	Chesapeake & Delaware Canal East	-	x	x	x	x	-	-	-	-
12	Appoquinimink River	-	x	x	x	x	-	(a)	-	-
13	Blackbird Creek	-	x	x	x	x	-	(a)	-	-
14	Delaware Bay	-	x	x	x	x	-	(a)	-	-
15	Smyrna River	-	x	x	x	x	-	(a)	-	-
16	Leipsic River	-	x	x	x	x	-	(a)	-	-
17	Little Creek	-	x	x	x	x	-	(a)	-	-
18	St. Jones River	-	x	x	x	x	-	(a)	-	-
19	Murderkill River	-	x	x	x	x	-	(a)	-	-
20	Mispillion River	-	x	x	x	x	-	(a)	-	-
21	Cedar Creek	-	x	x	x	x	-	(a)	(d)	-
22	Broadkill River (k)	-	x	x	x	x	-	(a)	-	-
23	Elk Creek	-	x	x	x	x	-	x	-	-
24	Perch Creek	-	x	x	x	x	-	x	-	-
25	Chesapeake & Delaware Canal West	-	x	x	x	x	-	-	-	-
26	Bohemia Creek	-	x	x	x	x	-	x	-	-
27	Sassafras River	-	x	x	x	x	-	x	-	-
28	Chester River	-	x	x	x	x	-	x	-	-
29	Choptank River	-	x	x	x	x	-	x	-	-
30	Marshyhope Creek	-	x	x	x	x	-	x	x	-
31	Nanticoke River	-	x	x	x	x (p)	-	(a)	x	-
32	Gum Branch	-	x	x	x	x	-	(a)	x	-
33	Gravelly Branch	-	x	x	x	x	-	(a)	x	-
34	Deep Creek	-	x	x	x	x	-	(a)	x	-
35	Broad Creek	-	x	x	x	x (p)	-	(a)	x	-
36	Wicomico	-	x	x	x	x	-	(a)	x	-
37	Pocomoke River	-	x	x	x	x	-	x	-	-
38	Lewes & Rehoboth Canal	-	x	x	x	x	-	-	-	-
39	Rehoboth Bay	-	x	x	x	x	-	(a)	x	(j)
40	Indian River	-	x	x	x	x	-	(a)	(d)	-
41	Iron Branch	-	x	x	x	x	-	(a)	(d)	-
42	Indian River Bay	-	x	x	x	x	-	(a)	x	(j)
43	Buntings Branch	-	-	x	x	x	-	x	-	-
44	Assawoman	-	-	x	x	x	-	(a)	x-	-
45	Little Assawoman Bay	-	x	x	x	x	-	(a)	x	-
	Delaware Bay (waterbody) (l), (n)	-	x	x	x	x	-	-	(m)	(j)
	Delaware River (Waterbody) (l),(o)	-	x	x	x	x	-	-	-	-
	Atlantic Ocean (waterbody)	-	x	x	x	x	-	-	(m)	-

- (a) Designated use for freshwater segments only.  
 (b) Designated use from March 15 to June 30 on:

1. Beaver Run from PA/DE line to Brandywine.
  2. Wilson Run Route 92 through Brandywine Creek State Park.
- (c) Designated use from March 15 to June 30 on:
1. Christina River from MD/DE line through Rittenhouse Park.
- (d) Designated use for marine water segments only.
- (e) Designated use year round on:
1. Red Clay Creek from PA/DE line to the concrete bridge above Yorklyn
- (f) Designated use year round on:
1. White Clay Creek from the PA/DE line to the dam at Curtis Paper.  
Designated use from March 15 to June 30 on:
  2. Mill Creek from Brackenville Road to Route 7.
  3. Pike Creek from Route 72 to Henderson Road.
- (g) Designated use from PA/DE line to the dam at Curtis Paper.
- (h) Designated use from PA/DE line to Wilmington city line.
- (i) Goal use - not currently attained.
- (j) Parts of these waters are APPROVED shellfish harvesting areas. Information on areas where shellfish may be taken should be obtained from the Shellfish & Recreational Waters Branch, Watershed Assessment Section, Division of Water Resources, Department of Natural Resources and Environmental Control.
- (k) Includes Primehook Creek watershed.
- (l) Includes assorted minor watersheds not explicitly associated with any other designated stream basin.
- (m) The specific portions of the Atlantic Ocean and the Delaware Bay for which the ERES designation shall apply shall be delineated in the Pollution Control Strategy developed for each of those waterbodies. The ERES designation for the Atlantic Ocean and the Delaware Bay does not include water explicitly associated with any other designated stream basis (e.g., Delaware Bay does not include St. Jones River).
- (n) The Delaware Bay extends from River Mile 0.0 to 48.2 as shown on Figure 1.
- (o) The Delaware River extends from River Mile 48.2 to 78.8 as shown in Figure 1.
- (p) The Nanticoke River from the upstream-most limits of the City of Seaford to the Maryland State Line and the Broad Creek from the upstream-most limits of the Town of Laurel to the confluence with the Nanticoke River have special criteria in Section 4.5 that are protective of open water fish and shellfish, shallow-water bay grass and migratory fish spawning and nursery designated uses consistent with the Maryland portion of the tidal Nanticoke River and as described in the U.S. Environmental Protection Agency document Ambient Water Quality Criteria for Dissolved Oxygen, Water Clarity and Chlorophyll a for the Chesapeake Bay and its Tidal Tributaries (EPA 903-R-03-002). Attainment of the water quality criteria that apply to these waters will be determined following the guidelines documented within the same document and any future published addendums or modifications to that original publication.
- (q) ERES designation is for Burrows Run from the Pennsylvania Line to the confluence with Red Clay Creek
- x his designated water use to be protected throughout entire stream basin
- water uses not designated in the stream basin
- \* waters of exceptional recreational or ecological significance
- \*\* includes shellfish propagation

Figure 1 Delaware Watersheds and Waterbodies



Basin Boundaries to be used in determination of standards applicability are on file with the DNREC Division of Water Resources.

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## 4.0 Criteria To Protect Designated Uses

*(Break in Continuity within Section)*

4.2.1.1.3 Concentrations of toxic substances in the treated water that may be harmful to human health. The requirements of Section 4.5.10 4.6.3 shall apply.

*(Break in Continuity within Section)*

**TABLE 1**  
**WATER QUALITY CRITERIA FOR PROTECTION OF AQUATIC LIFE**  
 (All Values Are Listed or Calculated in Micrograms Per Liter)

Parameter	Fresh Acute Criterion	Fresh Chronic Criterion	Marine Acute Criterion	Marine Chronic Criterion
Aldrin	3.0	--	1.3	--
Aluminum pH6.5-9.0	750.	87.	--	--
Ammonia	Temperature and pH dependent, see formula after this table	Temperature and pH dependent, see formula after this table		
Arsenic (III)*	340.	150	69.	36.
Cadmium*	$(1.136672 - \text{LN}(\text{hardness}) * 0.041838) * \text{EXP}(1.0166 * \text{LN}(\text{hardness}) - 3.924)$	$(1.101672 - \text{LN}(\text{hardness}) * 0.041838) * \text{EXP}(0.7409 * \text{LN}(\text{hardness}) - 4.719)$	40.	8.8
Chlordane	2.4	0.0043	0.09	0.004
Chlorine	19	11.	13	7.5
Chlorpyrifos (Dursban)	0.083	0.041	0.011	0.0056
Chromium (III)*	$0.316 * \text{EXP}(0.819 * \text{LN}(\text{hardness}) + 3.7256)$	$0.86 * \text{EXP}(0.819 * \text{LN}(\text{hardness}) + 0.6848)$	C	--
Chromium (VI)*	16.	11.	1,100.	50.
Copper*	$0.96 * \text{EXP}(0.9422 * \text{LN}(\text{hardness}) - 1.7)$	$0.96 * \text{EXP}(0.8545 * \text{LN}(\text{hardness}) - 1.702)$	4.8	3.1
Cyanide <sup>1</sup>	22.	5.2	1.0	--
DDT and Metabolites (DDD and DDE)	1.1	0.0010	0.13	0.0010
Demeton	--	0.10	--	0.10
Dieldrin	0.24	.056	0.71	0.0019
Endosulfan	0.22	0.056	0.034	0.0087
Endrin	.086	.036	0.037	0.0023
Guthion	--	0.01	--	0.01
Heptachlor	0.52	0.0038	0.053	0.0036

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Hexachloro-cyclohexane	.095	0.08	0.16	--
Iron	--	1000.	--	--
Lead*	(1.46203- LN(hardness)*0.145712)* EXP(1.273*LN(hardness)-1.460)	(1.46203- LN(hardness)*0.145712)* EXP(1.273*LN(hardness)-4.705)	210.	8.1
Malathion	--	0.1	--	0.1
Mercury (II)*	1.4	<del>0.77</del> .77	1.8	0.94
Methoxychlor	--	0.03	--	0.03
Mirex	--	0.001	C	0.001
Nickel*	0.998*EXP(0.8460*LN(hardness)+2 .255)	0.997*EXP(0.8460*LN(hardness)+0.0 584)	74.	8.2
Total PCBs		0.014		0.03
Parathion	0.065	0.013	--	--
Pentachlorop henol	EXP(1.005*pH-4.869)	EXP(1.005*pH-5.134)	13.	7.9
Selenium	20	5.0	290	71.
Silver*	0.85*EXP(1.72*LN(hardness)-6.59)	--	1.9	--
Toxaphene	0.73	0.0002	0.21	0.0002
Zinc*	0.978*EXP(0.8473*LN(hardness)+0 .884)	0.986*EXP(0.8473*LN(hardness)+0.8 84)	90	81

Notes:

<sup>1</sup>Cyanide measured as free cyanide at the lowest pH occurring in the receiving water, or cyanide amenable to chlorination.

Formulas in the table have been formatted so that they can be copied directly into spreadsheets to calculate criteria. Criteria are calculated to two significant figures.

LN = natural log base e

EXP = e = 2.71828

Hardness is expressed as mg/L as CaCO<sub>3</sub>

pH is expressed as Standard Units

\* Criteria is for total dissolved form

**Calculation of Freshwater Acute Ammonia Criterion:**

Where salmonid fish are present:

$$\text{Criterion} = \frac{0.275}{1 + 10^{7.204-\text{pH}}} + \frac{39.0}{1 + 10^{\text{pH}-7.204}}$$

Or where salmonid fish are not present:

$$\text{Criterion} = \frac{0.411}{1 + 10^{7.204-\text{pH}}} + \frac{58.4}{1 + 10^{\text{pH}-7.204}}$$

**Calculation of Freshwater Chronic Ammonia Criterion:**



# PROPOSED REGULATIONS

The thirty-day average concentration of total ammonia nitrogen (in mg N/L) does not exceed, more than once every three years on the average, the chronic criterion calculated using the following equations.

When fish early life stages are present:

$$0.0577 \quad 2.487$$

$$\text{Criterion} = \left( \frac{0.0577}{1 + 10^{7.688 - \text{pH}}} + \frac{2.487}{1 + 10^{\text{pH} - 7.688}} \right) * \text{MIN} (2.85, 1.45 * 10^{0.028 * (25 - T)})$$

When fish early life stages are absent:

$$0.0577 \quad 2.487$$

$$\text{Criterion} = \left( \frac{0.0577}{1 + 10^{7.688 - \text{pH}}} + \frac{2.487}{1 + 10^{\text{pH} - 7.688}} \right) * [1.45 * 10^{0.028 * (25 - \text{MAX}(T, 7))}]$$

**Additional Freshwater Chronic Ammonia Criterion:**

The highest four-day average within the 30-day period shall not exceed 2.5 times the chronic criterion.

**TABLE 2  
WATER QUALITY CRITERIA FOR PROTECTION OF HUMAN HEALTH**

(All Values Are Listed in Micrograms per Liter)

Chemical	Systemic Toxicants		Human Carcinogens	
	Fish Ingestion	Fish and Water Ingestion	Fish Ingestion	Fish and Water Ingestion
Acenaphthene	990	670		
Acrolein	300 <u>9.3</u>	190 <u>6.1</u>		
Acrylonitrile			0.25	0.051
Aldrin	0.025	0.025	0.00005	0.000049
Anthracene	40000	8300		
Antimony	1600	6 (MCL)		
Arsenic (inorganic)		10 (MCL)		
Asbestos		7 million fibers/L (MCL)		
barium		2000 (MCL)		
Benzene	3100	5 (MCL)	14	0.61
Benzidine	140	59	0.00019	0.000086
Benzo(a)Anthracene			0.18	0.038
Benzo(a)Pyrene		0.2 (MCL)	0.018	0.0038
Benzo(b)Fluoranthene			0.18	0.038
Beryllium	420	4 (MCL)	0.024	0.0034
Bis(2-Chloroethyl)Ether			0.53	0.03
Bis(2-Chloroisopropyl)Ether	65000	1400		
Bis(2-Ethylhexyl)Phthalate	620	6 (MCL)	2.2	1.2
Bromoform	9600	650	61	4.1

# PROPOSED REGULATIONS

Butylbenzyl Phthalate	1900	1500		
Cadmium	31	5 (MCL)		
Carbon Tetrachloride	150	5 (MCL)	1.6	0.23
Chlordane	0.14	0.14	0.00081	0.0008
Chlorobenzene	7800	100 (MCL)		
Chlorodibromomethane	21000	680	13	0.4
Chloroform	11000	340		
2-Chloronaphthalene	1600	1000		
2-Chlorophenol	150	81		
Chromium (III)	380000	100 (MCL)		
Chromium (VI)	750	92		
Chromium		100 (MCL)		
Chrysene			0.18	0.038
Copper		1300 (MCL)		
Cyanide	80000	200		
DDT and Metabolites (DDD and DDE)	0.037	0.037	0.00022	0.00022
Dibenzo(a,h)Anthracene			0.018	0.0038
1,2-Dichlorobenzene	6500	600 (MCL)		
1,3-Dichlorobenzene	1300	350		
1,4-Dichlorobenzene	1400	75 (MCL)		
3,3'-Dichlorobenzidine			0.028	0.021
Dichlorobromomethane		680	17	0.55
1,2-Dichloroethane		5 (MCL)	37	0.38
1,1-Dichloroethylene	36000	7 (MCL)	1.2	0.056
Dichloromethane	260000	5 (MCL)	590	4.6
2,4-Dichlorophenol	290	77		
2,4 Dichlorophenoxyacetic acid (2,4-D)		70 (MCL)		
1,2 Dichloropropane			15	0.5
1,3-Dichloropropene	63000	1000	42	0.69
Dieldrin	0.043	0.041	0.000054	0.000052
Diethyl Phthalate	44000	17000		
Dimethyl Phthalate	1100000	270000		
2,4-Dimethylphenol	850	380		
Di-n-Butyl Phthalate	4500	2000		
2,4-Dinitrophenol	5300	69		
2,4-Dinitrotoluene	2100	68	[28 3, 4]	[0.92 0.11]
2,3,7,8-TCDD (Dioxin) [(as TEQ <sup>1</sup> )]		0.00003 (MCL)	5.1E-09	5.0 E-09
1,2-Diphenylhydrazine			0.2	0.036
Endosulfan	89	62		
Endrin	0.3	0.29		
Endrin Aldehyde	0.3	0.29		
Ethylbenzene	11000	700 (MCL)		
Fluoranthene	140	130		

# PROPOSED REGULATIONS

Fluorene	5300	1108		
Fluoride		4000 (MCL)		
Heptachlor	0.18	0.18	0.000079	0.000079
Heptachlor Epoxide	0.0046	0.0046	0.000039	0.000039
Hexachlorobenzene	0.36	0.35	0.00028	0.00028
Hexachlorobutadiene	2900	68	18	0.44
Hexachlorocyclohexane			0.017	0.0091
Hexachlorocyclopentadiene	5500	50 (MCL)		
Hexachloroethane	46	20	3.3	1.4
Ideno(1,2,3-cd)pyrene			0.18	0.038
Isophorone	180000	6700	960	35
Lead		15 (MCL)		
alpha-BHC		0.2 (MCL)	0.0048	0.0026
beta-BHC		0.2 (MCL)	0.017	0.0091
gamma-BHC (Lindane)	9.2	0.2 (MCL)	0.23	0.12
Methyl Mercury	0.3mg/kg fish tissue	0.3mg/kg fish tissue		
Methoxychlor		40 (MCL)		
Methyl Bromide	1500	47		
3-Methyl-4-Chlorophenol				
Nickel (soluble salts)	1700	100 (MCL)		
Nitrate		10000 (MCL)		
Nitrobenzene	690	17		
N-Nitrosodimethylamine			3	0.00069
N-Nitrosodi-n-Propylamine			0.51	0.005
N-Nitrosodiphenylamine			6	3.3
Pentachlorophenol	11000	1 (MCL)	3	0.27
Phenol	860000	10000		
Polychlorinated Biphenyls PCBs:		0.5 (MCL)	0.000064	0.000064
Pyrene	4000	830		
Selenium	4200	50 (MCL)		
Silver	40000	170		
1,1,2,2-Tetrachloroethane			4	0.17
Tetrachloroethylene	1300	5 (MCL)	3.3	0.69
Thallium	18	2 (MCL)		
Toluene	<del>75000</del> 30000	1000 (MCL)		
Total Trihalomethanes (TTHM)		80 (MCL)		80
Toxaphene		3 (MCL)	0.00028	0.00028
1,2-Trans-Dichloroethylene	51000	100 (MCL)		
1,2,4-Trichlorobenzene	350	70 (MCL)		
1,1,1-Trichloroethane	<u>1400000</u>	200 (MCL)		
1,1,2-Trichloroethane	3600	5 (MCL)	16	0.59
Trichloroethylene		5 (MCL)	30	2.5
2,4,6-Trichlorophenol			2.4	1.4

2,4,5 Trichlorophenoxypropionic acid (2,4,5-TP- Silvex)		50 (MCL)		
Vinyl Chloride	10000	2 (MCL)	2.4	0.025
Zinc	26000	7400		

The columns labeled "Fish and Water Ingestion" shall apply only to waters of the State designated Public Water Supply sources in these standards.

The column labeled "Fish Ingestion Only" shall apply to all-waters of the State not designated Public Water Supply sources in this document.

\*\*Values shown with "(MCL)" under header "Fish and Water Ingestion" are Primary Maximum Contaminant Levels (MCLs) as given in the State of Delaware Regulations Governing Public Drinking Water Systems that became effective September 10, 2001

<sup>1</sup> Criteria is for the "total toxic equivalence (TEQ) to 2,3,7,8-TCDD". The toxic equivalence for a sample is the sum of the concentration for each congener multiplied by its associated Toxicity Equivalence Factor (TEF) listed in table below.

$$TEQ = ((\text{Concentration of Congener in sample}) \times (\text{TEF}))$$

where the TEF is unitless and the concentration is in ug/l.

Congener	TEF value	Congener	TEF value
<i>Dibenzo-p-dioxins</i>		<i>Non-ortho PCBs</i>	
2,3,7,8-TCDD	1	PCB 77	0.0001
1,2,3,7,8-PnCDD	1	PCB 81	<del>0.0004</del> <u>0.0003</u>
1,2,3,4,7,8-HxCDD	0.1	PCB 126	0.1
1,2,3,6,7,8-HxCDD	0.1	PCB 169	<del>0.04</del> <u>0.03</u>
1,2,3,7,8,9-HxCDD	0.1		
1,2,3,4,6,7,8-HpCDD	0.01	<i>Mono-ortho PCBs</i>	
OCDD	<del>0.0004</del> <u>0.0003</u>	PCB 105	<del>0.0004</del> <u>0.0003</u>
		PCB 114	<del>0.0005</del> <u>0.0003</u>
<i>Dibenzofurans</i>		PCB 118	<del>0.0004</del> <u>0.0003</u>
2,3,7,8-TCDF	0.1	PCB 123	<del>0.0004</del> <u>0.0003</u>
1,2,3,7,8-PnCDF	0.03	PCB 156	<del>0.0005</del> <u>0.0003</u>
2,3,4,7,8-PnCDF	0.3	PCB 157	<del>0.0005</del> <u>0.0003</u>
1,2,3,4,7,8-HxCDF	0.1	PCB 167	<del>0.00004</del> <u>0.0003</u>
1,2,3,6,7,8-HxCDF	0.1	PCB 189	<del>0.0004</del> <u>0.0003</u>
1,2,3,7,8,9-HxCDF	0.1		
2,3,4,6,7,8-HxCDF	0.1		
1,2,3,4,6,7,8-HpCDF	0.01		
1,2,3,4,7,8,9-HpCDF	0.01		
OCDF	<del>0.0004</del> <u>0.0003</u>		

## 5.0 Antidegradation and ERES Waters Policies

*(Break in Continuity within Section)*

### 5.6.3.4 Pollution Control Strategy

5.6.3.4.1 For each stream basin designated as ERES waters pursuant to Section 40 3 of these standards, the Department shall develop a pollution control strategy. The strategy shall provide for the implementation of best management practices established pursuant to Subsection ~~5.6.3.6~~ 5.6.3.5 of this section and shall include such additional requirements, measures, and practices as are necessary to:

5.6.3.4.1.1 Prevent the violation of water quality standards;

5.6.3.4.1.2 Protect all resources in the stream basin in a manner that allows for natural conditions to be maintained or restored; and

5.6.3.4.1.3 Assure the protection and propagation of a balanced, indigenous population of fish, shellfish, aquatic vegetation, and wildlife, and provide for recreational activities in and on the water.

*(Break in Continuity within Section)*

## 6.0 Regulatory Mixing Zones

The following requirements shall apply to regulatory mixing zones:

*(Break in Continuity within Section)*

6.4 Size: Size of the zone shall be no larger than is necessary to provide for mixing of effluent and receiving water. The following are the maximum size limitations that shall apply unless the discharger can demonstrate to the satisfaction of the Department that a larger mixing zone would not have an adverse impact in the receiving water:

*(Break in Continuity within Section)*

6.4.2 Mixing zones for thermal (temperature) pollutants shall be defined as those waters between the point of discharge and the point at which the receiving water temperature criteria are met as defined in Section 44 4, subject to criteria 6.4.2.1 through 6.4.2.5 below. For non-tidal freshwater, mixing zones shall be designed using the critical stream flow specified in Section 7.1 or 7.3.

*(Break in Continuity within Section)*

6.5 In-Zone and Boundary of Zone Water Quality Requirements:

*(Break in Continuity within Section)*

6.5.3 No acute aquatic life criterion, as detailed in Section ~~4.5.9~~ 4.6.3 of this document, may be exceeded at any point greater than one-tenth of the distance from the edge of the outfall structure to the boundary of the regulatory mixing zone as defined above. Substances in concentrations that may result in a dominance of nuisance species, or may affect species diversity.

6.5.4 No acute aquatic life criterion, as detailed in Section ~~4.5.9~~ 4.6.3 of this document, may be exceeded at any point greater than fifty (50) times the discharge length scale in any horizontal direction from the edge of the outfall structure.

- 6.5.5 No acute aquatic life criterion, as detailed in Section ~~4.5.9~~ 4.6.3 of this document, may be exceeded at any point greater than five (5) times the average water depth in the regulatory mixing zone in any horizontal direction from the edge of the outfall structure.
- 6.5.6 No chronic aquatic life criterion, as detailed in Section ~~4.5.9~~ 4.6.3 of this document, may be exceeded beyond the boundary of the regulatory mixing zone as defined above.

## 7.0 Critical Flows

*(Break in Continuity within Section)*

- 7.2 For all waters of the state, water quality criteria for toxic substances as specified in Section ~~4.5.9~~ 4.6.3 shall not apply at those times when the freshwater or net advective flow falls below the following values:

*(Break in Continuity of Sections)*

**\*Please Note: As the rest of the sections were not amended, they are not being published. A copy of the regulation is available at:**

**7401 Surface Water Quality Standards**

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## DEPARTMENT OF SAFETY AND HOMELAND SECURITY DIVISION OF STATE POLICE

Statutory Authority: 24 Delaware Code, Section 1304(b)(3) (24 **Del.C.** §1304(b)(3))  
24 **DE Admin. Code** 1300

### **PUBLIC NOTICE**

Notice is hereby given that the Board of Examiners of Private Investigators and Private Security Agencies, in accordance with **Del.C.** Title 24 Chapter 13 proposes to amend the following Rules: 1.0 Firearm's Policy, 2.0 Nightstick, Pr24, Mace, Peppergas and Handcuffs, 7.0 Employment Notification, 8.0 Criminal Offenses and 9.0 Private Investigators. If you wish to view the complete Regulation, contact Ms. Peggy Anderson at (302) 739-5991. Any persons wishing to present comments may submit them in writing, by August 31, 2009, to Ms. Peggy Anderson, Delaware State Police, Detective Licensing, P.O. Box 430, Dover, DE 19903.

### **1300 Board of Examiners of Private Investigators & Private Security Agencies**

#### **1.0 Firearm's Policy**

- 1.1 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~~ of instruction and an initial qualification administered by a Board approved certified firearms instructor. The course of instruction which shall include a minimum 40 hours ~~course of instruction~~ of training. The Detective Licensing Section may waive the 40 hour training requirement depending upon the applicant's professional credentials, training and/or work experience (i.e. prior law enforcement).
- 1.2 Individuals licensed to carry a firearm must 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 (3), there will be one (1) mandatory "low light" shoot. Simulation is permitted and it may

# PROPOSED REGULATIONS

be combined with a daylight shoot. The initial qualification shoot may be used to fulfill one day and one low light requirement during the first year.

## 1.23 Firearms - approved type of weapons

1.23.1 9mm

1.23.2 .357

1.23.3 .38

1.23.4 .40

1.34 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.

1.45 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.

1.56 All individuals must qualify with the same type of weapon that he/she will carry.

1.67 All ammunition will be factory fresh (no re-loads).

1.78 The minimum passing score is 80%.

1.89 All licenses are valid for a period of five (5) years, subject to proof of compliance of Rule 1.0 by submission of ~~sheets~~ shoot certification or re-certification forms by January 31st of each year for the previous calendar year.

## 1.10 Firearms Instructors

1.10.1 Firearms instructors must be certified by the National Rifle Association, a law enforcement training and standards commission (i.e. C.O.P.T.), and/or another professional firearms training institution as a "certified firearms instructor".

1.10.2 Firearms instructors are restricted to teaching and qualifying individuals according to the type of firearm matching their certification. (For example, a certified shotgun instructor may only instruct and qualify individual with the shotgun.)

1.10.3 All firearms instructors must be approved by the Board before they are authorized to instruct or qualify individuals licensed under Title 24 Chapter 13.

**Adopted 11/04/1994**

**3 DE Reg. 960 (1/1/00)**

**7 DE Reg. (3/1/04)**

## 2.0 Nightstick, Pr24, Mace, Peppergas 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.

**Adopted 11/04/1994**

*(Break in Continuity of Sections)*

## 7.0 Employment Notification

7.1 ~~It shall be the responsibility of each person licensed as a security guard under 24 Del.C. Ch. 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.)~~

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*(Break in Continuity of Sections)*

## 8.0 Criminal Offenses

- 8.1 In addition to those qualifications set forth in ~~24 Del.C. §1314~~ Title 24, Chapter 13, 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.
- 8.2 Anyone applying for licensure under Title 24 Chapter 13 shall not be issued a license if they have any pending criminal charge(s) for any crimes listed in this Chapter.
- 8.3 The Detective Licensing Section may suspend anyone licensed under Title 24 Chapter 13 who has been arrested and that arrest could result in the conviction of any misdemeanor or felony as described in this Chapter.

**Adopted 11/04/1994**

## 9.0 Private Investigators

- 9.1 A Private Investigator ~~must~~ shall not be a member or employee of any Delaware Law Enforcement Organization, as defined by the Council on Police Training, ~~or a member or employee of a law enforcement organization of any other state or federal jurisdiction.~~
- 9.2 ~~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.~~
- 9.3 A licensed Private Investigator may only be employed by one licensed private investigative agency at a time.

**Adopted 11/04/1994**

**\*Please Note: As the rest of the sections were not amended, they are not being published. A copy of the regulation is available at:**

**1300 Board of Examiners of Private Investigators & Private Security Agencies**

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## DEPARTMENT OF STATE DIVISION OF THE ARTS

Statutory Authority: 29 Delaware Code, Section 8729(c) (29 **Del.C.** §8729(c))

### NOTICE

The State of Delaware, Department of State's Division of the Arts hereby gives notice of its intention to adopt amended regulations pursuant to the General Assembly's delegation of authority to adopt such measures found at 29 Del.C. §8729(c) and in compliance with Delaware's Administrative Procedures Act, 29 Del.C. §10115. The proposed regulations constitute a regulatory adoption of grant procedures used to provide assistance for the development of the arts as authorized pursuant to 29 Del.C. §8729. Pursuant to §8729, the Director and the Delaware State Arts Council shall establish such rules and regulations as are necessary to determine the eligibility of any instrumentality, or agency or political subdivision, private or public nonprofit association for participation in contracts authorized by this section. A private or public nonprofit association shall submit a letter of exemption from the Internal Revenue Service as proof of nonprofit status.



The Division solicits, and will consider, timely filed written comments from interested individuals and groups concerning these proposed amended regulations. The deadline for the filing of such written comments will be thirty days (30) after these proposed amended regulations are published in the Delaware Register of Regulations.

Any such submissions should be mailed or delivered to:

Paul Weagraff, Director  
Delaware Division of the Arts  
820 N French Street  
Wilmington, DE 19801  
Email: delarts@state.de.us

Or Comments can also be made by telephone to the following dedicated voicemail line: 302-577-8290 by September 1, 2009.

### **1001 Assistance for the Development of the Arts Regulations**

#### **1.0 Introduction**

These regulations are authorized pursuant to 29 Del.C. §8729(c) which established a special fund of the State of Delaware to encourage instrumentalities, agencies and political subdivisions of the State and private and public nonprofit associations in the development of the arts in the State and to enhance the appreciation of artistic expressions by citizens of the State. Arts Funding is dictated by the availability of State, Federal, and other funds, and necessarily changes on a year to year basis. Current available funding may be found at <http://www.artsdel.org/grants>.

#### **2.0 Grantee Categories**

##### **2.1 Delaware Artists**

To be eligible for funding as a Delaware artist, the applicant must:

- 2.1.1 Be at least 18 years of age.
- 2.1.2 Be a resident of Delaware for at least one year at the time of application. Individual artists shall submit a valid Delaware Driver's License or Delaware Motor Vehicle Identification Card as proof of residency.
- 2.1.3 Recipients must remain Delaware residents during the grant period.
- 2.1.4 Not be enrolled in degree or certificate-granting educational programs at the time of application or for the duration of the grant period.
- 2.1.5 Additional grant specific eligibility guidelines may change in each fiscal year, given the availability and source of grant funding. Current guidelines are posted at <http://www.artsdel.org/grants>.

##### **2.2 Delaware Arts Organizations**

To be eligible for funding as an arts organization, the applicant must:

- 2.2.1 Identify in their charter, incorporation papers, bylaws, and IRS nonprofit determination letter at least one of the following as a primary purpose of the organization: the promotion, presentation, production, or teaching of the arts. The Division of the Arts shall make all final determinations as to the primary purpose of the organization.
- 2.2.2 Certify that the organization is based and chartered in Delaware as a nonprofit organization; exempt from federal income tax under Section 501(c)(3) or 501(c)(4) or 509(a) of the Internal Revenue Code; and eligible to receive donations allowable as charitable contributions under Section 170(c) of the Internal Revenue Code of 1954.
- 2.2.3 Have a stable, functioning board of directors that meets at least quarterly.
- 2.2.4 Additional grant specific eligibility guidelines may change in each fiscal year, given the availability and source of grant funding. Current guidelines are posted at <http://www.artsdel.org/grants>.

## 2.3 Delaware Community Based Organizations

To be eligible for funding as a community-based organization, the applicant must:

- 2.3.1 Identify in their charter, incorporation papers, bylaws, and IRS nonprofit determination letter a primary purpose of the organization other than the promotion, presentation, production, or teaching of the arts. The Division of the Arts shall make all final determinations as to the primary purpose of the organization. Such purpose may be, but is not limited to, libraries, civic groups, community/senior centers, festivals, parks/recreation programs, and universities and colleges.
- 2.3.2 Be based and chartered in Delaware as a nonprofit organization; exempt from federal income tax under Section 501(c)(3) or 501(c)(4) or 509(a) of the Internal Revenue Code; and eligible to receive donations allowable as charitable contributions under Section 170(c) of the Internal Revenue Code of 1954. Organizations that have not received Delaware incorporation or IRS nonprofit designation are not eligible to apply for Project Support, and
- 2.3.3 Have a stable, functioning board of directors that meets at least quarterly, or
- 2.3.4 Be an established unit of municipal, county, or state government within Delaware.
- 2.3.5 Additional grant specific eligibility guidelines may change in each fiscal year, given the availability and source of grant funding. Current guidelines are posted at <http://www.artsdel.org/grants>.

## 2.4 Delaware Arts Education Providers

To be eligible for arts education funding, the applicant must be:

- 2.4.1 Delaware public, private, or parochial school with an established arts curriculum and staff, pre-K through 12, or
- 2.4.2 Delaware public school district and/or consortia of public schools, or
- 2.4.3 Delaware arts organization with a demonstrated commitment to arts learning, that also meets the eligibility requirements for arts organization funding, or
- 2.4.4 Professional arts service or arts education organization based and chartered in Delaware.
- 2.4.5 Additional grant specific eligibility guidelines may change in each fiscal year, given the availability and source of grant funding. Current guidelines are posted at <http://www.artsdel.org/grants>.

## 2.5 Regional/National Nonprofit Organizations

To be eligible for funding, the applicant must:

- 2.5.1 Be chartered as a nonprofit organization; exempt from federal income tax under Section 501(c)(3) or 501(c)(4) or 509(a) of the Internal Revenue Code; and eligible to receive donations allowable as charitable contributions under Section 170(c) of the Internal Revenue Code of 1954.
- 2.5.2 Provide the program(s) or service(s) funded by the grant directly to the Delaware Division of the Arts or to its constituents, on behalf of the Division, under written agreement with the Division of the Arts.
- 2.5.3 Additional grant specific eligibility guidelines may change in each fiscal year, given the availability and source of grant funding. Current guidelines are posted at <http://www.artsdel.org/grants>.

## **3.0 Grant Award Process**

- 3.1 Organizational Grants. Organizational grants reviewed on an annual basis or for multi-year approval are reviewed by impartial peer review panels, (hereinafter "Grant Panels.") The decision to use private citizens on grant review Grant Panels reflects the importance of having diverse public and expert participation in the grant-making process.

### 3.1.1 Grant panels: Composition:

Individuals who work or live in Delaware are eligible to serve on Grant Panels. Grant Panels are composed of artists, arts educators, arts and nonprofit organization administrators, corporate and fund raising managers, knowledgeable arts specialists, and interested community members. Panelists are chosen for their professional experience, expertise in an artistic discipline, knowledge of the community, and ability to objectively review grant materials. The Division convenes Grant Panels, mindful of Delaware's demographic and geographic diversity. Additional

# PROPOSED REGULATIONS

out-of-state panelists may be selected in order to incorporate regional or national perspective, to provide additional expertise and diversity, or to mitigate the potential for conflicts of interest.

## 3.1.2 Conflicts of Interests

Grant Panelists are screened for conflicts of interest, and where they exist, panelists are recused from discussion of the grant application or assigned to an alternate panel where a conflict does not exist. Such conflicts are determined by review of statements and/or applications filed by Arts Council members, Division Staff, panelists, and Grantees

## 3.1.3 Nominations

Grant Panelist nominations are accepted and processed by the Division of the Arts year round.

## 3.1.4 Grant Review Panel Meetings

Grant Panel meetings are public, posted and held in accordance with 29 Del.C. Ch. 100. Meetings are chaired by a member of the State Arts Council or Division of the Arts staff.

## 3.1.5 Grant Review Process

Grant Panelists evaluate and rank applications according to grant specific criteria identified by Division staff, and published at <http://www.artsdel.org/grants> Grant Panel comments and rankness are incorporated into the funding recommendation process, and made available to applicants upon notification of the funding decision. At the conclusion of their review, the Grant Panel makes a recommendation to the State Arts Council.

## 3.1.6 Grant Award

The State Arts Council, at a meeting open to the public consistent with 29 Del.C. Ch. 100, reviews the Grant Panel recommendations and rankings of applicants, to match them with available grant funds. At the conclusion of this review, the State Arts Council makes funding recommendations to the Division Director, who is responsible for all final funding decisions. The Division announces grant awards after the approval of the State's fiscal year budget.

## 3.2 Artist Fellowship Grants

Delaware's arts community is very close-knit, and individual artists tend to be very familiar with the work of other Delaware artists. The nature of artists' work is that it is inextricably linked to them as individuals. Because of that, it is difficult to find impartial judges to adjudicate Fellowship applications for individual artists. Consequently, the Division of the Arts contracts with an out-of-state organization to facilitate the review of Artist Fellowship applications. Grant specific criteria are published at <http://www.artsdel.org/grants>.

### 3.2.1 Grant panels: Composition:

The facilitating organization presents a list of potential judges to Division staff, who selects the judges whose expertise most clearly aligns with the applications submitted each year. Out-of-state judges are chosen for their professional experience, expertise in an artistic discipline, and ability to objectively review grant materials.

### 3.2.2 Grant Review Process

Applications are submitted to the Division of the Arts. Upon review for completeness and accuracy, all materials are forwarded directly to the facilitating organization, which is responsible for distribution of the applications to the judges. Judges review the applications individually and submit their scores and comments to the facilitating organization. Scores and judges' comments are then forwarded to the Division staff. Division staff members present a list of funding recommendations, based on scores and available funds, to the State Arts Council for review at a public meeting.

### 3.2.3 Grant Award

The State Arts Council conducts a public review of the recommendations from Division staff in accordance with 29 Del.C. Ch. 100. At the conclusion of the public review, the State Arts Council makes its funding recommendations to the Division Director, who is responsible for all final funding decisions. Fellowship awards are announced after public approval by the State Arts Council and Division Director.

## 3.3 Short-term grants and Special Projects, and Interagency Partnerships

### 3.3.1 Grant Panelist Selection-

Short-term (non-annual) grant applications, special project grant applications, and interagency partnership agreements are assigned by the Division Director to the program specialist whose purview includes the arts discipline or project category.

### 3.3.2 Grant review process

Division staff review and evaluate short-term, special project grant applications according to criteria developed by Division staff and published with the grant guidelines. Staff recommendations are submitted to the Division Director for review.

### 3.3.3 Grant Award

The Division Director reviews staff recommendations and makes final funding decisions. Notification letters are sent out within six weeks of the application submission deadline. Funding decisions are presented to the State Arts Council at their quarterly meetings.

## **4.0 Appeals**

4.1 Applicants may appeal funding decisions only on the basis of procedural error or impropriety. Dissatisfaction with the amount of an award, or a decision not to fund a project, is not sufficient reason for appeal.

### 4.2 Standard of Review:

Grant determinations may be reconsidered if the Division Director determines that the application was reviewed on the basis of criteria other than those appearing in the published guidelines for that grant category; that Grant Panelists or Council members were influenced by Council members who failed to disclose conflicts of interest, or that erroneous information was provided by staff, panelists, or Council members at the time of the application's review, and such erroneous information was relied upon by the Grant Panel, Council, or Division Director in making the grant determination.

### 4.3 Procedure for Appeal

#### 4.3.1 Consultation

Prior to submitting an appeal, applicants should first consult with the staff member assigned to the application to review the panel comments and considerations.

#### 4.3.2 Written Request for Appeal

After consulting with the assigned staff member, if the applicant wishes to pursue an appeal, the appeal must be sent in writing to the Division Director within 30 days of the date notifying the applicant of the funding decision. The letter should contain evidence to support one or more of the grounds for appeal noted in 4.1.

#### 4.3.3 Review

The Director will notify the Chair of the State Arts Council of the appeal. The Director and Chair will review the appeal and, at their discretion, will make a ruling or submit the appeal to the full Council for review and recommendation.

#### 4.3.4 Notification

The Director will notify the applicant in writing of the ruling on the appeal.

#### 4.3.5 Arts Council Review

After reviewing the appeal letter determination, the applicant may request a public hearing with the Council, pursuant to 29 Del.C. Ch. 100. At the conclusion of the public hearing, the Council will reconsider the appeal and make a final ruling. A simple majority vote of the Council will determine the appeal outcome.

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# PROPOSED REGULATIONS

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## DIVISION OF PROFESSIONAL REGULATION

### 1700 Board of Medical Practice

Statutory Authority: 24 Delaware Code, Section 1713(a)(12)

24 DE Admin. Code 1700

The Delaware Board of Medical Practice in accordance with 24 Del.C. §1713(a)(12) has proposed changes to its rules and regulations as mandated by HB 236 (codified at 24 Del.C. §1761). The proposal creates a new regulation establishing a schedule of fees that may be charged by a physician when a patient requests a copy of their records to be transferred to another physician and/or wishes to obtain a copy of their own medical records directly from the physician.

A public hearing was held on March 10, 2009 at 3:00 p.m. in the second floor conference room A of the Cannon Building, 861 Silver Lake Boulevard, Dover, Delaware where members of the public offered comment on the regulations as published in the *Delaware Register of Regulations* on February 1, 2009, Vol. 12, Issue 8. The Board initially voted to adopt the rules as proposed but, at their next regularly scheduled public meeting, rescinded the vote and determined to make substantive changes.

A second public hearing will be held on September 1, 2009 at 3:00 p.m. in the second floor conference room A of the Cannon Building, 861 Silver Lake Boulevard, Dover, Delaware where members of the public may offer comments. Anyone wishing to receive a copy of the proposed rules and regulations may obtain a copy from the Delaware Board of Medical Practice, 861 Silver Lake Blvd, Cannon Building, Suite 203, Dover DE 19904. Persons wishing to submit written comments may forward the written comments to the Board at the above address. The final date to receive written comments will be at the public hearing.

The Board will consider promulgating the proposed regulations at its regularly scheduled meeting following the public hearing.

### 1700 Board of Medical Practice

*(Break in Continuity of Sections)*

#### **30.0 Patient Records: Fee Schedule for Copies**

- 30.1 A patient requesting of a copy of his or her own medical records to be transferred to another physician or to be obtained on their own behalf may be charged a reasonable fee not to exceed the fees set forth in the schedule below, excluding the actual cost of postage or shipping if the records are mailed:
- \$2.00 per page for pages 1-10
  - \$1.00 per page for pages 11-20
  - \$0.90 per page for pages 21-60
  - \$0.50 per page for pages 61 and above
- 30.2 The fees set forth in section 30.1 above shall apply whether the records are produced in paper or electronic format.
- 30.3 The full cost of reproduction may be charged for copies of records not susceptible to photostatic reproduction, such as radiology films, models, photographs or fetal monitoring strips.
- 30.4 Payment of all costs may be required in advance of release of the records except for records requested to make or complete an application for a disability benefits program.

**\*Please Note: As the rest of the sections were not amended, they are not being published. A copy of the regulation is available at:**

1700 Board of Medical Practice

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## DIVISION OF PROFESSIONAL REGULATION

### 1790 Acupuncture Advisory Council

Statutory Authority: 16 Delaware Code, Section 1796 (16 Del.C. §1796)

#### PUBLIC NOTICE

Consistent with a recent statutory amendments creating an Acupuncture Advisory Council of the Board of Medical Practice ("the Council"), and providing for the licensing and regulation of acupuncture practitioners, the Council in accordance with 24 Del.C. §1796(c) and 29 Del.C. Chapter 101, has developed and is proposing to recommend to the Board of Medical Practice ("the Board") the approval of regulations regarding the practice of acupuncture in the State of Delaware.

A public hearing will be held on Thursday, September 17, 2009 at 3:15 p.m. in the second floor conference room A of the Cannon Building, 861 Silver Lake Boulevard, Dover, Delaware where members of the public may offer comments. Anyone wishing to receive a copy of the proposed rules and regulations may obtain a copy from the Delaware Board of Medical Practice, 861 Silver Lake Blvd, Cannon Building, Suite 203, Dover, DE 19904. Persons wishing to submit written comments may forward the written comments to the Board at the above address. The final date to receive written comments will be at the public hearing.

The Council may vote on whether to promulgate the proposed regulations subject to the approval of the Board immediately following the public hearing.

### 1790 Acupuncture Advisory Council

#### **1.0** Source of Authority: 24 Del.C. Ch. 17, Subchapter X

- 1.1 The Rules and Regulations herein contained constitute, comprise, and shall be known as the Rules and Regulations of the Acupuncture Advisory Council of the Board of Medical Practice, and are hereby promulgated, pursuant to 24 Del.C. §1796 (c).

#### **2.0** Definitions

Whenever used in these Rules and Regulations unless expressly otherwise stated, or unless the context or subject matter requires a different meaning, the following terms shall have the respective meanings hereinafter set forth or indicated.

"ACAOM" means Accreditation Commission for Acupuncture and Oriental Medicine.

"Board" means Delaware Board of Medical Practice.

"CCAOM" means the Council of Colleges of Acupuncture and Oriental Medicine.

"Council" means the Acupuncture Advisory Council of the Board of Medical Practice.

"Crime Substantially Related to the Practice of Acupuncture" means those crimes identified in Rule 29 of the rules and regulations of the Board of Medical Practice.

"License" means a license issued by the Board to practice acupuncture.

"Licensed Acupuncturist" ("L.Ac.") means an individual authorized to practices acupuncture under the provisions of the Medical Practice Act, 24 Delaware Code, Chapter 17, Subchapter X.

"NCCAOM" means the National Certification Commission for Acupuncture and Oriental Medicine.

"Practice of Acupuncture" means the use of oriental medical therapies for the purpose of normalizing energetic physiological functions including pain control, and for the promotion, maintenance, and restoration of health.

#### **3.0** Purpose

The purpose of the rules and regulations standards is to establish minimal acceptable levels of safe practice to protect the general public and to serve as a guide for the Council and Board to evaluate the safe and effective practice of acupuncture.

**4.0 Minimum Standards of Practice for the Acupuncture Practitioner****4.1 Clean Needle Technique**

**4.1.1** All applicants for licensure shall complete a course in clean needle technique as administered by the CCAOM or provide evidence of passing an examination in clean needle technique before a license will be issued unless a waiver is granted pursuant to 24 Del.C. §1798(b).

**4.2 English as a Second Language**

**4.2.1** An applicant for whom English is a second language must demonstrate his or her ability to speak English by providing evidence of one of the following:

**4.2.1.1** Passage of the NCCAOM examination taken in English;

**4.2.1.2** Completion at least 60 credits from an English-speaking undergraduate school or English-speaking professional school;

**4.2.1.3** Passage of the TOEFL (Test of English as a Foreign Language with a score of 550 or higher on the paper based test or with a score of 213 or higher on the computer based test;

**4.2.1.4** Passage of the TSE (Test of Spoken English) with a score of 45 or higher;

**4.2.1.5** Passage of the TOEIC (Test of English for International Communication) with a score of 500 or higher; or

**4.2.1.6** At the discretion of the Council, passage of any similar, validated exam testing English competency given by a testing service with results reported directly to the Council or with results otherwise subject to verification by direct contact between the testing service and the Council.

**5.0 Filing of Application for Licensure as an Acupuncture Practitioner****5.1 Application - Initial Licensure**

**5.1.1** An applicant who is applying for licensure as acupuncture practitioner must submit a completed application on a form prescribed by the Council and approved by the Board to the Board office at the Division of Professional Regulation ("Division"), Dover, Delaware. The application must be accompanied by payment of the fees established by the Division.

**5.1.2** Each application must be accompanied by (1) proof of achievement of a Diplomate in Oriental Medicine from NCCAOM or other equivalent recognized by the Council and approved by the Board (2) evidence of completion of a course in clean needle technique as provided in regulations 4.1 and (3) for applicants for whom English is a second language, proof of ability to speak English as provided in Regulation 4.2.

**5.2 Application - Current Practitioners**

**5.2.1** An applicant who is applying for licensure under the 24 Del.C. 21 §1799A must have been practicing in Delaware for the 12 month period prior to June 27, 2008. The applicant must submit proof of achievement of a Diplomate in Acupuncture from NCCAOM or other equivalent recognized by the Council and approved by the Board of evidence of graduation from a course of training or at least 1,800 hours in acupuncture, including 300 clinical hours, that is accredited by ACAOM or its equivalent as determined by Council and (2) evidence of completion of a course in clean needle technique as provided in regulations 4.1.

**5.2.2** Proof of practice may be demonstrated by providing a W-2, business license, schedule C, or other similar documentation of practice during the period 6/27/2007 through 6/26/2008 acceptable to Council.

**5.3 Application - Reciprocity**

**5.3.1** An applicant for licensure by reciprocity must submit a copy of the law and regulations from the State in which they are currently licensed in order for the Council and Board to determine that the standards for licensure are substantially similar along with letters of good standing from all jurisdictions in which they are licensed.

- 5.4 If any documents submitted by an applicant require translation to English, the translation shall be obtained by the applicant, at the applicant's expense, from an organization approved by the Council and Board.
- 5.5 The Council and Board shall not consider an application for licensure as an acupuncture practitioner complete until all items specified in the applicable regulations are submitted to the Board's office.
- 5.5.1 The Council may recommend and the Board may, in its discretion, approve applications contingent on receipt of necessary documentation. If the required documentation is not received within 120 days from the date when the application is first reviewed by the Council, the Council shall propose to deny the application.
- 5.5.2 If an application is complete in terms of required documents, but the candidate has not responded to a Council or Board request for further information, explanation or clarification within 120 days of the Council or Board's request, the Council shall make its recommendation to and the Board shall vote on the application as is.

## **6.0 Unprofessional Conduct and Inability to Practice Acupuncture**

- 6.1 "Unprofessional conduct" includes but is not limited to any of the following acts or omissions:
- 6.1.1 Has employed or knowingly cooperated in fraud or material deception in order to acquire or renew a license to practice acupuncture, has impersonated another person holding a license, has allowed another person to use the acupuncturist's license, or has aided and abetted a person not licensed to practice acupuncture to represent himself or herself as an acupuncturist;
- 6.1.2 The use of any false, fraudulent, or forged statement or document or the use of any fraudulent, deceitful, dishonest, or unethical practice in connection with a certification, registration, or licensing requirement for acupuncturists, or in connection with the practice of acupuncture;
- 6.1.3 Having a license to practice acupuncture revoked, suspended, or otherwise disciplined, including the denial of licensure by the licensing authority of another state or territory for reasons which would preclude licensure in this state. In making its determination, the Board may rely upon decisions made by the appropriate authorities in other states or territories and may not permit a collateral attack on those decisions;
- 6.1.4 Conviction of or admission under oath to having committed a crime substantially related to the practice of medicine other profession regulated by the Board of Medical Practice as defined by the Board of Medical Practice in its rules and regulations;
- 6.1.5 Any dishonorable, unethical, or other conduct likely to deceive, defraud, or harm the public;
- 6.1.6 Advertising, practicing or attempting to practice acupuncture under a false or assumed name;
- 6.1.7 Advertising, practicing or attempting to practice acupuncture in an unethical or unprofessional manner;
- 6.1.8 The practice of acupuncture without a license;
- 6.1.9 Failing to perform any statutory or legal obligation placed upon an acupuncturist;
- 6.1.10 Making or filing a false report in connection with the practice of acupuncture which the licensee knows to be false, intentionally or negligently failing to file a report required by state or federal law, willfully impeding or obstructing such filing or inducing another person to do so.
- 6.1.11 Solicitation or acceptance of a fee from a patient or other person by fraudulent representation that a manifestly incurable condition, as determined with reasonable medical certainty, can be permanently cured;
- 6.1.12 Misconduct, incompetence, or gross negligence in the practice of acupuncture;
- 6.1.13 Willful violation of the confidential relationship with or confidential communications of a patient;
- 6.1.14 Engaging in sexual relations with a patient until at least six (6) months have lapsed since the patient-practitioner relationship has ended.
- 6.1.15 Making deceptive, untrue, or fraudulent misrepresentations in the practice of acupuncture;
- 6.1.16 Soliciting patients, either personally or through an agent, through the use of fraud, intimidation, or undue influence, or a form of overreaching conduct;



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- 6.1.17 Failing to keep written medical records documenting the course of treatment of the patient;
- 6.1.18 Exercising undue influence on the patient to exploit the patient for financial gain of the licensee or of a third party;
- 6.1.19 Being unable to practice acupuncture with reasonable skill and safety to patients by reason of illness or intemperate use of alcohol, drugs, narcotics, chemicals, or any other type of material or as a result of any mental or physical condition;
- 6.1.20 Malpractice or the failure to practice acupuncture at the level of care, skill and treatment which is recognized by a reasonably prudent similar practitioner of acupuncture as being acceptable under similar conditions and circumstances;
- 6.1.21 Practicing or offering to practice beyond the scope permitted by law or accepting or performing professional responsibilities which the licensee knows or has reason to know that such a person is not qualified by training, experience or certification to perform;
- 6.1.22 Delegating professional responsibilities to a person when the licensee delegating such responsibilities knows, or has reason to know, that such person is not qualified by training, experience, or licensure to perform them;
- 6.1.23 Violating any provision of the Medical Practice Act, a rule of the Council and Board or a lawful order of the Board entered in a disciplinary hearing conducted by Council or the Board or failing to comply with a lawfully issued subpoena of the Board to provide documents and or to appear before the Council or Board;
- 6.1.24 Conspiring with another to commit an act, or committing an act, which coerces, intimidates, or precludes another licensee from lawfully advertising or providing his or her services;
- 6.1.25 Fraud or deceit, or gross negligence, incompetence, or misconduct in the operation of a course of study;
- 6.1.26 Failing to comply with state, county, or municipal regulations or reporting requirements relating to public health and the control of contagious and infectious disease;
- 6.1.27 Failing to comply with clean needle techniques and proper procedures for the disposal of potentially infectious materials;
- 6.1.28 Unjustified failure upon request to divulge information relevant to the authorization or competence of a person to practice acupuncture to the Board, to any committee thereof, to the Executive Director, or to anyone designated by the Executive Director to request such information; and
- 6.1.29 Charging a grossly exorbitant fee for professional or occupational services rendered.

### **7.0 Disciplinary Investigations and Hearings**

- 7.1 Upon receipt of a written complaint against an acupuncturist or upon its own motion, the Council may request the Division of Professional Regulation to investigate the complaint or a charge against an acupuncturist and the process established by 29 Del.C. §8735(h) shall be followed with respect to any such matter.
- 7.2 As soon as practicable after receipt of a complaint from the Attorney General's Office following an investigation conducted pursuant to 29 Del.C. §8735(h), the Council shall conduct an evidentiary hearing upon notice to the licensee. Written findings of fact and conclusions of law shall be sent to the Board of Medical Practice along with any recommendation to revoke, to suspend, to refuse to renew a license, to place a licensee on probation, or to otherwise reprimand a licensee found guilty of unprofessional conduct in the licensee's professional activity which is likely to endanger the public health, safety or welfare, or the inability to render acupuncture services with reasonable skill or safety to patients because of mental illness or mental incompetence, physical illness or excessive use of drugs including alcohol.

### **8.0 Renewal of License**

- 8.1 Each license shall be renewed biennially. The failure of the Board to notify a licensee of his/her expiration date and subsequent renewals does not, in any way, relieve the licensee of the requirement to renew his/her certificate pursuant to the Board's regulations and 24 Del.C. Ch. 17.

- 8.2 Renewal may be effected by:
- 8.2.1 filing a renewal application prescribed by the Board and provided by the Division of Professional Regulation. License renewal may be accomplished online at [www.dpr.delaware.gov](http://www.dpr.delaware.gov);
  - 8.2.2 providing other information as may be required by the Board to ascertain the licensee's good standing;
  - 8.2.3 attesting on the renewal application to the completing of continuing education as required by Rule 9.0;
  - 8.2.4 payment of fees as determined by the Division of Professional Regulation.
- 8.3 Failure of a licensee to renew his/her license shall cause his/her license to expire. A licensee whose license has expired may renew his/her license within one year after the expiration date upon fulfilling items 7.2.1 - 7.2.4 above, certifying that he/she has not practiced acupuncture in Delaware while his/her license has expired, and paying the renewal fee and a late fee as determined by the Division of Professional Regulation.
- 8.4 No licensee will be permitted to renew his/her license once the one-year period has expired.
- 8.5 The former licensee may re-apply under the same conditions that govern applicants for new licensure under 24 **Del.C.** Ch. 17.
- 8.6 No acupuncturist shall practice acupuncture in the State of Delaware during the period of time that his/her Delaware license has expired.

## **9.0 Continuing Education**

- 9.1 Professional Development Activity Points Required for Renewal
- 9.1.1 Licensees are required to complete (30) Professional Development Activity (PDA) points biennially. Licensees shall retain all certificates and other documented evidence of participation in an approved/accredited continuing education program for a period of at least (3) three years. Upon request, such documentation shall be made available to the Council for random audit and verification purposes.
  - 9.1.2 PDAs shall be prorated for new licensees in accordance with the following schedule:
    - Two years remaining in the licensing cycle requires - 30 hours
    - One year remaining in the licensing cycle requires -15 hours
    - Less than one year remaining in the licensing cycle -exempt
- 9.2 Exemptions
- 9.2.1 A licensee who because of a physical or mental illness during the license period could not complete the continuing education requirement may apply through the Council to the Board of Medical Practice for a waiver. A waiver would provide for an extension of time or exemption from some or all of the continuing education requirements for one (1) renewal period. Should the illness extend beyond one (1) renewal period, a new request must be submitted.
  - 9.2.2 A request for a waiver must be submitted sixty (60) days prior to the license renewal date.
- 9.3 Criteria for Qualification of Continuing Education Program Offerings
- The following criteria are given to guide licensees in selecting an appropriate activity/program and to guide the provider in planning and implementing continuing education activities/programs. The overriding consideration in determining whether a specific activity/program qualifies as acceptable continuing education shall be that it is a planned program of learning which contributes directly to professional competence in the practice of acupuncture.
- 9.3.1 Definition and PDA Point Requirements
    - 9.3.1.1 Each hour of continuing education is equal to (1) PDA point.
    - 9.3.1.2 Fifteen of the required 30 PDA points shall enhance core knowledge, skills and abilities and shall be in biomedicine and/or one of the five branches of Oriental medicine (e.g., acupuncture, Chinese herbs, Chinese dietary therapy, Qigong, Asian bodywork therapy). Four the 15 core PDA points shall be taken in safety and/or ethics (e.g., CPR, herbal

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safety, universal precautions, clean needle techniques, ethics and liability, public health reporting requirements).

9.3.1.3 The remaining 15 PDA points may be taken in electives that directly contribute to a licensee's knowledge or practice of acupuncture (including Western science and medical practices, medical ethics, medical research, practice management, adjunctive therapies, patient education, and disaster relief training, etc.).

### 9.4 Acceptable Activities/Programs

#### 9.4.1 Acceptable activities and programs include:

9.4.1.1 Additional NCCAOM Certification: A maximum of 10 PDA points may be submitted for successfully achieving an additional certification from NCCAOM in acupuncture, Chinese herbology, or Asian bodywork therapy (Required Documentation: Copy of the NCCAOM certificate including certification date which must be within the two year renewal period);

9.4.1.2 Passage of the NCCAOM or other approved Biomedicine Examination: A maximum of 10 PDA points may be submitted for successfully passing the NCCAOM Biomedicine examination. (Required Documentation: A copy of the official letter notifying the licensee of their test score including the exam date which must be within the two year renewal period).

9.4.1.3 Service on a Professional Board: Serving on a regional, state, or national board or committee related to acupuncture may be submitted for a maximum of 5 PDA points submitted per renewal period. (Required Documentation: A letter, printed on letterhead from the organization's chair verifying participation dates of service, and in what capacity.)

9.4.1.4 Clinical Experience: Completing a supervised clinical experience in acupuncture, Chinese herbology, Oriental medicine or Asian bodywork therapy which includes observation, case discussions, and/or supervised practice. The experience must be conducted in a formal clinical setting and be part of an educational or preceptor program. One PDA point is equal to one hour of supervision with a maximum of 5 PDA points per renewal period. (Required Documentation: A letter from the school or preceptor who must be an NCCAOM Diplomate in active status for 5 years. Date(s), hours, and type of experience are required on letterhead stationery)

9.4.1.5 Directing Clinical Supervision: Supervising a clinical experience in acupuncture, Chinese herbology, Oriental medicine or Asian bodywork therapy which includes directing students in observation, case discussions, and/or supervised practice. The experience must be conducted in a formal clinical setting and be part of an educational or preceptor program. One PDA point is equal to one hour of supervision with a maximum of 5 PDA points per renewal period. (Required Documentation: A letter from the school or preceptor, on letterhead, indicating the date(s), hours, and type of supervision.)

9.4.1.6 Research in Oriental Medicine: A maximum of 10 PDA points may be submitted for documented research in acupuncture or Oriental medicine. The licensee must be a primary researcher, and the research must be funded (not self-funded). (Required Documentation: One PDA point is equal to one hour of research. A letter from the school, hospital or official agency funding the research is required. The letter, on letterhead, must be accompanied by a copy of the published abstract showing the licensee's name as contributor.)

9.4.1.7 Teaching or Lecturing: A maximum of 10 PDA points may be submitted for teaching and/or lecturing in acupuncture or Oriental medicine subjects. (Required Documentation: One PDA point is equal to one hour of teaching. Date(s), number of classroom hours, course title, and instructor's name is required on letterhead stationery from the providing organization, or listed on a school transcript)

9.4.1.8 Tai Chi/Qigong: A maximum of 5 PDA points may be submitted for Tai Chi and exercise Qigong courses. One PDA point is equal to one hour of instruction. (Required Documentation: Date(s), number of hours, course title, and instructor's name is required

- on either an end-of-course certificate or letterhead stationery from the providing organization.)
- 9.4.1.9 Language: A maximum of 5 PDA points may be submitted for the study of a second language relevant to a practitioner's practice. One PDA point is equal to one hour of instruction. (Required Documentation: Date(s), number of hours, course title, and instructor's name is required on either an end-of-course certificate or on letterhead from the providing organization.)
- 9.4.1.10 Publications: Includes writing and editing books, professional journals, and articles in Oriental medicine. PDA points may be permitted as follows:
- 9.4.1.10.1 Author a Book: A maximum of 15 PDA points may be submitted for authoring a book in the field of Oriental medicine that is at least 150 pages in length. (Required Documentation: Copy of the book cover and title pages showing the date, ISBN number, abstracts, and executive summaries.)
- 9.4.1.10.2 Author a Chapter in a Book: A maximum of 10 PDA points may be submitted for authoring chapters in a book in the field of Oriental Medicine. Five PDA points may be gained for each chapter with a maximum of submitting two chapters per renewal period. (Required Documentation: Copy of the book cover and title pages showing the date, ISBN number, abstracts, and executive summaries).
- 9.4.1.10.3 Edit a Book or Professional Journal: A maximum of 10 PDA points may be submitted for editing a professional book or journal. Five PDA points may be gained for each book or professional journal with a maximum of submitting two books/journals per renewal period. (Required Documentation: A letter, on letterhead, from the author of the book or the editor in chief of the journal is required. The letter should describe the licensee's participation in the editing process including the title of the book/journal, publishing date, ISBN number, abstracts, and executive summaries.)
- 9.4.1.10.4 Publication of a Peer-Reviewed Journal Article: A maximum of 10 points may be submitted for authoring an article in a professional, peer-reviewed journal in the field of Oriental medicine. Five PDA points may be gained for each article with a maximum of submitting two articles per recertification cycle. (Required Documentation: Copy of the article, the cover of the journal, and the table of contents that show the date, article title, and author.)
- 9.4.1.10.5 Author an Article: A maximum of 5 PDA points may be submitted for writing an article that is published. (Required Documentation: Copy of the article and the cover of the newspaper or magazine that shows the date and table of contents or article listing.)
- 9.4.1.10.6 Formal Continuing Education Programs: All PDA points may be obtained by taking formally organized courses which satisfy the content requirements of Regulation 9.3.1.2 and are approved by the Board or sponsored and/or approved by and sponsored by the following organizations and their member organizations:
- 9.4.1.10.6.1 The American Association of Acupuncture and Oriental Medicine (AAAOM),
- 9.4.1.10.6.2 The Council of Colleges of Acupuncture and Oriental Medicine (CCAOM),
- 9.4.1.10.6.3 The Accreditation Commission for Acupuncture and Oriental Medicine (ACAOM),
- 9.4.1.10.6.4 The National Commission for the Certification of Acupuncture and Oriental Medicine (NCCAOM),
- 9.4.1.10.6.5 The National Academy of Acupuncture and Oriental Medicine (NAAOM),
- 9.4.1.10.6.6 The Society for Acupuncture Research,
- 9.4.1.10.6.7 Center for Oriental Medical Research and Education (COMRE),
- 9.4.1.10.6.8 The National Acupuncture Detoxification Association,
- 9.4.1.10.6.9 The National Acupuncture Teachers Association, or
- 9.4.1.10.6.10 The American Academy of Medical Acupuncturists;
- 9.4.1.10.6.11 World Health Organization (WHO),

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- 9.4.1.10.6.12 National Institutes of Health (NIH).  
9.4.1.10.6.13 The National Institutes of Health Office of Alternative Medicine (NIHOAM).  
9.4.1.10.6.14 American Medical Association (AMA).  
9.4.1.10.6.15 American Osteopathic Association (AOA).  
9.4.1.10.6.16 American Nurses Association (ANA).  
9.4.1.10.6.17 American Psychiatric Association (APA).  
9.4.1.10.6.18 American Hospital Association (AHA).  
9.4.1.10.6.19 American Lung Association (ALA).  
9.4.1.10.6.20 Red Cross;  
9.4.1.10.6.21 Local colleges;  
9.4.1.10.6.22 Local hospitals; or  
9.4.1.10.6.23 Other professional or educational organizations as approved periodically by the Board upon the recommendation of Council. (Required Documentation: Certificate of attendance documenting hours attended and/or credits awarded.)
- 9.4.2 No continuing education PDA points will be given for advocating legislation or for peer Reviewed Posters and/ or exhibits.
- 9.4.3 PDA points for foreign study are subject to the approval of the Council and Board.
- 9.4.4 Approval of continuing education is at the discretion of the Council and with the approval of the Board. PDAs earned in excess of the required credits for the two (2) year period may not be carried over to the next biennial period.

### DIVISION OF PROFESSIONAL REGULATION

#### 2700 Board of Professional Land Surveyors

Statutory Authority: 24 Delaware Code, Section 2706 (24 **Del.C.** §2706(a))  
 24 **DE Admin. Code** 2700

### PUBLIC NOTICE

The Delaware Board of Professional Land Surveyors, in accordance with 24 **Del.C.** §2706(a)(1), has proposed revisions to its rules and regulations. The proposed revisions to the Rules and Regulations are intended to revise the minimum technical standards for licensees, including changes to what are currently known as Mortgage Inspection Plans (MIPs), and clarify an issue regarding license reciprocity.

A public hearing will be held on September 17, 2009 at 8:30 a.m. in the second floor conference room A of the Cannon Building, 861 Silver Lake Boulevard, Dover, Delaware where members of the public can offer comments. Anyone wishing to receive a copy of the proposed rules and regulations may obtain a copy from the Delaware Board of Professional Land Surveyors, 861 Silver Lake Boulevard, Cannon Building, Suite 203, Dover, DE 19904. Persons wishing to submit written comments may forward these to the Board at the above address. The final date to receive written comments will be at the public hearing.

The Board will consider promulgating the proposed regulations at its regularly scheduled meeting following the public hearing.

#### 2700 Board Professional Land Surveyors

*(Break of Continuity of Sections)*

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**12.0 Minimum Technical Standards for Licences**

- 12.1 The Board is required under Sections 2701 and 2112(a)(9) to establish minimum technical standards for licensees. The purpose of these standards is to establish minimum technical criteria to govern the performance of surveys when more stringent specifications are not required by other agencies or by contract. Further, the purpose is to protect the inhabitants of this state and generally to promote the public welfare. The Board also established minimum standards for Mortgage ~~Inspection~~ Survey Plans (~~MIPs~~ MSPs), and other types of work, frequently performed by licensees in portions of the state.
- 12.2 Procedure and Standards. Whenever a surveyor conducts a boundary survey, ~~or an improvement location survey of properties,~~ or an ALTA/ACSM Land Title Survey, or Subdivision Survey, a plat showing the results shall be prepared. The plat of a boundary survey shall be titled "Boundary Survey Plan"; no other plat title is acceptable. A copy of the survey shall be furnished to the client unless deemed unnecessary by the client. The plat shall conform to the following requirements and shall include the following information:
- 12.2.1 The plat shall be drawn on any reasonably stable and durable drawing paper, vellum or film of reproducible quality. No plat or map shall have dimensions of less than 8 ½ x 11 inches.
- 12.2.2 The plat shall indicate the Source of Title, Hundred, County, State, Tax Parcel Number and, when applicable, the Postal Address of the subject property. The plat shall show the written scale, area and classifications of the survey. These classifications (suburban, urban, rural, and marshland) are based upon both the purposes for which the property is being used at the time the survey is performed and any proposed developments, which are disclosed by the client, in writing. This classification must be based on the criteria in Section 12.4 and the survey must meet the minimum specifications set forth in Attachment A. The scale shall be sufficient to show detail for the appropriate classification.
- 12.2.3 The horizontal direction of all boundary lines shall be shown in relationship to grid north, magnetic, or in lieu thereof, to true north or to such other established line or lines to which the survey is referenced. The horizontal direction of the boundary lines shall be by direct angles or bearings. A prominent north arrow shall be drawn on every sheet. The description of the bearing reference system shall be stated on the plat. Bearings shall be written in a clockwise direction unless impractical.
- 12.2.4 All monuments, natural and artificial (man-made), found or set, used in the survey, shall be shown and described on the survey plat. The monuments shall be noted as found or set. All monuments set shall be ferrous metal, or contain ferrous metal, not less than ½ inch in diameter and not less than 18 inches in length, except however, a corner which falls upon solid rock, concrete, or other like materials shall be marked in a permanent manner and clearly identified on the plat. Monuments shall be set at all corners of all surveys as required by these standards, with the exception of meanders such as meanders of streams, tidelands, wetlands, lakes, swamps and prescriptive road rights-of-way. Witness monuments shall be set or referenced whenever a corner monument cannot be set or is likely to be disturbed. Such witness monument shall be set as close as practical to the true corner. If only one (1) witness monument is set, it must be set on the actual boundary line or prolongation thereof. Otherwise, at least two (2) witness monuments shall be set and so noted on the plat of the survey. Monuments shall be identified, where possible, with a durable marker bearing the firm name or the surveyor's registration number and/or name.
- 12.2.5 The plat of a metes and boundary survey must clearly describe the commencing point and label the point of beginning for the survey.
- 12.2.6 Notable discrepancies between the survey and the recorded description shall be noted. The source of title used in making the survey shall be indicated. When an inconsistency is found, including a gap or overlap, excess or deficiency, erroneously located boundary lines or monuments, the nature of the inconsistency shall be indicated on the drawing.
- 12.2.7 In the judgment of the surveyor, the description and location of any physical evidence found along a boundary line, including but not limited to fences, walls, buildings or monuments, shall be shown on the drawing.

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- 12.2.8 The horizontal length (distance) and direction (bearing) of each line as determined in an actual survey process shall be shown on the drawing and indicated in a clockwise direction unless impractical.
- 12.2.9 The radius, arc length, chord bearing and chord distance of all circular curves, shall be shown.
- 12.2.10 Information used by the surveyor in the property description shall be clearly shown on the plat, including but not limited to, the point of beginning, course bearing, distance, monuments, etc.
- 12.2.11 The lot and block or tract number or other recorded subdivision designation, of the subject property and adjoining properties shall be shown. If the adjoining properties are not within a recorded subdivision, then the name and deed record of all adjoining owners shall be shown.
- 12.2.12 Recorded public and private rights-of-way or easements which are discovered during the title search performed by others and supplied to the surveyor or graphically shown on the recorded plat, which includes the property, or which are known or observed adjoining or crossing the land surveyed, shall be shown.
- 12.2.13 Location of all permanent improvements pertinent to the survey, referenced radially and perpendicular to the nearest boundary, shall be shown.
- 12.2.14 Visible or suspected encroachments onto or from adjoining property or abutting streets, with the extent of such encroachments, shall be shown.
- 12.2.15 A plat or survey shall clearly bear the Firm Name and licensee's name, license number, title, "Professional Land Surveyor", contact address, and date of survey and original signature and board-approved seal of the licensed surveyor in responsible charge. This signature and seal is certification that the survey meets minimum requirements of the Standards for Land Surveyors as adopted by the Delaware Board.
- 12.2.16 A written property description shall accompany the preparation of a boundary survey, ALTA/ACSM Land Title Survey, and Subdivision Survey. A property description shall not be prepared based upon a Mortgage Survey Plan. The following information shown on the plat must be included in a written description, ~~if one is provided~~:
- 12.2.16.1 The commencing point and point of beginning.
  - 12.2.16.2 Sufficient caption to connect the plat and description.
  - 12.2.16.3 Length and direction of all lines in a clockwise direction unless impractical.
  - 12.2.16.4 Curve information as described in paragraph 12.2.9.
  - 12.2.16.5 Type of monuments noted as found or set.
  - 12.2.16.6 The area of the parcel.
  - 12.2.16.7 Adjoining owners, subdivision name, etc.
- 12.2.17 For a Major Subdivision Survey, the boundary corners of the property that is the subject of the subdivision shall be set and/or identified in accordance with Section 12.2.4. For a Minor Subdivision Survey, a minimum of two boundary corners of the property that is the subject of the subdivision shall be set and/or identified and their interconnection duly noted. Additionally, for a Minor Subdivision Survey, the connection between said boundary corners and the boundary of the "carved-out" property shall be noted; and the boundary corners of said "carved-out" property shall be set and/or identified in accordance with Section 12.2.4.
- 12.3 Standards for Horizontal Control.
- 12.3.1 Definitions for specific types of horizontal control surveys, along with standards and procedures, may be found in National Geodetic Survey (NGS) or successor publications. All geodetic surveys, including determination and publication of horizontal and vertical values utilizing Global Positioning Systems, Ground Control Systems or any other system which relates to the practice and profession of Land Surveying, shall be performed under the direct control and personal supervision of a licensed Professional Land Surveyor licensed in the State of Delaware.
- 12.3.2 Control Surveys that are used to determine boundary lines, including developing coordinates for existing boundary corners, shall meet the Standards contained herein.

- 12.3.3 Land Information Systems/Geographic Information Systems (LIS/GIS) maps should be built on a foundation of coordinates obtained by an accurate survey. Creation of LIS/GIS maps and services should include a Professional Land Surveyor licensed in the State of Delaware for coordination and input of their knowledge in these fields.
- 12.4 Classification of Surveys. (See Attachment A)
- 12.4.1 Urban Surveys - Surveys of land lying within or adjoining a city or town. This would also include the surveys of commercial and industrial properties, condominiums, townhouses, apartments and other high-density developments regardless of geographic location.
- 12.4.2 Suburban Surveys - Surveys of land lying outside urban areas. This land is used almost exclusively for single family residential use or residential subdivisions.
- 12.4.3 Rural Surveys - Surveys of land such as farms and other undeveloped land outside the suburban areas which may have a potential for future development.
- 12.4.4 Marshland Surveys - Surveys of land which normally lie in remote areas with difficult terrain and usually have limited potential for development and cannot be classified as urban, suburban or rural surveys. This includes, but is not limited to, surveys of farmlands and rural areas.
- 12.5 ALTA/ACSM Land Title Survey. The current published standard as amended from time to time.
- 12.6 Mortgage Inspection Survey Plans (MIP MSP)
- 12.6.1 Purpose. The purpose of an MIP MSP is to locate, describe and represent the positions of buildings ~~or~~ and other pertinent visible improvements, ~~or both,~~ affecting the property being inspected surveyed.
- 12.6.2 Product. The results of the MIP MSP shall be stated on a plat showing the property inspected surveyed and the location of the buildings ~~or~~ and other pertinent visible improvements affecting the inspected surveyed property. The plat shall be titled "Mortgage Survey Plan"; no other plan title is acceptable.
- 12.7 The ~~Approval Waiver~~ Waiver by the ~~Consumer~~ Ultimate User and Disclosures.
- 12.7.1 The surveyor shall ~~not begin work for compensation~~ prepare a MSP pursuant to this regulation until the surveyor receives a signed ~~approval form~~ waiver more particularly described below.
- 12.7.2 For purposes of this section, "ultimate user" means the contract purchaser of the property. If no purchaser exists, the ultimate user is the owner of the property. The ~~approval form or its equivalent~~ waiver shall be sufficient if signed by one ~~consumer~~ ultimate user, whether or not there are multiple consumers, or, if a consumer is not an individual, the consumer's duly authorized agent, with respect to the property for which services pursuant to this regulation are sought ultimate users. The ~~approval form~~ waiver shall at a minimum contain:
- 12.7.2.1 An approval by the ~~signer of the requested services~~ ultimate user to perform a MSP and to waive the right to have corner markers set; and
- 12.7.2.2 An explanation of the ~~differences between an MIP and a boundary survey which includes an improvement location drawing~~ impact of signing the waiver advising the ultimate user of the possible need for a future survey as a result of physical improvements of the property and the potential inability of the ultimate user to identify the boundary of the surveyed property.
- 12.7.2.3 The following ~~approval form or its equivalent~~ shall suffice for the purpose of complying with this regulation: "Waiver Not to Set Corner Markers and Approval Form ~~(on company letterhead, with name, address and telephone number)~~ to Perform a MSP Survey"

To: \_\_\_\_\_  
(Name, address, and telephone number of Land Surveyor)

From: \_\_\_\_\_  
(Name, address, and telephone number of Ultimate User)



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Re: \_\_\_\_\_  
Property (Appropriate Identifier; i.e. address, tax parcel number)

In connection with the purchase or ~~refinancing survey~~ of the property located at \_\_\_\_\_, ~~we I have waived having the corner markers set and have been requested to prepare an~~ the preparation of a Mortgage Survey Plan (MIP MSP).

~~Since I have been made aware that an MIP Mortgage Survey Plan (MSP) is not a boundary survey and does not identify property boundary lines, State regulations require us to have your approval. Therefore, please sign and return the original of this form promptly, by fax or mail, so that there will be no delay in settlement. Additionally, I have been advised of the impact of signing the waiver regarding the possible need for a future survey as a result of physical improvements of the property and my inability to identify the boundary of the surveyed property. Furthermore, I am aware that the inability to identify the boundary of the property may result in a boundary dispute with an adjoining property owner and/or property improvements not accurately situated on my property.~~

~~If you wish, we can perform a boundary survey, which includes an Improvement Location Drawing (ILD). This survey will identify property boundary lines and will mark property boundary corners.~~

~~An MIP will cost approximately \$ \_\_\_\_\_. A boundary survey which includes an ILD will cost (approximately \$ \_\_\_\_\_) (between \$ \_\_\_\_\_ and \$ \_\_\_\_\_).~~

Very truly yours,

Check appropriate lines:

~~\_\_\_\_\_ We approve the preparation of an MIP. We have read and understand that, in the absence of any problem revealed by or during the preparation of this drawing, it may be all that is required of the land surveyor.~~

~~\_\_\_\_\_ We request a boundary survey that will include an ILD, and will identify property boundary lines and mark property boundary corners.~~

\_\_\_\_\_(Signature of Ultimate User)

Date: \_\_\_\_\_

\_\_\_\_\_(Signature of Witness)

Date: \_\_\_\_\_

I hereby certify that I advised the ultimate user of the potential impact of not having corner markers set, reviewed this waiver for proper signatures, and prepared a Mortgage Survey Plan (MSP) in compliance with Section 12.0 Minimum Technical Standards for Licensees as set forth by the Delaware Board of Professional Land Surveyors

\_\_\_\_\_  
Delaware Professional Land Surveyor  
License Number: \_\_\_\_\_  
Date: \_\_\_\_\_

- 12.7.2.4 The following notation shall be noted on a MSP when a written waiver is obtained: "In accordance to the Delaware Board of Professional Land Surveyors' Regulation 12.7, a waiver not to set corner markers has been obtained".
- 12.7.2.5 The licensee shall maintain the signed corner marker waiver for a minimum of six years from date of ultimate user's signature.
- 12.7.2.6 The licensee shall submit to the Board documentation of any waiver upon the Board's request.
- 12.7.2.7 The Board may periodically review a licensee's records to determine compliance with this section.
- 12.7.2.8 Failure to comply with the provision of this section shall be deemed professional misconduct subject to an appropriate penalty.
- 12.7.3 Upon receipt of an approval form, which complies with this section, the surveyor shall perform the services approved by the consumer. If the consumer requests a boundary survey which includes an ILD, then the survey shall be consistent with the provisions set forth in The Minimum Model Standards adopted by the Board.
- 12.8 Minimum Procedures for Performing a MSP. If the consumer approves ultimate user waives setting corner markers and opts for the preparation of an ~~MIP~~ MSP, the surveyor shall perform at least the following procedures:
- 12.8.1 ~~Examine the current deed and/or plat~~ appropriate documents of record for the subject parcel and review the most current tax assessment map for inconsistencies with ~~deed or plat~~ said documents. The surveyor is required to check for mathematical closure of said documents. If said documents do not close mathematically, the surveyor will determine, based upon his professional judgement, if a boundary survey is warranted.
- 12.8.2 Take sufficient on-site measurements to enable the surveyor to perform the tasks called for by this regulation with regard to the:
- 12.8.2.1 ~~Locations relative to the property lines being surveyed of buildings and these other pertinent improvements pertinent to the MIP;~~
- 12.8.2.2 ~~Locations of possible encroachments relative to the property lines being surveyed reasonably determined based on a~~ by visual inspection;
- 12.8.2.3 ~~Easements; and~~
- 12.8.2.4 ~~Rights-of-way.~~
- 12.8.3 If the consumer ~~ultimate user~~ has approved an ~~MIP~~ MSP, then the following elements shall be shown:
- 12.8.3.1 ~~Significant buildings, structures and other pertinent improvements, and their relationship to the apparent property lines referenced radially and/or perpendicular to the nearest boundary, based on the field measurements taken by the surveyor, and any other boundary evidence considered by the surveyor;~~
- 12.8.3.2 ~~Statement with regard to the level of accuracy and accuracy of apparent setback distances~~ Classification of Survey; (REFER TO ATTACHMENT A)
- 12.8.3.3 ~~Possible encroachments on the subject property and from the subject property onto adjoining property located relative to the property lines being surveyed to the extent reasonably determined by a visual inspection of the propertyies either way across property lines; and~~
- 12.8.3.4 ~~Minimum setback lines, as shown on plats,~~
- 12.8.3.5 ~~A minimum of two control points described boundary corners of the subject property, either found or set, and their relationship denoted by appropriate courses and distances to each other and the subject property.~~
- 12.8.3.6 ~~Easements or rights-of-way as shown on plats or current deed of record the aforementioned documents of record for subject property.~~

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- 12.8.4 If, in connection with the preparation of an ~~MIP MSP~~, a surveyor finds evidence to warrant, in the surveyor's professional opinion, the performance of a boundary survey, the surveyor shall so notify, in writing, the ~~consumer~~ ultimate user or the ~~consumer's~~ ultimate user's representative.
- 12.8.5 If the ~~consumer~~ ultimate user has approved the preparation of an ~~MIP MSP~~, then:
- 12.8.5.1 The MIP MSP prepared by the surveyor shall prominently display, at a minimum, advice to the effect that:
- 12.8.5.1.1 The ~~MIP MSP~~ is of benefit to an ultimate user ~~consumer~~ only insofar as it is required by a lender, a title insurance company or its agent in connection with the contemplated transfer, financing, or refinancing of subject property; and
- 12.8.5.1.2 The ~~MIP MSP~~ is not to be relied upon for ~~the establishment or location of fences, garages, buildings or other existing or future improvements.~~
- 12.9 Plats.
- 12.9.1 The original plat of an ~~MIP MSP~~ shall be a reproducible drawing at a scale which clearly shows the results of the field work, computations, research and record information as compiled and checked and shall bear the title "Mortgage Survey Plan".
- 12.9.2 The plat shall be prepared in accordance with the following procedures:
- 12.9.2.1 A reasonably stable and durable drawing paper, linen or film is considered a suitable material;
- 12.9.2.2 Plats may not be smaller than 8 ½ x 11 inches;
- 12.9.2.3 The plat shall show the following:
- 12.9.2.3.1 Caption or title and address ~~or~~ (if applicable) and subdivision lot number of the property (if applicable),
- 12.9.2.3.2 Scale,
- 12.9.2.3.3 Date,
- 12.9.2.3.4 Name and address of the firm or surveyor; and
- 12.9.2.3.5 Original signature and board-approved seal of the licensed surveyor in responsible charge,
- 12.9.2.3.6 ~~Consumer's Ultimate User's~~ name,
- 12.9.2.3.7 Statement with regard to ~~the level of accuracy and accuracy of apparent setback distances~~ Classification of Survey; (REFER TO ATTACHMENT A)
- 12.10 Maintenance of Records.
- 12.10.1 The surveyor shall make a reasonable effort to maintain records, including names or initials of all personnel, date of performance, reference to field data, such as book number, loose leaf pages and other relevant data.
- 12.11 Local Standards.
- 12.11.1 All work shall be performed according to the minimum standards for the community in which the service is provided, as long as said standards meet or exceed the standards herein. ~~(4)~~ Current local standards shall take precedence over the ~~MIP MSP~~ as to the manner in which mortgage or deed-related surveys or plans are prepared and as to the manner of field work and staking related to these surveys or plans, if those standards require more detailed or more accurate work to meet those local standards.
- 12.12 Based on current information, the ~~MIP MSP~~ shall be accepted as a minimum standard only in New Castle County when requested by the ultimate user as an option to a boundary survey. In Kent and Sussex counties, ~~MIP's MSP's~~ shall not be considered to meet the minimum local standards for the work required for mortgage or deed-related surveys or plans. For mortgage and deed-related surveys or plans in Kent County and Sussex County, the minimum requirement is an ~~Improvement Location Drawing~~ a Boundary Survey Plan prepared in compliance with Regulation 12.0 which includes proper monument placement.
- 12.12.1 Electronically Transmitted Documents. Documents including drawings, specifications and reports, that are transmitted electronically to a client or a governmental agency shall have the computer-

generated seal removed from the original file, unless signed with a digital signature as defined in 12.12.2. After removal of the seal the electronic media shall have the following inserted in lieu of the signature and date: This document originally issued and sealed by (Name of sealer), containing the original seal, signature and date of the licensee may be duplicated by photocopy or electronic scanning processes and distributed either in hardcopy or electronic medium. The scanned digital files of properly certified documents are not subject to the requirements of this paragraph. The electronic submission of CAD, vector or other files subject to easy editing are subject to the requirements of this paragraph. Easy editing is based on the file consisting of separate elements that can be individually modified or deleted.

12.12.2 Documents to be electronically transmitted that are signed using a digital signature, shall contain the authentication procedure in a secure mode and a list of the hardware, software and parameters used to prepare the document(s). Secure mode means that the authentication procedure has protective measures to prevent alteration or overriding of the authentication procedure. The term "digital signature" shall be an electronic authentication process that is attached to or logically associated with an electronic document. The digital signature shall be:

12.12.2.1 Unique to the licensee using it;

12.12.2.2 Capable of verification;

12.12.2.3 Under the sole control of the licensee; and

12.12.2.4 Linked to a document in such a manner that the digital signature is invalidated if any data in the document is changed.

12.12.3 Electronic formats must be approved by the board and must meet all criteria set forth in 12.2.1 and 12.2.2.

7 DE Reg. 918 (01/01/04)

11 DE Reg. 1664 (06/01/08)

**\*Please Note: As the rest of the sections were not amended, they are not being published. A copy of the regulation is available at:**

**2700 Board Professional Land Surveyors**

**Symbol Key**

Arial 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.

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**DEPARTMENT OF EDUCATION  
OFFICE OF THE SECRETARY**

Statutory Authority: 14 Delaware Code, Section 10113(b)(1) (14 **Del.C.** §10113(b)(1))  
14 **DE Admin. Code** 202

**REGULATORY IMPLEMENTING ORDER****202 Freedom of Information Act (FOIA) Procedures****I. Summary of the Evidence and Information Submitted**

The Secretary of Education intends to publish the final Department of Education Freedom of Information Act (FOIA) Procedures regulation related to the procedures related to the inspection and copying of public records retained by the Department of Education pursuant to 29 **Del.C.** Chapter 100, Freedom of Information Act (FOIA). This regulation is exempt from the formal procedural requirements of the Administrative Procedures Act pursuant to 29 **Del.C.** §10113(b)(2) as these are rules of practice and procedure of the Department of Education.

**II. Findings of Facts**

The Secretary finds that it is appropriate to publish the final Freedom of Information Act (FOIA) Procedures as this regulation applies to the Department in dealing with requests from the public for information as set forth in the Freedom of Information Act (FOIA).

### III. Decision to Amend the Regulation

For the foregoing reasons, the Secretary concludes that it is appropriate to publish the final Department of Education Freedom of Information Act (FOIA) regulation related to FOIA as attached hereto as Exhibit "B".

### IV. Text and Citation

The text of the Department of Education Freedom of Information Act (FOIA) Procedures regulation hereby shall be in the form attached hereto as Exhibit "B".

### V. Effective Date of Order

The actions hereinabove referred to were taken by the Secretary pursuant to 14 **Del.C.** §122 on July 15, 2009. The effective date of this Order shall be ten (10) days from the date this Order is published in the *Delaware Register of Regulations*.

**IT IS SO ORDERED** the 15 day of July 2009.  
Department of Education  
Lillian M. Lowery, Ed. D., Secretary of Education

Approved this 15 day of July 2009

### **202 Freedom of Information Act (FOIA) Procedures**

#### **1.0 Purpose**

The purpose of this regulation is to prescribe procedures relating to the inspection and copying of public records retained by the Department of Education. ("the DOE") pursuant to 29 Del.C. Chapter 100, the Freedom of Information Act ("FOIA"). It is the DOE's goal in establishing this regulation to maximize the amount of information available to the public, establish a reasonable fee structure for copying public records, and to streamline procedures used to disseminate this information.

This regulation applies to the DOE in dealing with requests from the public for information as set forth in the Freedom of Information Act. This regulation does not apply to the DOE in its normal course of business with Federal, State or local agencies, nor to private parties (corporate or individual) with whom the DOE is conducting business, provided the public records are germane to the business being conducted.

It is the intent of the DOE, as well as the State of Delaware, that public business be performed in an open and public manner so that the citizens will have the opportunity to be advised of the performance of Department officials and of their decisions. In accordance with Delaware's FOIA laws, the public has the right to "reasonable access" to public records. FOIA provides it shall be the responsibility of the public body to establish rules and regulations regarding access to public records as well as fees charged for copying of such records. All requests for information made pursuant to FOIA shall be processed in the manner prescribed below.

#### **2.0 Definitions**

"Documents in Active Use" means those records required as working documents by the Department of Education staff in performing current assignments.

"Documents in Storage" means those documents officially placed in the custody of the Delaware State Archives.

"DOE" means the Delaware Department of Education.

**"Public Business"** means any matter over which the DOE has supervision, control, jurisdiction, or advisory power.

**"Public Information Officer"** or **"PIO"** means the Public Information Officer, Delaware Department of Education.

**"Public Record"** means written or recorded information made or received by DOE relating to public business except the following:

Any personnel, medical, or pupil file, the disclosure of which would constitute an invasion of personal privacy, under any State or Federal law as it relates to personnel privacy.

Financial information obtained from a person which is of a privileged or confidential nature.

Investigative files for law enforcement purposes.

Any records specifically exempted from public disclosure by statute or common law.

Any records which disclose the identity of the contributor of a bona fide and lawful charitable contribution to the Department of Education whenever public anonymity has been requested of the Department with respect to said contribution by the contributor.

Any records involving labor negotiations or collective bargaining.

Any records pertaining to pending or potential litigation which are not records of any court.

Any record of discussions held in executive session.

**"Requestor"** means any individual, organization or business that submits a request for information under the Delaware Freedom of Information Act.

**"Secretary"** means the Secretary of Education or the Secretary's designee.

### **3.0 Availability of Records**

#### **3.1 Access**

**3.1.1** The DOE will provide reasonable access and facilities for reviewing public records during regular business hours.

**3.1.2** The DOE shall make all requested records available for review by the requestor unless such records or portions of records are determined to be in active use, in storage, or otherwise exempted from disclosure as records deemed non-public pursuant to 29 Del.C. §10002(g).

**3.1.3** The DOE reserves the right to deny any request in part or in full which does not comply with the procedures set forth herein and/or the provisions of the Freedom of Information Act, as amended.

#### **3.2 DOE Records Review**

**3.2.1** Prior to disclosure, records will be reviewed to insure that those records or portions of records deemed non-public are removed.

**3.2.2** The types of records deemed nonpublic are as contained in 29 Del.C. §10002(g).

**3.2.3** DOE regulations, brochures, pamphlets, informational bulletins, and other such information are not subject to this regulation.

### **4.0 Record Request**

**4.1** Requests to access records shall be made in writing and shall adequately describe the records sought in sufficient detail to enable the DOE to locate the records with reasonable effort. The DOE shall make every reasonable effort to assist the requestor in identifying the record being sought. The request may be denied in part or in full and returned to the requestor for the following reasons:

**4.1.1** The request does not adequately describe the records;

**4.1.2** The request requires the DOE to perform research or to assemble information that has not been compiled; or

**4.1.3** Reasons set forth in 3.1.3, or as addressed in other areas of this regulation not specified here.

**5.0 DOE Response to Requests**

- 5.1 The DOE shall make every reasonable effort to determine within 10 business days after receipt of a request whether it can fulfill the request. The actual disclosure of records shall follow promptly thereafter.
- 5.2 If the DOE denies a request in whole or in part, the DOE shall indicate to the requestor the reasons for the denial.
- 5.3 The copying of any requested public records may be performed by DOE personnel and mailed to the requestor. If personnel are not available, DOE may arrange to copy and mail the records to the requestor. In the alternative, the requestor may elect to pick up copies during regular business hours and submit payment at that time.
  - 5.3.1 If over 250 pages are requested to be copied, the requestor may be required to bring in both copier and personnel to make the desired copies.
  - 5.3.2 Fragmentation of requests in order to avoid the 250 page limit shall not be allowed.
  - 5.3.3 The Department shall have discretion based on circumstances involved to make decisions regarding copying.

**6.0 Fees****6.1 Administrative Fees****6.1.1 Charges for administrative fees include:**

- 6.1.1.1 Staff time associated with processing FOIA requests;
- 6.1.1.2 Locating and reviewing files;
- 6.1.1.3 Monitoring file reviews; and
- 6.1.1.4 Generating computer records (electronic or print-outs).

**6.1.2 Calculation of Administrative Charges**

- 6.1.2.1 Administrative charges will be billed to the requestor per quarter hour. These charges will be billed at the current, hourly pay-grade rate (prorated for quarter hour increments) for the personnel performing the service. Administrative charges will be in addition to any copying charges.
- 6.1.2.2 Appointment Rescheduling/Cancellation - Requestors that do not reschedule or cancel appointments to view files at least two full business days in advance of the appointment may be subject to the administrative charges incurred by the DOE in preparing the requested records. The DOE will prepare an itemized invoice of these charges and mail to the requestor for payment.

**6.2 Photocopying Fees**

- 6.2.1 The charge for copying standard sized, black and white 8.5" x 11" public records shall be \$0.25 per printed page (i.e., single-sided copies are \$0.25 and double-sided copies are \$0.50).
- 6.2.2 The charge for copying standard sized, black and white 8.5" x 14" public records shall be \$0.30 per printed page (i.e., single-sided copies are \$0.30 and double-sided copies are \$0.60).
- 6.2.3 The charge for copying standard sized, color 8.5" x 11" public records shall be \$1.00 per printed page (i.e., single-sided copies are \$1.00 and double-sided copies are \$2.00).
- 6.2.4 The charge for copying standard sized, color 8.5" x 14" public records shall be \$1.50 per printed page (i.e., single-sided copies are \$1.50 and double-sided copies are \$3.00).
- 6.2.5 Multiple copies shall not be made.

**6.3 Electronic Generated Records**

- 6.3.1 Charges for copying records maintained in an electronic format will be calculated by the material costs involved in generating the copies (including but not limited to magnetic tape, diskette, or compact disk costs) and administrative costs.
- 6.3.2 In the event requests for records maintained in an electronic format can be electronically mailed to the requestor, only the administrative charges in preparing the electronic records will be charged.



**6.4 Other Copying Fees**

**6.4.1** The DOE, at its discretion, may arrange to have records copied by an outside contractor if the DOE does not have the resources or equipment to copy such records. In this instance, the requestor shall be liable for payment of these costs.

**6.5 Payment**

**6.5.1** Payment for copies and/or administrative charges will be due at the time the copies are released to the requestor. The DOE reserves the right to refuse to make copies for requestors who have outstanding balances.

**6.5.2** The DOE may require pre-payment of copying and administrative charges prior to mailing copies of requested records.

**6.5.3** DOE personnel will maintain a receipt register and, upon request, provide the requestor with a receipt when payment is received.

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**OFFICE OF THE SECRETARY**

Statutory Authority: 14 Delaware Code, Sections 122(b) and 14 Delaware Code, Chapter 16  
(14 Del.C. §122(b) & 14 Del. C. Ch. 16))  
14 DE Admin. Code 501

**REGULATORY IMPLEMENTING ORDER****501 State Content Standards****I. Summary of the Evidence and Information Submitted**

The Secretary of Education seeks the consent of the State Board of Education to amend 14 **DE Admin. Code** 501 State Content Standards. The amended regulation is part of the 5 year review process and provides for the ability of the Department with the consent of the State Board of Education to develop the state content standards. Section 1.13 is being amended by replacing the statement "the Guidelines for the Selection of Instructional Materials" with 14 **DE Admin. Code** 502 Alignment of Local School District Curricula to the State Content Standards and 14 **DE Admin. Code** 503 Instructional Program Requirements in regard to instructional materials and curricula content being kept current and consistent. In addition, "Skilled and Technical Sciences Content Standards" was added as one of the areas where there is a content standards document developed.

Notice of the proposed regulation was published in the *News Journal* and the *Delaware State News* on Thursday, June 4, 2009, in the form hereto attached as Exhibit "A". Comments were received from the Governor's Advisory Council for Exceptional Citizens and the State Council for Persons with Disabilities endorsing the changes.

**II. Findings of Facts**

The Secretary finds that it is appropriate to amend 14 **DE Admin. Code** 501 State Content Standards in order to be in compliance with the 5 year review process and to reflect the current process of ensuring instructional materials and curricula material are kept current.

**III. Decision to Amend the Regulation**

For the foregoing reasons, the Secretary concludes that it is appropriate to amend 14 **DE Admin. Code** 501 State Content Standards. Therefore, pursuant to 14 **Del.C.** §122, 14 **DE Admin. Code** 501 State Content

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Standards attached hereto as Exhibit "B" is hereby amended. Pursuant to the provision of 14 **Del.C.** §122(e), 14 **DE Admin. Code** 501 State Content Standards hereby amended shall be in effect for a period of five years from the effective date of this order as set forth in Section V. below.

#### IV. Text and Citation

The text of 14 **DE Admin. Code** 501 State Content Standards amended hereby shall be in the form attached hereto as Exhibit "B", and said regulation shall be cited as 14 **DE Admin. Code** 501 State Content Standards in the Administrative Code of Regulations for the Department of Education.

#### V. Effective Date of Order

The actions hereinabove referred to were taken by the Secretary pursuant to 14 Del.C. §122 on July 16, 2009. The effective date of this Order shall be ten (10) days from the date this Order is published in the *Delaware Register of Regulations*.

**IT IS SO ORDERED** the 16th day of July 2009.  
DEPARTMENT OF EDUCATION  
Lillian M. Lowery, Ed. D., Secretary of Education  
Approved this 16th day of July 2009

STATE BOARD OF EDUCATION  
Teri Quinn Gray, President  
G. Patrick Heffernan  
Jorge L. Melendez  
Barbara B. Rutt

Dennis J. Savage  
Dr. Terry M. Whittaker  
Dr. James L. Wilson

**\*Please note that no changes were made to the regulation as originally proposed and published in the June 2009 issue of the *Register* at page 1476 (12 DE Reg. 1476). Therefore, the final regulation is not being republished. A copy of the final regulation is available at:**

**501 State Content Standards**

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#### OFFICE OF THE SECRETARY

Statutory Authority: 14 Delaware Code, Sections 122(b) and 14 Delaware Code, Chapter 16  
(14 **Del.C.** §122(b) & 14 **Del. C.** Ch. 16))  
14 **DE Admin. Code** 502

#### REGULATORY IMPLEMENTING ORDER

#### 502 Alignment of Local School District Curricula to the State Content Standards

##### I. Summary of the Evidence and Information Submitted

The Secretary of Education intends to amend 14 **DE Admin. Code** 502 Alignment of Local School District Curricula to the State Content Standards. Changes were made in Section 8.1 to clarify the Subsequent Review of Alignment and the spelling of survey was corrected in the definitions.

Notice of the proposed regulation was published in the *News Journal* and the *Delaware State News* on Thursday, June 4, 2009, in the form hereto attached as Exhibit "A". Comments were received from the Governor's Advisory Council for Exceptional Citizens and the State Council for Persons with Disabilities endorsing the changes.

## II. Findings of Facts

The Secretary finds that it is appropriate to amend 14 **DE Admin. Code** 502 Alignment of Local School District Curricula to the State Content Standards to clarify the Subsequent Review of Alignment and to correct a spelling error.

## III. Decision to Amend the Regulation

For the foregoing reasons, the Secretary concludes that it is appropriate to amend 14 **DE Admin. Code** 502 Alignment of Local School District Curricula to the State Content Standards. Therefore, pursuant to 14 **Del.C.** §122, 14 **DE Admin. Code** 502 Alignment of Local School District Curricula to the State Content Standards attached hereto as Exhibit "B" is hereby amended. Pursuant to the provision of 14 **Del.C.** §122(e), 14 **DE Admin. Code** 502 Alignment of Local School District Curricula to the State Content Standards hereby amended shall be in effect for a period of five years from the effective date of this order as set forth in Section V. below.

## IV. Text and Citation

The text of 14 **DE Admin. Code** 502 Alignment of Local School District Curricula to the State Content Standards amended hereby shall be in the form attached hereto as Exhibit "B", and said regulation shall be cited as 14 **DE Admin. Code** 502 Alignment of Local School District Curricula to the State Content Standards in the Administrative Code of Regulations for the Department of Education.

## V. Effective Date of Order

The actions hereinabove referred to were taken by the Secretary pursuant to 14 **Del.C.** §122 on July 15, 2009. The effective date of this Order shall be ten (10) days from the date this Order is published in the *Delaware Register of Regulations*.

**IT IS SO ORDERED** the 15th day of July 2009.  
DEPARTMENT OF EDUCATION  
Lillian M. Lowery, Ed. D., Secretary of Education

\*Please note that no changes were made to the regulation as originally proposed and published in the June 2009 issue of the *Register* at page 1477 (12 DE Reg. 1477). Therefore, the final regulation is not being republished. A copy of the final regulation is available at

**502 Alignment of Local School District Curricula to the State Content Standards**

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## DEPARTMENT OF HEALTH AND SOCIAL SERVICES DIVISION OF MEDICAID AND MEDICAL ASSISTANCE

Statutory Authority: 31 Delaware Code, Section 512 (31 **Del.C.** §512)

### FINAL ORDER

#### Title XIX Reimbursement Methodology for Medicaid Services

##### Nature of the Proceedings:

Delaware Health and Social Services ("Department") / Division of Medicaid and Medical Assistance (DMMA). The Department's proceedings to amend the Title XIX Medicaid State Plan to revise the reimbursement methodology for certain Medicaid services 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 June 2009 *Delaware Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by June 30, 2009 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

##### Summary of Proposed Amendments

The purpose and effect of this proposal is to amend the Title XIX Medicaid State Plan to revise the reimbursement methodology for certain provider services to comply with proposed State budget legislation now under consideration.

##### Statutory Authority

- 42 CFR §440, Subpart A, Definitions;
- 42 CFR §447.205, Public Notice of Changes in Statewide Methods and Standards for Setting Payment Rates; and,
- 42 CFR §447, Payments for Services.

##### Background

Pursuant to 42 CFR §447.205, Delaware Health and Social Services (DHSS), Division of Medicaid and Medicaid Assistance (DMMA) is required to give public notice of any significant proposed change in its methods and standards for setting payment rates for services.

##### Summary of Proposed Amendments

As a result of a State budgetary shortfall and to remain within the available Medicaid appropriation, Delaware Health and Social Services (DHSS), Division of Medicaid and Medical Assistance (DMMA) has determined that it is necessary to amend the state plan provisions governing the reimbursement for medically necessary services provided to eligible recipients. This action is necessary to ensure no increase in State expenditures resulting from changes in reimbursement rates for the Delaware Medical Assistance Programs (DMAP).

Effective April 1, 2009, DHSS/DMMA intends to amend the applicable provisions of the Title XIX Medicaid State Plan governing the reimbursement methodology for certain services to reduce the reimbursement rate. In accordance with 42 CFR §440.205, public notice was published before the proposed effective date of the change on March 31, 2009 in the two newspapers of widest circulation in the State, the News Journal (New Castle County, Kent County, Sussex County) and, the Delaware State News (Kent County), as follows:

For periods beginning on and after April 1, 2009, the following provider rates will be "Rolled Back" or "Frozen" at their pre-January 1, 2009 level.

The following significant changes are proposed:

**Inpatient Hospital Services:**

Inpatient hospital discharge rates for General Acute Care Hospitals will be "rolled back" to their pre-January 1, 2009 level. Such reduction shall remain in effect until further notice.

**Outpatient Hospital Services:**

Outpatient hospital rates that are paid based on a hospital specific fee schedule will be "rolled back" to their pre-January 1, 2009 level. Such reduction shall remain in effect until further notice.

**Private Nursing Facility Services:**

Private nursing facility services rates will be "rolled back" to their pre-January 1, 2009 level. Such reduction shall remain in effect until further notice.

**Pediatric Nursing Facility Services:**

Pediatric nursing facility services rates will be frozen at their pre-April 1, 2009 level. Such change shall remain in effect until further notice.

**Private Intermediate Care Facilities/Mentally Retarded (ICFs/MR):**

Private ICFs/MR rates will be "rolled back" to their pre-January 1, 2009 level. Such reduction shall remain in effect until further notice.

**Prescribed Pediatric Extended Care:**

Prescribed Pediatric Extended Care services rates will be frozen at their pre-April 1, 2009 level. Such change shall remain in effect until further notice.

In addition, effective for dates of service on and after April 1, 2009, the following describes how these providers will be impacted by deferred implementation of inflationary adjustments. The providers impacted by this inflationary deferral are:

**Outpatient Hospitals:**

Effective for dates of service April 1, 2009 and after, the percent of charges paid to each hospital shall be reduced by an amount for each hospital that will result in a net aggregate reduction in projected payments of 3%. Such deferred adjustment shall remain in effect until further notice.

**Community Pharmacies:**

Effective for dates of service April 1, 2009 and after, claims for drug ingredient costs reimbursed based on a percentage of the Average Wholesale Price (AWP) shall be reimbursed at AWP minus 16%. Such deferred adjustment shall remain in effect until further notice. [See Agency Response to Public Comments Below]

**Non-Traditional Pharmacies:**

Effective for dates of service April 1, 2009 and after, claims for drug ingredient costs reimbursed based on a percentage of the Average Wholesale Price (AWP) shall be reimbursed at AWP minus 18%. Such deferred adjustment shall remain in effect until further notice.

**Physicians:**

Effective for claims paid on or after April 1, 2009 claims that are based on the Medicare rate shall be reimbursed at 98% of the Medicare rate. Such deferred adjustment shall remain in effect until further notice.

**Laboratories:**

Effective for claims paid on or after April 1, 2009 claims that are based on the Medicare rate shall be reimbursed at 98% of the Medicare rate. Such deferred adjustment shall remain in effect until further notice.

**Dental:**

Effective for dates of service April 1, 2009 and after, dental claims reimbursed as a percent of charges shall be reimbursed at 80% of charges. Such deferred adjustment shall remain in effect until further notice.

**Ambulatory Surgical Centers:**

Effective for dates of service April 1, 2009 and after, ambulatory surgical centers shall be reimbursed at 95% of the Medicare rate. Such deferred adjustment shall remain in effect until further notice.

## Dialysis Centers:

Effective for dates of service April 1, 2009 and after, dialysis centers shall be reimbursed at 85% of charges. Such deferred adjustment shall remain in effect until further notice. **[See Agency Response to Public Comments Below]**

The provisions of this amendment are contingent upon approval of the Centers for Medicare and Medicaid Services (CMS).

## Summary of Comments Received with Agency Response

The Governor's Advisory Council for Exceptional Citizens (GACEC) and the State Council for Persons with Disabilities (SCPD) offered the following observations and recommendations summarized below. DMMA has considered each comment and responds as follows.

The proposed reductions must be viewed within the context of the overall economy and the State budget shortfall. The Councils regret the reductions in reimbursement rates but understands the justification based on the State budget.

In a nutshell, the changes are as follows.

- Reimbursement rates for inpatient hospital services, outpatient hospital services based on a fee schedule, private nursing facility services, and private ICF/MRs will be rolled back to December 31, 2008 standards (pp. 1487, 1491, 1499).
- Reimbursement rates for pediatric nursing facility services and prescribed pediatric extended care will be rolled back to March 31, 2009 standards (pp.1482, 1502).
- Reimbursement rates for outpatient hospitals based on a percentage of charges will be reduced by 3% (p. 1487).
- Reimbursement rates for community pharmacy and non-traditional pharmacy drug acquisition costs will be reduced by 2%, i.e., from the average wholesale price (AWP) minus 14% and 16%, to AWP minus 16% and 18% respectively. The dispensing rate of \$3.65 is unchanged (p. 1489).
- Reimbursement rates for free standing surgical centers will be reduced from 100% of Medicare rates to a minimum of 95% of Medicare rates (p. 1490).
- Reimbursement rates for physicians and labs will be reduced to 98% of the Medicare rate.
- Reimbursement rates for dental services will be reduced from 85% of charges to 80% of charges (p. 1490).
- Reimbursement rates for dialysis centers are reduced to 85% of charges (p. 1483).

We also understand that the regulation may inadvertently omit intended provisions identified below. The GACEC and the SCPD would like to share the following observations.

First, federal Medicaid law requires the State to offer payments that are sufficient to ensure some minimum level of availability of providers. See, e.g., attached descriptions of Massachusetts and Arizona litigation. The level of reimbursement reductions in the DMMA regulation may not be so deep as to prompt a wholesale exodus of providers from participation in the Medicaid program. However, the State must be mindful that it cannot reduce provider compensation to levels that would result in a severe lack of providers of covered services.

**Agency Response:** Per Section 1902(a)(30)(A) of the Social Security Act, payment rates must be consistent with efficiency, economy and quality of care. These proposed rate changes reflect our conclusion that a broad-based package of moderate, equitable rate adjustments is a better approach to preserving quality care than reductions in eligibility or benefits. Understanding the potential negative reaction from providers, DMMA conducted outreach efforts with affected provider groups prior to publishing public notice of the rate adjustments. The rate adjustments were also presented and discussed at Medical Care Advisory Committee (MCAC) meetings and a Provider Bulletin was posted on the DMAP website. While none of the provider groups was happy about the adjustments, they did understand the need for the adjustments and have generally been supportive. We appreciate the cooperation of providers and thank them for their continued service to those who rely on Medicaid.

Second, although the summary of the regulation (pp. 1482-1483) outlines changes effected by the amendments to the State Medicaid Plan, the Council could not locate the actual amendments for providers listed and underlined in the regulation, i.e., physicians, labs, and dialysis centers. Moreover, Council is assuming that the private Intermediate Care Facility for persons with Mental Retardation (ICF/MR) rates may be incorporated in the nursing facility rates and that the pediatric nursing facility rates are contained in a separate document. See p. 1502 [individual rates of care established per child]. DMMA should be encouraged to review the regulation to determine if some intended amendments were inadvertently omitted from the actual regulation.

**Agency Response:** The Medicaid State Plan describes reimbursement methodologies for Medicaid covered services. In some cases, the reimbursement methodology may be described in more general terms in the State Plan. For example, physicians are paid based on Medicare payment levels. Public notice is required when the actual percentage of Medicare paid is changed but a State Plan Amendment is not needed. The ICF/MR and Pediatric Nursing Facility Methodologies are both part of the Long Term Care Facilities section of the State Plan.

Third, consistent with the June 4 Delaware Health and Social Services (DHSS) press release and June 5 News Journal article, Walgreens has decided to no longer accept Medicaid for prescription drugs given the two percent rate reduction. DHSS indicates that it offered to compromise at one percent but Walgreens rejected that offer. The two percent standard was expected to save the State \$1 million. The article suggests that DHSS now intends to adopt a one percent standard rather than the two percent standard reflected in the proposed regulation. Walgreens indicated that it would take a loss in filling each brand name prescription and encouraged DHSS to achieve cost savings by "pushing doctors to prescribe more generic drugs". Alan Levin, the former Happy Harry CEO and current State director of economic development, opined that the DHSS offer was fair.

**Agency Response:** DMMA adjusted reimbursement for community pharmacies to AWP minus 16% effective April 1, 2009. This change was one component of a comprehensive package of provider rate adjustments. DMMA asserts that the April 1, 2009 rate is sufficient and supported by available data. DMMA also sought guidance from a pharmacy consultant who expressed the opinion that Delaware's pharmacy network is sufficient to provide adequate access even if a chain pharmacy ceased to participate. However, after consideration of public comments received, implementation of the pharmacy and renal dialysis centers rate adjustments, as proposed in the June 1, 2009 issue of the Delaware Register of Regulations at 12 DE Reg. 1481, have been revised, as follows:

1. Community Pharmacies - Effective for dates of service July 1, 2009 and after, claims for drug ingredient costs reimbursed based on a percentage of the Average Wholesale Price (AWP) shall be reimbursed at AWP minus 15%.

2. Renal Dialysis Facility Services - Effective for dates of service on and after July 1, 2009, renal dialysis facilities shall be paid using the lesser of the facilities' usual and customary (U & C) charges or 100% of the Medicare rate.

In compliance with 42 CFR §447.205 and the Administrative Procedures Act, Public Notice was published before the proposed effective date of the change on June 29, 2009 in the two newspapers of widest circulation in the State, the *News Journal* (New Castle County, Kent County, Sussex County) and, the *Delaware State News* (Kent County). These changes will, also, be adopted in a proposed regulation in a future issue of the *Delaware Register of Regulations*.

No changes were made to the text of the proposed state plan pages as a result of these comments.

#### Findings of Fact:

The Department finds that the proposed changes as set forth in the June 2009 *Register of Regulations* should be adopted.

**THEREFORE, IT IS ORDERED**, that the proposed regulation regarding the reimbursement methodology for the above-referenced Medicaid services is adopted and shall be final effective August 10, 2009.

Rita M. Landgraf, Secretary, DHSS

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\*Please note that no changes were made to the regulation as originally proposed and published in the June 2009 issue of the *Register* at page 1481 (13 DE Reg. 1481). Therefore, the final regulation is not being republished. A copy of the final regulation is available at

**Title XIX Reimbursement Methodology for Medicaid Services**

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## DIVISION OF MEDICAID AND MEDICAL ASSISTANCE

Statutory Authority: 31 Delaware Code, Section 512 (31 Del.C. 512)

### ORDER

#### DSSM 20800 Determining Eligibility for the Acute Care Program

##### Nature of the Proceedings:

Delaware Health and Social Services ("Department") / Division of Medicaid and Medical Assistance (DMMA) initiated proceedings to amend existing rules in the Division of Social Services Manual (DSSM) used to determine eligibility related to Long Term Care, specifically, the Acute Care Program. 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 August 2008 *Delaware Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by August 31, 2008 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

##### Summary of Proposal

As a reminder, the proposed provides notice to the public that the Division of Medicaid and Medical Assistance (DMMA) intends to amend existing rules in the Division of Social Services Manual (DSSM) used to determine eligibility related to Long Term Care, specifically, the Acute Care Program.

##### Statutory Authority

- 42 CFR §435.211, Individuals who would be eligible for cash assistance if they were not in medical institutions;
- 42 CFR §435.236, Individuals in institutions who are eligible under a special income level; and,
- 42 CFR §435.622, Individuals in institutions who are eligible under a special income level.

##### Summary of Proposal

**DSSM 20800**, ~~Long Term Acute Care Program (SSI)~~ *Determining Eligibility for the Acute Care Program*: First, the rule title has been renamed to reflect the revised content of the rule regarding medical eligibility rules for 30-day hospitalization/rehabilitation and out-of-state rehabilitation. Individuals who are inpatients of an acute care hospital for 30 days or more may be eligible for Long Term Care Medicaid.

Second, to simplify the policy format, Section 20800 is substantially revised, renumbered, and reorganized for greater clarity and ease of reading. Individuals requiring out-of-state placement in a rehabilitation center may also be eligible for Long Term Care Medicaid. Specific medical policy clarifications have been added to assist DMMA staff in obtaining the necessary information when determining medical eligibility.



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**Summary of Comments Received with Agency Response**

The Delaware Developmental Disabilities Council (DDDC) and the State Council for Persons with Disabilities (SCPD) offered the following observations and recommendations summarized below. DMMA has considered each comment and responds as follows.

As background, under the regulations, an individual may be eligible for Medicaid coverage in an acute care hospital or rehabilitation facility if both medical and financial criteria are met. Financially, there is a \$2,000 countable resource limit. In general, income cannot exceed 100% of the Federal SSI standard. If an applicant is expected to enter a nursing home directly from the hospital or rehabilitation facility, countable income can be higher (250% of the Federal SSI standard). The medical eligibility standards are more detailed. Moreover, the medical eligibility standards for out-of-state rehabilitation are stricter than for in-state rehabilitation. We have the following observations and recommendations.

First, in the "Income Guidelines" section, it is anomalous to adopt a more liberal income test for persons opting for nursing home placement directly from the hospital. Consistent with Olmstead and similar precedents, the State Medicaid program is expected to encourage alternatives to institutionalization. See attached January 14, 2000 CMS letter to State Medicaid Directors. It would therefore be preferable to authorize the higher income cap if an applicant were expected to enter a Medicaid waiver program. The superseded regulation (Section 20800.1) contemplated patients being discharged to the community with HCBS services. For example, a patient could be discharged to an assisted living facility and benefit from Medicaid assisted living waiver services. Eligibility for such waiver requires the applicant to meet a nursing level of care. See 16 DE Admin Code 20700.

**Agency Response:** There is no change to current policy. This section was only reformatted. Therefore, no changes have been made to the proposed amendment text as a result of this comment.

Second, the Councils question the categorical requirement that a participant in an out-of-state rehabilitation facility participate in "at least 3 hours of physical and/or occupational therapy per day". The preceding standards are more flexible in justifying eligibility based on intensive speech therapy, psychological services, or prosthetic-orthotic services. Someone recovering from a traumatic brain injury could conceivably focus on speech language therapy, cognitive retraining, and other sophisticated supports apart from OT and PT. We recommend deletion of the categorical eligibility requirement that the individual participate in 3 hours of OT and PT. It would be preferable to simply condense the standard as follows: "The individual must be able to tolerate and participate in required therapies and services." Since eligibility is reviewed on a "bi-weekly basis", there is ample scrutiny of active treatment.

**Agency Response:** The Division believes that the proposed regulation fails to clearly articulate medical eligibility requirements. The intent was to ensure that individuals could, in fact, participate in the required services. The final order regulation has been amended to read, "The individual must be able to tolerate and participate in all required therapies or services."

**Findings of Fact:**

The Department finds that the proposed changes as set forth in the August 2008 Register of Regulations should be adopted.

**THEREFORE, IT IS ORDERED**, that the proposed regulation to amend the Division of Social Services Manual (DSSM) related to Long Term Care, specifically, the Acute Care Program, is adopted and shall be final effective August 10, 2009.

Rita M. Landgraf, Secretary, DHSS

**DMMA FINAL ORDER REGULATION #09-26**

**REVISION:**

**20800 Long Term Acute Care Program (SSI)**

Until 12/31/95, Medicaid coverage was available to individuals in acute care hospitals for more than 30 days, who would be eligible for SSI (aged, blind, or disabled) except that their income is between 100% and 250% of the SSI standard. Effective 1/1/96, individuals with income exceeding 100% of the SSI standard are not eligible. Individuals who would be eligible for TANF if not hospitalized may also qualify. This section will focus on applicants who would be eligible for SSI. These individuals will be determined eligible only after the patient has been in the hospital for 30 consecutive days. For example, if an individual enters the hospital on April 24th, Medicaid units need not consider eligibility unless the individual is still hospitalized on May 23rd (and has been continuously hospitalized since April 24th).

Financial eligibility for this program is always handled by the Financial Eligibility Units. Medical eligibility can be determined by PAS or by the Medicaid Review Team. To be medically eligible, the applicant must have required the level of care provided by a hospital during the time of his/her hospitalization. The individual may also be found eligible based on age alone (age 65 or older) or if the individual is statutorily blind and in the need of acute care services. Anyone 65 or statutorily blind and hospitalized for 30 consecutive days, and in need of acute care services would be medically eligible.

**20800.1 Referral Procedures**

1. The referral is taken by PAS if the applicant is seeking Nursing Home placement or Home and Community Based Services, in addition to this program. PAS will determine medical eligibility and will refer the case to the Financial Eligibility Unit. If Home and Community Based Services are needed, the Financial Unit will refer the case to the HCBS Unit.

2. If the applicant is planning to be discharged to his home or to an out of state hospital or has already been discharged and does not require Home and Community Based Services or long term care placement, the referral is taken by the Financial Eligibility Unit. The eligibility process begins only when the applicant has reached his 30th day of hospitalization. The Financial Eligibility Unit obtains a FORM 408 from the hospital and forwards it with any pertinent medical information to the Medical Review Team. If the applicant is under the age of 19 and does not require long term care or HCBS, the Financial Eligibility Unit refers the case to the Family and Community Medicaid Unit.

3. If, in either of the above two situations the referral is an emergency, i.e., the applicant requires a heart transplant, bone marrow transplant, etc., the appropriate referral unit will begin the eligibility process without waiting for the 30 days to elapse or for the FORM 408 Form to be completed.

In emergency situations, the worker handling the referral will notify her supervisor. The supervisor will inform the Long Term Care Coordinator of the applicant's medical situation. The Long Term Care Coordinator will determine medical eligibility with the assistance of a staff nurse.

**20800.2 Financial Determination**

1. Applicant or representative must complete the application process

2. Eligibility will be determined using all nursing home technical and financial standards.

3. If applicant is eligible, the Medicaid case must be opened on DCIS retroactive from the hospital admission date. For example, if an individual enters the hospital April 24th and is continuously hospitalized at least until May 23rd. The Medicaid coverage would begin effective April 24th. In no case shall the effective date of eligibility be earlier than the first day of hospitalization.

4. There is a patient pay requirement for these individuals and the patient pay amount is determined in accordance with policy section 20600 (Post-Eligibility Definitions/Procedures). Notification of patient pay amount and approval must be sent to the appropriate hospital social worker.

Complete data entry functions to update DCIS and templates.

5. Redeterminations of eligibility must be completed at six month intervals, but biweekly contacts must be made with the hospital to determine that the recipient is still institutionalized.

**LTC POL-20800**      **Determining Eligibility for the Acute Care Program**

This policy applies to all applications received for Medicaid payment of Inpatient hospitalization or rehabilitation.

**Thirty Consecutive Days of Hospitalization**

Eligibility for this program will only be determined once the individual has been hospitalized for 30 consecutive days, unless:

- the discharge plan is for nursing home placement; or
- the individual is seeking out of state inpatient rehabilitation placement.

**Licensed and Certified Hospital or Rehabilitation Facility**

The medical facility must be licensed and certified as a Title XIX Acute Care or Rehabilitation Medical Facility.

The Acute Care facility must be engaged in providing diagnostic and therapeutic services for medical diagnosis, treatments, and care of injured, disabled, or sick persons. These services must be provided by or under the supervision of physicians. Continuous twenty-four (24) hour nursing services are provided.

The Rehabilitation facility may be a freestanding rehabilitation hospital or a rehabilitation unit in an Acute Care hospital.

**Medical Eligibility Requirements For In State Hospitalization and/or Rehabilitation**

Medical eligibility for Inpatient hospitalization/rehabilitation services received within the state is determined by the Division of Medicaid and Medical Assistance Pre-Admission Screening (PAS) units. The individual must have required the level of care provided by a hospital during the time of his/her hospitalization, as determined by the PAS units.

Anyone 65 years of age or older, or statutorily blind would meet the medical eligibility criteria if they were in need of acute care services during the time of their hospitalization.

**Medical Eligibility Requirements For Out of State Rehabilitation**

Medical eligibility for Inpatient Rehabilitation services to be received out of state is determined by the Division of Medicaid and Medical Assistance Medical Director. The individual must require:

- close medical supervision by a rehabilitation physician;
- twenty-four (24) hour nursing supervision;
- an intensive level of physical, occupational or speech therapy; or
- psychological services; or
- prosthetic-orthotic services.

The individual must be able to tolerate and participate in [all required therapies or services.];

- ~~at least 3 hours of physical and/or occupational therapy per day;~~
- ~~and any other required therapies or services.]~~

Medical eligibility must be reviewed on a bi-weekly basis.

Prior authorization must be requested and approved before out of state placement is made.

**Financial Eligibility Requirements**

Financial eligibility is determined by the Division of Medicaid and Medical Assistance Financial units. An individual must meet income and resource guidelines.

## Income Guidelines

The income limit is equal to 100% of the Federal SSI Standard. However, if the individual is going to a nursing home directly from a hospital or rehabilitation facility, the higher income limit of 250% of the Federal SSI standard will be applied.

For out of state rehabilitation the income limit is 250% of the Federal SSI standard.

Refer to DSSM sections 20200, 20210, and 20240 for additional guidelines regarding income.

## Resource Guidelines

The resource limit is \$2,000.00. Refer to DSSM sections 20300 – 20360, and 20400 for additional information on determining countable resources.

## Spousal

If applicable, Spousal Impoverishment rules should be followed. (DSSM 20900)

## Financial Redetermination

A redetermination of the individual's financial eligibility should be completed at six month intervals.

## Post Eligibility Budgeting

There is a patient pay requirement for these individuals. The patient pay amount is determined in accordance with DSSM section 20600 - (Post-Eligibility Definitions/Procedures). Notification of patient pay amount and approval must be sent to the appropriate hospital/rehabilitation social worker.

## Medicaid Eligibility Effective Date

In no case shall the effective date of eligibility be earlier than the first day of hospitalization.

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### **DIVISION OF SOCIAL SERVICES**

Statutory Authority: 31 Delaware Code, Section 512 (31 Del.C. §512)  
16 DE Admin. Code 9032 and 9038

### **FINAL ORDER**

**DSSM: 9032.3, 9032.8, 9032.9, 9032.11 and 9038**

### **Nature of the Proceedings:**

Delaware Health and Social Services ("Department") / Division of Social Services initiated proceedings to amend Food Supplement Program policies in the Division of Social Services Manual (DSSM) regarding Utility Expenses; Liquid Resources and Loans; Continuing Shelter Charges; Household Size; and, Verification Subsequent to Initial Certification. 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 June 2009 *Delaware Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by June 30, 2009 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

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**Summary of Proposed Changes**

The proposed changes described below amend Food Supplement Program (FSP) policies in the Division of Social Services Manual (DSSM) regarding Utility Expenses; Liquid Resources and Loans; Continuing Shelter Charges; Household Size; and, Verification Subsequent to Initial Certification.

**Statutory Authority**

- 7 CFR §273.2(f)(1)(iii), Utility Expenses;
- 7 CFR §273.2(f)(1), Mandatory Verification;
- 7 CFR §273.2(f)(3), State Agency Option,
- 7 CFR §273.2(f)(1)(x), Household Composition; and,
- 7 CFR §273.2(f)(8), Verification Subsequent to Initial Certification.

**Summary of Proposed Changes**

The purpose of the proposed changes is to simplify the verification process and remove rules not required by the federal Supplemental Nutrition Assistance Program (SNAP), as follows:

**DSSM 9032.3**, Utility Expenses: The change makes clear that staff only verify the utility that is needed to give the household the appropriate Standard Utility Allowance (SUA). Revised policy adds clarification that addresses utilities for unoccupied homes.

**DSSM 9032.8**, Liquid Resources and Loans: The change removes this verification which is not mandatory under federal guidelines. Therefore, DSSM 9032.8 is "Reserved". DSSM 9059 excludes loans which have to be repaid from counting as income. DSSM 9038 allows the Division of Social Services (DSS) to verify any information that is questionable.

**DSSM 9032.9**, Continuing Shelter Charges: The change corrects the text that this section applies only to initial certifications, not recertifications.

**DSSM 9032.11**, Household Size: The change removes this requirement to verify household size which is not mandated by federal rules. Therefore, DSSM 9032.11 is "Reserved". DSSM 9038 allows DSS to verify any information that is questionable.

**DSSM 9038**, Verification Subsequent to Initial Certification: The change relaxes the verification rules for recertification to more align them with federal rules.

**Summary of Comments Received With Agency Response**

The Delaware Community Legal Aid Society, Inc. (CLASI) and ACTION for Children; and, the State Council for Persons with Disabilities (SCPD) offered the following observations and recommendations summarized below. The Division of Social Services (DSS) has considered each comment and responds as follows.

**CLASI/ACTION for Children**

Re: 9038 Food Supplement Program Verification Requirements

We support the changes proposed for the Food Supplement Program. For too long, CLASI and the agencies who are members of ACTION have seen clients suffering long delays in the processing of their Food Stamp/SNAP recertifications. We hope that reducing the amount of information that needs to be provided and processed at recertification will significantly reduce these delays.

We have one concern regarding the proposed change to DSSM 9038. Section A provides two lists: one of items that must be verified and one of items that do not need to be verified. Both lists are under the same subsection. It is unclear if the last sentence on the do not verify list, "unchanged information unless the information is incomplete, inaccurate, inconsistent, or more than 12 months old," applies to everything that was listed above on the required to be verified list. We hope it does. In which case, we suggest clarifying this language. This could be

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done by stating "A. At recertification, verify the following information if it has changed, is incomplete, inaccurate, inconsistent, or more than 12 months old."

If the sentence on the do not verify list that states "unchanged information unless the information is incomplete, inaccurate, inconsistent, or more than 12 months old," applies to items other than what is listed in the preceding section, what the sentence is referencing should be explained.

**Agency Response:** DSS revises the bulleted sentence in question to read in the final order regulation as follows:

Unchanged information, except for income, unless the information is incomplete, inaccurate, inconsistent, or more than 12 months old.

## SCPD

Council endorses the proposed regulation since it relaxes verification burdens on households, and has the following observations.

Utility Expenses: For background, SCPD is attaching a USDA summary of the standard utility allowance ("SUA") and chart reflecting Delaware's SUA compared to other states. According to the USDA, the SUAs are used in place of actual utility costs to calculate a household's total shelter costs. Utility costs include electric, gas/fuel, water, sewer, trash, and telephone. The proposed "utility expenses" regulation appears to be consistent with other DSS standards, including 16 DE Admin Code 9060.

Liquid Resources & Loans: A shelter cost deduction is available for loan repayments on a mobile home or mortgage payments. The proposed regulation removes a verification requirement which is not mandatory under federal guidelines.

Continuing Shelter Charge: A deduction is available for continuing charges of shelter such as condo fees and rent. See 16 **DE Admin. Code** 9060F. Under the proposed regulation, verification would not be required during recertification.

Household Size: The proposed regulation removes a requirement of verification of household size. The criteria for a household [16 DE Admin Code 9013] are somewhat flexible.

Verification Subsequent to Initial Certification: The proposed regulation relaxes verification standards at recertification, focusing on new or changed expenses as juxtaposed to updated verification of unchanged expenses.

**Agency Response:** Thank you for your concurrence. DSS appreciates your endorsement.

## Findings of Fact:

The Department finds that the proposed changes as set forth in the June 2009 *Register of Regulations* should be adopted.

**THEREFORE, IT IS ORDERED**, that the proposed regulation to amend the Division of Social Services Manual (DSSM) as it relates to the Food Supplement Program regarding Utility Expenses; Liquid Resources and Loans; Continuing Shelter Charges; Household Size; and, Verification Subsequent to Initial Certification is adopted and shall be final effective August 10, 2009.

Rita M. Landgraf, Secretary, DHSS

**\*Please note that no additional changes were made to the regulations as originally proposed and published in the June 2009 issue of the *Register* at page 1502 (12 DE Reg. 1502). Therefore, the final regulations are not being republished here. A copy of the final regulations are available at**

**DSSM: 9032.3, 9032.8, 9032.9, 9032.11 and 9038**

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# FINAL REGULATIONS

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## DEPARTMENT OF INSURANCE

Statutory Authority: 18 Delaware Code, Sections 314 and 1111 (18 Del.C. §§314 and 1111)  
18 DE Admin. Code 1501

### ORDER

#### 1501 Medicare Supplement Insurance Minimum Standards

Proposed changes to Regulation 1501 relating to Medicare Supplement Insurance Minimum Standards were published in the *Delaware Register of Regulations* on June 1, 2009. The comment period remained open until July 6, 2009. There was no public hearing on the proposed changes to Regulation 1501. Public notice of the proposed changes to Regulation 1501 in the *Register of Regulations* was in conformity with Delaware law.

#### SUMMARY OF THE EVIDENCE AND INFORMATION SUBMITTED

Comment was received from the America's Health Insurance Plan (AHIP). The comment pointed out a numbering error as well as numbering errors in references to sections of the regulation at various places. The comment also questions the need a requirement that is not found in the NAIC Model. While the specific requirement may require companies to use different rating methodology than would be required by adoption of the NAIC Model, the requirements are recommended by Department professional staff and are sound. The paragraph numbering errors have been corrected. The purpose of the proposed amendment is to update requirements for medicare supplement policies to conform with changes in federal law.

#### FINDINGS OF FACT

Based on Delaware law and the record in this docket, I make the following findings of fact:

The requirements of the amended Regulation 1501 best serve the interests of the public and of insurers and comply with Delaware law.

#### DECISION AND EFFECTIVE DATE

Based on the provisions of 18 Del.C. §§314, 1111 and 29 Del.C. §§10113-10118 and the record in this docket, I hereby adopt Regulation 1501 as amended and as may more fully and at large appear in the version attached hereto to be effective on August 11, 2009.

#### TEXT AND CITATION

The text of the proposed amendments to Regulation 1501 last appeared in the *Register of Regulations* Vol. 12, Issue 12, page 1506 and/or on-line.

**IT IS SO ORDERED** this 9th day of July 2009.

Karen Weldin Stewart, CIR-ML  
Insurance Commissioner

#### 1501 Medicare Supplement Insurance Minimum Standards

*(Break in Continuity of Sections)*

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**8.0 Benefit Standards for 1990 Standardized Medicare Supplement Benefit Plan Policies or Certificates Issued or Delivered on or After July 1, 2009 and [with an effective date of coverage Pp]rior to June 1, 2010**

The following standards are applicable to all Medicare supplement policies or certificates delivered or issued for delivery in this state on or after July 1, 2009 and prior to June 1, 2010. No policy or certificate may be advertised, solicited, delivered or issued for delivery in this state as a Medicare supplement policy or certificate unless it complies with these benefit standards.

**8.1 General Standards. The following standards apply to Medicare supplement policies and certificates and are in addition to all other requirements of this regulation.**

**8.1.1 A Medicare supplement policy or certificate shall not exclude or limit benefits for losses incurred more than six (6) months from the effective date of coverage because it involved a preexisting condition. The policy or certificate may not define a preexisting condition more restrictively than a condition for which medical advice was given or treatment was recommended by or received from a physician within six (6) months before the effective date of coverage.**

**8.1.2 A Medicare supplement policy or certificate shall not indemnify against losses resulting from sickness on a different basis than losses resulting from accidents.**

**8.1.3 A Medicare supplement policy or certificate shall provide that benefits designed to cover cost sharing amounts under Medicare will be changed automatically to coincide with any changes in the applicable Medicare deductible, co-payment, or coinsurance amounts. Premiums may be modified to correspond with such changes.**

**8.1.4 No Medicare supplement policy or certificate shall provide for termination of coverage of a spouse solely because of the occurrence of an event specified for termination of coverage of the insured, other than the nonpayment of premium.**

**8.1.5 Each Medicare supplement policy shall be guaranteed renewable.**

**8.1.5.1 The issuer shall not cancel or non-renew the policy solely on the ground of health status of the individual.**

**8.1.5.2 The issuer shall not cancel or non-renew the policy for any reason other than nonpayment of premium or material misrepresentation.**

**8.1.5.3 If the Medicare supplement policy is terminated by the group policyholder and is not replaced as provided under Section 8.1.5.5, the issuer shall offer certificate holders an individual Medicare supplement policy which (at the option of the certificate holder)**

**8.1.5.3.1 Provides for continuation of the benefits contained in the group policy, or**

**8.1.5.3.2 Provides for benefits that otherwise meet the requirements of this subsection.**

**8.1.5.4 If an individual is a certificate holder in a group Medicare supplement policy and the individual terminates membership in the group, the issuer shall**

**8.1.5.4.1 Offer the certificate holder the conversion opportunity described in Section 8.1.5.3, or**

**8.1.5.4.2 At the option of the group policyholder, offer the certificate holder continuation of coverage under the group policy.**

**8.1.5.5 If a group Medicare supplement policy is replaced by another group Medicare supplement policy purchased by the same policyholder, the issuer of the replacement policy shall offer coverage to all persons covered under the old group policy on its date of termination. Coverage under the new policy shall not result in any exclusion for preexisting conditions that would have been covered under the group policy being replaced.**

**8.1.5.6 If a Medicare supplement policy eliminates an outpatient prescription drug benefit as a result of requirements imposed by the Medicare Prescription Drug, Improvement and Modernization Act of 2003, the modified policy shall be deemed to satisfy the guaranteed renewal requirements of this paragraph.**

**8.1.6 Termination of a Medicare supplement policy or certificate shall be without prejudice to any continuous loss which commenced while the policy was in force, but the extension of benefits beyond the period during which the policy was in force may be conditioned upon the continuous total disability of the insured, limited to the duration of the policy benefit period, if any, or payment**



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# FINAL REGULATIONS

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- of the maximum benefits. Receipt of Medicare Part D benefits will not be considered in determining a continuous loss.
- 8.1.7 Policy or Certificate Suspension**
- 8.1.7.1** A Medicare supplement policy or certificate shall provide that benefits and premiums under the policy or certificate shall be suspended at the request of the policyholder or certificate holder for the period (not to exceed twenty-four (24) months) in which the policyholder or certificate holder has applied for and is determined to be entitled to medical assistance under Title XIX of the Social Security Act, but only if the policyholder or certificate holder notifies the issuer of the policy or certificate within ninety (90) days after the date the individual becomes entitled to assistance.
- 8.1.7.2** If suspension occurs and if the policyholder or certificate holder loses entitlement to medical assistance, the policy or certificate shall be automatically reinstated (effective as of the date of termination of entitlement) as of the termination of entitlement if the policyholder or certificate holder provides notice of loss of entitlement within ninety (90) days after the date of loss and pays the premium attributable to the period, effective as of the date of termination of entitlement.
- 8.1.7.3** Each Medicare supplement policy shall provide that benefits and premiums under the policy shall be suspended (for any period that may be provided by federal regulation) at the request of the policyholder if the policyholder is entitled to benefits under Section 226 (b) of the Social Security Act and is covered under a group health plan (as defined in Section 1862 (b)(1)(A)(v) of the Social Security Act). If suspension occurs and if the policyholder or certificate holder loses coverage under the group health plan, the policy shall be automatically reinstated (effective as of the date of loss of coverage) if the policyholder provides notice of loss of coverage within ninety (90) days after the date of the loss.
- 8.1.7.4** Reinstitution of coverages as described in 8.1.7.2 and 8.1.7.3:
- 8.1.7.4.1** Shall not provide for any waiting period with respect to treatment of preexisting conditions;
- 8.1.7.4.2** Shall provide for resumption of coverage that is substantially equivalent to coverage in effect before the date of suspension. If the suspended Medicare supplement policy provided coverage for outpatient prescription drugs, reinstatement of the policy for Medicare Part D enrollees shall be without coverage for outpatient prescription drugs and shall otherwise provide substantially equivalent coverage to the coverage in effect before the date of suspension; and
- 8.1.7.4.3** Shall provide for classification of premiums on terms at least as favorable to the policyholder or certificate holder as the premium classification terms that would have applied to the policyholder or certificate holder had the coverage not been suspended.
- 8.1.8** If an issuer makes a written offer to the Medicare Supplement policyholders or certificate holders of one or more of its plans, to exchange during a specified period from his or her 1990 Standardized plan (as described in Section 9 of this regulation) to a 2010 Standardized plan (as described in Section 9.1 of this regulation), the offer and subsequent exchange shall comply with the following requirements:
- 8.1.8.1** If an issuer need not provide justification to the Commissioner if the insured replaces a 1990 Standardized policy or certificate with an issue age rated 2010 Standardized]policy or certificate at the insured's original issue age and duration. If an insured's policy or certificate to be replaced is priced on an issue age rate schedule at the time of such offer, the rate charged to the insured for the new exchanged policy shall recognize the policy reserve buildup, due to the pre-funding inherent in the use of an issue age rate basis, for the benefit of the insured. The method proposed to be used by an issuer must be filed with the Commissioner.
- 8.1.8.2** The rating class of the new policy or certificate shall be the class closest to the insured's class of the replaced coverage.

- 8.1.8.3 An issuer may not apply new pre-existing condition limitations or a new incontestability period to the new policy for those benefits contained in the exchanged 1990 Standardized policy or certificate of the insured, but may apply pre-existing condition limitations of no more than six (6) months to any added benefits contained in the new 2010 Standardized policy or certificate not contained in the exchanged policy.
- 8.1.8.4 The new policy or certificate shall be offered to all policyholders or certificate holders within a given plan, except where the offer or issue would be in violation of state or federal law.
- 8.2 Standards for Basic (Core) Benefits Common to Benefit Plans A to J.** Every issuer shall make available a policy or certificate including only the following basic “core” package of benefits to each prospective insured. An issuer may make available to prospective insureds any of the other Medicare Supplement Insurance Benefit Plans in addition to the basic core package, but not in lieu of it.
- 8.2.1 Coverage of Part A Medicare eligible expenses for hospitalization to the extent not covered by Medicare from the 61st day through the 90th day in any Medicare benefit period;
- 8.2.2 Coverage of Part A Medicare eligible expenses incurred for hospitalization to the extent not covered by Medicare for each Medicare lifetime inpatient reserve day used;
- 8.2.3 Upon exhaustion of the Medicare hospital inpatient coverage, including the lifetime reserve days, coverage of one hundred percent (100%) of the Medicare Part A eligible expenses for hospitalization paid at the applicable prospective payment system (PPS) rate, or other appropriate Medicare standard of payment, subject to a lifetime maximum benefit of an additional 365 days. The provider shall accept the issuer’s payment as payment in full and may not bill the insured for any balance;
- 8.2.4 Coverage under Medicare Parts A and B for the reasonable cost of the first three (3) pints of blood (or equivalent quantities of packed red blood cells, as defined under federal regulations) unless replaced in accordance with federal regulations;
- 8.2.5 Coverage for the coinsurance amount, or in the case of hospital outpatient department services paid under a prospective payment system, the co-payment amount, of Medicare eligible expenses under Part B regardless of hospital confinement, subject to the Medicare Part B deductible;
- 8.3 Standards for Additional Benefits.** The following additional benefits shall be included in Medicare Supplement Benefit Plans “B” through “J” only as provided by Section 9 of this regulation.
- 8.3.1 Medicare Part A Deductible: Coverage for all of the Medicare Part A inpatient hospital deductible amount per benefit period.
- 8.3.2 Skilled Nursing Facility Care: Coverage for the actual billed charges up to the coinsurance amount from the 21st day through the 100th day in a Medicare benefit period for post-hospital skilled nursing facility care eligible under Medicare Part A.
- 8.3.3 Medicare Part B Deductible: Coverage for all of the Medicare Part B deductible amount per calendar year regardless of hospital confinement.
- 8.3.4 Eighty Percent (80%) of the Medicare Part B Excess Charges: Coverage for eighty percent (80%) of the difference between the actual Medicare Part B charge as billed, not to exceed any charge limitation established by the Medicare program or state law, and the Medicare-approved Part B charge.
- 8.3.5 One Hundred Percent (100%) of the Medicare Part B Excess Charges: coverage for all of the difference between the actual Medicare Part B charge as billed, not to exceed any charge limitation established by the Medicare program or state law, and the Medicare-approved Part B charge.
- 8.3.6 Basic Outpatient Prescription Drug Benefit: Coverage for fifty percent (50%) of outpatient prescription drug charges, after a \$250 calendar year deductible, to a maximum of \$1,250 in benefits received by the insured per calendar year, to the extent not covered by Medicare. The outpatient prescription drug benefit may be included for sale or issuance in a Medicare supplement policy until January 1, 2006.

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- 8.3.7 Extended Outpatient Prescription Drug Benefit: Coverage for fifty percent (50%) of outpatient prescription drug charges, after a \$250 calendar year deductible to a maximum of \$3,000 in benefits received by the insured per calendar year, to the extent not covered by Medicare. The outpatient prescription drug benefit may be included for sale or issuance in a Medicare supplement policy until January 1, 2006.
- 8.3.8 Medically Necessary Emergency Care in a Foreign Country: Coverage to the extent not covered by Medicare for eighty percent (80%) of the billed charges for Medicare-eligible expenses for medically necessary emergency hospital, physician and medical care received in a foreign country, which care would have been covered by Medicare if provided in the United States and which care began during the first sixty (60) consecutive days of each trip outside the United States, subject to a calendar year deductible of \$250, and a lifetime maximum benefit of \$50,000. For purposes of this benefit, "emergency care" shall mean care needed immediately because of an injury or an illness of sudden and unexpected onset.
- 8.3.9 Preventive Medical Care Benefit: Coverage for the following preventive health services not covered by Medicare:
- 8.3.9.1 An annual clinical preventive medical history and physical examination that may include tests and services from Subparagraph (b) and patient education to address preventive health care measures:
- 8.3.9.2 Preventive screening tests or preventive services, the selection and frequency of which is determined to be medically appropriate by the attending physician.
- 8.3.9.3 Reimbursement shall be for the actual charges up to one hundred percent (100%) of the Medicare-approved amount for each service, as if Medicare were to cover the service as identified in American Medical Association Current Procedural Terminology (AMA CPT) codes, to a maximum of \$120 annually under this benefit. This benefit shall not include payment for any procedure covered by Medicare.
- 8.3.10 At-Home Recovery Benefit: Coverage for services to provide short term, at-home assistance with activities of daily living for those recovering from an illness, injury or surgery.
- 8.3.10.1 For purposes of this benefit, the following definitions shall apply:
- 8.3.10.1.1 "Activities of daily living" include, but are not limited to bathing, dressing, personal hygiene, transferring, eating, ambulating, assistance with drugs that are normally self-administered, and changing bandages or other dressings.
- 8.3.10.1.2 "Care provider" means a duly qualified or licensed home health aide or homemaker, personal care aide or nurse provided through a licensed home health care agency or referred by a licensed referral agency or licensed nurses registry.
- 8.3.10.1.3 "At home" shall mean any place used by the insured as a place of residence, provided that the place would qualify as a residence for home health care services covered by Medicare. A hospital or skilled nursing facility shall not be considered the insured's place of residence.
- 8.3.10.1.4 "At-home recovery visit" means the period of a visit required to provide at home recovery care, without limit on the duration of the visit, except each consecutive four (4) hours in a twenty-four-hour period of services provided by a care provider is one visit.
- 8.3.10.2 Coverage Requirements and Limitations.
- 8.3.10.2.1 At-home recovery services provided must be primarily services which assist in activities of daily living.
- 8.3.10.2.2 The insured's attending physician must certify that the specific type and frequency of at-home recovery services are necessary because of a condition for which a home care plan of treatment was approved by Medicare.
- 8.3.10.3 Coverage Is Limited To:
- 8.3.10.3.1 To more than the number and type of at-home recovery visits certified as necessary by the insured's attending physician. The total number of at-home recovery visits shall

not exceed the number of Medicare approved home health care visits under a Medicare approved home care plan of treatment;

8.3.10.3.2 The actual charges for each visit up to a maximum reimbursement of \$40 per visit;

8.3.10.3.3 \$1,600 per calendar year;

8.3.10.3.4 Seven (7) visits in any one week;

8.3.10.3.5 Care furnished on a visiting basis in the insured's home;

8.3.10.3.6 Services provided by a care provider as defined in this section;

8.3.10.3.7 At-home recovery visits while the insured is covered under the policy or certificate and not otherwise excluded;

8.3.10.3.8 At-home recovery visits received during the period the insured is receiving Medicare approved home care services or no more than eight (8) weeks after the service date of the last Medicare approved home health care visit.

8.3.10.4 Coverage is excluded for:

8.3.10.4.1 Home care visits paid for by Medicare or other government programs; and

8.3.10.4.2 Care provided by family members, unpaid volunteers or providers who are not care providers.

#### **8.4 Standards for Plans K and L.**

8.4.1 Standardized Medicare supplement benefit plan "K" shall consist of the following:

8.4.1.1 Coverage of one hundred percent (100%) of the Part A hospital coinsurance amount for each day used from the 61st through the 90th day in any Medicare benefit period;

8.4.1.2 Coverage of one hundred percent (100%) of the Part A hospital coinsurance amount for each Medicare lifetime inpatient reserve day used from the 91st through the 150th day in any Medicare benefit period;

8.4.1.3 Upon exhaustion of the Medicare hospital inpatient coverage, including the lifetime reserve days, coverage of one hundred percent (100%) of the Medicare Part A eligible expenses for hospitalization paid at the applicable prospective payment system (PPS) rate, or other appropriate Medicare standard of payment, subject to a lifetime maximum benefit of an additional 365 days. The provider shall accept the issuer's payment as payment in full and may not bill the insured for any balance;

8.4.1.4 Medicare Part A Deductible: Coverage for fifty percent (50%) of the Medicare Part A inpatient hospital deductible amount per benefit period until the out-of-pocket limitation is met as described in Subparagraph (j);

8.4.1.5 Skilled Nursing Facility Care: Coverage for fifty percent (50%) of the coinsurance amount for each day used from the 21st day through the 100<sup>th</sup> day in a Medicare benefit period for post-hospital skilled nursing facility care eligible under Medicare Part A until the out-of-pocket limitation is met as described in Subparagraph (j);

8.4.1.6 Hospice Care: Coverage for fifty percent (50%) of cost sharing for all Part A Medicare eligible expenses and respite care until the out-of-pocket limitation is met as described in Subparagraph (j);

8.4.1.7 Coverage for fifty percent (50%), under Medicare Part A or B, of the reasonable cost of the first three (3) pints of blood (or equivalent quantities of packed red blood cells, as defined under federal regulations) unless replaced in accordance with federal regulations until the out-of-pocket limitation is met as described in Subparagraph (j);

8.4.1.8 Except for coverage provided in Subparagraph (i) below, coverage for fifty percent (50%) of the cost sharing otherwise applicable under Medicare Part B after the policyholder pays the Part B deductible until the out-of-pocket limitation is met as described in Subparagraph (j) below;

8.4.1.9 Coverage of one hundred percent (100%) of the cost sharing for Medicare Part B preventive services after the policyholder pays the Part B deductible; and

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- 8.4.1.10 Coverage of one hundred percent (100%) of all cost sharing under Medicare Parts A and B for the balance of the calendar year after the individual has reached the out-of-pocket limitation on annual expenditures under Medicare Parts A and B of \$4000 in 2006, indexed each year by the appropriate inflation adjustment specified by the Secretary of the U.S. Department of Health and Human Services.
- 8.4.2 Standardized Medicare supplement benefit plan "L" shall consist of the following:
- 8.4.2.1 The benefits described in Paragraphs 8.1.1, 2, 3 and 9;
- 8.4.2.2 The benefit described in Paragraphs 8.1.4, 5, 6, 7 and 8, but substituting seventy-five percent (75%) for fifty percent (50%); and
- 8.4.2.3 The benefit described in Paragraph 8.1.10, but substituting \$2000 for \$4000.

*(Break in Continuity of Sections)*

**10.0 Standard Medicare Supplement Benefit Plans for 1990 Standardized Medicare Supplement Benefit Plan Policies or Certificates Issued for Delivery on or After July 1, 2009 [with an effective date of coverage Pp]rior to June 1, 2010)**

- 10.1 An issuer shall make available to each prospective policyholder and certificate holder a policy form or certificate form containing only the basic core benefits, as defined in Section 8.2 of this regulation.
- 10.2 No groups, packages or combinations of Medicare supplement benefits other than those listed in this section shall be offered for sale in this state, except as may be permitted in Section 10.7 and in Section 11 of this regulation.
- 10.3 Benefit plans shall be uniform in structure, language, designation and format to the standard benefit plans "A" through "L" listed in this subsection and conform to the definitions in Section 4 of this regulation. Each benefit shall be structured in accordance with the format provided in Sections 8.2 and 8.3, or 8.4 and list the benefits in the order shown in this subsection. For purposes of this section, "structure, language, and format" means style, arrangement and overall content of a benefit.
- 10.4 An issuer may use, in addition to the benefit plan designations required in 10.3, other designations to the extent permitted by law.
- 10.5 Make-up of benefit plans:
- 10.5.1 Standardized Medicare supplement benefit plan "A" shall be limited to the basic (core) benefits common to all benefit plans, as defined in Section 8.2 of this regulation.
- 10.5.2 Standardized Medicare supplement benefit plan "B" shall include only the following: The core benefit as defined in Section 8.2 of this regulation, plus the Medicare Part A deductible as defined in Section 8.3.1.
- 10.5.3 Standardized Medicare supplement benefit plan "C" shall include only the following: The core benefit as defined in Section 8.2 of this regulation, plus the Medicare Part A deductible, skilled nursing facility care, Medicare Part B deductible and medically necessary emergency care in a foreign country as defined in Sections 8.3.1, 2, 3 and 8 respectively.
- 10.5.4 Standardized Medicare supplement benefit plan "D" shall include only the following: The core benefit (as defined in Section 8.2 of this regulation), plus the Medicare Part A deductible, skilled nursing facility care, medically necessary emergency care in a foreign country and the at-home recovery benefit as defined in Sections 8.3.1, 2, 8 and 10 respectively.
- 10.5.5 Standardized Medicare supplement benefit plan "E" shall include only the following: The core benefit as defined in Section 8.2 of this regulation, plus the Medicare Part A deductible, skilled nursing facility care, medically necessary emergency care in a foreign country and preventive medical care as defined in Sections 8.3.1, 2, 8 and 9 respectively.
- 10.5.6 Standardized Medicare supplement benefit plan "F" shall include only the following: The core benefit as defined in Section 8.2 of this regulation, plus the Medicare Part A deductible, the skilled nursing facility care, the Part B deductible, one hundred percent (100%) of the Medicare Part B excess charges, and medically necessary emergency care in a foreign country as defined in Sections 8.3.1, 2, 3, 5 and 8 respectively.

- 10.5.7 Standardized Medicare supplement benefit high deductible plan “F” shall include only the following: 100% of covered expenses following the payment of the annual high deductible plan “F” deductible. The covered expenses include the core benefit as defined in Section 8.2 of this regulation, plus the Medicare Part A deductible, skilled nursing facility care, the Medicare Part B deductible, one hundred percent (100%) of the Medicare Part B excess charges, and medically necessary emergency care in a foreign country as defined in Sections 8.3.1, 2, 3, 5 and 8 respectively. The annual high deductible plan “F” deductible shall consist of out-of-pocket expenses, other than premiums, for services covered by the Medicare supplement plan “F” policy, and shall be in addition to any other specific benefit deductibles. The annual high deductible Plan “F” deductible shall be \$1500 for 1998 and 1999, and shall be based on the calendar year. It shall be adjusted annually thereafter by the Secretary to reflect the change in the Consumer Price Index for all urban consumers for the twelve-month period ending with August of the preceding year, and rounded to the nearest multiple of \$10.
- 10.5.8 Standardized Medicare supplement benefit plan “G” shall include only the following: The core benefit as defined in Section 8.2 of this regulation, plus the Medicare Part A deductible, skilled nursing facility care, eighty percent (80%) of the Medicare Part B excess charges, medically necessary emergency care in a foreign country, and the at-home recovery benefit as defined in Sections 8.3.1, 2, 4, 8 and 10 respectively.
- 10.5.9 Standardized Medicare supplement benefit plan “H” shall consist of only the following: The core benefit as defined in Section 8.2 of this regulation, plus the Medicare Part A deductible, skilled nursing facility care, basic prescription drug benefit and medically necessary emergency care in a foreign country as defined in Sections 8.3.1, 2, 6 and 8 respectively. The outpatient prescription drug benefit shall not be included in a Medicare supplement policy sold after December 31, 2005.
- 10.5.10 Standardized Medicare supplement benefit plan “I” shall consist of only the following: The core benefit as defined in Section 8.2 of this regulation, plus the Medicare Part A deductible, skilled nursing facility care, one hundred percent (100%) of the Medicare Part B excess charges, basic prescription drug benefit, medically necessary emergency care in a foreign country and at-home recovery benefit as Defined in Sections 8.3.1, 2, 5, 6, 8 and 10 respectively. The outpatient prescription drug benefit shall not be included in a Medicare supplement policy sold after December 31, 2005.
- 10.5.11 Standardized Medicare supplement benefit plan “J” shall consist of only the following: The core benefit as defined in Section 8.2 of this regulation, plus the Medicare Part A deductible, skilled nursing facility care, Medicare Part B deductible, one hundred percent (100%) of the Medicare Part B excess charges, extended prescription drug benefit, medically necessary emergency care in a foreign country, preventive medical care and at-home recovery benefit as defined in Sections 8.3.1, 2, 3, 5, 7, 8, 9 and 10 respectively. The outpatient prescription drug benefit shall not be included in a Medicare supplement policy sold after December 31, 2005.
- 10.5.12 Standardized Medicare supplement benefit high deductible plan “J” shall consist of only the following: 100% of covered expenses following the payment of the annual high deductible plan “J” deductible. The covered expenses include the core benefit as defined in Section 9.2 of this regulation, plus the Medicare Part A deductible, skilled nursing facility care, Medicare Part B deductible, one hundred percent (100%) of the Medicare Part B excess charges, extended outpatient prescription drug benefit, medically necessary emergency care in a foreign country, preventive medical care benefit and at-home recovery benefit as defined in Sections 8.3.1, 2, 3, 5, 7, 8, 9 and 10 respectively. The annual high deductible plan “J” deductible shall consist of out-of-pocket expenses, other than premiums, for services covered by the Medicare supplement plan “J” policy, and shall be in addition to any other specific benefit deductibles. The annual deductible shall be \$1500 for 1998 and 1999, and shall be based on a calendar year. It shall be adjusted annually thereafter by the Secretary to reflect the change in the Consumer Price Index for all urban consumers for the twelve-month period ending with August of the preceding year, and rounded to the nearest multiple of \$10. The outpatient prescription drug benefit shall not be included in a Medicare supplement policy sold after December 31, 2005.

- 10.6 Make-up of two Medicare supplement plans mandated by The Medicare Prescription Drug, Improvement and Modernization Act of 2003 (MMA):
- 10.6.1 Standardized Medicare supplement benefit plan "K" shall consist of only those benefits described in Section 8.4.1.
- 10.6.2 Standardized Medicare supplement benefit plan "L" shall consist of only those benefits described in Section 8.4.2.
- 10.7 New or Innovative Benefits: An issuer may, with the prior approval of the Commissioner, offer policies or certificates with new or innovative benefits in addition to the benefits provided in a policy or certificate that otherwise complies with the applicable standards. The new or innovative benefits may include benefits that are appropriate to Medicare supplement insurance, new or innovative, not otherwise available, cost-effective, and offered in a manner that is consistent with the goal of simplification of Medicare supplement policies. After December 31, 2005, the innovative benefit shall not include an outpatient prescription drug benefit.

**11.0 Standard Medicare Supplement Benefit Plans for 2010 Standardized Medicare Supplement Benefit Plan Policies or Certificates Issued for Delivery with an effective date on or After June 1, 2010**

The following standards are applicable to all Medicare supplement policies or certificates delivered or issued for delivery in this state with an effective date of coverage on or after June 1, 2010. No policy or certificate may be advertised, solicited, delivered or issued for delivery in this state as a Medicare supplement policy or certificate unless it complies with these benefit plan standards. Benefit plan standards applicable to Medicare supplement policies and certificates issued before June 1, 2010 remain subject to the requirements of 18 Del.C. §3403.

- 11.1 An issuer shall make available to each prospective policyholder and certificate holder a policy form or certificate form containing only the basic (core) benefits, as defined in Section ~~[8-2~~ **9.2]** of this regulation.
- 11.2 If an issuer makes available any of the additional benefits described in Section ~~[8-1~~ **9.3]**, or offers standardized benefit Plans K or L (as described in Sections 9.1.5.8 and 9 of this regulation), then the issuer shall make available to each prospective policyholder and certificate holder, in addition to a policy form or certificate form with only the basic (core) benefits as described in subsection 11.1 above, a policy form or certificate form containing either standardized benefit Plan C (as described in Section 9.1.5.3 of this regulation) or standardized benefit Plan F (as described in 9.1.5.5 of this regulation).
- 11.3 No groups, packages or combinations of Medicare supplement benefits other than those listed in this Section shall be offered for sale in this state, except as may be permitted in Section ~~[9-1-6~~ **11.7]** and in Section ~~[40~~ **12]** of this regulation.
- 11.4 Benefit plans shall be uniform in structure, language, designation and format to the standard benefit plans listed in this Subsection and conform to the definitions in Section 4 of of this regulation. Each benefit shall be structured in accordance with the format provided in Sections ~~[8-19]~~.2 and ~~[8-19]~~.3 of this regulation; or, in the case of plans K or L, in Sections 9.1.5.8 or 9 of this regulation and list the benefits in the order shown. For purposes of this Section, "structure, language, and format" means style, arrangement and overall content of a benefit.
- 11.5 In addition to the benefit plan designations required in Subsection C of this section, an issuer may use other designations to the extent permitted by law.
- 11.6 Make-up of 2010 Standardized Benefit Plans:
- 11.6.1 Standardized Medicare supplement benefit Plan A shall include only the following: The basic (core) benefits as defined in Section ~~[8-19]~~.2 of this regulation.
- 11.6.2 Standardized Medicare supplement benefit Plan B shall include only the following: The basic (core) benefit as defined in Section ~~[8-19]~~.2 of this regulation, plus one hundred percent (100%) of the Medicare Part A deductible as defined in Section ~~[8-19]~~.3.1 of this regulation.
- 11.6.3 Standardized Medicare supplement benefit Plan C shall include only the following: The basic (core) benefit as defined in Section ~~[8-19]~~.2 of this regulation, plus one hundred percent (100%) of the Medicare Part A deductible, skilled nursing facility care, one hundred percent (100%) of the

- Medicare Part B deductible, and medically necessary emergency care in a foreign country as defined in Sections [8-19].3.1, 3, 4, and 6 of this regulation, respectively.
- 11.6.4 Standardized Medicare supplement benefit Plan D shall include only the following: The basic (core) benefit (as defined in Section [8-19].2 of this regulation), plus one hundred percent (100%) of the Medicare Part A deductible, skilled nursing facility care, and medically necessary emergency care in an foreign country as defined in Sections [8-19].3.1, 3, and 6 of this regulation, respectively.
- 11.6.5 Standardized Medicare supplement [regular] Plan F shall include only the following: The basic (core) benefit as defined in Section [8-19].2 of this regulation, plus one hundred percent (100%) of the Medicare Part A deductible, the skilled nursing facility care, one hundred percent (100%) of the Medicare Part B deductible, one hundred percent (100%) of the Medicare Part B excess charges, and medically necessary emergency care in a foreign country as defined in Sections [8-19].3.1, 3, 4, 5, and 6, respectively.
- 11.6.6 Standardized Medicare supplement Plan F With High Deductible shall include only the following: one hundred percent (100%) of covered expenses following the payment of the annual deductible set forth in Subparagraph 11.6.2.
- 11.6.6.1 The basic (core) benefit as defined in Section [8-19].2 of this regulation, plus one hundred percent (100%) of the Medicare Part A deductible, skilled nursing facility care, one hundred percent (100%) of the Medicare Part B deductible, one hundred percent (100%) of the Medicare Part B excess charges, and medically necessary emergency care in a foreign country as defined in Sections [8-19].3.1, 3, 4, 5, and 6 of this regulation, respectively.
- 11.6.6.2 The annual deductible in Plan F With High Deductible shall consist of out-of-pocket expenses, other than premiums, for services covered by [regular] Plan F, and shall be in addition to any other specific benefit deductibles. The basis for the deductible shall be \$1,500 and shall be adjusted annually from 1999 by the Secretary of the U.S. Department of Health and Human Services to reflect the change in the Consumer Price Index for all urban consumers for the twelve-month period ending with August of the preceding year, and rounded to the nearest multiple of ten dollars (\$10).
- 11.6.7 Standardized Medicare supplement benefit Plan G shall include only the following: The basic (core) benefit as defined in Section [8-19].2 of this regulation, plus one hundred percent (100%) of the Medicare Part A deductible, skilled nursing facility care, one hundred percent (100%) of the Medicare Part B excess charges, and medically necessary emergency care in a foreign country as defined in Sections [8-19].3.1, 3, 5, and 6), respectively.
- 11.6.8 Standardized Medicare supplement Plan K is mandated by The Medicare Prescription Drug, Improvement and Modernization Act of 2003, and shall include only the following:
- 11.6.8.1 Part A Hospital Coinsurance 61st through 90th days: Coverage of one hundred percent (100%) of the Part A hospital coinsurance amount for each day used from the 61st through the 90th day in any Medicare benefit period;
- 11.6.8.2 Part A Hospital Coinsurance, 91st through 150th days: Coverage of one hundred percent (100%) of the Part A hospital coinsurance amount for each Medicare lifetime inpatient reserve day used from the 91st through the 150th day in any Medicare benefit period;
- 11.6.8.3 Part A Hospitalization After 150 Days: Upon exhaustion of the Medicare hospital inpatient coverage, including the lifetime reserve days, coverage of one hundred percent (100%) of the Medicare Part A eligible expenses for hospitalization paid at the applicable prospective payment system (PPS) rate, or other appropriate Medicare standard of payment, subject to a lifetime maximum benefit of an additional 365 days. The provider shall accept the issuer's payment as payment in full and may not bill the insured for any balance;
- 11.6.8.4 Medicare Part A Deductible: Coverage for fifty percent (50%) of the Medicare Part A inpatient hospital deductible amount per benefit period until the out-of-pocket limitation is met as described in Subparagraph 11.6.8.10;



# FINAL REGULATIONS

- 11.6.8.5 Skilled Nursing Facility Care: Coverage for fifty percent (50%) of the coinsurance amount for each day used from the 21st day through the 100<sup>th</sup> day in a Medicare benefit period for post-hospital skilled nursing facility care eligible under Medicare Part A until the out-of-pocket limitation is met as described in Subparagraph 11.6.8.10;
- 11.6.8.6 Hospice Care: Coverage for fifty percent (50%) of cost sharing for all Part A Medicare eligible expenses and respite care until the out-of-pocket limitation is met as described in Subparagraph 11.6.8.10;
- 11.6.8.7 Blood: Coverage for fifty percent (50%), under Medicare Part A or B, of the reasonable cost of the first three (3) pints of blood (or equivalent quantities of packed red blood cells, as defined under federal regulations) unless replaced in accordance with federal regulations until the out-of-pocket limitation is met as described in Subparagraph 11.6.8.10;
- 11.6.8.8 Part B Cost Sharing: Except for coverage provided in Subparagraph 11.6.8.9, coverage for fifty percent (50%) of the cost sharing otherwise applicable under Medicare Part B after the policyholder pays the Part B deductible until the out-of-pocket limitation is met as described in Subparagraph 11.6.8.9 and 10;
- 11.6.8.9 Part B Preventive Services: Coverage of one hundred percent (100%) of the cost sharing for Medicare Part B preventive services after the policyholder pays the Part B deductible; and
- 11.6.8.10 Cost Sharing After Out-of-Pocket Limits: Coverage of one hundred percent (100%) of all cost sharing under Medicare Parts A and B for the balance of the calendar year after the individual has reached the out-of-pocket limitation on annual expenditures under Medicare Parts A and B of \$4000 in 2006, indexed each year by the appropriate inflation adjustment specified by the Secretary of the U.S. Department of Health and Human Services.
- 11.6.9 Standardized Medicare supplement Plan L is mandated by The Medicare Prescription Drug, Improvement and Modernization Act of 2003, and shall include only the following:
- 11.6.9.1 The benefits described in Paragraphs ~~[9-11]~~.5.8.1, 2, 3 and 9;
- 11.6.9.2 The benefit described in Paragraphs ~~[9-11]~~.5.8.4, 5 and 8, but substituting seventy-five percent (75%) for fifty percent (50%); and
- 11.6.9.3 The benefit described in Paragraph 9.1.5.8.10, but substituting \$2000 for \$4000.
- 11.6.10 Standardized Medicare supplement Plan M shall include only the following: The basic (core) benefit as defined in Section ~~[8-19]~~.2 of this regulation, plus fifty percent (50%) of the Medicare Part A deductible, skilled nursing facility care, and medically necessary emergency care in a foreign country as defined in Sections ~~[8-19]~~.3.2, 3 and 6 of this regulation, respectively.
- 11.6.11 Standardized Medicare supplement Plan N shall include only the following: The basic (core) benefit as defined in Section ~~[8-19]~~.2 of this regulation, plus one hundred percent (100%) of the Medicare Part A deductible, skilled nursing facility care, and medically necessary emergency care in a foreign country as defined in Sections ~~[8-19]~~.3.1, 3 and 6 of this regulation, respectively, with co-payments in the following amounts:
- 11.6.11.1 the lesser of twenty dollars (\$20) or the Medicare Part B coinsurance or co-payment for each covered health care provider office visit (including visits to medical specialists); and
- 11.6.11.2 the lesser of fifty dollars (\$50) or the Medicare Part B coinsurance or co-payment for each covered emergency room visit, however, this co payment shall be waived if the insured is admitted to any hospital and the emergency visit is subsequently covered as a Medicare Part A expense.
- 11.7 New or Innovative Benefits: An issuer may, with the prior approval of the Commissioner, offer policies or certificates with new or innovative benefits, in addition to the standardized benefits provided in a policy or certificate that otherwise complies with the applicable standards. The new or innovative benefits shall include only benefits that are appropriate to Medicare supplement insurance, are new or innovative, are not otherwise available, and are cost-effective. Approval of new or innovative benefits must not adversely impact the goal of Medicare supplement simplification. New or innovative benefits

shall not include an outpatient prescription drug benefit. New or innovative benefits shall not be used to change or reduce benefits, including a change of any cost-sharing provision, in any standardized plan.

**\*Please note that no additional changes were made to the regulation as originally proposed and published in the June 2009 issue of the *Register* at page 1506 (12 DE Reg. 1506). Therefore, the final regulation is not being republished here. A copy of the final regulation is available at**

**1501 Medicare Supplement Insurance Minimum Standards**

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**DEPARTMENT OF STATE**  
**DIVISION OF PROFESSIONAL REGULATION**  
**CONTROLLED SUBSTANCE ADVISORY COMMITTEE**  
Statutory Authority: 16 Delaware Code, Section 4731 (16 Del.C. §4731)

**ORDER**

After due notice in the *Register of Regulations* and two Delaware newspapers, public hearings were held on March 11, 2008, and October 20, 2008 to receive comments regarding proposed amendments to the Controlled Substance Regulations including the creation of a Controlled Substance Advisory Committee ("the Committee"). James L. Collins, Director of the Division of Professional Regulation ("the Director"), served as the Secretary of State's designee for purposes of conducting the public hearings and making recommendations on the proposed regulations.

The purpose of the Committee is to advise the Secretary of State ("the Secretary") on controlled substance regulatory matters and to conduct hearings related to registrants. The proposed regulations were first published in the *Register of Regulations* on February 1, 2008 at 11 DE Reg 1082. The March 11th hearing was noticed in the *Register of Regulations* on March 1, 2008 at 11 DE Reg 1269. As a result of the public comment, and upon the recommendation of the Director, the Secretary determined to make both substantive and non-substantive revisions to the proposed regulations and republished the regulations in the *Register of Regulations* on September 1, 2008 at 12 DE Reg 301. A second public hearing was noticed for and conducted on October 20, 2008.

**Summary of the Evidence and Information Submitted**

The following individuals submitted correspondence and/or offered public comment at the March 11, 2008 hearing: Elizabeth Roe, Assistant Director, State Government Affairs, American Academy of Physician Assistants (AAPA), Darlene L. Jackson-Bowen, MPAS, BS, PA-C, University of Maryland, Eastern Shore Physician Assistant Department, Matthew M. Dows, MS, PA-C, Salisbury Immediate Care, Natalie Miller, PA Student, Drexel University, Chris Carrier, PA-C, ATC, Peninsula Orthopedic Associates, Mark Key, PA-C, President, Delaware Academy of Physicians Assistants (DAPA), Kemuel Carey, MHS, PA-C, ATC, Peninsula Orthopaedic Associates, Hal G. Brown, Deputy Director, Office of the Chief Medical Examiner, Craig Johnson, PA-C, Kevin N. Nicholson, R. Ph., J.D., Vice President, Pharmacy Regulatory Affairs, Eric Eaton, PA-C, Peninsula Orthopaedic Associates, Hooshang Shanehsaz, R.Ph, Dan Holst, R.Ph, Sandra Robinson, R.Ph, Vice-President of the Delaware Board of Pharmacy, Pat Carroll-Grant, Executive Director, Delaware Pharmacists Society (DPS), Gaurang Ghandi, DPS, Sam Wetherill, DPS, Maryanne Holzapfel, DPS, Bruce Divencenzo, Chief Agent for the Office of Narcotics and Dangerous Drugs (ONDD), Dr. Phillip Kim, and Dr. Michael Kremer, State Board of Dental Examiners. Fourteen (14) documents were marked as exhibits to the public hearing.

The following individuals submitted correspondence and/or offered public comment at the October 20, 2008 hearing: Thomas John Chambers, R.Ph, Geoffrey Christ, Esquire, R.Ph, President of the Delaware Board of Pharmacy, Jeanne Chiquone, American Cancer Society and the American Cancer Society Cancer Action Network, Sandra Robinson, R.Ph, Vice-President of the Delaware Board of Pharmacy, Karl Berky, R.Ph, Pat Carroll-Grant, Executive Director, Delaware Pharmacists Society (DPS), Adam Solola, R.ph, Board of Directors of DPS,

Hooshang Shanehsaz, R.Ph, Phil Anderson, R.Ph, Tim Dillon, R.Ph, Theresa Gillis, M.D., Christiana Care Cancer Liaison Physician for the Commission on Cancer of the American College of Surgeons, Nicholas Biasotto, D.O., President of the Delaware Medical Society. Ten (10) documents were marked as exhibits to the public hearing.

### Findings of Fact With Respect to the Evidence and Information Submitted

1. As a result of comment received at the first public hearing on March 11th the Secretary made the following changes to the regulation before republishing on September 1, 2008. The regulations were republished with the following changes:

**Regulations 1.2 and 1.3** - The composition of the Controlled Substance Advisory Committee (the "Committee") established under Regulation 1.2 was increased to 9 members by adding 1 additional pharmacy member and 1 physician assistant member. The Secretary also clarified that the public member is exempted from the 5 year prescribing, dispensing or storing of controlled substances requirement. The language requiring the public member to be accessible to inquiry was deleted. The Committee member term length was decreased from 5 years to 3.

**Regulation 1.7** - The quorum and voting provisions were amended to reflect the 2 additional Committee members, raising the quorum to 5 members.

**Regulation 4.1.2** - The term "individual practitioner" in the definitional section was changed to "practitioner" and the word "individual" was stricken from each reference to individual practitioner throughout the regulations. Nurse practitioners and physician assistants were added to the definition of practitioner.

**Regulation 4.4** - The word "manually" was reinserted into the language dealing with the manner of issuance of prescriptions.

**Regulation 5.1.1.1.3** - The words "or Drug Control Administrator" were removed as unnecessary since the Secretary has the power to make designations. Clarifications were also made throughout the regulations that the word "Secretary" means the "Secretary of State."

2. A number of individuals commented on the requirements of Regulation 4.10 and 4.12 at both public hearings. The regulations provide that "The pharmacist and/or employee under his/ her direct supervision must verify the identification of the bearer and receiver of the controlled substance prescription by reference to a valid photographic identification and record the unique number associated with the valid photographic record as part of the prescription record..." The objection to the requirement of having to verify identification on the drop-off of the prescription is that it is burdensome on the pharmacist and the patient. However, the Secretary is not persuaded that the minimal burden of verifying identification outweighs the need to take measures to prevent prescription fraud, diversion and abuse of controlled substances. As a result, the Secretary finds that the adoption of the regulation as proposed without modification is consistent with public safety and welfare. The Secretary also finds that the issue should be referred to the newly formed Committee to revisit.

3. A number of the public comments were directed to sections of the regulations that are not being proposed for substantive modification at this time. Those comments included recommended changes to the prescriptions and prescription pads, amendments to regulation 3.0 regarding records and inventory, 4.1.4 defining the term "prescription", amendments to 4.2.2 regarding verbal prescriptions, amendments to 4.3.1 to define "usual course of professional treatment", amendments to 4.8.1 to with regard to prescriptions for schedule II and III controlled substances becoming void unless dispensed within seven days, and 5.1.1.4 with regard to security of storage of controlled substances.

The Secretary appreciates thought that was given by those individuals who provided comment to improving many areas of the regulations. However, the primary purpose of the regulations as currently proposed is to establish the Committee and to reference the transfer of the controlled substance regulation authority to the Secretary of State. As a result, the Secretary finds that requests for additional amendments should be referred to the newly formed Committee to address since they are new proposals for changes to additional sections of the regulations.

4. Public comment was reiterated at the October 20th hearing that the composition of the Committee should be further increased. The Secretary finds that the composition as proposed provides balanced representation for pharmacists and practitioners. Any additional changes to the composition may be recommended for future rule changes after the Committee is established if the Committee finds that there is a need.

5. One commenter was concerned that the Committee would be taking disciplinary action against physicians that is properly under the jurisdiction of the Board of Medical Practice. The Committee's only disciplinary role will to

be to make findings to the Secretary regarding denying, suspending or revoking a controlled substance registration. Discipline related to practice issues is still vested with the appropriate licensing body having jurisdiction over the practitioner. The Secretary finds that the regulations do not require any clarification as to the Committee's function.

6. The Secretary is persuaded, however, that Regulation 1.7 would be improved by clarifying that for proceedings involving the denial, suspension or revocation of a controlled substance registration at least 1 member quorum must be from the same profession as the practitioner whose registration is the subject of the proceeding. The Secretary finds that the change is for clarification and consistency and is not substantive.

## The Law

The Secretary's rulemaking authority is provided by 16 Del.C. §4731.

## Decision and Effective Date

The Secretary hereby adopts the proposed amendments to the controlled substance regulations to be effective 10 days following publication of this order in the *Register of Regulations*.

## Text and Citation

The text of the regulation including the revisions made to Regulation 1.7 as a result of the public hearing is attached hereto as Exhibit A.

**SO ORDERED** this 16th day of July, 2009.

SECRETARY OF STATE

Jeffrey W. Bullock

## Uniform Controlled Substances Act Regulations

(Adopted by the Secretary of Health and Social Services pursuant to 16 **Del.C.** §4731 effective February, 1973 amended July 8, 1974, May 27, October 30, 1975, September 27, 1976, February 1, 1983, July 1, 1985, January 28, 1987, March 5, 1992, and August 29, 1995.)

### **4.0 Adoption of Federal Regulations**

To the extent consistent with 16 **Del.C.** Ch. 47, regulations promulgated by the Federal Government pursuant to the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970, and in effect as of this date, are adopted as a part of these regulations. Readopted October 30, 1975.

### **1.0 Controlled Substance Advisory Committee**

1.1 The Controlled Substance Advisory Committee (hereafter designated as "the Committee") has a primary objective to promote, preserve and protect the public health, safety and welfare by regulating and monitoring controlled substance use and abuse through a program of registration, inspection, investigation and education. The Committee regulates by registering prescribers, dispensers, manufactures, distributors, clinics, researchers and other controlled substance registrants (i.e. – dog handler). Among its functions, the Committee issues and renews licenses; and makes recommendations to the Secretary of State of new or amended controlled substance regulations and disciplinary actions of registrants who violate the law. (16 **Del.C.** § 4700 to the end)

1.2 The Committee shall consist of 9 members: one physician, one dentist, one podiatrist, one veterinarian, one nurse practitioner, two pharmacists, one physician assistant and one public member. The Secretary of State will be provided recommendations for appointments to the Committee from the associated licensing Boards. Members shall have engaged in the prescribing, dispensing or storing of

- controlled substances for at least 5 years except for the public member. The public member will be appointed by the Secretary of State or their designee.
- 1.3 Each Committee member shall serve a term of three years and may succeed themselves for one additional term. A Committee member whose appointment has expired remains eligible to participate in Committee proceedings unless replaced by their respective regulatory board.
- 1.4 The Committee shall hold regularly scheduled meetings at least four times a calendar year and at other times the Committee considers necessary at the request of a majority of the members. A president and vice-president shall be elected by the members annually.
- 1.5 The conduct of all hearings and issuance of orders shall be in accordance with the procedures established pursuant to this section, Chapter 101 of Title 29, section 8735 of Title 29, and sections 4731 through 4736 of Title 16.
- 1.6 The Drug Control Administrator for the Division of Professional Regulation, who is an ex officio member of the Committee without a vote, is responsible for the performance of the regular administrative functions of the Committee and other duties as the Committee may direct.
- 1.7 A majority of members shall constitute a quorum, and no action shall be taken without the affirmative vote of at least 5 members. [For proceedings involving the denial, suspension or revocation of a controlled substance registration at least 1 member of the quorum must be from the same profession as the practitioner whose registration is the subject of the proceeding.] Any member who fails to attend 3 consecutive meetings, or who fails to attend at least half of all regular business meetings during any calendar year, shall automatically upon such occurrence be deemed to have resigned from office and a replacement shall be appointed by the Secretary of State.
- 1.8 Minutes of all meetings shall be maintained by the Division of Professional Regulation. A record from which a verbatim transcript can be prepared shall be made of all hearings where evidence is presented. The expense of preparing any transcript shall be borne by the person requesting it.

\*Please note that no additional changes were made to the regulation as originally proposed and published in the September 2008 issue of the *Register* at page 301 (12 DE Reg. 301). Therefore, the final regulation is not being republished here. A copy of the final regulation is available at

**Uniform Controlled Substances Act Regulations**

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**DIVISION OF PROFESSIONAL REGULATION  
1700 BOARD OF MEDICAL PRACTICE**

Statutory Authority: 24 Delaware Code, Section 1713(a)(12) (24 Del.C. §1713(a)(12))  
24 DE Admin. Code 1700

**ORDER**

After due notice in the *Register of Regulations* and two Delaware newspapers, a public hearing was held on July 21, 2009 at a scheduled meeting of the Delaware Board of Medical Practice (the "Board") to receive comments regarding proposed amendments to the Board's Rules and Regulations; specifically, the proposal amends regulation 16.0 as permitted by 24 Del.C. §1771(e) and (i) by creating a new subsection 16.2 that enables the Board of Medical Practice to increase the number of physician assistants that may be supervised by one supervising physician upon written application and upon a finding by the Board of good cause. Under the proposal existing subsection 16.2 has been renumbered to 16.3.

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## Summary of the Evidence and Information Submitted

The following exhibits were made a part of the record:

**Board Exhibit 1:** News Journal Affidavit of Publication

**Board Exhibit 2:** Delaware State News Affidavit of Publication

No written comments were received. No members of the public attended the hearing to comment on the proposed amendments.

## Findings of Fact and Conclusions

1. The public was given notice and an opportunity to provide the Board with comments in writing and by testimony at the public hearing on the proposed amendments to the Board's Rules and Regulations. The Board's proposal renumbers existing regulation 16.2 as 16.3 and adds a new regulation 16.2 enabling the Board to increase the number of physician assistants that may be supervised by one supervising physician upon written application and upon a finding by the Board of good cause for the increase. The Board received no written or verbal comments on the proposed amendments.

2. The Board finds that the proposed amendments to the rules and regulations will improve the regulations and benefit the public, including but not limited to, providing better patient coverage and providing care to underserved areas in appropriate circumstances. All requests for an increase will require a demonstration of good cause and the approval of the Board.

## The Law

Pursuant to 24 Del.C. §1713 (a) (12) the Board has statutory authority to promulgate regulations clarifying specific statutory sections of its statute. Pursuant to 24 Del.C. §1771(e) and (i) the Board has authority to adopt a regulation to increase or decrease the number of physician assistants that may be supervised.

## Decision and Effective Date

The Board hereby adopts the amendments to Regulation 16 as effective 10 days following publication of this order in the *Register of Regulations*.

## Text and Citation

The text of the Regulation 30 remains as published in *Register of Regulations*, Vol. 12, Issue 12, June 1, 2009 without any additional changes.

**SO ORDERED** this 21st day of July, 2009.

BOARD OF MEDICAL PRACTICE

Anthony M. Policastro, M.D., President

John Banks, Public Member

Stephen Cooper, M.D.

Sophia Kotliar, M.D.

Daryl Sharman, M.D.

Gregory Adams, M.D.

George Brown, Public Member

Sharon Jones, Public Member

Vincent Lobo, D.O.

**\*Please note that no changes were made to the regulation as originally proposed and published in the June 2009 issue of the *Register* at page 1506 (12 DE Reg. 1506). Therefore, the final regulation is not being republished. A copy of the final regulation is available at**

**Board of Medical Practice Regulations**

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# GENERAL NOTICES

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## DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL

### DIVISION OF AIR AND WASTE MANAGEMENT

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

#### 1. TITLE OF PROPOSED SIP REVISION(S):

1. Proposed State Implementation Plan (SIP) Revision for Meeting the Infrastructure Requirements of the Clean Air Act relative to the 24-hour Fine Particulate Matter (PM<sub>2.5</sub>) National Ambient Air Quality Standard (NAAQS).

2. Proposed changes to Delaware's December 17, 2007 State Implementation Plan Revision for Ozone, Fine Particulate Matter (PM<sub>2.5</sub>), and Visibility.

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

Section 110(a) of the Clean Air Act (CAA) requires states to submit an implementation plan to the U.S. EPA Administrator that provides for implementation, maintenance, and enforcement of national ambient air quality standards. Section 110(a)(2) lists the elements that are to comprise the implementation plan. The §110(a)(2) elements specifically address the need for states to demonstrate the ability to implement, maintain, and enforce the air quality standards.

The first proposed SIP revision deals with meeting these "infrastructure requirements" of the Clean Air Act relative to the 24-hour Fine Particulate Matter National Ambient Air Quality Standard (NAAQS) that the EPA promulgated in September 2006.

The second proposed SIP revision is a revision to Delaware's 2007 Plan that addressed these "infrastructure requirements" relative to the 1997 ozone and fine particulate matter (PM<sub>2.5</sub>) NAAQS, and visibility requirements (Submitted to EPA December 17, 2007). This proposed revision clarifies and supplements some of the language in the 2007 submittal.

#### 3. POSSIBLE TERMS OF THE AGENCY ACTION:

None

#### 4. STATUTORY BASIS OR LEGAL AUTHORITY TO ACT:

7 Delaware Code, Chapter 60, Environmental Control

#### 5. OTHER REGULATIONS THAT MAY BE AFFECTED BY THE PROPOSAL:

None

#### 6. NOTICE OF PUBLIC COMMENT:

These two proposed SIP revisions are available for inspection at DNRECs Air Quality Management Sections office, 156 S. State St, Dover, DE 19901, or may be reviewed online at <http://www.awm.delaware.gov/Info/Regs/Pages/AQMPlansRegs.aspx> The public comment period for these proposed SIP revisions will extend through at least August 27, 2009. Interested parties may submit comments in writing during this time frame to John Sipple, Air Quality Management Section, 156 S. State St., Dover, DE 19901, and/or statements and testimony may be presented either orally or in writing at the public hearing to be held on Thursday, August 27, 2009, beginning at 6:00 p.m. in the Priscilla Building, 156 South State Street, Dover, DE.

#### 7. PREPARED BY:

John Sipple (302) 739-9402 July 1, 2009

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### Implementation, Maintenance, And Enforcement of the 2006 24-Hr National Ambient Air Quality Standards (NAAQS)

#### 1.0 Preamble, Introduction and Background

A State Implementation Plan ("SIP") is a state plan that identifies how that state will attain and maintain air

quality that conforms to each primary and secondary National Ambient Air Quality Standard ("NAAQS"). The SIP is a complex, fluid document containing regulations, source-specific requirements, and non-regulatory items such as plans and emission inventories.

Delaware's initial SIP was approved by the EPA on May 31, 1972. Since this initial approval, the Delaware SIP has been revised numerous times to address air quality non-attainment and maintenance issues. This was done by updating plans and inventories, and adding new and revised regulatory control requirements. Delaware's SIP is compiled at 40 C.F.R. Part 52 Subpart I.

Section 2.0 of this document is a revision to Delaware's SIP. The purpose of this SIP revision is to detail how Delaware meets all of the necessary implementation, maintenance, and enforcement measures required by the Clean Air Act ("CAA"), specifically, CAA §110(a)(1) and (2). This SIP revision is necessary because the EPA finalized a new 24-hour PM<sub>2.5</sub> NAAQS in September 2006 (71 FR 61144), and "infrastructure SIPs" are due to the EPA within 3-years from the date of signature of any new NAAQS under CAA Section 110(a). Under the heading "Delaware's Plan" in Section 2.0 of this document Delaware provides a revision to its SIP to address those requirements of Section 110(a)(2)(A)-(M) of the CAA which have not been addressed in other SIP revisions. It is a compilation of certain elements that describe how Delaware demonstrates the 2006 24-hr fine particulate (PM<sub>2.5</sub>) NAAQS is being implemented, maintained and enforced. The elements of this SIP revision, once approved by EPA, will provide a federally enforceable written confirmation that Delaware will continue to comply with the Section 110(a)(2) requirements of the CAA.

Legislative authority for the Delaware air quality program relating to the responsibilities in the CAA is codified in Title 7 "Conservation" of the Delaware Code, Chapter 60 - Delaware's comprehensive water and air resources conservation law, which gives the Delaware DNREC the power and duty to implement the provisions of the CAA in the State of Delaware.

Many of the miscellaneous requirements of Section 110(a)(2)(A)-(M) of the CAA relevant to the 2006 PM<sub>2.5</sub> NAAQS are already contained in Delaware's SIP or in SIP revisions which have been submitted to but not yet approved by EPA. The following Table identifies those SIP provisions, which have all gone through public notice and hearing prior to submittal to EPA. The following Table also identifies those infrastructure requirements which are not applicable to Delaware.

**Table - 110(a)(2)(A)-(M) Requirements in the Current State of Delaware SIP**

Section 110(a) element	Summary of element	Provisions in the Current Delaware SIP or recent SIP revisions Submittals <sup>a</sup>	Where Codified or approved by EPA



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§110(a)(2)(A)	<p>Include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this Act.</p>	<p>Pertinent emission limitations and schedules contained in Delaware's SIP that are listed in 40 CFR 52.420(c).</p> <p>46 Electric Generating Unit (EGU) Multi-Pollutant Regulation, November 21, 2006</p> <p>Regulation 13, Open Burning Regulation, May 2, 2007</p> <p>Regulation 24, Section 46, Crude Oil Lightering, May 2, 2007</p> <p>Regulation 48, Combustion Turbine Generator Emissions, September 11, 2007</p> <p>Regulation 44, Stationary Generator Emissions, November 1, 2007</p> <p>Regulation 43, Not To Exceed California Heavy Duty Diesel Engine Standards, November 29, 2001</p> <p>Regulation 45, Excessive Idling Of Heavy Duty Vehicles, August 12, 2005</p> <p>Regulation 1, Definitions And Administrative Principles</p> <p>Regulation 4, Particulate Emissions From Fuel Burning Equipment</p> <p>Regulation 5, Particulate Emissions From Industrial Process Operations</p> <p>Regulation 6, Particulate Emissions From Construction And Materials Handling</p> <p>Regulation 7, Emissions From Incineration Of Noninfectious Waste</p> <p>Regulation 8, Sulfur Dioxide Emissions From Fuel Burning Equipment</p> <p>Regulation 9, Emissions Of Sulfur Compounds From Industrial Operations</p> <p>Regulation 10, Control Of Sulfur Dioxide Emissions Kent And Sussex Counties</p> <p>Regulation 12, Control Of Nitrogen Oxides Emissions</p> <p>Regulation 14, Visible Emissions</p> <p>Regulation 18, Particulate Emissions From Grain Handling Operations</p>	40 CFR 52.420(c)
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		<p>Regulation 22, Restriction On Quality Of Fuel In Fuel Burning Equipment                  Regulation 24, Control Of Volatile Organic Compound Emissions                  "Regulation 26, Motor Vehicle Emissions Inspection Program</p> <p>Regulation 27, Stack Heights                  Regulation 29, Emissions From Incineration Of Infectious Waste                  Regulation 31, Low Enhanced Inspection And Maintenance                  Regulation 27, Stack Heights                  Regulation 29, Emissions From Incineration Of Infectious Waste                  Regulation 31, Low Enhanced Inspection And Maintenance Program                  Regulation 32, Transportation Conformity Regulation                  Regulation 35, Conformity Of General Federal Actions To The State Implementation Plans                  Regulation 36, Acid Rain Program                  Regulation No. 37, NOx Budget Program                  Regulation No. 39, Nitrogen Oxides Budget Trading Program                  Regulation 40, National Low Emission Vehicle Program                  Regulation 41, Limiting Emissions Of Volatile Organic Compounds From Consumer And Commercial Products                  Regulation 42, Specific Emission Control</p>	
§110(a)(2)(B)	<p>Provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to - (i) monitor, compile, and analyze data on ambient air quality, and (ii) upon request, make such data available to the Administrator.</p>	<p>Regulation 17 Source Monitoring, Record Keeping And Reporting and Regulation 3, Ambient Air Quality Standards, provides for the establishment and operation of procedures necessary to monitor, compile and analyze data related to ambient air quality.</p>	<p>40 CFR 52.420(c)</p>

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§110(a)(2)(C)	Include a program to provide for the enforcement of the measures described in subparagraph (A) and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D;	Delaware implements its Construction and Operation Permit Program requirements under Regulation 2, and Regulation 25. Delaware implements its Prevention of Significant Deterioration (PSD) Program requirements under Regulation 25. Delaware implements its Emission Offset Provision (EOP) requirements under Regulation 25. Other aspects of Delaware's program for enforcement are found in those provisions of Regulation 25, and Regulation 17 as well as the source monitoring, source testing and test methods, and, recordkeeping and reporting provisions of Regulation 2, 23, 24, 26, 31, 37, 39, 40, 41, 42, and others in the approved Delaware SIP as well as recently submitted regulatory SIP revisions discussed under section 110(a)(2)(A) above.	40 CFR 52.420(c)
§110(a)(2)(E)(ii)	(ii) requirements that the state comply with the requirements respecting state boards under section 128, and	The requirements of §110(a)(2)(E)(ii) are not applicable to Delaware because it does not have any board or body which approves air quality permits or enforcement orders.	
§110(a)(2)(E)(iii)	(iii) necessary assurances that, where the state has relied on a local or regional government, agency, or instrumentality for the implementation of any plan provision, the state has responsibility for ensuring adequate implementation of such plan provision;	The requirements of §110(a)(2)(E)(iii) are not applicable to Delaware because it does not rely on localities for specific SIP implementation.	

<p>§110(a)(2)(F)</p>	<p>Require, as may be prescribed by the Administrator—</p> <p>(i) the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps by owners or operators of stationary sources to monitor emissions from such sources,</p> <p>(ii) periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and</p> <p>(iii) correlation of such reports by the state agency with any emission limitations or standards established pursuant to this Act, which reports shall be available at reasonable times for public inspection;</p>	<p>§110(a)(2)(F)(i): Specific monitoring requirements are found throughout the State of Delaware Regulations Governing the Control of Air Pollution, to include Regulation No. 17 and 3. These requirements are included in Delaware's SIP, as necessary.</p> <p>§110(a)(2)(F)(ii): Specific emission reporting requirements are found throughout the State of Delaware Regulations Governing the Control of Air Pollution, to include Regulation No. 17. These requirements are included in Delaware's SIP, as necessary.</p> <p>Other aspects of Delaware's program for requiring installation and maintenance of monitoring equipment, periodic emissions reporting, is found in the source monitoring, source testing and test methods, and recordkeeping and reporting provisions of Regulations 12, 23, 24, 26, 31, 37, 39, 40, 41, 42, and others in the approved Delaware SIP, 40 CFR 52.420(c), as well as submitted regulatory SIP revisions discussed under section 110(a)(2)(A) above.</p>	<p>40 CFR 52.420(c)</p>
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§110(a)(2)(G)	Provide for authority comparable to that in section 303 and adequate contingency plans to implement such authority;	State of Delaware Regulations Governing the Control of Air Pollution, Regulation 15, Air Pollution Alert and Emergency Plan, contains emergency episode plan provisions that are currently approved in the SIP, and found at 40 C.F.R. 52.420(c), that fulfill the contingency plan requirement for the 2006 24-hr PM <sub>10</sub> NAAQS, based on current federal requirements. 7 Del. C. § 6003(a)(1) requires a permit from the Secretary prior to discharging any air contaminant. 7 Del. C. § 6002(2) defines air contaminant essentially as any substance other than uncombined water. 7 Del. C. § 6005 allows the Secretary to seek a preliminary or permanent injunction or temporary restraining order for any discharge of an air contaminant without a permit, and issue cease and desist orders for violations (7 Del. C. § 6018). Thus, it necessarily follows that any discharge of an air contaminant that would cause imminent & substantial endangerment to the health, safety and welfare of the people of the State of Delaware or the environment would constitute a sufficient basis for the Secretary to seek an injunction or temporary restraining order to halt the violation.	40 CFR 52.420(c)
§110(a)(2)(I)	In the case of a plan or plan revision for an area designated as a nonattainment area, meet the applicable requirements of part D (relating to nonattainment areas);	Part D pertains to general requirements for nonattainment areas. New Castle County is in the Philadelphia-Wilmington-Camden PM <sub>2.5</sub> nonattainment area for the 2006 24-hr PM <sub>2.5</sub> NAAQS. The regulations in Delaware's approved SIP that are listed in 40 CFR Part 52, Subpart I related to nonattainment areas will continue to comply with Subpart D requirements and which could not have been approved if they had not met Subpart D requirements.	40 CFR 52.420(c)
§110(a)(2)(J) (PSD)	Meet the applicable requirements of part C (relating to prevention of significant deterioration of air quality and visibility protection);	Delaware's PSD requirements are promulgated in Regulation 25, Preconstruction Review.	

a. All of the State of Delaware "Regulations Governing the Control of Air Pollution" have been re-coded under 7 DE Admin Code 1100, effective September 11, 2008. This recoding was submitted to the EPA as a SIP on June 15, 2009, but has not yet been approved into the DE SIP. Because of this some of Delaware's control requirements are cited in this document in the old format. For example, "7 DE Admin. Code 1131" is cited as "Regulation 31"

## 2.0 SIP Revision

This SIP revision addresses those requirements of Section 110(a)(2)(A)-(M) of the Clean Air Act (CAA) which have not been addressed in other SIP revisions. Each of the requirements of §110(a)(2) of the CAA (Subparagraphs A-M) is presented below, along with a discussion of Delaware's plan revision to meet the requirement.

**(A) §110(a)(2)(A) Requirement:** Include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this Act.

**Delaware's Plan:** Delaware has established laws and regulations that include enforceable emissions limitations and other control measures, means or techniques, as well as schedules and timetables for compliance to meet the applicable requirements of the CAA. Delaware may make changes to its laws and regulations that it believes in its discretion are appropriate, while continuing to fulfill this obligation.

At present, Delaware's statutory authority is set out in Title 7 "Conservation" of the Delaware Code, Chapter 60 - Delaware's comprehensive water and air resources conservation law. Legislative authority giving the Secretary of the Delaware Department of Natural Resources and Environmental Control the authority to promulgate Regulations is codified at 7 Del. C., Chapter 60. This authority is also applicable to the 2006 PM2.5 NAAQS.

**(B) §110(a)(2)(B) Requirement:** Provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to - (i) monitor, compile, and analyze data on ambient air quality, and (ii) upon request, make such data available to the Administrator.

Delaware's SIP already contains other elements, namely, 7 DE Admin. Code 1117 Source Monitoring, Record Keeping and Reporting and 7 DE Admin. Code 1113, Ambient Air Quality Standards, addressing §110(a)(A) as discussed in the section 1.0 and the table thereto of this document.

**Delaware's Plan:** Delaware has established and currently operates appropriate devices, methods, systems and procedures necessary to monitor, compile and analyze data on ambient air quality, and upon request, makes such data available to the Administrator. Delaware will continue to operate devices, methods, systems and procedures and may make changes that it believes in its discretion are appropriate, while continuing to fulfill this obligation. At present, Delaware does this as follows for the 2006 24-hr PM2.5 matter NAAQS:

- "Delaware maintains and operates a multi-station network of ambient monitors throughout the State to measure ambient air quality levels within Delaware for comparison to each NAAQS as required by 40 CFR Part 58. Daily PM2.5 monitoring is currently performed at various locations throughout Delaware.
- "All data is measured using U.S. EPA approved methods as either Reference or Equivalent monitors; all monitors are subjected to the quality assurance requirements of 40 CFR Part 58; Appendix A; and all samplers are located at sites that have met the minimum siting requirements of Part 58, Appendix E. The data is submitted to the EPA's Air Quality System (AQS) system, in a timely manner in accordance to the scheduled prescribed by the U.S. EPA in 40 CFR Part 58.
- "In order to keep EPA informed of changes to the sampling network DNREC provides EPA Region III with prior notification of any planned changes to the network. As needed, details of these changes and anticipated approvals of the changes are communicated to EPA. On an annual basis, Delaware sends EPA a monitoring network plan as required by 40 CFR Part 58 Section 10: Annual monitoring network plan and periodic network assessment. This plan contains all required information including site and monitor description, analysis methods, operating schedule, monitoring objectives and scale of representativeness, as well as information on any planned

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changes. DNREC submits data to the AQS system, in a timely manner, pursuant to the schedule prescribed by the EPA in 40 CFR Part 58.

- "Delaware has and will continue to submit data to EPA's Air Quality System ("AQS") in a timely manner in accordance to the scheduled prescribed by the U.S. EPA in 40 CFR Part 58.

**(C) §110(a)(2)(C) Requirement:** Include a program to provide for the enforcement of the measures described in subparagraph (A), and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D.

For the 2006 PM<sub>2.5</sub> NAAQS, Delaware's SIP already contains the other elements addressing §110(a)(C) as discussed in the section 1.0 and the table thereto of this document.

**Delaware's Plan:** Delaware has established and currently operates a program to provide for the enforcement of the enforceable emission limitations and other control measures, means, or techniques, as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of the CAA and to regulate the modification and construction of any stationary source within areas covered by its SIP as necessary to assure the NAAQS are achieved, including permit programs required in parts C and D. At present, Delaware as part of its Air Quality Management Section function exercises its programmatic authority to utilize the enforcement powers set out in 7 Del. C. §6005 entitled "Enforcement; civil and administrative penalties; expenses"; 7 Del. C. §6013 entitled "Criminal penalties"; and 7 Del. C. §6018 entitled "Cease and desist order." Delaware will continue to operate this program and may makes changes that it believes in its discretion are appropriate, while continuing to fulfill this obligation.

**(D) §110(a)(2)(D) Requirement:** Contain adequate provisions - (i) prohibiting, consistent with the provisions of this title, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will - (I) contribute significantly to non-attainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard, or (II) interfere with measures required to be included in the applicable implementation plan for any other State under part C to prevent significant deterioration of air quality or to protect visibility, (ii) insuring compliance with the applicable requirements of sections 126 and 115 (relating to interstate and international pollution abatement).

**Delaware's Plan:** The implementation plan for Delaware and recently submitted SIP revisions presently contain adequate provisions prohibiting sources from emitting air pollutants in amounts which will contribute significantly to non-attainment or interfere with maintenance with any NAAQS and to prevent interference with measures related to preventing significant deterioration of air quality or which have to date proved adequate to protect visibility and to address interstate and international pollutant abatement; however, Delaware may make changes that it believes in its discretion are appropriate, while continuing to fulfill this obligation. At present, Delaware's legal authority is contained in the following:

- "Delaware Code Title 7, Chapter 60 § 6010 (c). Rules and regulations; plans. The Secretary may formulate, amend, adopt and implement, after public hearing, a statewide air resources management plan to achieve the purpose of this chapter and comply with applicable federal laws and regulations. Since 110(a)(2)(D) is in the CAA, and thus a law, Delaware has the legal authority to regulate sources of interstate transport to areas in nonattainment, or in those areas maintaining the NAAQS, if they were previously nonattainment.
- "110(a)(2)(D)(i)(I): Major stationary sources for the annual and 24-hr PM<sub>2.5</sub> are currently subject to Nonattainment New Source Review (NNSR) and Prevention of Significant Deterioration (PSD) permitting programs under the PSD and EOP provisions of 7 DE Admin. Code 1125, Preconstruction Review. [3] As provided in the PM<sub>2.5</sub> NSR Implementation Rule (73 FR 28321), NNSR in New Castle County for PM<sub>2.5</sub> will continue to be administered under the provisions of Appendix S until no later than May 16, 2011 when the EOP section of 7 DE Admin. Code 1125 and the Delaware SIP have been revised to reflect the provisions of 73 FR 28321. Also, in Kent and Sussex counties, PM<sub>2.5</sub> PSD activities will continue to be administered using PM<sub>10</sub> as a surrogate for PM<sub>2.5</sub>, without consideration of precursors, until no later than May 16, 2011 when changes to Regulation 25 and the SIP have been completed. Delaware has complied with §110(a)(2)(D) through promulgation of 7 DE Admin. Code 1146, Electric Generating Unit Multi-Pollutant Regulation, 7 DE Admin. Code 1142, Section 2, Control of NO<sub>x</sub> Emissions from

Industrial Boilers and Process Heaters at Petroleum Refineries, and 7 DE Admin. Code 1148, Control of Stationary Combustion Turbine Electric Generating Unit Emissions; which significantly reduce emissions from Delaware's largest EGUs, industrial boilers, and peaking units. These regulations have been submitted to the EPA as revisions to Delaware's SIP.

- "110(a)(2)(D)(i)(II): PSD requirements under Section 3 of Regulation 25. Major sources are subject to NNSR and PSD permitting programs implemented in accordance with EPA's PM2.5 NSR Implementation Rule (73 FR 28321) calling for use of Appendix S for NNSR and using PM10 as a surrogate for PM2.5 in the PSD NSR program requirements
- "The State of Delaware confirms that it is meeting this requirement for the use of Appendix S for PM2.5 activities under the NNSR program and using PM10 as a surrogate for PM2.5 in the PSD programs.
- "Delaware's proposed Visibility SIP assessed and demonstrated that Delaware has met Best Available Retrofit Technology and Reasonable Further Progress (RFP) goals, and thus did not interfere with measures required to be included in the applicable implementation plan for any other State to protect visibility.
- "110(a)(2)(D)(ii): Nothing in Delaware's statutory or regulatory authority prohibits or otherwise interferes with Delaware's ability to exercise sections 126 and 115 of the CAA.

**(E) §110(a)(2)(E) Requirement:** Provide (i) necessary assurances that the state (or, except where the Administrator deems inappropriate, the general purpose local government or governments, or a regional agency designated by the state or general purpose local governments for such purpose) will have adequate personnel, funding, and authority under state (and, as appropriate, local) law to carry out such implementation plan (and is not prohibited by any provision of federal or state law from carrying out such implementation plan or portion thereof), (ii) requirements that the State comply with the requirements respecting State boards under section 128, and (iii) necessary assurances that, where the state has relied on a local or regional government, agency, or instrumentality for the implementation of any plan provision, the state has responsibility for ensuring adequate implementation of such plan provision.

The elements of §§110(a)(2)(E)(ii) and (iii) are not applicable to Delaware as discussed in section 1.0 and the table thereto of this document.

**Delaware's Plan:** With respect to the remaining obligations under this section, Delaware assures EPA that it has adequate authority under state law pursuant to 7 Del. C. Chapter 60 to carry out its SIP obligations with respect to the 24-hr PM2.5 NAAQS. DNREC does not believe that there is any prohibition in any federal or state law that would prevent it from carrying out its SIP or any portion thereof. Further, DNREC assures EPA that it has, through the State of Delaware General Fund and through the Title V fee program, and will continue to have, funding to carry out its SIP obligations. Further, DNREC believes its funding sources are sufficient to provide adequate personnel for those purposes; however, Delaware may make changes that it believes in its discretion are appropriate, while continuing to fulfill this obligation.

At present Delaware fulfills this obligation by virtue of having adequate personnel and funding through the CAA §105 grant process (federal grant funds), the State of Delaware general fund (state tax revenues), and appropriated special funds collected by the State of Delaware from application fees, permit fees, renewal fees, and civil or administrative penalties or fines. Delaware does not anticipate the need for additional resources beyond those to be appropriated in the above manner to carry out its SIP requirements.

**(F) §110(a)(2)(F) Requirement:** Require, as may be prescribed by the Administrator - (i) the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources, (ii) periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and (iii) correlation of such reports by the State agency with any emission limitations or standards established pursuant to this Act, which reports shall be available at reasonable times for public inspection.

**Delaware's Plan:** Delaware requires that owners or operators of stationary sources monitor and submit periodic reports on the nature and amounts of PM2.5 emissions and emissions related-date emissions from the sources. This may include the installation, maintenance and replacement of equipment, where appropriate. This information submitted to DNREC is available to the public at reasonable times for public inspection pursuant to Delaware law. Delaware will continue to require reporting of emissions but may make changes that it believes in its discretion are appropriate, while continuing to fulfill this obligation.



Except as specifically exempted by the Delaware Freedom of Information Act, 29 Del.C. Chapter 100, Delaware makes all records, reports or information obtained by the Department or referred to at public hearings available to the public pursuant to the provisions of the Delaware Freedom of Information Act, 29 Del. C. Chapter 100.

**(G) §110(a)(2)(G) Requirement:** Provide for authority comparable to that in section 303 and adequate contingency plans to implement such authority;

Delaware's SIP contains an emergency episode plan for PM10 fine particulates as discussed in the section 1.0 and the table thereto of this document. For the 1997 and 2006 PM2.5 NAAQS, the emergency episode plan will be updated after EPA develops new thresholds per 40 C.F.R. 52.420(c), as necessary.

**Delaware's Plan:** Delaware has authority comparable to that in section 303 and adequate contingency plans to implement such authority but may makes changes that it believes in its discretion are appropriate, while continuing to fulfill this obligation.

7 **Del.C.** §6003(a)(1) requires a permit from the Secretary prior to discharging any air contaminant. 7 **Del.C.** §6002(2) defines air contaminant essentially as any substance other than uncombined water. 7 **Del.C.** §6005 allows the Secretary to seek a preliminary or permanent injunction or temporary restraining order for any discharge of an air contaminant without a permit, and issue cease and desist orders for violations (7 **Del.C.** §6018). Thus, it necessarily follows that any discharge of an air contaminant that would cause imminent & substantial endangerment to the health, safety and welfare of the people of the State of Delaware or the environment would constitute a sufficient basis for the Secretary to seek an injunction or temporary restraining order to halt the violation.

**(H) §110(a)(2)(H) Requirement:** Provide for revision of such plan - (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard, and (ii) except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to the Administrator that the plan is substantially inadequate to attain the national ambient air quality standard which it implements or to otherwise comply with any additional requirements established under this Act.

**Delaware's Plan:** Delaware will review and revise its SIP from time to time as may be necessary to take account of revisions of such primary or secondary NAAQS or the availability of improved or more expeditious methods of attaining such standard and whenever the Administrator finds on the basis of information available to the Administrator that the plan is substantially inadequate to attain the NAAQS which it implements or to otherwise comply with any additional requirements established under the CAA.

For the 2006 24-hr fine particulate matter.5 NAAQS, the attainment demonstration is not yet due under the CAA, and will be developed as a SIP revision, as required.

**(I) §110(a)(2)(I) Requirement:** In the case of a plan or plan revision for an area designated as a non-attainment area, meet the applicable requirements of part D (relating to non-attainment areas).

For the 1997 annual PM2.5 NAAQS, Delaware's SIP or recent SIP revisions already contain other elements addressing §110(a)(I) as discussed in the section 1.0 and the table thereto of this document, as well as §110(a)(2)(D)of section 2. Many of these also apply to the 2006 24-hr PM2.5 NAAQS. For the 2006 24-hr PM2.5 NAAQS, any remaining applicable requirements, which are not yet due under the CAA, will be developed as SIP revisions, as required.

**(J) §110(a)(2)(J) Requirement:** Meet the applicable requirements of section 121 (relating to consultation), section 127 (relating to public notification), and part C (relating to prevention of significant deterioration of air quality and visibility protection).

**Delaware's Plan:** Delaware will meet the applicable requirements of section 121 (relating to consultation), section 127 (relating to public notification), and has met the applicable part C (relating to prevention of significant deterioration of air quality and visibility protection) in Delaware's Visibility SIP submitted to EPA September 25, 2008; but may makes changes that it believes in its discretion are appropriate, while continuing to fulfill this obligation. At present, Delaware does so utilizing the following:

- 7 **DE Admin. Code** 1146, Transportation Conformity provides a legal platform for the various consultation procedures that have been developed between DNREC, DELDOT, and the Metropolitan Planning Organizations (MPOs). The MPOs provide the forum for consultation with local governments. Delaware's MPOs are: (1) WILMAPCO, Kent County MPO, and the Salisbury-Wicomoco MPO. Regional Planning Organizations provide the forum for inter-state

consultations. Additionally, consultations with Federal Land Managers are always on-going in accordance with EPA Rules and Delaware's Visibility SIP. All SIP revisions undergo public notice and hearing which have allowed for comment by the public which includes local political subdivisions. Delaware believes the public notice and hearing processes also fulfill the section 121 consultation process. The submitted attainment plans and regulations in the approved Delaware SIP specify the organizations responsible for implementing and enforcing the plans.

- DNREC makes real-time and historical air quality information available on its Web site. All relevant SIPs and plans to achieve the NAAQS contain public notification provisions related to air monitoring levels of ozone and PM<sub>2.5</sub> such as Air Quality Action Days, and DNREC's website. DNREC provides extended range air quality forecasts, which give the public advanced notice of air quality events. This advance notice allows the public to limit their exposure to unhealthy air and enact a plan to reduce pollution at home and at work. DNREC forecasts daily ozone and particle levels and issues e-mails to the public, businesses and the media via AirAlerts. AirAlert e-mail forecasts and notifications are free to the public.
- For the 1997 PM<sub>2.5</sub> NAAQS, Delaware's SIP already contains the other elements addressing §110(a)(J) as discussed in the section 1.0 and the table thereto of this document. For the 2006 24-hr PM<sub>2.5</sub> NAAQS, any remaining applicable requirements, which are not yet due under the CAA, will be developed as SIP revisions, as required.

**(K) §110(a)(2)(K) Requirement:** Provide for - (i) the performance of such air quality modeling as the Administrator may prescribe for the purpose of predicting the effect on ambient air quality of any emissions of any air pollutant for which the Administrator has established a national ambient air quality standard, and (ii) the submission, upon request, of data related to such air quality modeling to the Administrator.

For the annual PM<sub>2.5</sub> NAAQS, Delaware's SIP or recently submitted SIP revisions contains required modeling as discussed in the section 1.0 and the table thereto of this document. For the 2006 24-hr PM<sub>2.5</sub> NAAQS, any remaining applicable requirements, which are not yet due under the CAA, will be developed as SIP revisions, as required.

**Delaware's Plan:** Delaware will continue to perform modeling as required under the CAA to demonstrate attainment), but may make changes that it believes in its discretion are appropriate, while continuing to fulfill this obligation. Delaware will continue to submit the Air Quality modeling data as part of Delaware's relevant SIP submissions and through federal grant commitments or in other ways that EPA may request.

**(L) §110(a)(2)(L) Requirement:** Require the owner or operator of each major stationary source to pay to the permitting authority, as a condition of any permit required under this Act, a fee sufficient to cover - (i) the reasonable costs of reviewing and acting upon any application for such a permit, and (ii) if the owner or operator receives a permit for such source, the reasonable costs of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action), until such fee requirement is superseded with respect to such sources by the Administrator's approval of a fee program under Title V.

**Delaware's Plan:** In a manner consistent with Delaware law, Delaware will continue to require the owner or operator of each major stationary source to pay to the permitting authority, as a condition of any permit required under this Act, a fee sufficient to cover (i) the reasonable costs of reviewing and acting upon any application for such a permit, and (ii) if the owner or operator receives a permit for such source, the reasonable costs of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action), until such fee requirement is superseded with respect to such sources by the Administrator's approval of a fee program under title V pursuant to Delaware law. Delaware currently fulfills this under the enabling authority of 7 Del.C. § 6095 to 6099 and fee legislation that currently is renewed every three years. Delaware has a fully approved Title V operating permits program. See paragraphs (b) and (c) under "Delaware" in Appendix A to 40 CFR Part 70-Approval Status of State and Local Operating Permits Programs. Delaware may make changes that it believes in its discretion are appropriate, while continuing to fulfill this obligation.

**(M) §110(a)(2)(M) Requirement:** Provide for consultation and participation by local political subdivisions affected by the plan.

**Delaware's Plan:** Delaware will continue to provide for consultation and participation by local political subdivisions affected by the SIP pursuant to the public notice laws found in 7 Del.C. §6006 and 6010 and 29 Del.C.

Chapters 10003, 10004 and 10115, as applicable. Furthermore, all SIP revisions undergo public notice and hearing which have allowed for comment by the public which includes local political subdivisions. We believe the public notice and hearing processes fulfill the requirements for consultation with local political subdivisions affected by the SIP.

### 3.0 Conclusion

Based on the information provided above, Delaware fully complies with the requirements of §110(a)(2)(A) through §110(a)(2)(M).

## Implementation, Maintenance, And Enforcement of National Ambient Air Quality Standards ,State Implementation Plan Revision For Ozone, Fine Particulate Matter (PM<sub>2.5</sub>), and Visibility

### 1.0 Preamble, Introduction and Background

A State Implementation Plan ("SIP") is a state plan that identifies how that state will attain and maintain air quality that conforms to each primary and secondary National Ambient Air Quality Standard ("NAAQS"). The SIP is a complex, fluid document containing regulations, source-specific requirements, and non-regulatory items such as plans and emission inventories.

Delaware's initial SIP was approved by the EPA on May 31, 1972. Since this initial approval, the Delaware SIP has been revised numerous times to address air quality non-attainment and maintenance issues. This was done by updating plans and inventories, and adding new and revised regulatory control requirements. Delaware's SIP is compiled at 40 C.F.R. Part 52 Subpart I.

Section 2.0 of this document is a revision to Delaware's SIP. The purpose of this SIP revision is to detail how Delaware meets all of the necessary implementation, maintenance, and enforcement measures required by the Clean Air Act ("CAA"), specifically, CAA §110(a)(2). Under the heading "Delaware's Plan" in Section 2.0 of this document Delaware provides a revision to its SIP to address those requirements of Section 110(a)(2)(A)-(M) of the CAA which have not been addressed in other SIP revisions. It is a compilation of certain elements that describe how Delaware demonstrates how the 1997 eight-hour ozone and ~~in some cases~~ the 1997 fine particulate (PM<sub>2.5</sub>) NAAQS are being implemented, maintained and enforced. The elements of this SIP revision, once approved by EPA, will provide a federally enforceable written confirmation that Delaware will continue to comply with the Section 110(a)(2) requirements of the CAA.

Legislative authority for the Delaware air quality program relating to the responsibilities in the CAA is codified in Title 7 "Conservation" of the Delaware Code, Chapter 60 - Delaware's comprehensive water and air resources conservation law, which gives the Delaware DNREC the power and duty to implement the provisions of the CAA in the State of Delaware.

Many of the miscellaneous requirements of Section 110(a)(2)(A)-(M) of the CAA relevant to the 1997 eight-hour ozone and 1997 fine particulate (PM<sub>2.5</sub>) NAAQS are already contained in Delaware's SIP or in SIP revisions which have been submitted to but not yet approved by EPA. The following Table identifies those SIP provisions. The attainment and base year inventory plans and the regulations cited in the following Table have gone through public notice and hearing prior to submittal to EPA. The following Table also identifies those infrastructure requirements which are not applicable to Delaware.

**Table - 110(a)(2)(A)-(M) Requirements in the Current State of Delaware SIP**

Section element	110(a) Summary of element	Provisions in the Current Delaware SIP or recent SIP revisions Submittals <sup>a</sup>	Where Codified or approved by EPA

# GENERAL NOTICES

<p><b>§110(a)(2)(A)</b></p>	<p>Include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this Act.</p>	<p>For the <del>1997</del> ozone and <del>1997</del> PM<sub>2.5</sub> NAAQS, the pertinent emission limitations and schedules are contained in Delaware's <del>submitted Reasonable Further Progress (RFP) and attainment demonstration SIPs that were submitted on June 13, 2007, in recently submitted regulatory revisions listed below and in the regulations in</del> Delaware's approved SIP that are listed in 40 CFR 52.420(c).</p> <p>Regulation No. 4446 Electric Generating Unit (EGU) Multi-Pollutant Regulation, November 21, 2006          Regulation No. 4413, Open Burning Regulation, May 2, 2007          Regulation No. 24, Section 46, Crude Oil Lightering, May 2, 2007          Regulation No. 48, Combustion Turbine Generator Emissions, September 11, 2007          Regulation No. 4444, Stationary Generator Emissions, November 1, 2007          Regulation No. 43, Not To Exceed California Heavy Duty Diesel Engine Standards, November 29, 2001          Regulation No. 45, Excessive Idling Of Heavy Duty Vehicles, August 12, 2005  <del>The regulatory revisions listed above and the following regulations listed below that are in Delaware's approved SIP that are listed in 40 CFR 52.420(c) also apply to the fine particulate matter NAAQS.</del></p> <p>Regulation No. 1, Definitions And Administrative Principles          Regulation No. 4, Particulate Emissions From Fuel Burning Equipment          Regulation No. 5, Particulate Emissions From Industrial Process Operations          Regulation No. 6, Particulate Emissions From Construction And Materials Handling          Regulation No. 7, Emissions From Incineration Of Noninfectious Waste</p>	<p>40 CFR 52.420(c)</p>
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## GENERAL NOTICES

		<p>Regulation No. 8, Sulfur Dioxide Emissions From Fuel Burning Equipment; Regulation No. 9, Emissions Of Sulfur Compounds From Industrial Operations; Regulation No. 10, Control Of Sulfur Dioxide Emissions Kent And Sussex Counties; Regulation No. 12, Control Of Nitrogen Oxides Emissions; Regulation No. 14, Visible Emissions; Regulation No. 18 , Particulate Emissions From Grain Handling Operations; Regulation No. 22, Restriction On Quality Of Fuel In Fuel Burning Equipment; Regulation No. 24, Control Of Volatile Organic Compound Emissions; Regulation No. 26, Motor Vehicle Regulation No. 27, Stack Heights; Regulation No. 29, Emissions From Emissions Inspection Program Incineration Of Infectious Waste; Regulation No. 31, Low Enhanced Inspection And Maintenance Program; Regulation No. 32, Transportation Conformity Regulation; Regulation No. 34, Emission Banking And Trading Program Regulation No. 35, Conformity Of General Federal Actions To The State Implementation Plans; Regulation No. 36, Acid Rain Program; Regulation No. 37, NOx Budget; Regulation No. 39, Nitrogen Oxides Budget Trading Program Program; Regulation No. 40, National Low Emission Vehicle Program; Regulation No. 4441, Limiting Emissions Of Volatile Organic Compounds From Consumer And Commercial Products; Regulation No. 42, Specific Emission Control</p> <p><del>For the fine particulate matter NAAQS, any remaining applicable requirements under §110(a)(2)(A) will be addressed in future SIP revisions.</del></p>	
§110(a)(2)(B)	Provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to - (i) monitor, compile, and analyze data on ambient air quality, and (ii) upon request, make such data available to the Administrator.	Regulation 17 Source Monitoring, Record Keeping And Reporting and Regulation No. 3, Ambient Air Quality Standards, of the State of Delaware Regulations Governing the Control of Air Pollution provides for the establishment and operation of procedures necessary to monitor, compile and analyze data related to ambient air quality.	40 CFR 52.420(c)

<p><b>§110(a)(2)(C)</b></p>	<p>Include a program to provide for the enforcement of the measures described in subparagraph (A) and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D;</p>	<p>Delaware implements its Construction and Operation Permit Program requirements under Regulation Nos. 4402, and 25<sup>b</sup> of the State of Delaware Regulations Governing the Control of Air Pollution.</p> <p>Delaware implements its Prevention of Significant Deterioration (PSD) Program requirements under Regulation No. 25 of the State of Delaware Regulations Governing the Control of Air Pollution.</p> <p>Delaware implements its Emission Offset Provision (EOP) requirements under Regulation No. 25 of the State of Delaware Regulations Governing the Control of Air Pollution.”</p> <p>Other aspects of Delaware’s program for enforcement are found in those provisions of Regulation 25, Regulation 11 and Regulation 17 as well as the source monitoring, source testing and test methods, and, recordkeeping and reporting provisions of Regulations 12, 23, 24, 26, 31, 37, 39, 40, 41, 42, and others in the approved Delaware SIPs as well as recently submitted regulatory SIP revisions discussed under section 110(a)(2)(A) above. <sup>c</sup></p> <p>These recently submitted regulatory revisions and the regulations in Delaware’s approved SIP that are listed in 40 CFR 52.420(c) also apply to the 1997 fine particulate matter NAAQS.</p> <p>For the fine particulate matter NAAQS, any remaining applicable requirements under §110(a)(2)(C) will be addressed in future SIP revisions.</p>	<p>40 CFR 52.420(c)</p>
<p><b>§110(a)(2)(E)(ii)</b></p>	<p>(ii) requirements that the state comply with the requirements respecting state boards under section 128, and</p>	<p>The requirements of §110(a)(2)(E)(ii) are not applicable to Delaware because it does not have any board or body which approves air quality permits or enforcement orders.</p>	
<p><b>§110(a)(2)(E)(iii)</b></p>	<p>(iii) necessary assurances that, where the state has relied on a local or regional government, agency, or instrumentality for the implementation of any plan provision, the state has responsibility for ensuring adequate implementation of such plan provision;</p>	<p>The requirements of §110(a)(2)(E)(iii) are not applicable to Delaware because it does not rely on localities for specific SIP implementation.</p>	

## GENERAL NOTICES

<p><b>§110(a)(2)(F)</b></p>	<p>Require, as may be prescribed by the Administrator—</p> <p>(i) the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps by owners or operators of stationary sources to monitor emissions from such sources,</p> <p>(ii) periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and</p> <p>(iii) correlation of such reports by the state agency with any emission limitations or standards established pursuant to this Act, which reports shall be available at reasonable times for public inspection;</p>	<p>§110(a)(2)(F)(i): Specific monitoring requirements are found throughout the State of Delaware Regulations Governing the Control of Air Pollution, to include Regulation No. 17 <u>and Regulation 3</u>. These requirements are included in Delaware's SIP, as necessary.</p> <p>§110(a)(2)(F)(ii): Specific <u>emissions</u> reporting requirements are found throughout the State of Delaware Regulations Governing the Control of Air Pollution, to include Regulation No. 17 <u>and Regulation 3</u>. These requirements are included in Delaware's SIP, as necessary.</p> <p>Other aspects of Delaware's program for requiring installation and maintenance of monitoring equipment, periodic emissions reporting, is found in the source monitoring, source testing and test methods, and recordkeeping and reporting provisions of Regulations 12, 23, 24, 26, 31, 37, 39, 40, 41, 42, and others in the approved Delaware SIP, 40 CFR 52.420(c), as well as recently submitted regulatory SIP revisions discussed under section 110(a)(2)(A) above.</p> <p>These <del>recently submitted regulatory revisions and the regulations</del> in Delaware's approved SIP that are listed in 40 CFR 52.420(c) also apply to the <u>1997</u> fine particulate matter NAAQS.</p> <p>For the fine particulate matter NAAQS, any remaining applicable requirements under §110(a)(2)(F) will be addressed in future SIP revisions.</p>	<p>40 CFR 52.420(c)</p>
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<b>§110(a)(2)(G)</b>	Provide for authority comparable to that in section 303 and adequate contingency plans to implement such authority;	<p>State of Delaware Regulations Governing the Control of Air Pollution, Regulation 15, Air Pollution Alert and Emergency Plan, contains emergency episode plan provisions that are currently approved in the SIP, and found at 40 C.F.R. 52.420(c), that fulfill the contingency plan requirement for the <u>1997</u> ozone NAAQS.</p> <p>7 Del. C. § 6005 allows the Secretary to seek a preliminary or permanent injunction or temporary restraining order for any discharge of an air contaminant without a permit (7 Del. C. § 6005). Thus, it necessarily follows that any discharge of an air contaminant that would cause imminent &amp; substantial endangerment to the health, safety and welfare of the people of the State of Delaware or the environment would constitute a sufficient basis for the Secretary to seek an injunction or temporary restraining order to halt the violation. The provisions of 7 Del. C. § 6003 also provide equal authority for Delaware to seek permanent, preliminary injunctions and temporary restraining orders and to issue cease and desist orders to moving sources if they present an imminent and substantial endangerment to public health, safety, welfare or the environment.</p> <p>For the fine particulate matter NAAQS, the emergency episode plan will be addressed in future SIP revisions.</p>	40	CFR 52.420(c)
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## GENERAL NOTICES

§110(a)(2)(I)	In the case of a plan or plan revision for an area designated as a nonattainment area, meet the applicable requirements of part D (relating to nonattainment areas);	<p>Part D pertains to general requirements for nonattainment areas. All of Delaware is in the Philadelphia-Wilmington-Atlantic City ozone nonattainment area. <u>New Castle County is in the Philadelphia-Wilmington-DE-PA-NJ PM<sub>2.5</sub> nonattainment area.</u></p> <p>On June 13, 2007 Delaware submitted SIP revisions pertaining to the base year inventory, RFP plan and attainment demonstration for the Philadelphia-Wilmington-Atlantic City ozone nonattainment area and submitted the RACT SIP on March 29, 2007 and was updated on May 2, 2007 to cover Crude Oil Lightering operations. Delaware has also submitted those recently submitted regulatory SIP revisions discussed under section 110(a)(2)(A) above.</p> <p>The pertinent emission limitations and schedules are contained in these submitted plans.</p> <p>The regulations in Delaware's approved SIP that are listed in 40 CFR Part 52, Subpart I related to nonattainment areas will continue to comply with Subpart D requirements and which could not have been approved if they had not met Subpart D requirements.</p> <p>For the fine particulate matter NAAQS, the applicable Part D requirements have not yet come due and will be addressed in future SIP revisions.</p>	40 CFR 52.420(c)
§110(a)(2)(J) (PSD)	Meet the applicable requirements of ... part C (relating to prevention of significant deterioration of air quality and visibility protection);	Delaware's PSD requirements are promulgated in Regulation No. 25, Preconstruction Review, of the State of Delaware Regulations Governing the Control of Air Pollution.	

<p>§110(a)(2)(K)</p>	<p>Provide for:                  (i) the performance of such air quality modeling as the Administrator may prescribe for the purpose of predicting the effect on ambient air quality of any emissions of any air pollutant for which the Administrator has established a national ambient air quality standard, and                  (ii) the submission, upon request, of data related to such air quality modeling to the Administrator;</p>	<p>On June 13, 2007 Delaware submitted SIP revisions pertaining to the base year inventory, RFP plan and attainment demonstration for the Philadelphia-Wilmington-Atlantic City ozone nonattainment area which contained the required modeling.                   For the fine particulate matter NAAQS, the attainment demonstration is not yet due and will be addressed in future SIP revisions.</p>	
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a. All of the State of Delaware "Regulations Governing the Control of Air Pollution" have been re-coded under 7 DE Admin Code 1100, effective September 11, 2008. This recoding was submitted to the EPA as a SIP on June 15, 2009, but has not yet been approved into the DE SIP. Because of this some of Delaware's control requirements are cited in this document in the old format. For example, "7 DE Admin Code 1131" is cited as "Regulation 31".

b. ~~Now codified under regulation 1125 in the Title 7 -- Department of Natural Resources and Environmental Control of Delaware's Administrative Code.~~

c. ~~Regulation Numbers 41 and 42 are now codified under regulations 1141 and 1142 in the Title 7 -- Department of Natural Resources and Environmental Control of Delaware's Administrative Code.~~

**2.0 SIP Revision**

This SIP revision addresses those requirements of Section 110(a)(2)(A)-(M) of the Clean Air Act (CAA) which have not been addressed in other SIP revisions. Each of the requirements of §110(a)(2) of the CAA (Subparagraphs A–M) is presented below, along with a discussion of Delaware's plan revision to meet the requirement.

**(A) §110(a)(2)(A) Requirement:** Include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this Act.

For the ozone NAAQS, Delaware's SIP or recent SIP revisions already contain other elements addressing §110(a)(2)(A) as discussed in the section 1.0 and the table thereto of this document. Many of these also apply to the fine particulate (PM<sub>2.5</sub>) NAAQS. For the fine particulate (PM<sub>2.5</sub>) NAAQS, any remaining applicable requirements under §110(a)(2)(A) will be addressed in future SIP revisions.

**Delaware's Plan:** Delaware has established laws and regulations that include enforceable emissions limitations and other control measures, means or techniques, as well as schedules and timetables for compliance to meet the applicable requirements of the CAA. Delaware may make changes to its laws and regulations that it believes in its discretion are appropriate, while continuing to fulfill this obligation.

At present, Delaware's statutory authority is set out in Title 7 "Conservation" of the Delaware Code, Chapter 60 – Delaware's comprehensive water and air resources conservation law. Legislative authority giving the Secretary of the Delaware Department of Natural Resources and Environmental Control the authority to promulgate Regulations is codified at 7 Del. C., Chapter 60. This authority is applicable to the 1997 ozone as well as the 1997 fine particulate (~~PM<sub>2.5</sub>~~) NAAQS.

**(B) §110(a)(2)(B) Requirement:** Provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality, and (ii) upon request, make such data available to the Administrator.

Delaware's SIP already contains other elements, namely, ~~Regulation No. 3, 7 DE Admin. Code 1103~~<sup>4</sup>, Ambient Air Quality Standards, and 7 DE Admin. Code 1117 of the State of Delaware Regulations Governing the

Control of Air Pollution addressing §110(a)(A), as discussed in the section 1.0 and the table thereto of this document.

**Delaware's Plan:** Delaware has established and currently operates appropriate devices, methods, systems and procedures necessary to monitor, compile and analyze data on ambient air quality, and upon request, makes such data available to the Administrator. Delaware will continue to operate devices, methods, systems and procedures and may make changes that it believes in its discretion are appropriate, while continuing to fulfill this obligation. At present, Delaware does this as follows for both the 1997 ozone and fine particulate matter NAAQS:

- Delaware maintains and operates a multi-station network of ambient monitors throughout the State to measure ambient air quality levels within Delaware for comparison to each NAAQS as required by 40 CFR Part 58. Seasonal (April – October) ozone, and daily PM<sub>2.5</sub> monitoring is currently performed at various locations throughout Delaware.
- All data is measured using U.S. EPA approved methods as either Reference or Equivalent monitors; all monitors are subjected to the quality assurance requirements of 40 CFR Part 58; Appendix A; and all samplers are located at sites that have met the minimum siting requirements of Part 58, Appendix E. The data is submitted to the EPA's Air Quality System (AQS) system, in a timely manner in accordance to the schedule prescribed by the U.S. EPA in 40 CFR Part 58.
- In order to keep EPA informed of changes to the sampling network DNREC provides EPA Region III with prior notification of any planned changes to the network. As needed, details of these changes and anticipated approvals of the changes are communicated to EPA. On an annual basis, Delaware sends EPA a monitoring network plan as required by 40 CFR Part 58 Section 10: Annual monitoring network plan and periodic network assessment. This plan contains all required information including site and monitor description, analysis methods, operating schedule, monitoring objectives and scale of representativeness, as well as information on any planned changes. a summary table of all the changes to the network. This summary also provides for a description of each change, the reason for each change, and any other information relevant to the change. DNREC submits data to the AQS system, in a timely manner, pursuant to the schedule prescribed by the EPA in 40 CFR Part 58.

Delaware has and will continue to submit data to EPA's Air Quality System ("AQS") in a timely manner in accordance to the schedule prescribed by the U.S. EPA in 40 CFR Part 58.

**(C) §110(a)(2)(C) Requirement:** Include a program to provide for the enforcement of the measures described in subparagraph (A), and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D.

For the ~~ozone~~ 1997 ozone and 1997 PM<sub>2.5</sub> NAAQS, Delaware's ozone and PM<sub>2.5</sub> SIPs already contains the other elements addressing §110(a)(C) as discussed in the section 1.0 and the table thereto of this document. ~~These also apply to the fine particulate (PM<sub>2.5</sub>) NAAQS. For the fine particulate (PM<sub>2.5</sub>) NAAQS, any remaining applicable requirements under §110(a)(2)(C) will be addressed in future SIP revisions.~~

**Delaware's Plan:** Delaware has established and currently operates a program to provide for the enforcement of the enforceable emission limitations and other control measures, means, or techniques, as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of the CAA and to regulate the modification and construction of any stationary source within areas covered by its SIP as necessary to assure the NAAQS are achieved, including permit programs required in parts C and D. At present, Delaware as part of its Air Quality Management Section function exercises its programmatic authority to utilize the enforcement powers set out in 7 Del. C. §6005 entitled "Enforcement; civil and administrative penalties; expenses"; 7 Del. C. §6013 entitled "Criminal penalties"; and 7 Del. C. §6018 entitled "Cease and desist order." Delaware will continue to operate this program and may make changes that it believes in its discretion are

4. All of the State of Delaware "Regulations Governing the Control of Air Pollution" have been re-coded under 7 DE Admin Code 1100, effective September 11, 2008. This recoding was submitted to the EPA as a SIP on June 15, 2009, but has not yet been approved into the DE SIP. Delaware's control requirements are cited in Section 2 in the new format. For example, "Regulation 31" is cited as "7 DE Admin Code 1131".

appropriate, while continuing to fulfill this obligation.

**§110(a)(2)(D) Requirement:** Contain adequate provisions – (i) prohibiting, consistent with the provisions of this title, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will - (I) contribute significantly to non-attainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard, or (II) interfere with measures required to be included in the applicable implementation plan for any other State under part C to prevent significant deterioration of air quality or to protect visibility, (ii) insuring compliance with the applicable requirements of sections 126<sup>5</sup> and 115<sup>6</sup> (relating to interstate and international pollution abatement).

**Delaware's Plan:** The implementation plan for Delaware and recently submitted Ozone, PM<sub>2.5</sub> and Visibility SIP revisions presently contain adequate provisions prohibiting sources from emitting air pollutants in amounts which will contribute significantly to non-attainment or interfere with maintenance with any NAAQS and to prevent interference with measures related to preventing significant deterioration of air quality or which have to date proved adequate to protect visibility and to address interstate and international pollutant abatement; however, Delaware may make changes that it believes in its discretion are appropriate, while continuing to fulfill this obligation. At present, Delaware's legal authority is contained in the following:

- Delaware Code Title 7, Chapter 60 § 6010 (c). Rules and regulations; plans. The Secretary may formulate, amend, adopt and implement, after public hearing, a statewide air resources management plan to achieve the purpose of this chapter and comply with applicable federal laws and regulations. Since 110(a)(2)(D) is in the CAA, and thus a law, Delaware has the legal authority to regulate sources of interstate transport to areas in nonattainment, or in those areas maintaining the NAAQS, if they were previously nonattainment.
- 110(a)(2)(D)(i)(I): Major stationary sources for 1997 8-hour ozone and PM<sub>2.5</sub> are currently subject to Nonattainment New Source Review (NNSR) and Prevention of Significant Deterioration (PSD) permitting programs under the PSD and EOP provisions of 7 DE Admin. Code 1125, Regulation No. 25, Preconstruction Review, of the State of Delaware Regulations Governing the Control of Air Pollution.<sup>7</sup> ~~Delaware sources are subject to the Clean Air Interstate Rule (CAIR) Federal Implementation Plan (FIP) for annual and seasonal ozone, and for sulfur dioxide. In the adoption of CAIR EPA has indicated that compliance with CAIR satisfies a States §110(a)(2)(D)(i) obligations relating to "significant contribution" and "interference with maintenance" requirements, and the State of Delaware currently satisfies the CAIR requirements by relying on the CAIR FIP.<sup>8</sup> In addition, because Delaware believes that more than CAIR is necessary to mitigate transport, Delaware has promulgated 7 DE Admin. Code 1146 Regulation No. 1146, Electric Generating Unit Multi-Pollutant Regulation, 7 DE Admin. Code 1142, Regulation No. 1142, Section 2, Control of~~

5. §126(a) - Each plan shall (1) require each major proposed new or modified source (A) subject to Part C or (D) which may significantly contribute to pollution in excess of the NAAQS in any AQCR outside the State in which such source intends to locate or modify, to provide written notice to all nearby States the pollution levels of which may be affected by such source 60 days prior to the date on which commencement of construction is to be permitted by the State, and (2) identify all major existing stationary sources which may have the impact described in (1) with respect to new or modified sources and provide notice to all nearby States of the identity of such sources. (b) Any State may petition EPA for a finding that any major source or group of stationary sources emits or would emit any pollutant in violation of the prohibition of §110(a)(2)(D)(ii) or this section. (c) Notwithstanding any permit which may have been granted by the State, it shall be a violation of this section and the plan - (1) for any major proposed new or modified source with respect to which a finding has been made under subsection (b) to be constructed or to operate in violation of this section and the prohibition of §110(a)(2)(D)(ii) or this section, or (2) for any major existing source to operate more than 3 months after such finding has been made. EPA may permit the continued operation of a source beyond the expiration of the 3-month period if the source complies with the emission limitations and compliance schedules as may be provided by EPA to bring about compliance with the requirements of §110(a)(2)(D)(ii). Nothing shall be construed to preclude any such source from being eligible for an enforcement order under §113(d) after the expiration of such period during which EPA has permitted continuous operation.

## GENERAL NOTICES

NO<sub>x</sub> Emissions from Industrial Boilers and Process Heaters at Petroleum Refineries, and ~~7 DE Admin. Code 1148, Regulation No. 1148,~~ Control of Stationary Combustion Turbine Electric Generating Unit Emissions; which significantly reduce emissions from Delaware's largest EGUs, industrial boilers, and peaking units (i.e., generally, Delaware's CAIR covered units). These regulations have, or are in the process, of being submitted to the EPA as revisions to Delaware's SIP.

- 110(a)(2)(D)(i)(II): PSD requirements under Section 3 of ~~DE Admin. Code 1125, Regulation No. 25~~ of the State of Delaware Regulations Governing the Control of Air Pollution. Major sources are subject to NNSR and PSD permitting programs implemented in accordance with EPA's interim guidance calling for use of PM<sub>10</sub> as a surrogate for PM<sub>2.5</sub> related to the non-attainment and PSD NSR program requirements.
- The State of Delaware confirms that it is meeting this requirement for the use of PM<sub>10</sub> as a surrogate for PM<sub>2.5</sub> in the PSD and NNSR programs.
- ~~The EPA's guidance<sup>9</sup> advises that the section 110(a)(2)(D)(i) requirement related to protection of visibility is deferred until such time as Delaware submits its Visibility SIP. Delaware's Visibility SIP will assess whether there is interference with measures required to be included in the applicable implementation plan for any other State to protect visibility. Delaware's Visibility SIP assessed and demonstrated that Delaware has met Best Available Retrofit Technology and Reasonable Further Progress (RFP) goals, and thus did not interfere with measures required to be included in the applicable implementation plan for any other State to protect visibility.~~
- 110(a)(2)(D)(ii): Nothing in Delaware's statutory or regulatory authority prohibits or otherwise interferes with Delaware's ability to exercise sections 126 and 115 of the CAA.

**(E) §110(a)(2)(E) Requirement:** Provide (i) necessary assurances that the state (or, except where the Administrator deems inappropriate, the general purpose local government or governments, or a regional agency designated by the state or general purpose local governments for such purpose) will have adequate personnel, funding, and authority under state (and, as appropriate, local) law to carry out such implementation plan (and is not prohibited by any provision of federal or state law from carrying out such implementation plan or portion thereof), (ii) requirements that the State comply with the requirements respecting State boards under section 128,<sup>10</sup> and (iii) necessary assurances that, where the state has relied on a local or regional government, agency, or instrumentality

6. §115(a) - Whenever EPA, upon receipt of reports, surveys or studies from any duly constituted international agency has reason to believe that any pollutants emitted in the US cause or contribute to pollution which may reasonably be anticipated to endanger public health or welfare in a foreign country or whenever the Secretary of State requests it to do so, EPA shall give formal notification to the Governor of the State in which such emissions originate. (b) The EPA notice shall be deemed to be a finding under §110(a)(2)(H)(ii) which requires a plan revision with respect to so much of the applicable plan as is inadequate to prevent or eliminate the endangerment. Any foreign country so affected by such emission of pollutants shall be invited to appear at any public hearing associated with any revision of the appropriate portion of the applicable plan. (c) This section shall apply only to a foreign country which EPA determines has given the US the same rights with respect to the prevention or control of air pollution occurring in that country. (d) Recommendations issued following any abatement conference conducted prior to CAA 1977 shall remain in effect with respect to any pollutant for which no NAAQS has been established under § 109 unless EPA, after consultation with all agencies, which were party to the conference, rescinds any such recommendation.

7. Now codified under regulation 1125 in the Title 7 - Department of Natural Resources and Environmental Control of Delaware's Administrative Code.

~~8. If Delaware later decides to adopt its own program to replace the CAIR FIP, that program will be submitted to the EPA as a SIP revision.~~

~~9. William T. Harnett Guidance Memorandum, dated August 15, 2006, "Guidance for State Implementation Plan (SIP) Submissions to Meet Current Outstanding Obligations Under Section 110(a)(2)(D)(i) for the 8-Hour Ozone and PM<sub>2.5</sub> NAAQS."~~

for the implementation of any plan provision, the state has responsibility for ensuring adequate implementation of such plan provision.

The elements of §110(a)(2)(E)(ii) and (iii) are not applicable to Delaware as discussed in section 1.0 and the table thereto of this document.

**Delaware's Plan:** With respect to the remaining obligations under this section, Delaware assures EPA that it has adequate authority under state law pursuant to 7 *Del. C.* Chapter 60 to carry out its SIP obligations with respect to both the 1997 8-hour ozone and the 1997 fine particulate (PM<sub>2.5</sub>) NAAQS. DNREC does not believe that there is any prohibition in any federal or state law that would prevent it from carrying out its SIP or any portion thereof. Further, DNREC assures EPA that it has, through the State of Delaware General Fund and through the Title V fee program, and will continue to have, funding to carry out its SIP obligations. Further, DNREC believes its funding sources are sufficient to provide adequate personnel for those purposes; however, Delaware may make changes that it believes in its discretion are appropriate, while continuing to fulfill this obligation.

At present Delaware fulfills this obligation by virtue of having adequate personnel and funding through the CAA §105 grant process (federal grant funds), the State of Delaware general fund (state tax revenues), and appropriated special funds collected by the State of Delaware from application fees, permit fees, renewal fees, and civil or administrative penalties or fines. Delaware does not anticipate the need for additional resources beyond those to be appropriated in the above manner to carry out its SIP requirements.

**(F) §110(a)(2)(F) Requirement:** Require, as may be prescribed by the Administrator - (i) the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources, (ii) periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and (iii) correlation of such reports by the State agency with any emission limitations or standards established pursuant to this Act, which reports shall be available at reasonable times for public inspection.

For the 1997 ozone and 1997 PM<sub>2.5</sub> NAAQS, Delaware's SIPs already contains the other elements addressing §§110(a)(F)(i) and (ii) as discussed in the section 1.0 and the table thereto of this document. ~~These also apply to the fine particulate (PM<sub>2.5</sub>) NAAQS. For the fine particulate (PM<sub>2.5</sub>) NAAQS, any remaining applicable requirements under §110(a)(2)(C) will be addressed in future SIP revisions.~~

**Delaware's Plan:** Delaware requires that owners or operators of stationary sources monitor and submit periodic reports on the nature and amounts of emissions and emissions related-date emissions from the sources. This may include the installation, maintenance and replacement of equipment, where appropriate. This information submitted to DNREC is available to the public at reasonable times for public inspection pursuant to Delaware law. Delaware will continue to require reporting of emissions but may make changes that it believes in its discretion are appropriate, while continuing to fulfill this obligation.

Except as specifically exempted by the Delaware Freedom of Information Act, 29 *Del. C.* Chapter 100, Delaware makes all records, reports or information obtained by the Department or referred to at public hearings available to the public pursuant to the provisions of the Delaware Freedom of Information Act, 29 *Del. C.* Chapter 100.

**(G) §110(a)(2)(G) Requirement:** Provide for authority comparable to that in section 303 and adequate contingency plans to implement such authority;<sup>11</sup>

Delaware's SIP contains an emergency episode plan for ozone as discussed in the section 1.0 and the table thereto of this document. For the 1997 fine particulate (PM<sub>2.5</sub>) NAAQS, the emergency episode plan will be updated as required by EPA. ~~addressed in future SIP revisions.~~

**Delaware's Plan:** Delaware has authority comparable to that in section 303 and adequate contingency plans to implement such authority but may make changes that it believes in its discretion are appropriate, while continuing to fulfill this obligation.

~~At present, 7 *Del. C.*, Chapter 60 provides authority comparable to section 303 in that Delaware may seek~~

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10. §128 (a) each plan shall contain requirements that - (1) any board or body which approves permits or enforcement orders shall have at least a majority of members who represent the public interest and do not derive any significant portion of their income from persons subject to permits or enforcement orders, and (2) any potential conflicts of interest by members of such board or body or the head of an executive agency with similar powers be disclosed. A State may adopt any requirements respecting conflicts of interest for such boards or bodies or heads of executive agencies, or any other entities which are more stringent than the requirements of (1) and (2).

## GENERAL NOTICES

~~permanent, preliminary injunctions and temporary restraining orders (7 Del. C. § 6005) and issue cease and desist orders for violations (7 Del. C. § 6018). Under 7 Del. C., § 6003, any unpermitted emission which may cause imminent or substantial danger to public health, safety, welfare or the environment is a violation of 7 Del. C., Chapter 60-7 Del. C. § 6003(a)(1) requires a permit from the Secretary prior to discharging any air contaminant. 7 Del. C. § 6002(2) defines air contaminant essentially as any substance other than uncombined water. 7 Del. C. § 6005 allows the Secretary to seek a preliminary or permanent injunction or temporary restraining order for any discharge of an air contaminant without a permit, and issue cease and desist orders for violations (7 Del. C. § 6018). Thus, it necessarily follows that any discharge of an air contaminant that would cause imminent & substantial endangerment to the health, safety and welfare of the people of the State of Delaware or the environment would constitute a sufficient basis for the Secretary to seek an injunction or temporary restraining order to halt the violation.~~

**§110(a)(2)(H) Requirement:** Provide for revision of such plan - (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard, and (ii) except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to the Administrator that the plan is substantially inadequate to attain the national ambient air quality standard which it implements or to otherwise comply with any additional requirements established under this Act.

**Delaware's Plan:** Delaware will review and revise its SIP from time to time as may be necessary to take account of revisions of such primary or secondary NAAQS or the availability of improved or more expeditious methods of attaining such standard and whenever the Administrator finds on the basis of information available to the Administrator that the plan is substantially inadequate to attain the NAAQS which it implements or to otherwise comply with any additional requirements established under the CAA.

**(I) §110(a)(2)(I) Requirement:** In the case of a plan or plan revision for an area designated as a non-attainment area, meet the applicable requirements of part D (relating to non-attainment areas).

For the 1997 ozone and 1997 PM<sub>2.5</sub> NAAQS, Delaware's SIPs or recent SIP revisions already contain other elements addressing §110(a)(I) as discussed in the section 1.0 and the table thereto of this document. ~~Many of these also apply to the fine particulate (PM<sub>2.5</sub>) NAAQS. For fine the particulate matter NAAQS, the remaining applicable requirements under Part D will be addressed in future SIP revisions.~~

**(J) §110(a)(2)(J) Requirement:** Meet the applicable requirements of section 121 (relating to consultation), section 127 (relating to public notification), and part C (relating to prevention of significant deterioration of air quality and visibility protection).<sup>12</sup>

**Delaware's Plan:** Delaware will meet the applicable requirements of section 121 (relating to consultation), section 127 (relating to public notification), and part C (relating to prevention of significant deterioration of air quality and visibility protection); but may makes changes that it believes in its discretion are appropriate, while continuing to fulfill this obligation. At present, Delaware does so utilizing the following:

- ~~7 DE Admin. Code 1132 Regulation No. 32~~, Transportation Conformity, of the State of Delaware Regulations Governing the Control of Air Pollution provides a legal platform for the various consultation procedures that have been developed between DNREC, DELDOT, and the

11. Sec. 303- Notwithstanding any other provisions of this Act, the Administrator upon receipt of evidence that a pollution source or combination of sources (including moving sources) is presenting an imminent and substantial endangerment to public health or welfare, or the environment, may bring suit on behalf of the United States in the appropriate United States District court to immediately restrain any person causing or contributing to the alleged pollution to stop the emission of air pollutants causing or contributing to such pollution or to take such other action as may be necessary. If it is not practicable to assure prompt protection of public health or welfare or the environment by commencement of such a civil action, the Administrator may issue such orders as may be necessary to protect public health or welfare or the environment. Prior to taking any action under this section, the Administrator shall consult with appropriate State and local authorities and attempt to confirm the accuracy of the information on which the action proposed to be taken is based. Any order issued by the Administrator under this section shall be effective upon issuance and shall remain in effect for a period of not more than 60 days, unless the Administrator brings an action pursuant to the first sentence of this section before the expiration of that period. Whenever the Administrator brings such an action within the 60-day period, such order shall remain in effect for an additional 14 days or for such longer period as may be authorized by the court in which such action is brought.

Metropolitan Planning Organizations (MPOs). The MPOs provide the forum for consultation with local governments. <sup>13</sup> Delaware's MPOs are: (1) WILMAPCO, Kent County MPO, and the Salisbury-Wicomico MPO. Regional planning organizations provide the forum for inter-state consultations. Additionally, consultations with Federal Land Managers are always on-going in accordance with EPA Rules. All SIP revisions undergo public notice and hearing which have allowed for comment by the public which includes local political subdivisions. Delaware believes the public notice and hearing processes also fulfills the section 121 consultation process. The submitted attainment plans and regulations in the approved Delaware SIP specify the organizations responsible for implementing and enforcing the plans.

- DNREC makes real-time and historical air quality information available on its Web site. All relevant SIPs and plans to achieve the NAAQS contain public notification provisions related to air monitoring levels such as Ozone Action Days, Air Quality Action Days, and DNREC's website. DNREC provides extended range air quality forecasts, which give the public advanced notice of air quality events. This advance notice allows the public to limit their exposure to unhealthy air and enact a plan to reduce pollution at home and at work. DNREC forecasts daily ozone and particle levels and issues e-mails to the public, businesses and the media via AirAlerts. AirAlert e-mail forecasts and notifications are free to the public.

For the 1997 ozone and PM<sub>2.5</sub> NAAQS, Delaware's SIPs already contains the other elements addressing §110(a)(J) as discussed in the section 1.0 and the table thereto of this document. ~~For the fine particulate (PM<sub>2.5</sub>) NAAQS, any remaining applicable requirements under §110(a)(2)(J) will be addressed in future SIP revisions.~~

**(K) §110(a)(2)(K) Requirement:** Provide for - (i) the performance of such air quality modeling as the Administrator may prescribe for the purpose of predicting the effect on ambient air quality of any emissions of any air pollutant for which the Administrator has established a national ambient air quality standard, and (ii) the submission, upon request, of data related to such air quality modeling to the Administrator.

For the 1997 ozone and PM<sub>2.5</sub> NAAQS, Delaware's SIPs or recently submitted SIP revisions contains required modeling as discussed in the section 1.0 and the table thereto of this document. ~~For the fine particulate (PM<sub>2.5</sub>) NAAQS, the attainment demonstration is not yet due and will be addressed in future SIP revisions.~~

**Delaware's Plan:** Delaware will continue to perform modeling as required under the CAA to demonstrate attainment), but may makes changes that it believes in its discretion are appropriate, while continuing to fulfill this obligation. Delaware will continue to submit the Air Quality modeling data as part of Delaware's relevant SIP submissions and through federal grant commitments or in other ways that EPA may request.

**(L) §110(a)(2)(L) Requirement:** Require the owner or operator of each major stationary source to pay to the permitting authority, as a condition of any permit required under this Act, a fee sufficient to cover - (i) the reasonable costs of reviewing and acting upon any application for such a permit, and (ii) if the owner or operator receives a permit for such source, the reasonable costs of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action), until such fee requirement is superseded with respect to such sources by the Administrator's approval of a fee program under Title V.

**Delaware's Plan:** In a manner consistent with Delaware law, Delaware will continue to require the owner

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12. §121. - In carrying out requirements for plans to contain - (1) any transportation controls, air quality maintenance plan requirements or preconstruction review of direct sources of pollution, or (2) any measure referred to - (A) in part D), or (B) in part C, and in carrying out the requirements of §113(d), the State shall provide a satisfactory process of consultation with general purpose local governments, designated organizations of elected officials of local governments and any FLM having authority over Federal land to which the State plan applies. Such process shall be in accordance with regulations promulgated by EPA. Only a general purpose unit of local government, regional agency, or council of governments adversely affected by action of EPA approving any portion of a plan may petition for judicial review.

§127. (a) - Each plan shall contain measures to regularly notify the public of when any NAAQS is exceeded or was exceeded during the preceding year, to advise the public of health hazards associated with such pollution, and to enhance awareness of measures which can be taken to prevent the standards from being exceeded and ways in which the public can participate in regulatory and other efforts to improve air quality.

13. Regulation 1132 was submitted as a revision to the Delaware SIP in a separate submittal.



or operator of each major stationary source to pay to the permitting authority, as a condition of any permit required under this Act, a fee sufficient to cover (i) the reasonable costs of reviewing and acting upon any application for such a permit, and (ii) if the owner or operator receives a permit for such source, the reasonable costs of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action), until such fee requirement is superseded with respect to such sources by the Administrator's approval of a fee program under title V pursuant to Delaware law. Delaware currently fulfills this under the enabling authority of 7 Del.C. §6095 to 6099 and fee legislation that currently is renewed every three years. Delaware has a fully approved Title V operating permits program. See paragraphs (b) and (c) under "*Delaware*" in Appendix A to 40 CFR Part 70—Approval Status of State and Local Operating Permits Programs. Delaware may make changes that it believes in its discretion are appropriate, while continuing to fulfill this obligation.

**(M) §110(a)(2)(M) Requirement:** Provide for consultation and participation by local political subdivisions affected by the plan.

**Delaware's Plan:** Delaware will continue to provide for consultation and participation by local political subdivisions affected by the SIP pursuant to the public notice laws found in 7 Del.C. §6006 and 6010 and 29 Del.C. Chapters 10003, 10004 and 10115, as applicable. Furthermore, all SIP revisions undergo public notice and hearing which have allowed for comment by the public which includes local political subdivisions. We believe the public notice and hearing processes fulfill the requirements for consultation with local political subdivisions affected by the SIP.

### **3.0 Conclusion**

Based on the information provided above, Delaware fully complies with the requirements of §110(a)(2)(A) through §110(a)(2)(M).

**DELAWARE RIVER BASIN COMMISSION****NOTICE OF PUBLIC HEARING**

**Summary:** The Commission will hold a public hearing to receive comments on proposed amendments to the Commission's Water Quality Regulations, Water Code and Comprehensive Plan to revise the human health water quality criteria for polychlorinated biphenyls (PCBs) in the Delaware Estuary (DRBC Water Quality Management Zones 2 through 5), extend application of the DRBC's PCB human health water quality criterion to Delaware Bay (DRBC Water Quality Zone 6) and provide for the use of compliance schedules where implementation of a stream quality objective established by the Commission requires a reduction of the pollutant concentration or loading of a discharge to Basin waters.

The **public hearing** will be held at 1:30 p.m. on Thursday, October 8, 2009 at the Commission's office building located at 25 State Police Drive, West Trenton, NJ. As Internet mapping tools are inaccurate for this location, please use the driving directions posted on the Commission's website. The hearing will continue until all those wishing to testify have had an opportunity to do so. Persons wishing to testify at the hearing are asked to register in advance by phoning Ms. Paula Schmitt at 609-883-9500, ext. 224.

**Written comments** will be accepted and must be received by 5:00 p.m. on Monday, October 19, 2009. Written comments may be submitted as follows: if by email, to [paula.schmitt@drbc.state.nj.us](mailto:paula.schmitt@drbc.state.nj.us); if by fax, to Commission Secretary at 609-883-9522; if by U.S. Mail, to Commission Secretary, DRBC, P.O. Box 7360, West Trenton, NJ 08628-0360. In all cases, please include the commenter's name, address and affiliation, if any, in the comment document and "PCB Rulemaking" in the subject line.

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**DEPARTMENT OF EDUCATION****PUBLIC NOTICE**

The State Board of Education will hold its monthly meeting on Thursday, August 20, 2009 at 1:00 p.m. in the Townsend Building, Dover, Delaware.

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**DEPARTMENT OF INSURANCE****EXTENSION OF EMERGENCY ORDER**

**NOW THEREFORE**, pursuant to 29 **Del. C.** § 10119, Emergency Regulation 1212 as it appears in 12 **DE Reg.** 1135-1146 (3/1/09) shall be and is hereby extended until August 25, 2009 or until the proposed amendments to Regulation 1212 are adopted in final form, whichever shall first occur. Any person can file written comments, suggestions, briefs, and compilations of data or other materials concerning the proposed amendment. Any written submission in response to this notice and relevant to the proposed change must be received by the Department of Insurance no later than 4:30 p.m. Monday, August 3, 2009 by delivering said comments to Mitch Crane, Esquire, c/o Delaware Department of Insurance, 841 Silver Lake Boulevard, Dover, DE 19904, or sent by fax to 302.739.2021 or emailed to [mitch.crane@state.de.us](mailto:mitch.crane@state.de.us).

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**DEPARTMENT OF INSURANCE****EXTENSION OF EMERGENCY ORDER**

**NOW THEREFORE**, pursuant to 29 **Del. C.** § 10119, Emergency Regulation 1215 as it appears in 12 **DE Reg.** 1146-1149 (3/1/09) shall be and is hereby extended until August 25, 2009 or until the proposed amendments to Regulation 1215 are adopted in final form, whichever shall first occur. Any person can file written comments, suggestions, briefs, and compilations of data or other materials concerning the proposed amendment. Any written

submission in response to this notice and relevant to the proposed change must be received by the Department of Insurance no later than 4:30 p.m. Monday, August 3, 2009 by delivering said comments to Mitch Crane, Esquire, c/o Delaware Department of Insurance, 841 Silver Lake Boulevard, Dover, DE 19904, or sent by fax to 302.739.2021 or emailed to [mitch.crane@state.de.us](mailto:mitch.crane@state.de.us).

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**DEPARTMENT OF INSURANCE****PUBLIC NOTICE OF PROPOSED CHANGES TO THE DEPARTMENT OF INSURANCE'S REGULATION 607  
RELATING TO DEFENSIVE DRIVING COURSES**

INSURANCE COMMISSIONER KAREN WELDIN STEWART, CIR-ML hereby gives notice of intent to adopt amendments to Department of Insurance Regulation 607 relating to Defensive Driving Courses. The docket number for this proposed amendment is 1145.

The purpose of the proposed amendment to regulation 607 is to update the existing regulation with respect course content, requirements for course and instructor certification, on-line course attendance verification, proof of course completion and notifications to the Division of Motor Vehicles. The text of the proposed amendment is reproduced in the August 2009 edition of the Delaware Register of Regulations. The text can also be viewed at the Delaware Insurance Commissioner's website at: <http://www.delawareinsurance.gov/departments/documents/ProposedRegs/ProposedRegs.shtml>.

The Department of Insurance does not plan to hold a public hearing on the proposed changes. Any person can file written comments, suggestions, briefs, compilations of data or other materials concerning the proposed amendments. Any written submission in response to this notice and relevant to the proposed changes must be received by the Department of Insurance no later than 4:00 p.m., Tuesday September 8, 2009, and should be addressed to Mitch Crane, Esquire, Delaware Department of Insurance, 841 Silver Lake Boulevard, Dover, DE 19904, or sent by fax to 302.739.2021 or email to [mitch.crane@state.de.us](mailto:mitch.crane@state.de.us).

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**DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL  
CONTROL****DIVISION OF AIR AND WASTE MANAGEMENT****1138 Emission Standards for Hazardous Air Pollutants for Source Categories  
PUBLIC NOTICE**

Under Section 112(k) of the 1990 Clean Air Act Amendments, Congress mandated that the EPA identify 30 or more hazardous air pollutants (HAPs) that posed the greatest threat to public health in urban areas, to identify the small area sources that emit those pollutants and to develop regulations to reduce the emission of HAPs. In 1999, the EPA identified 33 HAPs that posed the greatest threat to public health and has, since that time, identified over 60 new area source categories for which regulations are being developed.

In July 2008, the EPA promulgated another of these area source category standards that will affect existing and future Delaware sources; the area source standard for plating and polishing operations under 40 CFR Part 63 Subpart WWWWWW.

Delaware is proposing to amend Regulation 1138 by adding a new Section 10 that covers plating and polishing operations. The purpose of this proposed amendment is to provide increased protection for Delaware citizens against a variety of potential adverse health effects linked to a long term exposure to cadmium, chromium, lead, manganese, or nickel compounds. In addition, all of these compounds, except the manganese compounds, are classified as known or probable human carcinogen by the EPA. The proposed amendment will provide greater consistency between Delaware's air toxics standards and the recently promulgated federal standard (40 CFR Part 63 Subpart WWWWWW) on which this proposed amendment is heavily based. In addition, this amendment proposes to include more health protective requirements that currently exist in similar air standards found in Regulation 1138 and other Delaware air regulations.

Statements and testimony may be presented either orally or in writing at a public hearing to be held on Tuesday, August 25, 2009 beginning at 6:00 PM in the main conference room at the DNREC Air Quality

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Management Office, 715 Grantham Lane (first building on right after turning off Rt. 9), New Castle, DE. Interested parties may submit comments in writing to: Jim Snead, DNREC Air Quality Management Section, 715 Grantham Lane, New Castle, DE 19720.

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**DIVISION OF AIR AND WASTE MANAGEMENT**  
**1301 Regulations Governing Solid Waste**  
**PUBLIC NOTICE**

There are four amendments to update and enhance various sections of the solid waste regulations. The first amendment strikes one redundant requirement for siting new industrial landfill cells in section 6.1.3.8 of the DRGSW. The second amendment updates an exclusion for temporary debris from the Delaware Emergency Management Agency at Transfer Stations in section 10.1.2.6. The third amendment updates and clarifies Financial Assurance criteria in section 4.1.11. The fourth amendment clarifies one exception for transporters in section 7.2.1. These four amendments will help improve understanding and implementation of the solid waste requirements.

The public hearing on the proposed amendments to DRGSW will be held on Thursday, August 20<sup>th</sup> starting at 6:00 p.m. in the Richardson and Robbins Auditorium, 89 Kings Highway, Dover, DE.

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**DIVISION OF WATER RESOURCES**  
**7401 Surface Water Quality Standards**  
**PUBLIC NOTICE**

The Department of Natural Resources and Environmental Control, Division of Water Resources, will conduct a public hearing on September 2, 2009 beginning at 5 p.m., in the auditorium of the Richardson and Robbins Building, 89 Kings Highway, Dover, Delaware, to hear testimony and receive comments on the proposed amendments to the State of Delaware Surface Water Quality Standards, (as amended July 11, 2004).

Additional information, copies of the regulation and supporting documents are available on the internet at this URL: <http://www.dnrec.state.de.us/DNREC2000/Divisions/Water/WaterQuality/Standards.htm>. To request a copy of the proposed revisions to the regulations, please contact David Wolanski at the Watershed Assessment Section at (302) 739-9939 or by email at [david.wolanski@state.de.us](mailto:david.wolanski@state.de.us).

The procedures for public hearings are established in 7 Del.C. §6006 and 29 Del.C. §10117. Inquiries regarding the public hearing should be directed to Robert Haynes at (302) 739-9039. Statements and testimony may be presented orally or in written form at the hearing. It is requested that those interested in presenting statements register in advance by mail or email. The deadline for inclusion of written comments in the hearing record will be announced at the time of the hearing; this deadline will be no earlier than 4:30 p.m. September 11, 2009. Written statements may be presented prior to the hearing and should be addressed to: Robert Haynes, Hearing Officer, DNREC, 89 Kings Highway, Dover, DE 19901. If available, electronic versions of written or oral statements emailed to David Wolanski at [david.wolanski@state.de.us](mailto:david.wolanski@state.de.us) will expedite preparation of a response to comments document after the hearing.

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**DEPARTMENT OF SAFETY AND HOMELAND SECURITY**  
**DIVISION OF STATE POLICE**  
**NOTICE OF PUBLIC COMMENT PERIOD**

Notice is hereby given that the Board of Examiners of Private Investigators and Private Security Agencies, in accordance with **Del.C.** Title 24 Chapter 13 proposes to amend the following Rules: 1.0 Firearm's Policy, 2.0 Nightstick, Pr24, Mace, Peppergas and Handcuffs, 7.0 Employment Notification, 8.0 Criminal Offenses and 9.0 Private Investigators. If you wish to view the complete Regulation, contact Ms. Peggy Anderson at (302) 739-5991.

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Any persons wishing to present views may submit them in writing, by August 31, 2009, to Delaware State Police, Detective Licensing, P.O. Box 430, Dover, DE 19903.

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**DEPARTMENT OF STATE**  
**DIVISION OF PROFESSIONAL REGULATION**  
**1700 Board of Medical Practice**  
**NOTICE OF PUBLIC HEARING**

The Delaware Board of Medical Practice in accordance with 24 Del.C. §1713(a)(12) has proposed changes to its rules and regulations as mandated by HB 236 (codified at 24 Del.C. §1761). The proposal creates a new regulation establishing a schedule of fees that may be charged by a physician when a patient requests a copy of their records to be transferred to another physician and/or wishes to obtain a copy of their own medical records directly from the physician.

A public hearing was held on March 10, 2009 at 3:00 p.m. in the second floor conference room A of the Cannon Building, 861 Silver Lake Boulevard, Dover, Delaware where members of the public offered comment on the regulations as published in the *Delaware Register of Regulations* on February 1, 2009, Vol. 12, Issue 8. The Board initially voted to adopt the rules as proposed but, at their next regularly scheduled public meeting, rescinded the vote and determined to make substantive changes.

A second public hearing will be held on September 1, 2009 at 3:00 p.m. in the second floor conference room A of the Cannon Building, 861 Silver Lake Boulevard, Dover, Delaware where members of the public may offer comments. Anyone wishing to receive a copy of the proposed rules and regulations may obtain a copy from the Delaware Board of Medical Practice, 861 Silver Lake Blvd, Cannon Building, Suite 203, Dover DE 19904. Persons wishing to submit written comments may forward the written comments to the Board at the above address. The final date to receive written comments will be at the public hearing.

The Board will consider promulgating the proposed regulations at its regularly scheduled meeting following the public hearing.

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**DIVISION OF PROFESSIONAL REGULATION**  
**1790 Acupuncture Advisory Council**

**PUBLIC NOTICE**

Consistent with a recent statutory amendments creating an Acupuncture Advisory Council of the Board of Medical Practice ("the Council"), and providing for the licensing and regulation of acupuncture practitioners, the Council in accordance with 24 Del.C. §1796(c) and 29 Del.C. Chapter 101, has developed and is proposing to recommend to the Board of Medical Practice ("the Board") the approval of regulations regarding the practice of acupuncture in the State of Delaware.

A public hearing will be held on Thursday, September 17, 2009 at 3:15 p.m. in the second floor conference room A of the Cannon Building, 861 Silver Lake Boulevard, Dover, Delaware where members of the public may offer comments. Anyone wishing to receive a copy of the proposed rules and regulations may obtain a copy from the Delaware Board of Medical Practice, 861 Silver Lake Blvd, Cannon Building, Suite 203, Dover, DE 19904. Persons wishing to submit written comments may forward the written comments to the Board at the above address. The final date to receive written comments will be at the public hearing.

The Council may vote on whether to promulgate the proposed regulations subject to the approval of the Board immediately following the public hearing.

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**DIVISION OF PROFESSIONAL REGULATION**  
**2700 Board of Professional Land Surveyors**  
**PUBLIC NOTICE**

The Delaware Board of Professional Land Surveyors, in accordance with 24 **Del.C.** §2706(a)(1), has proposed revisions to its rules and regulations. The proposed revisions to the Rules and Regulations are intended to revise the minimum technical standards for licensees, including changes to what are currently known as Mortgage Inspection Plans (MIPs), and clarify an issue regarding license reciprocity.

A public hearing will be held on September 17, 2009 at 8:30 a.m. in the second floor conference room A of the Cannon Building, 861 Silver Lake Boulevard, Dover, Delaware where members of the public can offer comments. Anyone wishing to receive a copy of the proposed rules and regulations may obtain a copy from the Delaware Board of Professional Land Surveyors, 861 Silver Lake Boulevard, Cannon Building, Suite 203, Dover, DE 19904. Persons wishing to submit written comments may forward these to the Board at the above address. The final date to receive written comments will be at the public hearing.

The Board will consider promulgating the proposed regulations at its regularly scheduled meeting following the public hearing.

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