
Delaware Register of Regulations

Issue Date: January 1, 2011

Volume 14 - Issue 7, Pages 592 - 720



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Pursuant to 29 **Del.C.** Chapter 11, Subchapter III, this issue of the *Register* contains all documents required to be published, and received, on or before December 15, 2010.

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The *Delaware Register* will publish any regulations that are proposed to be adopted, amended or repealed and any emergency regulations promulgated.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

CITATION TO THE DELAWARE REGISTER

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

14 **DE Reg.** 24-47 (07/01/10)

Refers to Volume 14, pages 24-47 of the *Delaware Register* issued on July 1, 2010.

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.

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and other interested parties may participate in the process by which administrative regulations are adopted, amended or repealed, and may initiate the process by which the validity and applicability of regulations is determined.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file notice and full text of such proposals, together with copies of the existing regulation being adopted, amended or repealed, with the Registrar for publication in the *Register of Regulations* pursuant to §1134 of this title.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.

INFORMATION ABOUT THE DELAWARE REGISTER OF 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.

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

No action of an agency with respect to the making or consideration of a proposed adoption, amendment or repeal of a regulation shall be subject to review until final agency action on the proposal has been taken. When any regulation is the subject of an enforcement action in the Court, the lawfulness of such regulation may be reviewed by the Court as a defense in the action.

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

CLOSING DATES AND ISSUE DATES FOR THE DELAWARE REGISTER OF REGULATIONS

ISSUE DATE	CLOSING DATE	CLOSING TIME
February 1	January 17	4:30 p.m.
March 1	February 15	4:30 p.m.
April 1	March 15	4:30 p.m.
May 1	April 15	4:30 p.m.
June 1	May 15	4:30 p.m.

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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.

Proposed Regulations

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

DEPARTMENT OF AGRICULTURE
HARNESS RACING COMMISSION

Statutory Authority: 3 Delaware Code, Section 10005 (3 **Del.C.** §10005)
3 **DE Admin. Code** 501

PUBLIC NOTICE**501 Harness Racing Rules and Regulations**

The Delaware Harness Racing Commission, pursuant to 3 **Del.C.** §10005, proposes to change its Rules 2.3.2 and 5.1.22.4. The Commission will hold a public hearing on the proposed rule changes on February 8, 2010. Written comments should be sent to Hugh J. Gallagher, Administrator of Harness Racing, Department of Agriculture, 2320 South DuPont Highway, Dover, DE 19901. Written comments will be accepted for thirty (30) days from the date of publication in the *Register of Regulations* on January 1, 2011.

The proposed changes are for the purpose of updating the Rules and to more accurately reflect current policies, practices and procedures. Copies are published online at the *Register of Regulations* website: http://regulations.delaware.gov/services/current_issue.shtml

A copy is also available for inspection at the Harness Racing Commission office.

501 Harness Racing Rules and Regulations**(Break in Continuity of Sections)****2.0 Commission**

2.1 Purpose

- 2.1.1 The Delaware Harness Racing Commission, created by the Act, Title 4, Chapter 100, of the **Delaware Code**, is charged with implementing, administering and enforcing the Act. It is the intent of the Commission that the rules of the Commission be interpreted in the best interests of the public and the State of Delaware.

- 2.1.2 Through these Rules, the Commission intends to implement its statutory mandate to promulgate and prescribe such rules and regulations as are necessary and proper for the purpose of regulating and overseeing the sport of harness racing, as defined in the Act, within the State of Delaware in the public interest, including the regulation of the conduct of all grooms, drivers and owners and their employees, and the regulation of all harness racing horses entered or to be entered in any harness racing meet authorized by the Commission pursuant to the Act.
- 2.2 General Authority
- 2.2.1 The Commission shall regulate each race meeting and the persons who participate in each race meeting.
- 2.2.2 Pursuant to the authority granted in the Act the Commission may delegate to the Board of Judges all powers and duties necessary to fully implement the purposes of the Act.
- 2.3 Membership And Meetings
- 2.3.1 The Commission consists of 5 members appointed as prescribed by the Act. No member of the Commission shall be licensed or regulated, directly or indirectly, by the Commission, nor shall any member of the Commission have any legal or beneficial interest, direct or indirect, pecuniary or otherwise, in any firm, association or corporation so licensed or regulated or which participates in pari-mutuel meetings in any manner. No member of the Commission shall be a person not of good moral character, nor shall a member of the Commission be a person convicted of, or under indictment for, a felony under the laws of Delaware or any other state, or the United States.
- 2.3.2 The Chairman of the Commission shall be ~~elected by majority vote of the members of the Commission~~ appointed by the Governor. If at any time the Governor has not appointed a Chairman of the Commission, the Chairman of the Commission shall be elected by majority vote of the members of the Commission, with such election to be effective until such time as the Governor has appointed a Chairman of the Commission. The Vice Chairman of the Commission shall be elected annually at the January meeting of the Commission by majority vote of the members of the Commission. The Vice Chairman shall serve as Chairman at any meeting from which the Chairman is absent.
- 2.3.3 The Commission shall meet at the call of the Chairman or of a majority of the members. The Commission shall establish and maintain offices on each Association grounds, and at such other places as the Commission deems appropriate, and shall meet at least monthly during the period when any Association is conducting a harness horse racing meet, and at such other times as deemed necessary. Notice of the meetings must be given and the meetings must be conducted in accordance with the Freedom of Information Act, 29 **Del.C.** Ch. 100.
- 2.3.4 A majority of the Commission constitutes a quorum. When a quorum is present, a motion before the Commission is carried by an affirmative vote of the majority of the Commissioners present at the meeting.
- 2.3.5 To the extent required by 29 **Del.C.** Ch. 101 or by the Act, the Commission rules and orders shall be subject to the Administrative Procedures Act.
- 2.3.6 A Commission member may not act in the name of the Commission on any matter without a majority vote of a quorum of the Commission.

(Break in Continuity within Section)

5.0 Licensees

5.1.22 Conflict of Interest

- 5.1.22.1 The Commission or its designee shall refuse, deny, suspend or revoke the license of a person whose spouse holds a license and which the Commission or judges find to be a conflict of interest.

- 5.1.22.2 A commissioner or Commission employee or racing official shall not be an owner of a horse entered to race, and shall not accept breeder awards at, a race meeting where the Commission has jurisdiction.
- 5.1.22.3 A racing official who is an owner of either the sire or dam of a horse entered to race shall not act as an official with respect to that race.
- 5.1.22.4 A person who is licensed as an owner or trainer, or has any financial interest in a horse registered for racing at a race meeting in Delaware shall not be employed or licensed at that race meeting as a racing official; racetrack managing employee; photo finish operator; racing chemist or testing laboratory employee; ~~provided, further, that a racing official who is the parent, child or sibling of such person shall not officiate on any day when the horse owned or trained, or in which the person has any financial interest, is entered to race at association grounds; provided, however, that a parent, child or sibling acting as a groom for such a horse shall not be deemed to pose a conflict of interest for an official.~~
- 5.1.23 License Presentation
- 5.1.23.1 A person shall present an appropriate license to enter a restricted area.
- 5.1.23.2 The Presiding Judge may require visible display of a license in a restricted area.
- 5.1.23.3 A license may only be used by the person to whom it is issued.

***Please Note: Since the rest of the regulation is not being amended, it is not being published here. A copy of the regulation is available at:**

501 Harness Racing Rules and Regulations

DEPARTMENT OF EDUCATION OFFICE OF THE SECRETARY

Statutory Authority: 14 Delaware Code, Section 122(b) (14 Del.C. §122(b))
14 DE Admin. Code 922

PUBLIC NOTICE

922 Children with Disabilities Subpart A, Purposes and Definitions

Education Impact Analysis Pursuant To 14 Del.C. Section 122(D)

A. Type Of Regulatory Action Required

Amendment to Existing Regulation

B. Synopsis Of Subject Matter Of The Regulation

The Secretary of Education seeks the consent of the State Board of Education to amend 14 DE Admin. Code 922, Children With Disabilities, Subpart A, Purposes and Definitions.

Regulations 922 through 929 address the special education needs of children with disabilities, and implement 14 Del.C. Ch. 31 and Part B of the Individuals With Disabilities Education Act, 20 U.S.C. 1400 et seq. ("IDEA"). The Department of Education adopted Regulation 922 as part of a comprehensive review of Delaware's special education regulations, undertaken in response to changes in federal special education regulations in August 2006 implementing the IDEA.

The Department now proposes to amend Regulation 922 in response to changes made to the federal regulations in December 2008 implementing the IDEA.

The proposed revisions to 14 DE Admin. Code 922 are designed to continue the alignment of state and federal regulations addressing the education of children with disabilities and their families, and to establish the conditions under which school districts, charter schools, and other educational agencies may receive funding for

the education of children with disabilities. 14 DE Admin. Code 922 is also being revised to correct errata and some minor typographical errors.

Please note the IDEA specifically requires the Department of Education notify school districts and other education agencies of any State requirements for the education of children with disabilities that exceed federal requirements. Regulation 922 identifies those additional State requirements by italicizing them in the text of the regulations.

Persons wishing to present their views regarding the proposed amendments may do so in writing by the close of business on or before March 4, 2011 to Martha Toomey, Director, Exceptional Children Resources, Department of Education, at 401 Federal Street, Suite 2, Dover, DE 19901. A copy of this regulation is available from the above address or may be viewed at the Department of Education business office. The proposed regulation is also available by contacting Jennifer Kline, Esq., Education Associate, at the above address, or by email at: jkline@doe.k12.de.us.

C. Impact Criteria

1. Will the amended regulation help improve student achievement as measured against state achievement standards? The proposed amendments address the achievement of children with disabilities, including their achievement measured against state standards.

2. Will the amended regulation help ensure that all students receive an equitable education? The proposed amendments help assure children with disabilities receive equitable educational services.

3. Will the amended regulation help to ensure that all students' health and safety are adequately protected? The proposed amendments do not directly address health and safety issues, but those issues are addressed by regulations already in place.

4. Will the amended regulation help to ensure that all students' legal rights are respected? The proposed amendments specifically ensure and implement the rights of children with disabilities under the IDEA and the provisions of Chapter 31 of Title 14 of the Delaware Code.

5. Will the amended regulation preserve the necessary authority and flexibility of decision making at the local board and school level? The proposed amendments leave decisions about the provision of special education services to the child's local planning team.

6. Will the amended regulation place unnecessary reporting or administrative requirements or mandates upon decision makers at the local board and school levels? The proposed amendments do not require any more reporting than necessary to comply with State statutory and federal requirements addressing the education of children with disabilities.

7. Will the decision making authority and accountability for addressing the subject to be regulated be placed in the same entity? The State and school districts and local educational agencies share authority and accountability for the education of children with disabilities, and the proposed amendments reflect that partnership.

8. Will the amended regulation be consistent with and not an impediment to the implementation of other state educational policies, in particular to state educational policies addressing achievement in the core academic subjects of mathematics, science, language arts and social studies? The proposed amendments clarify the State's alignment with the requirements of the IDEA.

9. Is there a less burdensome method for addressing the purpose of the regulation? The proposed amendments are designed to assure compliance with applicable laws regarding the education of children with disabilities in the most efficient and effective way for the Department, the school districts, and other affected State and local agencies.

10. What is the cost to the State and to the local school boards of compliance with the regulation? Compliance with the IDEA is required as a condition of federal funding.

***Please Note: Due to the size of the proposed regulation, it is not being published here. A copy of the regulation is available at:**

922 Children with Disabilities Subpart A, Purposes and Definitions

OFFICE OF THE SECRETARY

Statutory Authority: 14 Delaware Code, Section 122(b) (14 **Del.C.** §122(b))
14 **DE Admin. Code** 923

PUBLIC NOTICE**923 Children with Disabilities Subpart B General Duties and Eligibility of Agencies****Education Impact Analysis Pursuant To 14 Del.C. Section 122(D)****A. Type Of Regulatory Action Required**

Amendment to Existing Regulation

B. Synopsis Of Subject Matter Of The Regulation

The Secretary of Education seeks the consent of the State Board of Education to amend 14 **DE Admin. Code** 923, Children With Disabilities, Subpart B, General Duties and Eligibility of Agencies.

Regulations 922 through 929 address the special education needs of children with disabilities, and implement 14 **Del.C.** Ch. 31 and Part B of the Individuals With Disabilities Education Act, 20 U.S.C. 1400 et seq. ("IDEA"). The Department of Education adopted Regulation 923 as part of a comprehensive review of Delaware's special education regulations, undertaken in response to changes in federal special education regulations in August 2006 implementing the IDEA.

The proposed revisions to 14 **DE Admin. Code** 923 are designed to continue the alignment of state and federal regulations addressing the education of children with disabilities and their families, and to establish the conditions under which school districts, charter schools, and other educational agencies may receive funding for the education of children with disabilities. 14 **DE Admin. Code** 923 is also being revised to correct errata and some minor typographical errors. The proposed amendments further clarify provisions related to child find duties of school districts and local education agencies and procedural safeguards.

Please note the IDEA specifically requires the Department of Education notify school districts and other education agencies of any State requirements for the education of children with disabilities that exceed federal requirements. Regulation 923 identifies those additional State requirements by italicizing them in the text of the regulations.

Persons wishing to present their views regarding the proposed amendments may do so in writing by the close of business on or before March 4, 2011 to Martha Toomey, Director, Exceptional Children Resources, Department of Education, at 401 Federal Street, Suite 2, Dover, DE 19901. A copy of this regulation is available from the above address or may be viewed at the Department of Education business office. The proposed regulation is also available by contacting Jennifer Kline, Esq., Education Associate, at the above address, or by email at: jkline@doe.k12.de.us.

C. Impact Criteria

1. Will the amended regulation help improve student achievement as measured against state achievement standards? The proposed amendments address the achievement of children with disabilities, including their achievement measured against state standards.

2. Will the amended regulation help ensure that all students receive an equitable education? The proposed amendments help assure children with disabilities receive equitable educational services.

3. Will the amended regulation help to ensure that all students' health and safety are adequately protected? The proposed amendments do not directly address health and safety issues, but those issues are addressed by regulations already in place.

4. Will the amended regulation help to ensure that all students' legal rights are respected? The proposed amendments specifically ensure and implement the rights of children with disabilities under the IDEA and the provisions of Chapter 31 of Title 14 of the Delaware Code.

5. Will the amended regulation preserve the necessary authority and flexibility of decision making at the local board and school level? The proposed amendments leave decisions about the provision of special education services to the child's local planning team.

6. Will the amended regulation place unnecessary reporting or administrative requirements or mandates upon decision makers at the local board and school levels? The proposed amendments do not require any more reporting than necessary to comply with State statutory and federal requirements addressing the education of children with disabilities.

7. Will the decision making authority and accountability for addressing the subject to be regulated be placed in the same entity? The State and school districts and local educational agencies share authority and accountability for the education of children with disabilities, and the proposed amendments reflect that partnership.

8. Will the amended regulation be consistent with and not an impediment to the implementation of other state educational policies, in particular to state educational policies addressing achievement in the core academic subjects of mathematics, science, language arts and social studies? The proposed amendments clarify the State's alignment with the requirements of the IDEA.

9. Is there a less burdensome method for addressing the purpose of the regulation? The proposed amendments are designed to assure compliance with applicable laws regarding the education of children with disabilities in the most efficient and effective way for the Department, the school districts, and other affected State and local agencies.

10. What is the cost to the State and to the local school boards of compliance with the regulation? Compliance with the IDEA is required as a condition of federal funding.

923 Children with Disabilities Subpart B General Duties and Eligibility of Agencies

***Please Note: Due to the size of the proposed regulation, it is not being published here. A copy of the regulation is available at:**

[923 Children with Disabilities Subpart B General Duties and Eligibility of Agencies](#)

OFFICE OF THE SECRETARY

Statutory Authority: 14 Delaware Code, Section 122(b) (14 **Del.C.** §122(b))
14 **DE Admin. Code** 924

PUBLIC NOTICE

924 Children with Disabilities Subpart C Local Educational Agency Eligibility

Education Impact Analysis Pursuant To 14 Del.C. Section 122(D)

A. Type Of Regulatory Action Required

Amendment to Existing Regulation

B. Synopsis Of Subject Matter Of The Regulation

The Secretary of Education seeks the consent of the State Board of Education to amend 14 **DE Admin. Code** 924, Children With Disabilities, Subpart C, Local Educational Agency Eligibility.

Regulations 922 through 929 address the special education needs of children with disabilities, and implement 14 **Del.C.** Ch. 31 and Part B of the Individuals With Disabilities Education Act, 20 U.S.C. 1400 et seq. ("IDEA"). The Department of Education adopted Regulation 924 as part of a comprehensive review of Delaware's special education regulations, undertaken in response to changes in federal special education regulations in August 2006 implementing the IDEA.

The proposed revisions to 14 **DE Admin. Code** 924 are designed to continue the alignment of state and federal regulations addressing the education of children with disabilities and their families, and to establish the conditions under which school districts, charter schools, and other educational agencies may receive funding for the education of children with disabilities. 14 **DE Admin. Code** 924 is also being revised to correct errata and some minor typographical errors.

Please note the IDEA specifically requires the Department of Education notify school districts and other education agencies of any State requirements for the education of children with disabilities that exceed federal requirements. Regulation 924 identifies those additional State requirements by italicizing them in the text of the regulations.

Persons wishing to present their views regarding the proposed amendments may do so in writing by the close of business on or before March 4, 2011 to Martha Toomey, Director, Exceptional Children Resources, Department of Education, at 401 Federal Street, Suite 2, Dover, DE 19901. A copy of this regulation is available from the above address or may be viewed at the Department of Education business office. The proposed regulation is also available by contacting Jennifer Kline, Esq., Education Associate, at the above address, or by email at: jkline@doe.k12.de.us.

C. Impact Criteria

1. Will the amended regulation help improve student achievement as measured against state achievement standards? The proposed amendments address the achievement of children with disabilities, including their achievement measured against state standards.

2. Will the amended regulation help ensure that all students receive an equitable education? The proposed amendments help assure children with disabilities receive equitable educational services.

3. Will the amended regulation help to ensure that all students' health and safety are adequately protected? The proposed amendments do not directly address health and safety issues, but those issues are addressed by regulations already in place.

4. Will the amended regulation help to ensure that all students' legal rights are respected? The proposed amendments specifically ensure and implement the rights of children with disabilities under the IDEA and the provisions of Chapter 31 of Title 14 of the Delaware Code.

5. Will the amended regulation preserve the necessary authority and flexibility of decision making at the local board and school level? The proposed amendments leave decisions about the provision of special education services to the child's local planning team.

6. Will the amended regulation place unnecessary reporting or administrative requirements or mandates upon decision makers at the local board and school levels? The proposed amendments do not require any more reporting than necessary to comply with State statutory and federal requirements addressing the education of children with disabilities.

7. Will the decision making authority and accountability for addressing the subject to be regulated be placed in the same entity? The State and school districts and local educational agencies share authority and accountability for the education of children with disabilities, and the proposed amendments reflect that partnership.

8. Will the amended regulation be consistent with and not an impediment to the implementation of other state educational policies, in particular to state educational policies addressing achievement in the core academic subjects of mathematics, science, language arts and social studies? The proposed amendments clarify the State's alignment with the requirements of the IDEA.

9. Is there a less burdensome method for addressing the purpose of the regulation? The proposed amendments are designed to assure compliance with applicable laws regarding the education of children with disabilities in the most efficient and effective way for the Department, the school districts, and other affected State and local agencies.

10. What is the cost to the State and to the local school boards of compliance with the regulation? Compliance with the IDEA is required as a condition of federal funding.

924 Children with Disabilities Subpart C Local Educational Agency Eligibility

***Please Note:** Due to the size of the proposed regulation, it is not being published here. A copy of the regulation is available at:

924 Children with Disabilities Subpart C Local Educational Agency Eligibility

OFFICE OF THE SECRETARY

Statutory Authority: 14 Delaware Code, Section 122(b) (14 Del.C. §122(b))
14 DE Admin. Code 925

PUBLIC NOTICE

925 Children with Disabilities Subpart D, Evaluations, Eligibility Determination, Individualized Education Programs

Education Impact Analysis Pursuant To 14 Del.C. Section 122(D)

A. Type Of Regulatory Action Required

Amendment to Existing Regulation

B. Synopsis Of Subject Matter Of The Regulation

The Secretary of Education seeks the consent of the State Board of Education to amend 14 DE Admin. Code 925, Children With Disabilities, Subpart D, Evaluations, Eligibility Determinations, Individualized Education Programs.

Regulations 922 through 929 address the special education needs of children with disabilities, and implement 14 Del. C. Ch. 31 and Part B of the Individuals With Disabilities Education Act, 20 U.S.C. 1400 et seq. ("IDEA"). The Department of Education adopted Regulation 925 as part of a comprehensive review of Delaware's special education regulations, undertaken in response to changes in federal special education regulations in August 2006 implementing the IDEA.

The Department now proposes to amend Regulation 925 in response to changes made to the federal regulations in December 2008 implementing the IDEA.

The proposed revisions to 14 DE Admin. Code 925 are designed to continue the alignment of state and federal regulations addressing the education of children with disabilities and their families, and to establish the conditions under which school districts, charter schools, and other educational agencies may receive funding for the education of children with disabilities. 14 DE Admin. Code 925 is also being revised to correct errata and some minor typographical errors. The proposed amendments further clarify provisions, including transition services and planning, and the procedural safeguards available to parents.

Please note the IDEA specifically requires the Department of Education notify school districts and other education agencies of any State requirements for the education of children with disabilities that exceed federal requirements. Regulation 925 identifies those additional State requirements by italicizing them in the text of the regulations.

Persons wishing to present their views regarding the proposed amendments may do so in writing by the close of business on or before March 4, 2011 to Martha Toomey, Director, Exceptional Children Resources, Department of Education, at 401 Federal Street, Suite 2, Dover, DE 19901. A copy of this regulation is available from the above address or may be viewed at the Department of Education business office. The proposed regulation is also available by contacting Jennifer Kline, Esq., Education Associate, at the above address, or by email at: jkline@doe.k12.de.us.

C. Impact Criteria

1. Will the amended regulation help improve student achievement as measured against state achievement standards? The proposed amendments address the achievement of children with disabilities, including their achievement measured against state standards.
2. Will the amended regulation help ensure that all students receive an equitable education? The proposed amendments help assure children with disabilities receive equitable educational services.
3. Will the amended regulation help to ensure that all students' health and safety are adequately protected? The proposed amendments do not directly address health and safety issues, but those issues are addressed by regulations already in place.
4. Will the amended regulation help to ensure that all students' legal rights are respected? The proposed amendments specifically ensure and implement the rights of children with disabilities under the IDEA and the provisions of Chapter 31 of Title 14 of the Delaware Code.
5. Will the amended regulation preserve the necessary authority and flexibility of decision making at the local board and school level? The proposed amendments leave decisions about the provision of special education services to the child's local planning team.
6. Will the amended regulation place unnecessary reporting or administrative requirements or mandates upon decision makers at the local board and school levels? The proposed amendments do not require any more reporting than necessary to comply with State statutory and federal requirements addressing the education of children with disabilities.
7. Will the decision making authority and accountability for addressing the subject to be regulated be placed in the same entity? The State and school districts and local educational agencies share authority and accountability for the education of children with disabilities, and the proposed amendments reflect that partnership.
8. Will the amended regulation be consistent with and not an impediment to the implementation of other state educational policies, in particular to state educational policies addressing achievement in the core academic subjects of mathematics, science, language arts and social studies? The proposed amendments clarify the State's alignment with the requirements of the IDEA.
9. Is there a less burdensome method for addressing the purpose of the regulation? The proposed amendments are designed to assure compliance with applicable laws regarding the education of children with disabilities in the most efficient and effective way for the Department, the school districts, and other affected State and local agencies.
10. What is the cost to the State and to the local school boards of compliance with the regulation? Compliance with the IDEA is required as a condition of federal funding.

925 Children with Disabilities Subpart D, Evaluations, Eligibility Determination, Individualized Education Programs

***Please Note: Due to the size of the proposed regulation, it is not being published here. A copy of the regulation is available at:**

925 Children with Disabilities Subpart D

OFFICE OF THE SECRETARY

Statutory Authority: 14 Delaware Code, Section 122(b) (14 Del.C. §122(b))
14 DE Admin. Code 926

PUBLIC NOTICE

926 Children with Disabilities Subpart E Procedural Safeguards for Parents and Children

Education Impact Analysis Pursuant To 14 Del.C. Section 122(D)

A. Type Of Regulatory Action Required

Amendment to Existing Regulation

B. Synopsis Of Subject Matter Of The Regulation

The Secretary of Education seeks the consent of the State Board of Education to amend 14 **DE Admin. Code** 926, Children With Disabilities, Subpart E, Procedural Safeguards for Parents and Children.

Regulations 922 through 929 address the special education needs of children with disabilities, and implement 14 Del. C. Ch. 31 and Part B of the Individuals With Disabilities Education Act, 20 U.S.C. 1400 et seq. ("IDEA"). The Department of Education adopted Regulation 926 as part of a comprehensive review of Delaware's special education regulations, undertaken in response to changes in federal special education regulations in August 2006 implementing the IDEA.

The proposed revisions to 14 **DE Admin. Code** 926 are designed to continue the alignment of state and federal regulations addressing the education of children with disabilities and their families, and to establish the conditions under which school districts, charter schools, and other educational agencies may receive funding for the education of children with disabilities. 14 **DE Admin. Code** 926 is also being revised to correct errata and some minor typographical errors. The proposed amendments further clarify provisions, related to the procedural safeguards available to parents.

Please note the IDEA specifically requires the Department of Education notify school districts and other education agencies of any State requirements for the education of children with disabilities that exceed federal requirements. Regulation 926 identifies those additional State requirements by italicizing them in the text of the regulations.

Persons wishing to present their views regarding the proposed amendments may do so in writing by the close of business on or before March 4, 2011 to Martha Toomey, Director, Exceptional Children Resources, Department of Education, at 401 Federal Street, Suite 2, Dover, DE 19901. A copy of this regulation is available from the above address or may be viewed at the Department of Education business office. The proposed regulation is also available by contacting Jennifer Kline, Esq., Education Associate, at the above address, or by email at: jkline@doe.k12.de.us.

C. Impact Criteria

1. Will the amended regulation help improve student achievement as measured against state achievement standards? The proposed amendments address the achievement of children with disabilities, including their achievement measured against state standards.

2. Will the amended regulation help ensure that all students receive an equitable education? The proposed amendments help assure children with disabilities receive equitable educational services.

3. Will the amended regulation help to ensure that all students' health and safety are adequately protected? The proposed amendments do not directly address health and safety issues, but those issues are addressed by regulations already in place.

4. Will the amended regulation help to ensure that all students' legal rights are respected? The proposed amendments specifically ensure and implement the rights of children with disabilities under the IDEA and the provisions of Chapter 31 of Title 14 of the Delaware Code.

5. Will the amended regulation preserve the necessary authority and flexibility of decision making at the local board and school level? The proposed amendments leave decisions about the provision of special education services to the child's local planning team.

6. Will the amended regulation place unnecessary reporting or administrative requirements or mandates upon decision makers at the local board and school levels? The proposed amendments do not require any more reporting than necessary to comply with State statutory and federal requirements addressing the education of children with disabilities.

7. Will the decision making authority and accountability for addressing the subject to be regulated be placed in the same entity? The State and school districts and local educational agencies share authority and accountability for the education of children with disabilities, and the proposed amendments reflect that partnership.

8. Will the amended regulation be consistent with and not an impediment to the implementation of other state educational policies, in particular to state educational policies addressing achievement in the core academic subjects of mathematics, science, language arts and social studies? The proposed amendments clarify the State's alignment with the requirements of the IDEA.

9. Is there a less burdensome method for addressing the purpose of the regulation? The proposed amendments are designed to assure compliance with applicable laws regarding the education of children with disabilities in the most efficient and effective way for the Department, the school districts, and other affected State and local agencies.

10. What is the cost to the State and to the local school boards of compliance with the regulation? Compliance with the IDEA is required as a condition of federal funding.

926 Children with Disabilities Subpart E Procedural Safeguards for Parents and Children

***Please Note: Due to the size of the proposed regulation, it is not being published here. A copy of the regulation is available at:**

926 Children with Disabilities Subpart E Procedural Safeguards for Parents and Children

OFFICE OF THE SECRETARY

Statutory Authority: 14 Delaware Code, Section 122(b) (14 Del.C. §122(b))
14 DE Admin. Code 927

PUBLIC NOTICE

927 Children with Disabilities Subpart F, Monitoring, Enforcement and Confidentiality of Information

Education Impact Analysis Pursuant To 14 Del.C. Section 122(D)

A. Type Of Regulatory Action Required

Amendment to Existing Regulation

B. Synopsis Of Subject Matter Of The Regulation

The Secretary of Education seeks the consent of the State Board of Education to amend 14 DE Admin. Code 927, Children With Disabilities, Subpart F, Monitoring, Enforcement and Confidentiality of Information.

Regulations 922 through 929 address the special education needs of children with disabilities, and implement 14 Del.C. Ch. 31 and Part B of the Individuals With Disabilities Education Act, 20 U.S.C. 1400 et seq. ("IDEA"). The Department of Education adopted Regulation 927 as part of a comprehensive review of Delaware's special education regulations, undertaken in response to changes in federal special education regulations in August 2006 implementing the IDEA.

The proposed revisions to 14 DE Admin. Code 927 are designed to continue the alignment of state and federal regulations addressing the education of children with disabilities and their families, and to establish the conditions under which school districts, charter schools, and other educational agencies may receive funding for the education of children with disabilities. 14 DE Admin. Code 927 is also being revised to correct errata and some minor typographical errors. The proposed amendments further clarify provisions related to the Department's monitoring duties.

Please note the IDEA specifically requires the Department of Education notify school districts and other education agencies of any State requirements for the education of children with disabilities that exceed federal requirements. Regulation 927 identifies those additional State requirements by italicizing them in the text of the regulations.

Persons wishing to present their views regarding the proposed amendments may do so in writing by the close of business on or before March 4, 2011 to Martha Toomey, Director, Exceptional Children Resources, Department of Education, at 401 Federal Street, Suite 2, Dover, DE 19901. A copy of this regulation is available from the above address or may be viewed at the Department of Education business office. The proposed regulation is also available by contacting Jennifer Kline, Esq., Education Associate, at the above address, or by email at: jkline@doe.k12.de.us.

C. Impact Criteria

1. Will the amended regulation help improve student achievement as measured against state achievement standards? The proposed amendments address the achievement of children with disabilities, including their achievement measured against state standards.

2. Will the amended regulation help ensure that all students receive an equitable education? The proposed amendments help assure children with disabilities receive equitable educational services.

3. Will the amended regulation help to ensure that all students' health and safety are adequately protected? The proposed amendments do not directly address health and safety issues, but those issues are addressed by regulations already in place.

4. Will the amended regulation help to ensure that all students' legal rights are respected? The proposed amendments specifically ensure and implement the rights of children with disabilities under the IDEA and the provisions of Chapter 31 of Title 14 of the Delaware Code.

5. Will the amended regulation preserve the necessary authority and flexibility of decision making at the local board and school level? The proposed amendments leave decisions about the provision of special education services to the child's local planning team.

6. Will the amended regulation place unnecessary reporting or administrative requirements or mandates upon decision makers at the local board and school levels? The proposed amendments do not require any more reporting than necessary to comply with State statutory and federal requirements addressing the education of children with disabilities.

7. Will the decision making authority and accountability for addressing the subject to be regulated be placed in the same entity? The State and school districts and local educational agencies share authority and accountability for the education of children with disabilities, and the proposed amendments reflect that partnership.

8. Will the amended regulation be consistent with and not an impediment to the implementation of other state educational policies, in particular to state educational policies addressing achievement in the core academic subjects of mathematics, science, language arts and social studies? The proposed amendments clarify the State's alignment with the requirements of the IDEA.

9. Is there a less burdensome method for addressing the purpose of the regulation? The proposed amendments are designed to assure compliance with applicable laws regarding the education of children with disabilities in the most efficient and effective way for the Department, the school districts, and other affected State and local agencies.

10. What is the cost to the State and to the local school boards of compliance with the regulation? Compliance with the IDEA is required as a condition of federal funding.

927 Children with Disabilities Subpart F, Monitoring, Enforcement and Confidentiality of Information

***Please Note: Due to the size of the proposed regulation, it is not being published here. A copy of the regulation is available at:**

927 Children with Disabilities Subpart F, Monitoring, Enforcement and Confidentiality of Information

OFFICE OF THE SECRETARY

Statutory Authority: 14 Delaware Code, Section 122(b) (14 **Del.C.** §122(b))
14 **DE Admin. Code** 928

PUBLIC NOTICE**928 Children with Disabilities Subpart G Use and Administration of Funds****Education Impact Analysis Pursuant To 14 Del.C. Section 122(D)****A. Type Of Regulatory Action Required**

Amendment to Existing Regulation

B. Synopsis Of Subject Matter Of The Regulation

The Secretary of Education seeks the consent of the State Board of Education to amend 14 **DE Admin. Code** 928, Children With Disabilities, Subpart G, Use and Administration of Funds.

Regulations 922 through 929 address the special education needs of children with disabilities, and implement 14 **Del.C.** Ch. 31 and Part B of the Individuals With Disabilities Education Act, 20 U.S.C. 1400 et seq. ("IDEA"). The Department of Education adopted Regulation 928 as part of a comprehensive review of Delaware's special education regulations, undertaken in response to changes in federal special education regulations in August 2006 implementing the IDEA.

The proposed revisions to 14 **DE Admin. Code** 928 are designed to continue the alignment of state and federal regulations addressing the education of children with disabilities and their families, and to establish the conditions under which school districts, charter schools, and other educational agencies may receive funding for the education of children with disabilities. 14 **DE Admin. Code** 928 is also being revised to remove the reference to a specific monitoring handbook which is no longer in use by the Department.

Please note the IDEA specifically requires the Department of Education notify school districts and other education agencies of any State requirements for the education of children with disabilities that exceed federal requirements. Regulation 928 identifies those additional State requirements by italicizing them in the text of the regulations.

Persons wishing to present their views regarding the proposed amendments may do so in writing by the close of business on or before March 4, 2011 to Martha Toomey, Director, Exceptional Children Resources, Department of Education, at 401 Federal Street, Suite 2, Dover, DE 19901. A copy of this regulation is available from the above address or may be viewed at the Department of Education business office. The proposed regulation is also available by contacting Jennifer Kline, Esq., Education Associate, at the above address, or by email at: jkline@doe.k12.de.us.

C. Impact Criteria

1. Will the amended regulation help improve student achievement as measured against state achievement standards? The proposed amendments address the achievement of children with disabilities, including their achievement measured against state standards.

2. Will the amended regulation help ensure that all students receive an equitable education? The proposed amendments help assure children with disabilities receive equitable educational services.

3. Will the amended regulation help to ensure that all students' health and safety are adequately protected? The proposed amendments do not directly address health and safety issues, but those issues are addressed by regulations already in place.

4. Will the amended regulation help to ensure that all students' legal rights are respected? The proposed amendments specifically ensure and implement the rights of children with disabilities under the IDEA and the provisions of Chapter 31 of Title 14 of the Delaware Code.

5. Will the amended regulation preserve the necessary authority and flexibility of decision making at the local board and school level? The proposed amendments leave decisions about the provision of special education services to the child's local planning team.

6. Will the amended regulation place unnecessary reporting or administrative requirements or mandates upon decision makers at the local board and school levels? The proposed amendments do not require any more reporting than necessary to comply with State statutory and federal requirements addressing the education of children with disabilities.

7. Will the decision making authority and accountability for addressing the subject to be regulated be placed in the same entity? The State and school districts and local educational agencies share authority and accountability for the education of children with disabilities, and the proposed amendments reflect that partnership.

8. Will the amended regulation be consistent with and not an impediment to the implementation of other state educational policies, in particular to state educational policies addressing achievement in the core academic subjects of mathematics, science, language arts and social studies? The proposed amendments clarify the State's alignment with the requirements of the IDEA.

9. Is there a less burdensome method for addressing the purpose of the regulation? The proposed amendments are designed to assure compliance with applicable laws regarding the education of children with disabilities in the most efficient and effective way for the Department, the school districts, and other affected State and local agencies.

10. What is the cost to the State and to the local school boards of compliance with the regulation? Compliance with the IDEA is required as a condition of federal funding.

928 Children with Disabilities Subpart G Use and Administration of Funds

***Please Note: Due to the size of the proposed regulation, it is not being published here. A copy of the regulation is available at:**

928 Children with Disabilities Subpart G Use and Administration of Funds

DEPARTMENT OF HEALTH AND SOCIAL SERVICES DIVISION OF MEDICAID AND MEDICAL ASSISTANCE

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

PUBLIC NOTICE

Long-Term Care Program – Pre-Admission Screening and Resident Review

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 Medicaid and Medical Assistance (DMMA) is amending Long-Term Care program policies in the Division of Social Services Manual (DSSM) regarding *Pre-Admission Screening and Resident Review*.

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, Planning & Policy Development Unit, Division of Medicaid and Medical Assistance, 1901 North DuPont Highway, P.O. Box 906, New Castle, Delaware 19720-0906 or by fax to 302-255-4425 by January 31, 2011.

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 PROPOSAL

The proposal amends the Division of Social Services Manual (DSSM) regarding the Long-Term Care Program, specifically, *Pre-Admission Screening and Resident Review*.

Statutory Authority

- The Omnibus Budget Reconciliation Act of 1987
- Social Security Act §1919(e)(7), *State requirements for preadmission screening and resident review*.
- 42 CFR §§483.100 – 483.116, *Preadmission Screening and Annual review of Mentally Ill and Mentally Retarded Individuals*

Background

The Omnibus Reconciliation Act of 1987 (OBRA) and P.L. 100-203, Section 4211(c)(7), and OBRA 1990 contain provisions with major implications for persons with mental illness or mental retardation who are applying to or residing in a nursing facility. The provisions were designed to eliminate the practice of inappropriately placing persons with mental illness, mental retardation and related conditions in Medicaid-certified nursing facilities.

Specifically, the PASRR program must ensure that the following conditions are met.

- That no person may be admitted to a Medicaid-certified nursing facility without first being screened for mental illness and mental retardation. This provision applies to the source of nursing facility placement.
- That as a result of this preadmission screening, referred to as the Level I, persons who appear to have a mental illness, mental retardation or related condition will undergo additional screening, referred to as the Level II, to determine if their needs can be met safely in a Medicaid certified nursing facility, with or without specialized services.

Public Law 104-315, signed into law on October 19, 1996, amends Title XIX of the Social Security Act to repeal the requirement for an annual resident review. The amendment requires nursing facilities to notify the state mental health or mental retardation authority, as applicable, of a significant change in the physical or mental condition of a resident who has a serious mental illness or mental retardation. The change in condition must affect either the resident's need for continued nursing facility placement or for specialized services. A review and determination under Section 1919(e)(7) of the Act must be done promptly after the nursing facility notifies the state mental health or mental retardation authority of the significant change in condition.

Summary of Proposed Change

The Division of Medicaid and Medical Assistance (DMMA) proposes to amend DSSM 20102 to add language at new **DSSM 20102.3**, *Pre-Admission Screening and Resident Review Overview* and new **DSSM 20102.3.1**, *Pre-Admission Screening and Resident Reviews* to reflect current Medicaid policy regarding preadmission screening and resident review (PASRR) for all persons applying for admission to or residing in a nursing facility. The addition of this new rule is consistent with current PASRR evaluation policy and procedures that determines whether (1) the person requires nursing facility level of care and, if so, (2) whether the person also requires specialized services (active treatment).

Fiscal Impact Statement

This revision imposes no increase in cost on the General Fund.

DMMA PROPOSED REGULATION #10-55**REVISION:****PAS POL 20102.3 PRE-ADMISSION SCREENING AND RESIDENT REVIEWS (PASRR) OVERVIEW**

By Federal mandate, all individuals applying for placement in a Medicaid certified nursing facility, regardless of pay source, must have a Level I Pre-Admission Screening and Resident Review (PASRR) for Mental Illness (MI) or Mental Retardation (MR).

Based on results of a Level I PASRR Screening, the PAS RN may determine that further screening, a Level II PASRR, is warranted. A Level II PASRR evaluates clients with MI and MR and determines if nursing home placement, either with or without specialized services, is appropriate. In addition to the PAS RN, an Independent Contracted Psychiatrist also makes placement recommendations. However, the final decision on appropriate placement for individuals with MI or MR is made by the State Mental Health Authority for MI or the Division of Developmental Disabilities Services for MR.

PAS POL 20102.3.1 PRE-ADMISSION SCREENING AND RESIDENT REVIEWS (PASRR)

This applies to all nursing home applicants or residents of a Medicaid certified nursing facility (NF) regardless of payment source or diagnoses.

1. DMMA is Responsible for PASRR Oversight

DMMA will assure PASRR program operates in accordance with federal regulations.

2. A Level I PASRR Screening is completed on all residents or potential residents of a Medicaid certified Nursing home.

A Level I screening is the process of identifying individuals who are suspected of having a mental illness or mental retardation or if categorical determinations are met.

The Nursing Facility is responsible for completing the Level I screening for non-Medicaid individuals.

The Division of Medicaid and Medical Assistance is responsible for completing the Level I screening for Medicaid and potential Medicaid individuals when notified.

3. Determination is made regarding the need for a Level II PASRR screening.

Based on the Level I screening, the individual will meet one of three categories:

- No indication of mental illness/mental retardation/related condition – nursing home admission/continued stay is appropriate - No further evaluation is needed.
- There are indicators of mental illness/mental retardation/related condition however individual meets any of the following Physician's Exemption Criteria:
 - Primary Diagnosis of Dementia or related disorder.
 - Convalescent Care not to exceed 30 days - PAS nurses will track this exemption and initiate Level II PASRR evaluation prior to expiration if continued NF stay is warranted.
 - Terminal Illness – a life expectancy of 6 months or less if the illness runs its normal course.
 - Medical dependency with a severe physical illness.

No further evaluation is needed at this time.

- There are indicators of mental illness, mental retardation/related conditions – Needs complete PASRR Assessment (Level II).

4. DMMA will coordinate the Level II screening for all Medicaid and non-Medicaid individuals.

DMMA PAS nurse will gather data for Level II PASRR screening.

Data is reviewed with DMMA Nurse Supervisor for approval to continue with the Level II screening.

5. The individual and/or legal representatives must receive written notice that further evaluation is needed.

The notice must inform them that the individual is being referred for Level II Evaluation to DSAMH due to mental illness indicators or to DDDS due to mental retardation.

6. An Independent Psychiatric Consultant (IPC) will complete the Level II Evaluation for those with mental illness/indicators.

The IPC will assess individual and review documentation to verify whether or not there is a serious MI.

PROPOSED REGULATIONS

The Level II evaluation may be terminated at any time if the evaluator determines that no Mental Illness is present.

7. DDDS will complete the Level II Evaluation for those with mental retardation/indicators.

The Level II evaluation may be terminated at any time if the evaluator determines that no Mental Retardation is present.

8. DSAMH or DDDS Determines Need For Specialized Services and /or NF Services.

DSAMH will review IPC's recommendations and determine need for Specialized Services and/or NF services.

9. DMMA is notified by DSAMH/DDDS of final determination.

10. DMMA will send final determination letter to:

- Individual/applicant;
- Legal Representative;
- Admitting or retaining NF;
- Attending Physician;
- Discharging hospital – if exemption is not applicable.

DIVISION OF SOCIAL SERVICES

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

PUBLIC NOTICE

DSSM: Fair Hearing Practices and Procedures

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 the Division of Social Services Manual (DSSM) regarding *Fair Hearing Practices and Procedures*.

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 January 31, 2011.

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 CHANGES

The proposed changes described below amend administrative policies in the Division of Social Services Manual (DSSM) regarding *Fair Hearing Practices and Procedures*.

Statutory Authority

7 CFR §273.15, *Fair Hearings*

7 CFR §271.7, *Allotment reduction procedures*

42 CFR §431.206, *Informing applicants and recipients*
42 CFR §431.213, *Exceptions from advance notice*
42 CFR §431.220, *When a hearing is required*
42 CFR §431.221, *Request for a hearing*
42 CFR §431.223, *Denial or dismissal of request for hearing*
42 CFR §431.230, *Basis and purpose*
42 CFR §431.241, *Matters to be considered at hearing*
42 CFR §431.242, *Procedural rights of the applicant or recipient*
42 CFR §431.243, *Parties in cases involving an eligibility determination*
42 CFR §431.244, *Hearing decisions*
42 CFR §431.245, *Notifying the applicant or recipient of a State agency decision*
42 CFR §438.408, *Resolution and notification: Grievances and appeals*
45 CFR §205.10, *Hearings*

Summary of Proposed Changes

These rule changes are being made to simplify language and re-order content for clarity and ease of use. Specifically, the following policy sections are reformatted and reworded for clarity with no change in content:

DSSM 5001, *Fair Hearing General Practices*
DSSM 5100, *Legal Base*
DSSM 5200, *Statewide Fair Hearings*
DSSM 5300, *Notices*
DSSM 5301, *Adequate and Timely Notice to Recipients*
DSSM 5302, *Exemptions: TANF, GA, Medicaid, EA, Child Care*
DSSM 5303, *Mass Review Actions*
DSSM 5304, *Jurisdiction*
DSSM 5304.1, *Jurisdiction for PASARR Hearings*
DSSM 5304.3, *Jurisdiction for Medicaid Managed Care Cases*
DSSM 5304.4, *Energy Assistance Program Hearings*
DSSM 5304.5, *Jurisdiction for Hearings over Medicaid Program Services*
DSSM 5305, *Time Limits*
DSSM 5307, *Dismissal of Requests*
DSSM 5308, *Prohibition Against Termination*
DSSM 5309, *Timely Action on Food Stamp Benefit Hearings*
DSSM 5310, *Clarification Conference*
DSSM 5311, *Notification of Time and Place of Hearing*
DSSM 5312, *Responses to Hearing Requests*
DSSM 5400, *Fair Hearing Requirements*
DSSM 5401, *Hearing on Actions*
DSSM 5402, *Hearing on Decisions*
DSSM 5403, *Availability of Documents and Records*
DSSM 5404, *Appellant's Opportunities at a Hearing*
DSSM 5405, *Fair Hearing Procedures*
DSSM 5406, *Powers and Duties*
DSSM 5407, *Presenter's Role; and,*
DSSM 5500, *Decisions by the Final Hearing Authority.*

In addition:

- 1) DSSM 5100, *Legal Base*: citations were added to specific sections so the section on *Legal Base* is no longer needed.
- 2) DSSM 5301, *Adequate and Timely Notice to Recipients*: combined with section DSSM 5300, *Notices*.
- 3) DSSM 5303, *Mass Review Actions*: combined with section DSSM 5302, *Exemptions: TANF, GA, Medicaid, EA, Child Care*; where out dated information about monthly reporting was removed from DSSM 5302.
- 4) DSSM 5405, *Fair Hearing Procedures* and DSSM 5407, *Presenter's Role*: removed and will be re-issued in a separate document that will be posted on the agency web page.

***Please Note: Due to the size of the proposed regulation, it is not being published here. A copy of the regulation is available at:**

DSSM: Fair Hearing Practices and Procedures

DIVISION OF SOCIAL SERVICES

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

PUBLIC NOTICE

Food Supplement Program

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 policies in the Division of Social Services Manual (DSSM) regarding the Food Supplement Program regarding *Mandatory Verification*.

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 Friday, January 31, 2010.

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 CHANGES

The proposal described below amends policies in the Division of Social Services Manual (DSSM) regarding the Food Supplement Program, specifically, *Mandatory Verification*.

Statutory Authority

7 CFR §273.2(f)(1), *Mandatory verification*

Summary of Proposed Changes

DSSM 9032: *Mandatory Requiring Verification*: The purpose and effect of the proposed amendment is to change the policy to allow self-declaration of shelter, utility and dependent care expenses. Additional changes are proposed to rename this section to better describe its content and to reformat and reorganize original text to simplify language and improve readability.

**DSS PROPOSED REGULATION #10-54
REVISIONS:**

9032 Mandatory Requiring Verification

[7 CFR 273.2(f)(1)]

Verify the following information prior to certification of households initially applying:

9032.1 Income

Gross nonexempt income shall be verified for all households prior to certification.

Verify termination of employment. Acceptable documentation includes employer's statement, lay-off notice, etc. In addition, if the household reports no income, explore past management and potential sources of income, e.g., UC benefits, OASDI, Workmen's Compensation, etc.

When all attempts to verify income have been unsuccessful because the person or organization providing the income has failed to cooperate with the household and DSS, and all other sources of verification are unavailable, determine an amount to use based on the best available information.

Sometimes the best available information may be from a collateral contact or just from a client.

9032.2 Alien Eligibility

A. DSS must verify the eligible status of applicant aliens. If an alien does not wish DSS to contact INS to verify his or her immigration status, DSS will give the household the option of withdrawing its application or participating without that member.

The following information may be relevant to the eligibility of some aliens: date of admission or date status was granted; military connection; battered status; if the alien was lawfully residing in the United States on August 22, 1996; membership in certain Indian tribes; if the person was 65 or older on August 22, 1996; if a lawful permanent resident can be credited with 40 qualifying quarters of covered work and if any Federal means tested public benefits were received in any quarter after December 31, 1996; or if the alien was a member of certain Hmong or Highland Laotian tribes during a certain period of time or is the spouse or unmarried dependent of such a person. DSS must verify these factors if applicable to the alien's eligibility.

The SSA Quarters of Coverage History System (QCHS) is used to verify whether a lawful permanent resident has earned or can receive credit for a total of 40 qualifying quarters. The QCHS may not show all qualifying quarters because SSA records do not show current year's earnings and in some cases the last year's earnings, depending on the time of request. Sometimes an applicant may have work from an uncovered employment that is not documented by SSA, but is countable toward the 40 quarters test. In both cases the individual, rather than SSA, will need to provide the evidence needed to verify the quarters.

B. An alien is ineligible until acceptable documentation is provided unless:

1. DSS has submitted a copy of a document provided by the household to INS for verification. Pending such verification, DSS cannot delay, deny, reduce, or terminate the individual's eligibility for benefits on the basis of the individual's immigration status; or

2. The applicant of DSS has submitted a request to SSA for information regarding the number of quarters of work that can be credited to the individual. SSA has responded that the individual has fewer than 40 quarters, and the individual provides documentation from SSA that SSA is conducting an investigation to determine if more quarters can be credited. DSS will certify the individual pending the results of the investigation for up to 6 months from the date of the original determination of insufficient quarters; or

3. The applicant or DSS has submitted a request to a Federal agency for verification of information which bears on the individual's eligible status. DSS will certify the individual pending the results of the investigation for up to 6 months from the date of the original request for verification.

C. DSS must provide alien applicants with a reasonable opportunity to submit acceptable documentation of their eligible status as of the 30th day following the date of application. A reasonable opportunity is at least 10 days from the date of DSS's request for an acceptable document. When DSS fails to provide an alien applicant with a reasonable opportunity as of the 30th day following the date of application, DSS must provide the household with benefits no later than 30 days following the date of application, provided the household is otherwise eligible.

9032.3 Utility Expenses

Verify only the utility (or utilities) needed for the household to receive one of the four Standard Utility Allowances. Heating and Cooling SUA

- Verify the electric bill for air conditioning, or

- Verify the utility that provides the heat.

Limited SUA

- Verify only two utilities (non-heat and non-cooling).

One Utility SUA

- Verify the one utility (non-heat, non-cooling and non-phone).

Phone SUA

- Verify the phone expense.

Utilities for Unoccupied Homes per 9060 F(4)

- Verify the actual expenses for the unoccupied home.
- If the household has utility expenses at both homes, give the appropriate SUA.
- If the household has utility expenses only at the unoccupied home, the SUA is not permitted. Combine the actual utility expenses with the shelter costs.

9032.4 Medical Expenses

The amount of any medical expenses (including the amount of reimbursements) deductible under DSSM 9060 (C) shall be verified prior to initial certification. Verification of other factors, such as the allowability of services provided or the person incurring the cost shall be required if questionable.

9032.5 Social Security Numbers

~~[273.2(f)(1)(v)]; [273.6(c)]~~

DSS will verify Social Security Number(s) (SSN's) reported by the household by submitting them to the Social Security Administration (SSA) for verification through the DCIS system.

When a SSN is returned from SSA as unverified, proceed as follows:

Recontact the household to determine if the information the household provided is correct. Obtain the correct information as appropriate. As SSN's are often unverified because surnames are unmatched due to marriage, death, or adoption, question these items if the cause of mismatch is not otherwise apparent.

Correct the client information on the DCIS database so that the SSN can be resubmitted to SSA.

DSS is required to pursue the unmatched information with the client. If the household refuses to provide the correct information, take action against the household for refusal to cooperate (See DSSM 9029).

If a household claims it cannot cooperate for reasons beyond its control, substantiate the household's inability to cooperate. The casefile must adequately document the household's inability to cooperate, or the household will be terminated. For example, a household may claim it cannot verify a name change because official records were destroyed in a fire. DSS would need to verify this claim to the point that it is satisfied that documentation of the name change no longer exists.

For example, a household applied for family of five and one child does not have a birth certificate available or a Social Security Number. In order to apply for a SSN, Social Security Administration requires an original certificate to verify name and birthdate. Document the record and set short term control to check for the SSN application, at a minimum at each redetermination. Getting copies of birth certificates from different states can take months to receive.

If the individual must appear at the SSA Office to provide the correct information and refuses to, such refusal is also grounds for termination per DSSM 9029.

When an individual household member has refused or failed without good cause to provide or apply for an SSN, that individual shall be ineligible to participate.

The disqualification applies only to the individual member not the entire household. The income and resources for the disqualified individual shall be treated as specified in DSSM 9076.2.

Do not delay the certification for or issuance of benefits to an otherwise eligible household solely to verify the SSN of a household member. Once a SSN has been verified, make a permanent annotation to the file to prevent the unnecessary recertification of the SSN in the future. Accept as verified a SSN which has been verified by another program participating in the Income and Eligibility Verification System (IEVS) (see DSSM 2013.1).

If an individual is unable to provide a SSN or does not have a SSN, require the individual to submit Form SS-5, Application for a Social Security Number, to the SSA in accordance with procedures in DSSM 9012.

A completed SSA Form 2853 (message from Social Security) shall be considered proof of application for a SSN for a newborn infant.

9032.6 Residency (Including Homelessness Definition)

[273.2(f)(1)(vi)]

The residency requirements of DSSM 9008 will be verified except in unusual cases where verification of residency cannot reasonably be accomplished. "Unusual cases" would include homeless households, some migrant farmworker households, or households newly arrived in a project area, where verification of residency cannot reasonably be accomplished. Verification of residency should be accomplished to the extent possible in conjunction with the verification of other information such as, but not limited to, rent and mortgage payments, utility expenses, and identity. If verification cannot be accomplished in conjunction with the verification of other information, then use a collateral contact or other readily available documentary evidence. Documents used to verify other factors of eligibility should normally suffice to verify residence as well.

Any documents or collateral contacts which reasonably establish the applicant's residency must be accepted and no requirement for a specific type of verification may be imposed. No durational residency requirement will be established. An otherwise eligible household cannot be required to reside in a permanent dwelling or to have a fixed mailing address as a condition of eligibility.

"Homeless individual" means an individual who lacks a fixed and regular nighttime residence or an individual whose primary nighttime residence is:

A supervised shelter designed to provide temporary accommodations (such as a welfare hotel or congregate shelter);

A halfway house or similar institution that provides temporary residence for individuals intended to be institutionalized (applied to individuals released from institutions who still need supervision, not prisoners considered to be detained under a Federal or State law while in a halfway house);

A temporary accommodation in the residence of another individual if the accommodation is for no more than 90 days.

The 90-day period starts at application or when a change is reported.

The 90-day period starts over when a household moves from one residence to another.

If a homeless household leaves, for whatever reason, and returns to the same residence, the 90-day period will start over again.

If a household has a break in receiving food stamps, the 90-day period will not start over if the household remains in the same residence. The 90-day period will start over if the household moved to another residence.

A place not designed for, or ordinarily used, as a regular sleeping accommodation for human beings (a hallway, a bus station, a lobby or similar places).

9032.7 Identity

The identity of the person making application will be verified. Where an authorized representative applies on behalf of a household, the identity of both the authorized representative and the head of household will be verified. Identity may be verified through readily available documentary evidence, or if this is unavailable, through a collateral contact. Any documents which reasonably establish the applicant's identity must be accepted, and no requirement for a specific type of document may be imposed. Examples of acceptable documentary evidence which the applicant may provide include, but are not limited to, a driver's license, a work or school ID, an ID for health benefits, or for other assistance or social services program, a voter registration card, wage stubs, or a birth certificate.

9032.8 Reserved**9032.9 Continuing Shelter Charges**

Verify shelter expenses if the expense is a potential deduction.

9032.10 Dependent Care Costs

For those households claiming dependent care cost as specified in DSSM 9060(D), verify that the household actually incurs the costs and the actual amount of the costs, if allowing the expense could potentially result in a deduction. Verification is permitted on a one-time basis unless the provider has changed, the amount has changed

and the change would potentially affect the level of the deduction, or unless questionable as defined in DSSM 9033.

9032.11 Reserved

9032.12 Disability

Verify disability as defined in DSSM 9013.1. For disability determinations which must be made relevant to the provisions of DSSM 9013.1(B), use the SSA's most current list of disabilities as the initial step for verifying if an individual has a disability considered permanent under the Social Security Act. However, only those individuals who suffer from one of the disabilities mentioned in the SSA list who are unable to purchase and prepare meals because of such disability will be considered disabled for the purpose of this provision.

If it is obvious that the individual is unable to purchase and prepare meals because (s)he suffers from a severe physical or mental disability, consider the individual disabled for the purpose of the provision even if the disability is not specifically mentioned on the SSA list.

If the disability is not obvious, verify the disability by requiring a statement from a physician or licensed or certified psychologist certifying that the individual (in the physician's/psychologist's opinion) is unable to purchase and prepare meals because (s)he suffers from one of the non-obvious disabilities mentioned in the SSA list or is unable to purchase meals because (s)he suffers from some other severe, permanent physical or mental disease or non-disease related disability.

The elderly and disabled individual (or his/her authorized representative) is responsible for obtaining the cooperation of the individuals with whom (s)he resides in providing the necessary income information about the others to DSS.

TYPE OF DISABILITY BENEFIT	VERIFICATION METHOD
Title XVI (SSI) or Titles I, II, X, XIV, or XVI of Social Security Act (disability/blindness)	Household must provide proof of benefit receipt.
Title 38 USC (veteran with a service-connected disability)	Household must present a statement from the Veterans Administration which clearly indicates (1) that the disabled individual is receiving VA disability benefits for a service-connected disability, and (2) that the disability is rated as total or paid at the total rate.
Title 38 USC (veterans in need of regular aid and attendance or permanently housebound, or dependent surviving spouse/child) benefits.	Household must prove that the disabled individual is receiving VA disability
Title 38 USC and Section 221(i) of Social Security Act	Use SSA's most current list of disabilities considered permanent. If it is obvious that the individual has one of the listed disabilities, the item is considered verified. If disability is not obvious, the household must provide a statement from a physician or licensed or certified psychologist certifying that the individual has one of the non-obvious disabilities listed.

9032.13 Quality Control

Verify all factors of eligibility for households who have been terminated for refusal to cooperate with a State QC reviewer, and reapply after 95 days from the end of the annual review period. Verify all factors of eligibility for households who have been terminated for refusal to cooperate with a Federal QC reviewer and reapply after seven months from the end of the annual review period. The annual review period is the Federal Fiscal Year, October to September.

9032.14 Students

If a person claims to be physically or mentally unfit for purposes of the student exemption in DSSM 9010.1 and the unfitness is not evident, verification may be required. Appropriate verification may consist of receipt of temporary or permanent disability benefits issued by governmental or private sources, or of a statement from a physician or licenses or certified psychologist.

9032.15 Legal Obligation and Actual Child Support Payments

Verify the household's legal obligation to pay child support, the amount of the obligation, and the monthly amount of child support the household actually pays.

Documents that verify the legal obligation to pay child support cannot be used to verify the actual amount of child support payments made.

9032.16 Additional Verification for Able-bodied Adults without Dependents (ABAWDs)

A. Hours worked individual who are satisfying the ABAWD work requirements by working, by combining work and participation in a work program, or by participating in a work or workfare program that is not operated or supervised by the State, the individual's work hours shall be verified.

B. Countable months in another State – for individuals subject to the ABAWD provisions, DSS must verify the number of countable months an individual has used in another State if there is an indication that the individual participated in that State.

This policy applies to applicants of the FSP.

Verification is the use of third party information or documentation to establish the accuracy of statements on the application.

1. DSS Requires Mandatory Verification of Eligibility Factors Before Certifying Applicants

The following verifications are mandatory:

A. Gross income (unless excluded)

If the client is unable to provide verification use other resources available to you including third party verification. If you are still unable to verify the income, determine an amount based on the best available information. Sometimes the best available information will be from a collateral contact or from the client him/herself.

B. Alien Eligibility Status

DSS must verify the eligible status of applicant aliens.

1. If an alien does not wish DSS to contact INS to verify his or her immigration status, give the household the option of withdrawing its application or participating without that member.

2. DSS must verify the following factors if applicable to the alien's eligibility:

i. date of admission

ii. date status was granted

iii. military connection

iv. battered status

v. if the alien was lawfully residing in the United States on August 22, 1996

vi. membership in certain Indian tribes

vii. if the person was age 65 or older on August 22, 1996

viii. 40 qualifying quarters of covered work (if the alien is a lawful permanent resident)

ix. if any Federal means-tested public benefits were received in any quarter after December

31, 1996

x. if the alien was a member of certain Hmong or Highland Laotian tribes during a certain period of time (or is the spouse or unmarried dependent of such a person)

Exceptions:

1. If DSS has submitted a copy of a document provided by the household to INS for verification, DSS cannot delay, deny, reduce, or terminate the individual's eligibility for benefits on the basis of the individual's immigration status while pending.
2. If SSA has responded that the individual has fewer than 40 quarters, and the individual provides documentation from SSA that SSA is conducting an investigation to determine if more quarters can be credited, DSS will certify the individual pending the results of the investigation for up to 6 months from the date of the original determination of insufficient quarters.
3. If the applicant or DSS has submitted a request to a Federal agency for verification of information which bears on the individual's eligible status, DSS will certify the individual pending the results of the investigation for up to 6 months from the date of the original request for verification.

3. DSS must provide alien applicants at least 10 days from the date of the request to submit acceptable documentation of their eligible alien status as of the 30th day following the date of application.

4. DSS must provide the household with benefits no later than 30 days following the date of application, provided the household is otherwise eligible, if DSS fails to give applicants at least 10 days to submit acceptable documentation.

5. DSS must verify a household member's citizenship or status as a non-citizen national.

i. DSS will accept participation in another program as acceptable verification if verification of citizenship or non-citizen national was obtained for that program.

ii. If the household cannot obtain acceptable verification, DSS must accept a signed third-party statement, under penalty of perjury, which indicates a reasonable basis for personal knowledge that the member in question is a U. S. citizen or a non-citizen national.

C. Utility Expenses for Unoccupied Homes

DSS will verify actual utilities for unoccupied homes per DSSM 9060.

1. Verify the actual expenses for the unoccupied home.

2. If the household has utility expenses at both homes, give the appropriate SUA.

3. If the household has utility expenses only at the unoccupied home, the SUA is not permitted. Combine the actual utility expenses with the shelter costs.

D. Medical Expenses

DSS will verify the medical expenses deductible under DSSM 9060.

Verification of other factors, such as whether a service provided is allowed, may be required if questionable.

E. Social Security Numbers

DSS will verify Social Security Numbers (SSNs) reported by the household by submitting them to the Social Security Administration (SSA) for verification through the DCIS system.

1. Contact the household to determine if the information the household provided is correct if the SSN returns from SSA as unverified. Obtain the correct information so that the SSN can be resubmitted to SSA.

2. Pursue all unmatched SSNs with the client. If the household refuses to provide the correct information, take action against the household for refusal to cooperate per DSSM 9029.

3. When a household claims it cannot cooperate for reasons beyond its control, verify and document the household's inability to cooperate.

4. If an individual must appear at the SSA Office to provide correct information and refuses to, the refusal is grounds for termination per DSSM 9029.

5. When an individual household member refuses or fails without good cause to provide or apply for an SSN, that individual shall be ineligible to participate.

6. Disqualifications apply only to individual members, not the entire household. Treat the income and resources for the disqualified individual according to DSSM 9076.2.

7. Do not delay the certification for or issuance of benefits to an otherwise eligible household solely to verify the SSN of a household member.

8. Once an SSN has been verified, enter the number as verified to prevent the unnecessary

re-verification of the SSN in the future.

9. Accept as verified a SSN which has been verified by another program participating in the Income and Eligibility Verification System (IEVS).

10. If an individual is unable to provide an SSN or does not have an SSN, require the individual to apply for one with SSA and provide proof of the application.

E. Residency (Including Homelessness Definition)

DSS will verify residency (DSSM 9008).

<p><u>EXCEPTION: Do not require proof of residency in cases where verification of residency is not easily accomplished such as homeless households (as defined in DSSM 9094), migrant farm worker households, or households newly arrived in the state</u></p>
--

1. Verify residency with the verification of other information such as, but not limited to, rent and mortgage payments, utility expenses, and identity.

2. If verification cannot be accomplished with the verification of other information, use a collateral contact or other readily available documentary evidence.

3. Documents used to verify other factors of eligibility can sometimes verify residency.

4. Any documents or collateral contacts which reasonably establish the applicant's residency must be accepted.

5. Do not impose requirements for a specific type of verification.

6. Do not impose a durational residency requirement.

7. Household do not have to reside in a permanent dwelling or have a fixed mailing address as a condition of eligibility.

<p><u>NOTE: According to DSSM 9094, a homeless individual is defined as someone who resides in a temporary accommodation for not more than 90 days in the residence of another individual.</u></p>
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<p><u>"The 90-day period starts at application or when a change is reported.</u></p>
--

<p><u>"The 90-day period starts over when a household moves from one residence to another.</u></p>
--

<p><u>"If a homeless household leaves, for whatever reason, and returns to the same residence, the 90-day period will start over again.</u></p>

<p><u>If a household has a break in receiving food stamps, the 90-day period will not start over if the household remains in the same residence. The 90-day period will start over if the household moved to another residence.</u></p>

G. Identity

DSS will verify the identity of the person making application.

1. Where an authorized representative applies on behalf of a household, verify the identity of both the authorized representative and the head of household.

2. Identity may be verified through readily available documentary evidence, or if this is unavailable, through a collateral contact.

3. Accept any documents which reasonably establish the applicant's identity. (Examples include a driver's license, a work or school ID, an ID for health benefits, or for other assistance or social services program, a voter registration card, wage stubs, or a birth certificate.)

4. Do not impose requirements for a specific type of document.

H. Disability

DSS will verify disability as defined under DSSM 9094 for individuals applying for food benefits as a separate household under DSSM 9013.

1. The disability must be one considered permanent under the Social Security Act.

2. Only those individuals who suffer from one of the disabilities mentioned in the SSA list who are unable to purchase and prepare meals because of such disability will be considered disabled for the purpose of this provision.

i. If it is obvious that the individual is unable to purchase and prepare meals because s/ he suffers from a severe physical or mental disability, consider the individual disabled for the purpose of the

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provision even if the disability is not specifically mentioned on the SSA list.

ii. If the disability is not obvious, verify the disability by requiring a statement from a physician or licensed or certified psychologist certifying that the individual (in the physician's/psychologist's opinion) is unable to purchase and prepare meals because s/he suffers from one of the non-obvious disabilities mentioned in the SSA list or is unable to purchase meals because s/he suffers from some other severe, permanent physical or mental disease or non-disease related disability.

3. The elderly and disabled individual (or his/her authorized representative) is responsible for obtaining the cooperation of the individuals with whom s/he resides in providing the necessary income information about the others to DSS.

I. Quality Control (QC)

DSS will verify all factors of eligibility for households who refuse to cooperate with a QC review.

1. Verify all factors of eligibility for households who have been terminated for refusal to cooperate with a State QC reviewer and reapply after 95 days from the end of the annual review period.

2. Verify all factors of eligibility for households who have been terminated for refusal to cooperate with a Federal QC reviewer and reapply after seven months from the end of the annual review period.

3. The annual review period is the Federal Fiscal Year, October to September.

J. Students

DSS may verify a disability or medical unfitness for student exemptions (DSSM 9010.1) if the disability or medical condition is not obvious.

1. Appropriate verifications include receipt of temporary or permanent disability benefits issued by governmental or private sources, or of a statement from a physician or licensed or certified psychologist.

K. Legal Obligation and Actual Child Support Payments

DSS will verify the household's legal obligation to pay child support, the amount of the obligation, and the monthly amount of child support the household actually pays.

Documents that verify the legal obligation to pay child support cannot be used to verify the actual amount of child support payments made.

L. Additional Verification For Able-bodied Adults Without Dependents (ABAWD)

DSS will verify work hours and countable months for ABAWD individuals.

1. Hours worked – verify the hours worked for individuals who are satisfying the ABAWD work requirements by working, by combining work and participation in a work program, or by participating in a work or workfare program that is not operated or supervised by the State.

2. Countable months in another state – verify the number of countable months for individuals subject to the ABAWD provisions if an individual has lived in another state and there is an indication that the individual participated in that state.

2. DSS Gives Households at Least 10 Days to Provide Requested Verifications.

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 1124

PUBLIC NOTICE

1124 Control of Volatile Organic Compound Emissions

1. TITLE OF THE REGULATIONS:

Revision to 7 DE Admin Code 1124 Section 47.0 "Offset Lithographic Printing," and submittal of the revision to the US Environmental Protection Agency (EPA) as revision to Delaware State Implementation Plan (SIP).

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

The Clean Air Act (CAA) Section 182(b)(2) requires that all ozone non-attainment areas, including Delaware, must develop or update relevant regulations to implement Reasonably Available Control Technology (RACT) controls on emission sources covered in EPA's Control Techniques Guidelines (CTG) or Alternate Control Techniques (ACT), and submit the regulations to EPA as State Implementation Plan (SIP) revisions.

In September 2006, the EPA updated its CTG for offset lithographic printing industry by adding control requirements for letterpress printing activities. To reflect the new requirements in EPA's 2006 updated CTG, the DAQ revised 7 **DE Admin. Code** 1124 Section 47.0 "Offset Lithographic Printing" in early 2010. After a relevant public comment period, a public hearing was held on June 2, 2010.

Public comments were received before and on the June 2, 2010 hearing on the revision to Section 47.0. Based on these comments, the DAQ has determined that some changes to the proposed Section 47.0 that was addressed in the June 2, 2010 hearing should be made. Major new changes are those in Sections 47.1.2, 47.3.1, 47.5.4.4, 47.5.5, 47.6.1.2.2, and 47.6.3.1. To provide the opportunity for public to review and comment on these new changes, the DAQ is now publishing a new proposed revision to Section 47.0, establishing a new public comment period, and will hold a public hearing on February 1, 2011. Since a sufficient comment period was provided to the public prior to the June 2, 2010 hearing, the public is advised that the February 1, 2011 hearing will address only comments on those major new changes, which are also printed in red text in the newly proposed Section 47.0 as posted at DAQ's website <http://www.awm.delaware.gov/Info/Regs/Pages/AQMPlansRegs.aspx>.

3. POSSIBLE TERMS OF THE AGENCY ACTION:

None.

4. STATUTORY BASIS OR LEGAL AUTHORITY TO ACT:

7 **Del.C.**, Chapter 60, Environmental Control

5. OTHER REGULATIONS THAT MAY BE AFFECTED BY THE PROPOSAL:

None

6. NOTICE OF PUBLIC COMMENT:

A public hearing will be held on February 1, 2011, beginning at 6:00 pm, in DNREC's Auditorium, R & R Building, 89 Kings Hwy, Dover, Delaware 19901.

7. PREPARED BY:

Frank F. Gao, Phone: (302) 323-4542, Date: November 30, 2010, E-Mail: Frank.Gao@state.de.us

1124 Control of Volatile Organic Compound Emissions

(Break in Continuity of Sections)

47.0 Offset Lithographic Printing and Letterpress Printing.

44/29/1994 xx/xx/2011

47.1 Applicability.

47.1.1 The provisions of 47.0 of this regulation apply to any offset lithographic or letterpress printing press facility, including heatset web, non heatset web (non newspaper), non heatset sheet fed, and newspaper (non heatset web) facilities. Except as provided in 47.1.2 of this regulation, every owner or operator of any offset lithographic or letterpress printing press shall comply with the provisions of 47.0 of this regulation on and after [insert effective date of the revised 47.0 of regulation].

- 47.1.2 Transition period for existing permitted sources. Every owner or operator of any offset lithographic printing press that is subject to a permit issued pursuant to 7 DE Admin Code 1102 or 1130 containing all applicable conditions of 47.0 of this regulation, as that regulation existed on November 29, 1994, shall comply with those permit conditions for up to one year after the effective date of this revision of 47.0 of this regulation. Every owner or operator of any letterpress printing press that is subject to a permit issued pursuant to 7 DE Admin Code 1102 or 1130 shall comply with the permit's conditions for letterpress printing for up to one year after the effective date of this regulation. On and after the date one year after the effective date of this revision of 47.0 of this regulation, every such owner or operator of any offset lithographic or letterpress printing press shall comply with the provisions of 47.0 of this regulation.
- 47.1.23 Except as specified in 47.6.1 of this regulation, ~~the provisions of 47.0 of this regulation do not apply to any offset lithographic and letterpress printing facility press within a facility whose total actual volatile organic compound (VOC) emissions from all offset lithographic and letterpress printing operations (including emissions from cleaning solutions used on lithographic printing presses) are less than 6.8 kilograms (kg) (15 pounds [lb]) VOCs per day before the application of capture systems and control devices.~~
- 47.1.3 ~~The provisions of 47.0 of this regulation do not apply to other types of printing operations, such as flexography, rotogravure, or letterpress.~~
- 47.1.4 ~~Existing sources affected by 47.0 of this regulation shall comply with the provisions of 47.0 of this regulation as soon as practicable, but no later than April 1, 1996. New, modified, or reconstructed sources affected by 47.0 of this regulation shall comply with the provisions of 47.0 of this regulation upon startup.~~
- 47.1.54 Any facility that becomes or is currently subject to the provisions of 47.0 of this regulation by exceeding the applicability threshold in 47.1.23 of this regulation shall remain subject to ~~these provisions~~ 47.0 of this regulation even if its emissions later fall below the applicability threshold.
- 47.1.65 Any facility that is currently subject to a state or federal rule promulgated pursuant to the Clean Air Act Amendments of 1977 by exceeding an applicability threshold is and shall remain subject to these provisions, even if its throughput or emissions have fallen or later fall below the applicability threshold.
- 47.2 Definitions. As used in 47.0 of this regulation, all terms not defined herein shall have the meaning given them in the November 15, 1990 Clean Air Act Amendments (CAAA), or in 2.0 of this regulation.
- "Alcohol" means a chemical compound consisting of the hydroxyl (OH) group attached to an alkyl radical and having the general formula $C_nH_{2n+1}OH$, such as ethanol, n-propanol, and iso-propanol.
- "Alcohol substitute" means a non-alcohol additive that contains VOCs and is used in the fountain solution to reduce the surface tension of water or to prevent piling (ink build-up).
- "Batch" means a supply of fountain solution that is prepared continuously or as a batch and that is used without alteration until completely used or removed from the printing process.
- "Cleaning solution" means a liquid that is used to remove ink, including dried ink, and debris from the operating surfaces of the printing press and its parts.
- ~~"Dampening system" means equipment that is used to deliver the fountain solution to the lithographic plate.~~
- "Fountain solution" means a mixture of water and non-volatile printing chemicals, and additives which reduce the surface tension of the water. The fountain solution wets the non-image areas so that the ink is maintained within the image areas.
- "Heatset" means any operation in which heat is required to evaporate ink oil from the printing ink.
- "Letterpress printing" means a printing process in which the image is raised relative to the non-image area and the paste ink is transferred to the substrate directly from the image surface.
- "Lithography" or "lithographic printing" means a printing process in which the image and non-image areas are chemically differentiated; the image area is oil-receptive and the non-image area is water-receptive. This method differs from other printing methods, in which the image is a raised or recessed surface.

“**Non-heatset**” or “**coldset**” means any operation in which printing inks are set without the use of heat. For the purposes of 47.0 of this regulation, ultraviolet-cured and electron beam-cured inks are considered non-heatset operations.

“**Offset lithographic printing**” means a printing process ~~in which that transfers~~ the ink film is transferred from the lithographic plate to an intermediary surface (blanket), which, in turn, transfers the ink film to the substrate.

“**Press**” means a printing production assembly that is composed of one or many units to produce a printed sheet or web.

“**Sheet-fed**” means a printing operation in which individual sheets of substrate are fed to the press sequentially.

“**Total actual VOC emissions**” means the quantity of VOCs emitted from all lithographic ~~printing presses~~ and letterpress printing operations, including VOC emissions from cleaning materials and activities, during a particular time period.

“**Unit**” means the smallest complete printing component of a printing press.

“**Web**” means a continuous roll of paper used as the printing substrate.

47.3 Standards.

47.3.1 No owner or operator of a heatset offset lithographic printing press ~~or a heatset letterpress printing press~~ shall operate the printing press unless the owner or operator installs a control device to reduce VOC emissions from the press dryer exhaust vent by complying with 47.3.1.1, or 47.3.1.2, or 47.3.1.3 at all time the press operates:

47.3.1.1 At least 90% (weight) of the uncontrolled total organics (minus methane and ethane), or maintains a maximum dryer exhaust outlet concentration of 20 parts per million by volume (ppmv) as methane (as C1), whichever is less stringent when the press is in operation by weight, if the first installation date of the control device is prior to [insert the effective date of this regulation].

47.3.1.2 At least 95%, by weight, if the first installation date of the control device is on or after [insert the effective date of this regulation].

47.3.1.3 Maintaining a maximum press dryer exhaust outlet VOC concentration of 20 parts per million by volume (ppmv) as carbon (C1) on a dry basis.

47.3.2 No owner or operator of an offset lithographic printing press ~~that uses alcohol in the fountain solution~~ shall operate the printing press unless the owner or operator meets ~~one~~ of the requirements listed under 47.3.2.1, 47.3.2.2, ~~or 47.3.2.3, and 47.3.2.4~~ of this regulation.

47.3.2.1 For any heatset web offset lithographic printing presses,:

47.3.2.1.1 When the fountain solution contains alcohol, the fountain solution on-press (as applied) VOC content shall be maintained at 1.6% or less (by volume). Alternatively, a standard of 3% or less (by volume) alcohol may be used if the fountain solution containing alcohol is refrigerated to less than 15.6 degrees Celsius (°C) (60 degrees Fahrenheit [°F]).:

47.3.2.1.1.1 At 1.6% or less (by volume), or

47.3.2.1.1.2 At 3.0% or less (by volume) and the temperature of the fountain solution shall be maintained at or below 15.5 degrees Celsius (°C) (60 degrees Fahrenheit [°F]).

47.3.2.1.2 When the fountain solution contains no alcohol, the fountain solution on-press (as-applied) VOC content shall be maintained at 3.0% or less (by volume).

47.3.2.2 For any non-heatset web offset lithographic printing presses, ~~the alcohol content in the fountain solution shall be eliminated. Alternatively, non-alcohol additives or alcohol substitutes may be used to accomplish the total elimination of alcohol use.:~~

47.3.2.2.1 There shall be no alcohol in the fountain solution, and

47.3.2.2.2 The fountain solution on-press (as-applied) VOC content shall be maintained at 3.0% or less (by volume).

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- 47.3.2.3 For any sheet-fed offset lithographic printing presses, ~~the alcohol content in the fountain solution shall be maintained at 5% or less (by volume). Alternatively, a standard of 8.5% or less (by volume) alcohol may be used if the fountain solution is refrigerated to below 15.6°C (60°F)~~ the fountain solution on-press (as-applied) VOC content shall be maintained.
- 47.3.2.3.1 At 5.0% or less (by volume), or,
- 47.3.2.3.2 At 8.5% or less (by volume) and the temperature of the fountain solution shall be maintained at or is refrigerated to below 15.65°C (60°F).
- 47.3.2.4 ~~Any type of offset lithographic printing press shall be considered in compliance with this regulation if the only VOCs in the fountain solution are in non-alcohol additives or alcohol substitutes, so that the concentration of VOCs in the fountain solution is 3.0% or less (by weight). (The fountain solution shall not contain any alcohol.)~~
- 47.3.3 No owner or operator of an offset lithographic printing press or a letterpress printing press shall operate the printing press unless the owner or operator reduces VOC emissions from cleaning solutions by meeting requirements in 47.3.3.1, or 47.3.3.2 and 47.3.3.3, of this regulation:
- 47.3.3.1 Using a cleaning solution with a 30% or less (as used) VOC content.
- 47.3.3.2 Alternatively, the use Using of cleaning solutions with a VOC composite partial vapor pressure less than 10 millimeters (mm) mercury (Hg) (0.4 inches [in] Hg) at 20°C (68°F) ~~may be used.~~ The VOC composite partial vapor pressure is calculated as follows:

$$PP_C = \sum_{i=1}^n \frac{\frac{(W_i)(VP_i)}{MW_i}}{\frac{W_w}{MW_w} + \frac{W_e}{MW_e} + \sum_{i=1}^n \frac{W_i}{MW_i}}$$

(47-1)

Where:

W_i = Weight of the i^{th} VOC compound, in grams (g);

W_w = Weight of water, in g;

W_e = Weight of exempt compound, in g;

MW_i = Molecular weight of the i^{th} VOC compound, in grams per gram-mole

$$\left(\frac{\text{g}}{\text{g-mole}} \right);$$

MW_w = Molecular weight of water, in $\left(\frac{\text{g}}{\text{g-mole}} \right);$

MW_e = Molecular weight of exempt compound, in $\left(\frac{\text{g}}{\text{g-mole}} \right);$

PP_C = VOC composite partial pressure at 20°C, in mmHg

VP_i = Vapor pressure of the i^{th} VOC compound at 20°C, in mmHg

- 47.3.3.3 Keeping all cleaning solutions and used shop towels or cloths in closed containers.
- 47.4 Control Devices. An owner or operator of an offset lithographic printing press or a letterpress printing press equipped with a control system shall ensure that:

- 47.4.1 The capture system and control device are operated at all times ~~that~~ when the printing press is in operation, and ~~the owner or operator demonstrates~~ compliance with 47.0 of this regulation is demonstrated through the applicable coating analysis and capture system and control device efficiency test methods specified in **Appendix B**, **Appendix D**, and **Appendix E** of of this regulation and in accordance with the capture efficiency test methods specified in **Appendix D** of this regulation.
- 47.4.2 The control device is equipped with the applicable monitoring equipment specified in 2.0 of **Appendix D** of this regulation, and the monitoring equipment is installed, calibrated, operated, and maintained according to the vendor's specifications at all times the control device is in use.
- 47.5 Test Methods and Procedures.
- 47.5.1 The VOC content of each ink, the alcohol content of each fountain solution, and the efficiency of each capture system and control device shall be determined by the applicable test methods and procedures specified in **Appendix A** through **Appendix D** of this regulation to establish the records required under 47.6 of this regulation.
- 47.5.2 To demonstrate compliance with the emission control requirements of 47.0 of this regulation, the ~~affected facility~~ affected by 47.0 of this regulation shall be run at maximum operating conditions and flow rates during any emission testing.
- 47.5.3 Emission tests for facilities using an add-on dryer exhaust control device shall include an initial test when the control device is installed and operating in operation that demonstrates compliance with ~~either the 90% (by weight) reduction or the 20 ppmv emission limit~~ 47.3.1 of this regulation.
- 47.5.4 To determine compliance with 47.3.2 of this regulation, the owner or operator of an offset lithographic printing facility shall perform the following procedures:
- 47.5.4.1 A sample shall be taken of the fountain solution (as used) from the fountain tray or reservoir that contains a fresh batch of fountain solution (after mixing), for each unit or centralized reservoir, to determine the alcohol content of the fountain solution in accordance with 47.3.2.1 through 47.3.2.~~34~~ of this regulation, before the fountain solution is used.
- 47.5.4.2 A direct measurement of the alcohol content of the fountain solution sample or samples shall be performed in accordance with the method specified in **Appendix L** of this regulation.
- 47.5.4.3 Alternatively, a sample of the fountain solution (as used) may be taken from the fountain tray or reservoir of fountain solution during use and measured with a hydrometer or refractometer that has been standardized with tests performed in accordance with 47.5.4.1 and 47.5.4.2 of this regulation. The unit shall be considered in compliance with 47.3.2.1 through 47.3.2.~~34~~ of this regulation if the refractometer or hydrometer measurement is less than or equal to the measurement obtained by the method specified in **Appendix L** of this regulation plus 10%.
- 47.5.4.4 The VOC content of a fountain solution containing alcohol substitutes or non-alcohol additives shall be established with proper recordkeeping and the manufacturer's ~~laboratory analysis~~ technical information of the VOC content of the concentrated alcohol substitute and included in facility records. Records shall include the amount of concentrated substitute added per quantity of fountain water; the date and time of preparation if the fountain solution is mixed as a batch; and the calculated VOC content of the final solution to fulfill the requirements listed in 47.3.2.4 of this regulation.
- 47.5.5 To determine compliance with 47.3.2.1.1.2 and 47.3.2.3.2 of this regulation, an owner or operator of an offset lithographic printing facility shall use a thermometer or other temperature detection device capable of reading to 0.28°C (0.5°F) accuracy to ensure that a refrigerated fountain solution containing alcohol is below 15.65°C (60°F) at all times.
- 46.5.6 To determine compliance with 47.3.3 of this regulation, an owner or operator of an offset lithographic printing press or a letterpress printing press shall:
- 47.5.6.1 Take a sample of the cleaning solution (as used) to demonstrate compliance with the cleaning solution VOC content limitations listed in 47.3.3 of this regulation. If the cleaning

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solution is used as received from the supplier without dilution or alteration, the manufacturer's technical information may be used to demonstrate compliance.

- 47.5.6.2 Use the method specified in **Appendix L** of this regulation to determine the VOC content of the cleaning solution (as used). Alternatively, the VOC content and VOC partial pressure of the cleaning solution may be established using the manufacturer's technical data. If the cleaning solution is prepared through the dilution of concentrated materials, the blending ratio and VOC content of the concentrate may be used to determine the "as used" VOC content of the cleaning solution.

47.6 Recordkeeping and Reporting.

- 47.6.1 Requirements for Sources Below Threshold Emission Limit. Any owner or operator of any offset lithography printing ~~press facility, any letterpress printing facility, or any facility with both offset lithographic and letterpress printing operations,~~ that emits less than the threshold limit according to 47.1 of this regulation shall comply with the following requirements:

- 47.6.1.1 Initial Certification. Within six months after [insert the effective date of this revision of 47.0], or upon initial startup of a new printing press, ~~¶~~the owner or operator shall certify to the Department that the facility emits less than the threshold limit according to 47.1 of this regulation. Such certification shall include the following information:

47.6.1.1.1 The name and location of the facility.

47.6.1.1.2 The address and telephone number of the person responsible for the facility.

47.6.1.1.3 A declaration that the facility is not subject to the requirements of 47.0 of this regulation because of the criteria listed in 47.1 of this regulation.

47.6.1.1.4 The calculations demonstrating that total actual VOC emissions from all offset lithographic and letterpress printing presses at the facility are and will be less than 6.8 kg (15 lb) per day before the application of capture systems and control devices.

47.6.1.1.5 A description of the instrument or method by which the owner or operator accurately measured or calculated the volume of ink applied and the amount that can potentially be applied each year on each printing press.

- 47.6.1.2 Recordkeeping. On and after [insert the effective date of this revision of 47.0], ~~¶~~the owner or operator shall collect and record all of the following information each year for each offset lithographic printing press and each letterpress printing press and maintain the information at the facility for a period of five years:

47.6.1.2.1 The name and identification number of each ink, as applied, each year on each printing press.

~~47.6.1.2.2 The weight of VOC per volume of coating solids and the volume of solids of each ink, as applied, each year on each printing press.~~

47.6.1.2.3 ~~2~~ The total actual VOC emissions as calculated in 47.6.1.1.4 of this regulation using the VOC content for that year.

- 47.6.1.3 Reporting. On and after [insert the effective date of this revision of 47.0], ~~Upon promulgation of 47.0 of this regulation,~~ any record showing that total actual emissions of VOCs from all offset lithographic printing presses and all letterpress printing presses exceed 6.8 kg (15 lb) per day before the application of capture systems and control devices shall be reported by sending a copy of the record to the Department within 45 calendar days after the exceedance occurs. This requirement is in addition to any other State of Delaware exceedance reporting requirements.

- 47.6.2 Requirements for Sources Above Threshold Emission Limit. Any owner or operator of any offset lithography printing ~~press facility, or any letterpress printing facility, or any facility with both offset lithographic and letterpress printing operations,~~ that emits greater than the threshold limit according to 47.1 of this regulation shall comply with the following requirements:

- 47.6.2.1 Initial Certification. Within six months after [insert the effective date of this revision of 47.0], or upon initial startup of a new printing press, ~~¶~~the owner or operator shall certify to the

Department that the facility emits greater than the threshold limit according to 47.1 of this regulation. Such certification shall include the following information:

- 47.6.2.1.1 The name and location of the facility.
- 47.6.2.1.2 The address and telephone number of the person responsible for the facility.
- 47.6.2.1.3 The calculations demonstrating that total actual VOC emissions from all ~~offset lithographic printing presses~~ aspects of printing operations at the facility are and shall be greater than 15 lb (6.8 kg) per day before the application of capture systems and control devices.
- 47.6.2.1.4 A description of the instrument or method by which the owner or operator accurately measured or calculated the volume of ink applied and the amount that can potentially be applied each year on each printing press.
- 47.6.2.2 Recordkeeping. On and after [insert the effective date of this revision of 47.0], ~~the~~ owner or operator shall collect and record all of the following information each year for each offset lithographic printing press and each letterpress printing press and maintain the information at the facility for a period of five years:
 - 47.6.2.2.1 The name and identification number of each ink, as applied, each year on each printing press.
 - 47.6.2.2.2 The weight of VOCs per volume of coating solids and the volume of solids of each ink, as applied, each year on each printing press.
 - 47.6.2.2.3 The total actual VOC emissions as calculated in ~~47.6.1.1.4~~ 47.6.2.1.3 of this regulation using the VOC content for that year.
- 47.6.3 Requirements for Sources Using an Add-On Dryer Exhaust Control Device.
 - 47.6.3.1 Within six months after [insert the effective date of this revision of 47.0], or upon initial startup of a new printing press, ~~the~~ owner or operator of a heatset offset lithographic printing press, or a heatset letterpress printing press, shall install, calibrate, maintain, and operate a temperature monitoring device, according to the manufacturer's instructions, at the outlet of the control device or at a location approved by the Department. The monitoring temperature shall be set during the testing required to certify compliance with the requirements of 47.4 of this regulation. Monitoring shall be performed only when the unit is operational.
 - 47.6.3.2 The temperature monitoring device shall be equipped with a continuous recorder and shall have an accuracy of 0.28°C (0.5°F).
 - 47.6.3.3 The dryer pressure shall be maintained lower than the press room area pressure such that air flows into the dryer at all times when the press is operating. A 100% emissions capture efficiency for the dryer shall be demonstrated using an air flow direction measuring device.
- 47.6.4 Requirements for Monitoring Fountain Solution VOC Concentration. On and after [insert the effective date of this revision of 47.0], ~~the~~ alcohol concentration in the fountain solution shall be monitored to provide data that can be correlated to the amount of material used when the fountain solution complies with the limits listed in 47.3.2.1 through 47.3.2.43 of this regulation. One of the following methods shall be used to frequently measure the concentration of alcohol in the fountain solution:
 - 47.6.4.1 The owner or operator of any offset lithographic printing press shall monitor the alcohol concentration of the fountain solution with a refractometer that is corrected for temperature at least once per 8-hour shift or once per batch, whichever is longer. The refractometer shall have a visual, analog, or digital readout with an accuracy of 0.5%. A standard solution shall be used to calibrate the refractometer for the type of alcohol used in the fountain. Alternatively, the refractometer shall be standardized with measurements performed to determine compliance, according to the procedures described in 47.5.4.1 and 47.5.4.2 of this regulation.
 - 47.6.4.2 Alternatively, the owner or operator of any offset lithographic printing press shall monitor the alcohol concentration of the fountain solution with a hydrometer equipped with a

- temperature correction at least once per eight-hour shift or once per batch, whichever is longer. The hydrometer shall have a visual, analog, or digital readout with an accuracy of 0.5%. A standard solution shall be used to calibrate the hydrometer for the type of alcohol used in the fountain. Alternatively, the hydrometer shall be standardized with measurements performed to determine compliance, according to the procedures described in 47.5.4.1 and 47.5.4.2 of this regulation.
- 47.6.4.3 The VOC content of the fountain solution may be monitored with a conductivity meter if it is determined that a refractometer or hydrometer cannot be used for the type of VOCs in the fountain solution. The conductivity meter reading for the fountain solution shall be referenced to the conductivity of the incoming water.
- 47.6.4.4 If, through recordkeeping for a period of 6 months or more, the printing process is shown to consistently meet the requirements in 47.3.2.4 and 47.5.4 of this regulation, the monitoring requirement may be waived or extended to a longer period of time upon prior approval by the Department.
- 47.6.5 Requirements for Monitoring Fountain Solution Temperature. On and after [insert the effective date of this revision of 47.0]:
- 47.6.5.1 The owner or operator of any offset lithographic printing press using refrigeration equipment on the fountain solution shall install, maintain, and continuously operate a temperature monitor of the fountain solution reservoir.
- 47.6.5.2 The temperature monitor shall be attached to a continuous recording device such as a strip chart, recorder, or computer.
- 47.6.6 Requirements for Monitoring Cleaning Solution. On and after [insert the effective date of this revision of 47.0]. ~~F~~for any offset lithographic printing press or any letterpress printing press with continuous cleaning equipment, flow meters shall be used to monitor the water and cleaning solution flow rates. The flow meters shall be calibrated so that the VOC content of the mixed solution is accurately measured to fulfill the requirements of 47.3.3 of this regulation.
- 47.6.7 Requirements for Monitoring Other Key Parameters. On and after [insert the effective date of this revision of 47.0]. ~~F~~the owner or operator of any offset lithographic printing press or any letterpress printing press shall record daily, and make available to the Department within 45 calendar days upon the Department's verbal or written request, the following key parameters:
- 47.6.7.1 The type of control device operating on ~~the~~ any heatset offset lithographic printing press or any heatset letterpress printing press and the operating parameters specified in 47.5.3 of this regulation.
- 47.6.7.2 The equipment standard selected to comply with the requirements listed in 47.3.2.1 through 47.3.2.4~~3~~ and 47.3.3 of this regulation.
- 47.6.7.3 The VOC content of the fountain solutions and cleaning solutions, to comply with the requirements listed in 47.5.4, 47.6.4, and 47.6.6 of this regulation.
- 47.6.7.4 The temperature of the fountain solution, to comply with the requirements listed in 47.6.5 of this regulation, if applicable.
- 47.6.7.5 For manual cleaning methods, the amount of cleaning solution and the amount of water added per batch of cleaning solution mixed.
- 47.6.7.6 For automatic cleaning methods, the flow rates of water and cleaning solution concentrate, as specified in 47.6.6 of this regulation.
- 47.6.7.7 Corrective actions taken when exceedances of any parameters monitored according to the requirements of 47.4 or 47.5 of this regulation, occur.

DIVISION OF AIR AND WASTE MANAGEMENT

Statutory Authority: 7 Delaware Code, Chapter 60 (7 Del.C., Ch. 60)
7 DE Admin. Code 1142

REGISTER NOTICE

SAN # 2010-22

1142 Specific Emission Control Requirements

1. TITLE OF THE REGULATIONS:

7 DE Admin. Code 1142.2, Control of NO_x Emissions from Industrial Boilers and Process Heaters at Petroleum Refineries

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

The Department of Natural Resources and Environmental Control (DNREC), Division of Air Quality, will conduct a public hearing on proposed amendments to Section 2.0 of 7 DE Admin. Code 1142, "Control of NO_x Emissions from Industrial Boilers and Process Heaters at Petroleum Refineries." These amendments are based on a May 31, 2010 agreement between DNREC and the Delaware City Refining Company, LLC ("DCRC") which states that DNREC will propose to revise Section 2.0 of 7 DE Admin. Code 1142 to provide for a facility-wide NO_x emission cap compliance alternative to the existing unit specific NO_x emission limitations.

In addition, DNREC will propose a document for submittal to the Environmental Protection Agency (EPA) as a State Implementation Plan (SIP) revision. This document, "*Demonstration that Amendments to Section 2.0 of 7 DE Admin. Code 1142, Control of NO_x Emissions from Industrial Boilers and Process Heaters at Petroleum Refineries, Do not Interfere with Any Applicable Requirement of the Clean Air Act (CAA)*" demonstrates that these amendments to 7 DE Admin. Code 1142 will not interfere with attainment or maintenance of any National Ambient Air Quality Standard (NAAQS), or any other applicable requirement of the CAA.

3. POSSIBLE TERMS OF THE AGENCY ACTION:

None.

4. STATUTORY BASIS OR LEGAL AUTHORITY TO ACT:

7 DE Code, Chapter 60, Environmental Control.

5. OTHER REGULATIONS THAT MAY BE AFFECTED BY THE PROPOSAL:

None.

6. NOTICE OF PUBLIC COMMENT:

The public hearing on this proposed amendments to 7 DE Admin. Code 1142, and the associated SIP revision, will be held February 1, 2011, beginning at 6:00 p.m., in DNREC's R&R Bldg. Auditorium, 89 Kings Highway, Dover, Delaware 19901.

7. PREPARED BY:

Ron Amirikian (302) 739-9402 December 8, 2010 Email address: ronald.amirikian@state.de.us

1142 Specific Emission Control Requirements

12/12/2001

1.0 Control of NO_x Emissions from Industrial Boilers**1.1 Purpose**

New Castle County and Kent County are part of the Philadelphia-Wilmington-Trenton 1-hour ozone non-attainment area. All areas of Delaware impact this non-attainment area. On December 19, 1999, the EPA identified an emission reduction "shortfall" associated with this non-attainment area. Promulgation of 1.0 of this regulation is one measure that the Department is taking to mitigate this shortfall.

In determining the applicability of 1.0 of this regulation, the Department attempted to minimize the impact on facilities that recently installed NO_x controls under 7 **DE Admin. Code** 1112 (NO_x RACT) and 7 **DE Admin. Code** 1137/1139 (NO_x Budget Trading Program). The Department did this by regulating only large sources that, as of the effective date of 1.0 of this regulation, emitted NO_x at a rate greater than the rate identified in Table 3-1 of 7 **DE Admin. Code** 1112, were not equipped with NO_x emission control technology, and were not subject to the requirements of 7 **DE Admin. Code** 1139. In effect, 1.0 of this regulation regulates sources that remain high NO_x emitters after the application of RACT and post RACT requirements, and that have not committed substantial capital funds to reduce NO_x emissions.

1.2 Applicability

1.2.1 The provisions of 1.0 of this regulation apply to any person that owns or operates any combustion unit with a maximum heat input capacity of equal to or greater than 100 million btu per hour, except that 1.0 of this regulation shall not apply to any unit that, as of the effective date of 1.0 of this regulation:

- 1.2.1.1 Emits NO_x at a rate equal to or less than the rate identified in Table 3-1 of **DE Admin. Code** 1112.
- 1.2.1.2 Is equipped with low NO_x burner, flue gas recirculation, selective catalytic reduction, or selective non-catalytic reduction technology.
- 1.2.1.3 Is subject to the requirements of 7 **DE Admin. Code** 1139.

1.2.2 The requirements of 1.0 of this regulation are in addition to all other state and federal requirements.

1.2.3 Affected persons shall comply with the requirements of 1.3 of this regulation as soon as practicable, but no later than May 1, 2004.

1.3 Standards.

1.3.1 The NO_x emission rate from any unit subject to 1.0 of this regulation shall be equal to or less than the following:

- 1.3.1.1 Between May 1st through September 30th of each year, inclusive: 0.10 lb/mmBTU, 24-hour calendar day average.
- 1.3.1.2 During all times that gaseous fuel is being fired: 0.10 lb/mmBTU, 24-hour calendar day average.
- 1.3.1.3 During all times not covered by 1.3.1.1 and 1.3.1.2 of this regulation: 0.25 lb/mmBTU, 24-hour calendar day average.

1.3.2 As an alternative to compliance with the requirements of 1.3.1 of this regulation, compliance may be achieved through the procurement and retirement of NO_x allowances authorized for use under 7 **DE Admin. Code** 1139, as follows:

- 1.3.2.1 The actual 24-hour calendar day average NO_x emission rate in pounds per million btu shall be determined for each day of unit operation, using CEMs operated in accordance with 1.4 of this regulation.

- 1.3.2.2 The actual heat input to each unit in million btu shall be determined for each day of unit operation, using methods proposed by the person subject to 1.0 of this regulation and acceptable to the Department.
- 1.3.2.3 0.10 or 0.25, as applicable and consistent with 1.3.1 of this regulation, shall be subtracted from the rate determined in 1.3.2.1 of this regulation.
- 1.3.2.4 To obtain the number of pounds of NO_x emitted for a particular day, the emission rate determined in 1.3.2.3 of this regulation shall be multiplied by the heat input to the unit for that day determined in 1.3.2.2 of this regulation. If the emission rate determined in 1.3.2.3 of this regulation is equal to or less than zero, then the number of pounds of NO_x emitted for that day shall be zero.
- 1.3.2.5 Not later than the 20th day of each month:
 - 1.3.2.5.1 The number of pounds of NO_x emissions calculated pursuant to 1.3.2.4 of this regulation shall be summed for each calendar month, the result shall be divided by 2000, and shall be rounded to the nearest whole ton.
 - 1.3.2.5.2 For each ton of NO_x emissions calculated pursuant to 1.3.2.5.1 of this regulation, records shall be maintained demonstrating that one NO_x allowance owned by the person subject to 1.0 of this regulation is identified and available, by serial number, for retirement.
- 1.3.2.6 Not later than February 1 of each calendar year, the NO_x allowances identified pursuant to 1.3.2.5.2 of this regulation for the previous calendar year, shall be submitted to the Department for retirement. Such submission shall detail the calculations specified in 1.3.2.1 through 1.3.2.5 of this regulation, and shall indicate the serial number of each allowance to be retired.
- 1.4 Monitoring Requirements. Compliance with the NO_x emission standards specified in 1.0 of this regulation shall be determined based on CEM data collected in accordance with the requirements of 3.1.2 of 7 **DE Admin. Code** 1117 (Performance Specification 2), and in compliance with the requirements of 40 CFR, Part 60, Appendix F.
- 1.5 Recordkeeping and Reporting Requirements.
 - 1.5.1 Not later than 180 days after the effective date of 1.0 of this regulation, any person subject to 1.0 of this regulation shall develop, and submit to the Department for approval, a schedule for bringing the affected emission unit or units into compliance with the requirements of 1.0 of this regulation. Such schedule shall include, at a minimum, all of the following:
 - 1.5.1.1 The method by which compliance will be achieved
 - 1.5.1.2 The dates by which the affected person commits to completing the following major increments of progress, as applicable:
 - 1.5.1.2.1 Completion of engineering;
 - 1.5.1.2.2 Submission of permit applications;
 - 1.5.1.2.3 Awarding of contracts for construction or installation;
 - 1.5.1.2.4 Initiation of construction;
 - 1.5.1.2.5 Completion of construction;
 - 1.5.1.2.6 Commencement of trial operation;
 - 1.5.1.2.7 Initial compliance testing;
 - 1.5.1.2.8 Submission of compliance testing reports;
 - 1.5.1.2.9 Commencement of normal operations (in full compliance).
 - 1.5.2 Any person subject to 1.0 of this regulation shall submit to the Department an initial compliance certification not later than May 1, 2004. The initial compliance certification shall, at a minimum, include the following information:
 - 1.5.2.1 The name and the location of the facility.
 - 1.5.2.2 The address and telephone number of the person responsible for the facility.

- 1.5.2.3 Identification of the subject source or sources.
- 1.5.2.4 The applicable standard.
- 1.5.2.5 The method of compliance.
- 1.5.2.6 Certification that each subject source is in compliance with the applicable standard
- 1.5.2.7 All records necessary for determining compliance with the standards of 1.0 of this regulation shall be maintained at the facility for a period of five years.
- 1.5.3 Any person subject to 1.0 of this regulation shall, for each occurrence of excess emissions, within 30 calendar days of becoming aware of such occurrence, supply the Department with the following information:
 - 1.5.3.1 The name and location of the facility.
 - 1.5.3.2 The subject source or sources that caused the excess emissions.
 - 1.5.3.3 The time and date of first observation of the excess emissions.
 - 1.5.3.4 The cause and expected duration of the excess emissions.
 - 1.5.3.5 The estimated rate of emissions (expressed in the units of the applicable emission limitation) and the operating data and calculations used in determining the magnitude of the excess emissions.
 - 1.5.3.6 The proposed corrective actions and schedule to correct the conditions causing the excess emissions.
- 1.5.4 Any person subject to 1.0 of this regulation shall maintain all information necessary to demonstrate compliance with the requirements of 1.0 of this regulation for a minimum period of five years. Such information shall be immediately made available to the Department upon verbal and written request.

41/11/2009 xx/xx/2011

2.0 Control of NO_x Emissions from Industrial Boilers and Process Heaters at Petroleum Refineries

2.1 Purpose

- 2.1.1 The purpose of Section 2.0 of this regulation is to reduce NO_x emissions from Delaware's large industrial boilers and process heaters that are located at petroleum refineries.
- 2.1.2 Under the 8-hour ozone national ambient air quality standard (NAAQS), the state of Delaware is part of the Philadelphia-Wilmington-Atlantic City, PA-DE-MD-NJ moderate non-attainment area (NAA). The entire NAA, including Delaware, is required by the Clean Air Act (CAA) to attain the 8-hour ozone NAAQS by 2010. After attainment, the area must maintain compliance with the NAAQS. By implementing Section 2.0 of this regulation, NO_x emission reductions from the affected boilers and heaters shall contribute to (1) attainment and maintenance of the 8-hour ozone standard, and (2) improvement of the ambient air quality, in both Delaware and the entire NAA.
- 2.1.3 Additionally, New Castle County of Delaware is a part of the Philadelphia-Wilmington-Camden, PA-DE-NJ NAA for the annual fine particulate matter (PM_{2.5}) NAAQS, and is required by the CAA to attain the NAAQS by 2010. Since NO_x is a significant precursor to PM_{2.5} formation, reducing NO_x emissions will also assist in attainment and maintenance of the PM_{2.5} standard.

2.2 Applicability and Compliance Dates

- 2.2.1 Section 2.0 of this regulation applies to any industrial boiler or process heater with a maximum heat input capacity of equal to or greater than 200 million BTUs per hour (mmBTU/Hour) (~~except for any Fluid Catalytic Cracking Unit carbon monoxide (CO) boiler~~), which is operated or permitted to operate within a petroleum refinery facility on ~~the effective date of this section~~ July 11, 2007. This comprises the following ~~nine (9)~~ ten (10) units at the Delaware City refinery:
 - 2.2.1.1 Crude Unit Vacuum Heater (Unit 21-H-2);
 - 2.2.1.2 Crude Unit Atmospheric Heater (Unit 21-H-701);
 - 2.2.1.3 Fluid Coking Unit Carbon Monoxide boiler (Unit 22-H-3);

- 2.2.1.4 Steam Methane Reformer Heater (Unit 37-H-1);
- 2.2.1.5 Continuous Catalyst Regenerator Reformer Heater (Unit 42-H-1,2,3);
- 2.2.1.6 Boiler 1 (Unit 80-1);
- 2.2.1.7 Boiler 2 (Unit 80-2);
- 2.2.1.8 Boiler 3 (Unit 80-3);
- 2.2.1.9 Boiler 4 (Unit 80-4).
- 2.2.1.10 Fluid Catalytic Cracking Unit Carbon Monoxide (CO) boiler (Unit 23-H-3).
- 2.2.2 The requirements of Section 2.0 of this regulation are in addition to all other state and federal requirements.
- 2.2.3 The following units shall be in compliance with the requirements of Section 2.0 of this regulation on and after July 11, 2007: Crude Unit Atmospheric Heater (Unit 21-H-701), Steam Methane Reformer Heater (Unit 37-H-1) and Boiler 2 (Unit 80-2).
- 2.2.4 The following units shall be in compliance with the requirements of Section 2.0 of this regulation as soon as practicable, but not later than:
 - 2.2.4.1 December 31, 2008: Boiler 1 (Unit 80-1) and Crude Unit vacuum Heater (Unit 21-H-2), and Fluid Catalytic Cracking Unit CO boiler (Unit 42-H-1, 2, 3).
 - 2.2.4.2 May 1, 2011: Boiler 3 (Unit 80-3) and Boiler 4 (Unit 80-4).
 - 2.2.4.3 December 31, 2012: Continuous Catalyst Regenerator Reformer Heater (Unit 42-H-1, 2, 3).
- 2.3 Standards.
 - 2.3.1 Except as provided for in 2.3.2 of this regulation, the owner or operator of any industrial boiler or process heater identified in Section 2.2.1 of this regulation shall ~~meet~~ not operate except in compliance with the applicable NO_x emission limitation identified in the following sections:
 - 2.3.1.1 For the Fluid Coking Unit Carbon Monoxide boiler (Unit 22-H-3), Reserved.
 - 2.3.1.2 For the Steam Methane Reformer (SMR) Heater (Unit 37-H-1), Reserved.
 - 2.3.1.3 For Boiler 1 (Unit 80-1), Boiler 3 (Unit 80-3) and Boiler 4 (Unit 80-4), 0.015 lb/mmBTU, on a 24-hour rolling average basis.
 - 2.3.1.4 For the Fluid Catalytic Cracking Unit CO boiler (Unit 23-H-3), 20 ppmvd @ 0 % O₂ on a 365 day rolling average basis, and 40 ppmvd @ 0 % O₂ on a 7-day rolling average basis.
 - 2.3.1.45 For any unit not covered by 2.3.1.1, 2.3.1.2, or 2.3.1.3, or 2.3.1.4 0.04 lb/mmBTU, on a 24-hour rolling average basis.
 - 2.3.1.56 The standards set out in 2.3 of this regulation shall not apply to the start-up and shutdown of equipment when emissions from such equipment during a start-up and shutdown are addressed in an operation permit issued pursuant to the provisions of ~~§2 of Regulation 7~~ DE Admin. Code 1102.
 - 2.3.2 As an alternative to complying with one or more of the unit specific emission limitations specified in 2.3.1 of this regulation the owner or operator of any industrial boiler or process heater identified in Section 2.2.1 of this regulation shall limit the NO_x emissions, from all NO_x emission sources at the facility, to equal to or less than the applicable emission cap specified in 2.3.2.1 though 2.3.2.3 of this regulation.
 - 2.3.2.1 2,525 tons per year, evaluated over each twelve (12) consecutive month rolling period, for any twelve (12) month rolling period ending on or before January 2014.
 - 2.3.2.2 2,225 tons per year, evaluated over each twelve (12) consecutive month rolling period, commencing with the twelve (12) month rolling period beginning on December 31, 2013 and ending on December 31, 2014.
 - 2.3.2.3 1,650 tons per year, evaluated over each twelve (12) consecutive month rolling period, commencing with the twelve (12) month rolling period beginning on December 31, 2014 and ending on December 31, 2015.
- 2.4 Monitoring Compliance Requirements.

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- 2.4.1 Compliance with the NO_x emission standards specified in 2.3.1, ~~2.3.2, and 2.3.4~~ of this regulation shall be determined based on CEM data collected in accordance with the appropriate requirements set forth in 40 CFR, Part 60, Appendix B, Performance Specification 2, and the QA/QC requirements in 40 CFR Part 60, Appendix F.
- 2.4.2 Compliance with the facility-wide NO_x emission cap specified in 2.3.2 of this regulation shall be determined not later than the last day of each month, as follows.
- 2.4.2.1 The mass of NO_x (tons) emitted from each NO_x emission source at the facility during the prior month shall be accurately determined using the methods specified in 2.4.2.1.1 through 2.4.2.1.3 of this regulation, as approved by the Department.
- 2.4.2.1.1 Continuous emission monitoring systems (CEMS) that meet the requirements of 2.4.1 of this regulation shall be used to determine the emission from any emission unit equipped or required to be equipped with NO_x CEMS, or
- 2.4.2.1.2 A NO_x emission factor that is based upon the results of the most recent performance testing conducted in accordance with a protocol approved by the Department shall be used to determine the emission from any unit that has conducted or that is required to conduct such performance testing, or
- 2.4.2.1.3 Published NO_x emission factors for such source or category of sources, or any other method approvable by the Department, shall be used to determine the emission from any unit not covered by 2.4.2.1.1 or 2.4.2.1.2 of this regulation. Emission factors may be adjusted by the Department to account for the degree of uncertainty or limitations in the factors' development.
- 2.4.2.2 NO_x emissions from each NO_x emission source at the facility shall be determined for all periods of startup, shutdown or malfunction. To the extent that such emissions are not measured by CEMS during such periods of startup, shutdown or malfunction, and to the further extent that performance testing for such source did not establish emission factors for such equipment reflective of operations during periods of startup, shutdown or malfunction, then the owner or operator shall estimate such emission rates from such source during any periods of startup, shutdown or malfunction in accordance with best engineering judgment, provided however that the owner or operator must report to the Department the basis for the emission projections in such instance, and the Department may object to and modify the emission estimation methodology as it determines appropriate.
- 2.4.2.3 The emissions calculated in 2.4.2.1 and 2.4.2.2 of this regulation shall be summed and aggregated with the calculation results for the preceding months as provided for in 2.4.2.3.1 through 2.4.2.3.3 below.
- 2.4.2.3.1 For any month before January 2014, the preceding eleven (11) consecutive months shall be included.
- 2.4.2.3.2 For any month in calendar year 2014, only months in calendar year 2014 shall be included.
- 2.4.2.3.3 For any month in calendar year 2015, only months in calendar year 2015 shall be included.
- 2.4.2.4 Compliance shall be determined by comparing the results of the calculations in 2.4.2.3 of this regulation with the appropriate NO_x emission cap specified in 2.3.2 of this regulation. Each ton of emissions calculated under 2.4.2.3 of this regulation that is above the applicable NO_x emission cap specified in 2.3.2 of this regulation constitutes a violation of 2.0 of this regulation. Fractions of tons shall be rounded up to the next higher number.
- 2.5 Recordkeeping and Reporting Requirements
- 2.5.1 Not later than ~~(insert the date that is 180 days after the effective date of this revised Section 2.0) of this regulation~~, any person subject to Section 2.0 of this regulation shall develop, and submit to the Department, a schedule for bringing the ~~affected emission unit(s), identified in Section 2.2.4,~~

facility into compliance with the requirements of Section 2.3 of this regulation. Such schedule shall include, at a minimum, all of the following:

- 2.5.1.1 The method by which compliance will be achieved.
- 2.5.1.2 For persons subject to the requirements of 2.3.1 of this regulation, the dates by which the affected person plans to complete the following major increments of progress, as applicable:
 - 2.5.1.2.1 Completion of engineering;
 - 2.5.1.2.2 Submission of permit applications;
 - 2.5.1.2.3 Awarding of contracts for construction and/or installation;
 - 2.5.1.2.4 Initiation of construction;
 - 2.5.1.2.5 Completion of construction;
 - 2.5.1.2.6 Commencement of trial operation;
 - 2.5.1.2.7 Initial compliance testing;
 - 2.5.1.2.8 Submission of compliance testing reports;
 - 2.5.1.2.9 Commencement of normal operations (in full compliance).
- 2.5.2 For persons subject to the requirements of 2.3.2 of this regulation, the owner or operator shall submit to the Department all of the information specified in 2.5.2.1 and 2.5.2.2 of this regulation.
 - 2.5.2.1 The date that compliance with this regulation will begin pursuant to 2.3.2 of this regulation.
 - 2.5.2.2 A plan for achieving NOx emission reductions consistent with the NOx caps specified in 2.3.2 of this regulation. This plan shall include the information specified in 2.5.2.2.1 and 2.5.2.2.3 of this regulation.
 - 2.5.2.2.1 A list of the emission units at the facility that are required to be included in the facility-wide NOx cap.
 - 2.5.2.2.2 A report of the monthly NOx emissions from the emission units identified in 2.5.2.2.1 of this regulation, for each of the twelve (12) months that precedes the date specified in 2.5.2.1 of this regulation.
 - 2.5.2.2.3 The current expectation of NOx emission reductions to be achieved at specific individual sources, along with a statement of the anticipated control measures to be utilized and timelines for achieving such emission reductions.
- 2.5.23 Any person subject to ~~Section 2.0~~ the requirements of 2.3.1 of this regulation shall submit to the Department an initial compliance certification by the later of the following dates, or the date the unit first operates after the following date subject to the requirements of 2.3.1: September 10, 2007 for units identified in Section 2.2.3 of this regulation and, for units identified in Section 2.2.4, by the compliance date specified in Section 2.2.4. The initial compliance certification shall include, at a minimum, all of the following information:
 - 2.5.23.1 The name and the location of the facility;
 - 2.5.23.2 The name, address and telephone number of the person responsible for the facility;
 - 2.5.23.3 Identification of the subject source(s);
 - 2.5.23.4 The applicable standard;
 - 2.5.23.5 The method of compliance;
 - 2.5.23.6 Certification that each subject source is in compliance with the applicable standard.
- 2.5.4 Any person subject to the requirements of 2.3.2 of this regulation shall submit to the Department a semi-annual report that contains all of the information specified in 2.5.4.1 through 2.5.4.5 of this regulation.
 - 2.5.4.1 The identification of owner and operator of the facility.
 - 2.5.4.2 The total annual NOx emissions (tons/year) from the facility based on a 12-month rolling total for each month in the reporting period recorded pursuant to 2.4.2 of this regulation.
 - 2.5.4.3 A list of the emission units at the facility that are required to be included in the facility-wide NOx cap.

PROPOSED REGULATIONS

- 2.5.4.4 Identification of any deviation from the monitoring provisions that were approved by the Department pursuant to 2.4.2 of this regulation, and documentation of the alternate methods used to determine emissions.
- 2.5.4.5 A signed statement by the responsible official certifying the truth, accuracy, and completeness of the information provided in the report.
- 2.5.35 Any person subject to Section 2.0 of this regulation shall, for each occurrence of excess emissions above the standards of Section 2.3 of this regulation, including periods when monitoring data was not collected in accordance with procedures approved pursuant to 2.4.2.1 of this regulation, within thirty (30) calendar days of becoming aware of such occurrence, supply the Department with the following information:
- 2.5.35.1 The name and location of the facility;
- 2.5.35.2 The subject source(s) that caused the excess emissions;
- 2.5.35.3 The time and date of first observation of the excess emissions;
- 2.5.35.4 The cause and expected duration of the excess emissions;
- 2.5.35.5 The estimated rate of emissions (expressed in the units of the applicable emission limitation) and the operating data and calculations used in determining the magnitude of the excess emissions;
- 2.5.35.6 The proposed corrective actions and schedule to correct the conditions causing the excess emissions.
- 2.5.46 Any person subject to Section 2.0 of this regulation shall maintain all information necessary to determine and demonstrate compliance with the requirements of this section for a minimum period of five (5) years. Such information shall be immediately made available to the Department upon verbal and written request.

5 DE Reg. 1299 (12/01/01)

11 DE Reg. 75 (07/01/07)

12 DE Reg. 347 (09/01/08)

13 DE Reg. 670 (11/01/09)

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.

DEPARTMENT OF AGRICULTURE NUTRIENT MANAGEMENT PROGRAM

Statutory Authority: 3 Delaware Code, Section 2221 (3 Del.C. §2221)
3 DE Admin. Code 1201

1201 Nutrient Management Certification Regulations

ORDER

Date of Issuance: December 15, 2010

Effective Date: January 11, 2010

Pursuant to the authority provided by 3 Delaware Code, Chapter 22, §2221 and 3 Delaware Administrative Code 1201, the Delaware Department of Agriculture (DDA) and the Delaware Nutrient Management Commission (DNMC) issue this Order adopting amendments to 1201 Nutrient Management Certification Regulations. Following public notice of the proposed regulation amendments, the DNMC and DDA make the following findings and conclusions.

BACKGROUND AND PROCEDURAL HISTORY

This Order considers the proposed Nutrient Management Certification Regulations. Certification by the Delaware Nutrient Management Program is required (3 Del.C. §2201 - 2290) for all who apply fertilizer and/or animal manure greater than 10 acres or who manage animals greater than 8,000 pounds of live animal weight. The proposed amendments to the certification regulations establish nutrient handling requirements for certain nutrient handlers. The proposed regulatory amendments specifically address field staging and stockpiling of poultry manure. The DNMC and DDA published the proposed regulations in the October 1, 2010 *Delaware Register of*

Regulations. Public notice of the proposed regulations was also provided in the *News Journal* and *State News*. In addition, two separate notices were published in the *Delmarva Farmer*. The public comment period remained open from October 1 to October 31, 2010. No written public comments were received. A public hearing was not held.

FINDINGS OF FACT AND CONCLUSIONS

1. The public was given notice and opportunity to provide the DNMC and DDA with comments in writing concerning the proposed regulation.
2. After considering the regulation amendments as proposed, the Commission and the Department hereby adopt the regulations (attached) as final.
3. The effective date of this Order will be ten (10) days from the publication of this Order in the *Register of Regulations* on January 1, 2010

So ordered as of December 15, 2010

William Vanderwende, Chair Delaware Nutrient Management Commission

Ed Kee, Secretary Delaware Department of Agriculture

1201 Nutrient Management Certification Regulations

*Please note that no changes were made to the regulation as originally proposed and published in the October 2010 issue of the *Register* at page 212 (14 DE Reg. 212). Therefore, the final regulation is not being republished. A copy of the final regulation is available at:

1201 Nutrient Management Certification Regulations

DELAWARE STANDARDBRED BREEDERS' FUND
Statutory Authority: 29 Del.C. Section 4815(b)(3)b.2.D
(29 Del.C. §4815(b)(3)b.2.D)
3 DE Admin. Code 502

ORDER

502 Delaware Standardbred Breeders' Fund Regulations

I. NATURE OF PROCEEDINGS

Pursuant to its authority under 29 Del.C. §4815(b)(3)b.2.D and §10115, the State of Delaware, Department of Agriculture's Standardbred Breeder's Fund (herein "the Fund") proposed to amend its regulations. The Fund's purpose in proposing this amendment was to clarify a racing condition already in place.

Notice of a public comment period of thirty (30) days on the Fund's proposed amendments was published in the *Delaware Register of Regulations* for November 1, 2010 in accordance with 29 Del.C. §10115. This is the Fund's Decision and Order adopting the proposed amended regulations.

II. PUBLIC COMMENTS

The Fund received no public comments in response to its notice of intention to adopt the proposed amended regulations.

III. FINDINGS AND CONCLUSIONS

The public was given the required notice of the Fund's intention to adopt the proposed amended regulations and was given ample opportunity to provide the Fund with comments opposing the Fund's plan. Thus, the Fund concludes that its consideration of the proposed amended regulations was entirely within its prerogatives and statutory authority and, having received no comments opposed to adoption, is now free to adopt the proposed amended regulations.

IV. ORDER

AND NOW this 8th day of December, 2010, it is hereby ordered that:

1. The proposed amendment to the Fund's regulations is adopted;
2. The text of the regulation shall be in the form attached hereto as Exhibit A;
3. The effective date of this Order is ten days from the date of its publication in the *Delaware Register of Regulations* in accordance with 29 *Del.C. §10118(e)*; and
4. The Fund reserves to itself the authority to issue such other and further orders in this matter as may be just and proper.

IT IS SO ORDERED:

***Please note that no changes were made to the regulation as originally proposed and published in the November 2010 issue of the *Register* at page 345 (14 DE Reg. 345). Therefore, the final regulation is not being republished. A copy of the final regulation is available at:**

502 Delaware Standardbred Breeders' Fund Regulations

DEPARTMENT OF EDUCATION**OFFICE OF THE SECRETARY**

Statutory Authority: 14 Delaware Code, Section 122(b) (14 **Del.C.** §122(b))
14 **DE Admin. Code** 103

REGULATORY IMPLEMENTING ORDER**103 Accountability for Schools, Districts and the State****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** 103 Accountability for Schools, Districts and the State related to the Comprehensive Success Review requirement for schools Under Improvement Phase I. The Department in response to recent feedback from the intended participants is proposing to change the requirements around this review. All LEAs are currently engaged in Change Management work that is similar, albeit not synonymous, to the intention of the planned Comprehensive Success Review work. In addition, the Department with input from LEAs proposes additional flexibility in determining which schools would most benefit from the process. This is also in line with our federal requirements to provide support to schools that are not performing as well as others. Additionally, there is a resource concern and this added flexibility will allow for limited resources to be used in the most beneficial manner.

Notice of the proposed regulation was published in the News Journal and the Delaware State News on November 4, 2010, in the form hereto attached as *Exhibit "A"*. Comments were received from Governor's Advisory

Council for Exceptional Citizens and the State Council for Persons with Disabilities. The Councils expressed concerns with the elimination of the Comprehensive Success Review process as a requirement for schools that are Under Improvement Phase I. The Department will continue to monitor LEA and school compliance and implementation of all federal and state requirements; administer and review school improvement grants in a timely manner; and provide technical assistance to LEAs. The Comprehensive Success Review was an additional process imposed on schools already subject to significant federal and state consequences. Through the elimination of the mandatory requirement, LEAs will have flexibility in determining which schools would most benefit from this process and when that benefit would best be realized. For example, LEAs may choose to implement the process during the first year of Academic Review or earlier in order to prevent a school from reaching improvement status. The Councils suggested wording changes, which have been made.

II. Findings of Facts

The Secretary finds that it is appropriate to amend 14 **DE Admin. Code** 103 Accountability for Schools, Districts, and the State related to the Comprehensive Success Review requirement for schools Under Improvement Phase I.

III. Decision to Amend the Regulation

For the foregoing reasons, the Secretary concludes that it is appropriate to amend 14 **DE Admin. Code**. Therefore, pursuant to 14 **Del.C.** §122, 14 **DE Admin. Code** 103 Accountability for Schools, Districts, and the State attached hereto as *Exhibit "B"* is hereby amended. Pursuant to the provision of 14 **Del.C.** §122(e), 14 **DE Admin. Code** 103 Accountability for Schools, Districts, and the State 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** 103 Accountability for Schools, Districts, and the State amended hereby shall be in the form attached hereto as *Exhibit "B"*, and said regulation shall be cited as 14 **DE Admin. Code** 103 Accountability for Schools, Districts, and the State 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 December 16, 2010. 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 December, 2010.

Department of Education

Lillian M. Lowery, Ed.D., Secretary of Education

Approved this 16th day of December, 2010

State Board of Education

Teri Quinn Gray, Ph.D., President
Jorge L. Melendez, Vice President
G. Patrick Heffernan

Gregory Coverdale
Terry M. Whittaker, Ed.D.
James L. Wilson, Ed.D.

Barbara B. Rutt

103 Accountability for Schools, Districts and the State

(Break in Continuity of Sections)

7.0 Accountability for Schools that are Under Improvement

- 7.1 Under Improvement Phase 1 -- A school that meets the definition of "Under Improvement" found in 2.11.5 shall, in the first school year after meeting the definition of Under Improvement, be considered in "Under Improvement Phase 1." A school that is in Under Improvement Phase I shall:
- 7.1.1 Review and modify its current School Improvement Plan, outlining specific school improvement activities to be implemented; and
 - 7.1.2 ~~Utilize the Department's Comprehensive Success Review process, which includes an audit tool, an on-site visit, and feedback on strengths and opportunities for improvement; and~~
 - 7.1.3 ~~[A school designated as Title I shall offer ESEA Choice. If a school is designated Title I, offer ESEA choice.]~~
- 7.2 Under Improvement Phase 2 - A school that is identified as Under Improvement Phase 1 pursuant to 7.1 and fails to meet AYP for an additional year shall be considered "Under Improvement Phase 2." Such schools shall:
- 7.2.1 Amend the School Improvement Plan to add, at a minimum, one or more of the following options deemed appropriate, if permitted by State law; and that should be closely aligned with the areas in which the school failed to make AYP. Districts and charter schools may use federal, state or local funding, as permitted by State law, and may request funding from the Department to implement these initiatives:
 - 7.2.1.1 Development of community partnerships for after school opportunities/tutoring, increasing parental involvement;
 - 7.2.1.2 Educator professional development or mentoring;
 - 7.2.1.3 Supplemental services as defined in 7.2.2 or other nontraditional services such as credit recovery programs;
 - 7.2.1.4 Performance incentives for Highly Effective Teachers, as defined in 14 DE Admin Code 106A;
 - 7.2.1.5 Use of family crisis therapists and/or counseling and support programs for students;
 - 7.2.1.6 Technical assistance to assist with budget development/usage, professional development and evaluation, engaging parents and the community;
 - 7.2.1.7 Attendance and school climate initiatives.
 - 7.2.2 Schools designated as Title I shall continue to provide school choice as defined by ESEA and shall offer students supplemental services, defined as tutoring and other supplemental academic enrichment services that are designed to increase the academic achievement of students, and are offered in addition to instruction provided during the school day and are of high quality and research-based.

***Please note that no additional changes were made to the regulation as originally proposed and published in the November 2010 issue of the *Register* at page 347 (14 DE Reg. 347). Therefore, the final regulation is not being republished. A copy of the final regulation is available at:**

103 Accountability for Schools, Districts and the State

DEPARTMENT OF HEALTH AND SOCIAL SERVICES
DIVISION OF MEDICAID AND MEDICAL ASSISTANCEStatutory Authority: 31 Delaware Code, Section 512 (31 **Del.C.**, §512)**NATURE OF THE PROCEEDINGS****Delaware Medicaid and CHIP Managed Care Quality Assessment & Improvement Strategy Draft**

Delaware Health and Social Services ("Department") / Division of Medicaid and Medical Assistance (DMMA) initiated proceedings to announce a thirty (30)-day public comment period regarding the Delaware's Quality Management Strategy Draft. 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 November 2010 *Delaware Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by November 30, 2010 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

SUMMARY OF PROPOSAL

The proposed announces a thirty (30)-day public comment period on the draft of the Delaware Medicaid and CHIP Managed Care Quality Assessment and Improvement Strategy for healthcare services.

Statutory Authority

- Section 1932(c)(1) of the Social Security Act, *Quality Assurance Standards, Quality Assessment and Improvement Strategy*
- 42 CFR 438, Subpart D, *Quality Assessment and Performance Improvement*

Background

The Delaware Medical Assistance Program (DMAP) is required to develop a Medicaid Managed Care Quality Assessment and Improvement Strategy (Strategy), pursuant to 42 CFR §438.200. A separate strategy has been developed for the Managed Care Organizations (MCOs).

The DMAP Managed Care Quality Assessment and Improvement Strategy incorporates policies; procedures; contract compliance; and input from the public, stakeholder providers, recipient advocates and multiple state agencies that hold an interest in the improvement of access and of clinical and service quality received by the Medicaid recipients.

All quality activities for the DMAP population are integrated into a single Strategy, which applies throughout the Delaware Medicaid Managed Care service area. The Division of Medicaid and Medical Assistance (DMMA) oversees the Strategy to verify that the performance of quality improvement functions is timely, consistent, and effective.

The Strategy is designed with the intent that services provided to recipients meet established standards for access to care; clinical quality of care and quality of service, and that opportunities to improve these areas are identified and acted upon. The Strategy is designed to identify, document, and review access, quality of care, and service issues, and to verify that appropriate corrective actions are taken to address these issues.

The Strategy features:

- Assessment and improvement of quality of care and services through use of monitoring and national benchmarks for the Medicaid population
- Focused audits
- Studies
- Assessment of recipient and provider satisfaction

- Review of potential quality issues, recipient appeals and grievances
- Review of access to care through analysis of provider networks using contract and credentialing criteria
- Compliance with contractual operations and organizational structure.

Following public notice, the proposed Quality Strategy will be submitted to the Centers for Medicare and Medicaid Services (CMS) for approval. The finalized Quality Strategy will become effective with the execution of the new Memorandum of Agreement and will be reviewed by the state quarterly, as a standing agenda item, during regularly scheduled Quality Improvement Initiative (QII) Task Force meetings and teleconferences. The State, in turn, will provide quarterly updates to CMS with regard to the status of the State's Quality Strategy for DMAP and will provide CMS with written revisions to the Quality Strategy whenever significant revisions are made to the Strategy. A copy of the annual Work Plan will be submitted to CMS each year.

The program is reviewed, evaluated and updated annually or more often as additional information becomes available.

Summary of Proposal

DMMA is announcing a thirty (30)-day public comment period on the draft State Quality Strategy. The strategy is designed to monitor and evaluate the quality and appropriateness of healthcare services to enrollees the Delaware Medicaid and CHIP programs.

The specific goals of the Quality Strategy are to:

- Enhance efficiency of care;
- Increase effectiveness of care;
- Promote equity of care;
- Enrich patient-centeredness;
- Ensure safety; and,
- Improve timeliness of care.

Cost/Budgetary Impact

These revisions impose no increase in cost on the General Fund.

SUMMARY OF COMMENTS RECEIVED WITH AGENCY RESPONSE AND EXPLANATION OF CHANGES

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. The Division of Medicaid and Medicaid Assistance (DMMA) has considered each comment and responds as follows.

First, on p. 3, Quality Strategy Overview, last paragraph, there is a reference to providing quality care ...“through increased address and appropriate and timely utilization of health care services. The word “address” is erroneous.

Agency Response: The word “address” was corrected to “access”.

Second, on p. 6, DMMA describes a QII Task Force which includes “representatives from all CHIP funded programs and waivers, MCO's, Health Benefits Manager, Pharmacy Benefits Manager (PBM), the External Quality Review Organization (EQPO), State agencies receiving Medicaid and CHIP funding, and the MMDS leadership team.” DMMA may wish to consider whether the Task Force could be strengthened through addition of a representative from the SCPD, CLASI, or similar organization.

Agency Response: DMMA appreciates your comments on this issue.

Third, on p. 8, the chart lists “Division of Child Mental Health Services”. The reference should be updated to “Division of Prevention and Behavioral Health Services”.

Agency Response: The division name has been updated to “Division of Prevention and Behavioral Health Services”.

Fourth, p. 10 describes the MCOs under the Diamond State Health Plan. It omits the Division of Prevention and Behavioral Health Services which serves as an MCO under the Plan. This is a major concern with the entire document. There are simply no references to the Division. For example, performance data is only generated for Unison and DPCI. See pp. 65-67. The Plan should address quality assurance within the Division acting as an MCO.

Agency Response: The QMS has been written to be generic enough to be all inclusive of the many groups which spend Medicaid dollars. The quality management structure diagram has been updated to reflect the new name change for the Division of Prevention and Behavioral Health Services. DMMA appreciates your comments on this issue.

Fifth, on p. 11, CHIP section, second paragraph, there is a reference to “infants (under age 1) under 200% covered through a Medicaid expansion program...” We believe the reference should be to “under 200% of the Federal Poverty Level (FPL)”.

Agency Response: QMS updated to correctly reflect the reference to “under 200% of the Federal Poverty Level (FPL)”.

Sixth, on p. 11, last paragraph, there is a reference to a 5 year bar on child eligibility if the child entered the United States after 8/22/96. We believe DMMA rescinded that bar earlier this year. See 13 DE Reg. 1540 (June 1, 2010).

Agency Response: Delaware has implemented the option under Section 214 of the Children’s Health Insurance Program Reauthorization Act of 2009 (P.L. 111-3) known as CHIPRA, to provide coverage to noncitizen children regardless of their date of entry into the U.S. This has been updated in the QMS.

Seventh, p. 17 recites that MCOs are required to develop a treatment plan for all beneficiaries qualifying as persons with special health care needs, including those with a “serious or chronic physical, developmental, behavioral, or emotional condition, and who also require health and related services of a type or amount beyond that required by children generally”. Does DMMA have a template for such plans or does each MCO have its own criteria? If DMMA does not have a template or standards, it could consider adopting them.

Agency Response: DMMA does not have a template for the treatment plan. Both MCOs contracted by DMMA are nationally certified by the National Committee for Quality Assurance (NCQA) and operate under their nationally approved and recognized standards. DMMA accepts the standards approved by this national accrediting body.

Eighth, on p. 22, it appears that information on “grievances” and “appeals” is reviewed. It is unclear if fair hearing results are included in this assessment. If not, we recommend that DMMA include such review in assessing MCOs.

Agency Response: DMMA does include fair hearing results in its assessment of MCOs.

Ninth, p. 22 refers to an MCO requirement of ensuring the availability of a no-cost second opinion from a qualified health care professional. We have not seen this aspect of MCO coverage advertised. Are there standards which define eligibility for a second opinion? If so, we respectfully request a copy.

Agency Response: Any member is eligible for a second opinion. The requirement is a Prior Authorization if the provider is out of network. This information is discussed in the Member Handbook provided to all members.

Tenth, p. 33 refers to the following MCO duty: “(s)atisfactory methods for ensuring their providers are in compliance with Title II of the Americans with Disabilities Act”. Title II covers public agencies. Title III covers private entities. It would be preferable to amend the reference to read “Titles II and III of the Americans with

Disabilities Act”. Consistent with the attachments, the accessibility of health care provider offices and equipment (e.g. height adjustable examination tables) has historically been a barrier to effective health care, particularly for persons who must transfer from a wheelchair or use a restroom. How does DMMA assess MCO compliance with the mandate? Do MCOs survey their providers on accessibility, provision of interpreters for the Deaf, etc?

Agency Response: DMMA has amended the reference to read “Titles II and III of the Americans with Disabilities Act”. MCOs provide site visits for all new PCPs to assure wheelchair accessibility. Translation services are provided to members as outlined in the Member Handbook.

Eleventh, p. 35, Notice of Adverse Action section, contains the following sentence: “The MCO’s notice must meet the requirements of §438.404, except that the notice to the provider need not be in writing.” The attached 42 C.F.R. §438.404 does not contain an exemption from the written notice requirement for notices to providers. DMMA may wish to reassess the accuracy of the sentence.

Agency Response: Language is consistent with 42 CFR §438.210(c).

Twelfth, on p. 40, Confidentiality section, second bullet, some words appear to have been omitted. The second “sentence” reads as follows: “And shall be afforded access within thirty (30) calendar days to all members’ medical records whether electronic or paper”.

Agency Response: The sentence has been revised to “ The State is not required to obtain written approval from a member before requesting the member’s record from the primary care provider or any other provider and she be afforded access within thirty 30 calendar days to all members’ medical records whether electronic or paper.

Thirteenth, on p. 45, General Requirements section, last bullet, second “sentence”, some words appear to have been omitted and the 59-word “sentence” is awkward and difficult to understand. The second “sentence” reads as follows: “And who if deciding an appeal of a denial that is based upon lack of medical necessity...disease.”

Agency Response: DMMA agrees that this sentence is awkward, but it follows the CFR language without changing the intent of the regulation. DMMA clarifies that the intent is for the MCOs to ensure that those individuals who make decisions on grievances and appeals are health care professionals who have the appropriate clinical expertise, as determined by the State, in treating the enrollee’s condition or disease.

Fourteenth, on p. 40, Duration of Continued or Reinstated Benefits section, the reference to “within 10 days from when the MCO mails an adverse MCO decision” is not the correct timeframe. The federal regulation [42 C.F.R. 438.420(c)] and 16 DE Admin Code, Part 5000, §5303 clarify that the relevant period is “the period between the date a notice is mailed and the effective date of the action”. Thus, if an MCO provides 15 days notice prior to the effective date of an action, there are 15 days to request a hearing and maintain benefits. The reference could be amended to read “within the timely notice period between mailing of the notice and the effective date of the action”.

Agency Response: Language in the QMS is consistent with the 42 CFR §438.420.

Fifteenth, p. 55 addresses oral interpreter services for foreign languages. It would be preferable to also include a reference in the document to interpreter services for the Deaf.

Agency Response: DMMA has reviewed the C. F. R. 438.10 and references section (d)Format, (1), (i), and (ii), and which includes that “The State expects the MCO will assure that written material uses : (i) easily understood language and format at a sixth grade level; and (ii) written materials are available in alternative formats and in an appropriate manner that takes into consideration the special needs of those who, for example, are visually limited..... and (2) The MCO will inform all enrollees and potential enrollees that information is available in alternative formats. The MCOs provide Interpretive Services which are designed to assist members who have special needs including speech, hearing, sight, etc. The Delaware Relay Services for Hearing –Impaired Members is a free service available 24 hours a day.

Sixteenth, the data on p. 67 suggest a significant disparity in mental health inpatient and outpatient services between DPCI and Unison. Moreover, pp. 68-69 contains the following recital:

The benchmark for Antidepressant medication management has not been met for either MCO. DPCI showed a decrease in compliance with effective acute phase treatment from 2008 (46.92 percent) to 2009 (45.58). Unison, on the other hand, made some progress toward the benchmark with an increase from 2008 (41.84) to 47.64 percent in 2009. Effective continuation phase treatment showed a slight decline for DPCI from 2008 (31.51 percent) to 28.05 percent in 2009 (sic "2009") while Unison stayed steady at 27.55 percent in 2008 and 27.95 percent in 2009.

We respectfully request more specifics on mental health treatment data since it appears that MCOs may be "falling short".

Agency Response: DMMA appreciates this feedback and will explore ways to include in the MCO monitoring and evaluation processes going forward.

FINDINGS OF FACT:

The Department finds that the proposed changes as set forth in the November 2010 *Register of Regulations* should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation to regarding the Delaware's Quality Management Strategy Draft is adopted and shall be final effective January 10, 2011.

Rita M. Landgraf, Secretary, DHSS

***Please Note:** Due to the size of the final regulation, it is not being published here. A PDF version of *Delaware's Quality Management Strategy Draft* is available at:

<http://regulations.delaware.gov/register/january2011/final/CHIP.pdf>

DIVISION OF MEDICAID AND MEDICAL ASSISTANCE

Statutory Authority: 31 Delaware Code, Chapter 5, §512

(31 Del.C., Ch. 5, §512)

ORDER

DSSM: Citizenship and Alienage

NATURE OF THE PROCEEDINGS:

Delaware Health and Social Services ("Department") / Division of Medicaid and Medical Assistance (DMMA) initiated proceedings to amend the Division of Social Services Manual (DSSM) to make administrative changes regarding *Citizenship and Alienage*. 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 November 2010 *Delaware Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by November 30, 2010 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

SUMMARY OF PROPOSAL

The reason for this regulatory action is to amend existing rules in the Division of Social Services Manual (DSSM) necessitated by the citizenship requirements of the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA).

Statutory Authority

- Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA), Public Law 111-3, enacted on February 3, 2009
- Section 1903(v)(4) of the Social Security Act, *Payment to States*
- Section 2107(e)(1)(J) of the Social Security Act, Application to Certain General Provisions, *Relating to Presumptive Eligibility for Children*

Background

Section 214 of the Children's Health Insurance Program Reauthorization Act of 2009 (P.L. 111-3), known as CHIPRA, now allows States the option to extend coverage to all otherwise eligible children and pregnant women who are lawfully residing in the United States (U.S.). These amendments do not extend coverage to children and pregnant women who do not have documentation of their legal entry to the U.S.

Summary of Proposed Amendments

The purpose of the proposal is to comply with the guidance issued by the Centers for Medicare and Medicaid Services (CMS) about the phrase "lawfully residing in the United States" as it relates to the eligibility of certain aliens and to clarify that certain alien pregnant women may be found eligible under Medicaid only and not CHIP.

On July 1, 2010, CMS issued State Health Official (SHO) letter #10-006, CHIPRA #17 to provide guidance regarding the phrase "lawfully residing in the U.S." This guidance clarifies the immigration classifications of individuals who may be found eligible for Medicaid or CHIP. As such, DSSM 14320 and DSSM 14350 are amended, as follows:

DSSM 14320, *Lawfully Residing Nonqualified Aliens*: These immigration classifications of individuals are also used in the eligibility determinations for the state funded legal noncitizen program.

DSSM 14350, *Legal Immigrant Pregnant Women and Children under age 21*: Section 214 of the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA), Public Law 111-3, permits States to cover certain children and pregnant women in Medicaid and the Children's Health Insurance Program (CHIP) who are "lawfully residing in the U.S." as described in section 1903(v)(4) and 2107(e)(1)(J) of the Social Security Act.

CMS guidance included a revised State plan amendment template at Attachment 2.6-A, Page 2; which DMMA has submitted for approval.

Fiscal Impact Statement

This revision imposes no increase in cost on the General Fund.

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. The Division of Medicaid and Medical Assistance (DMMA) has considered each comment and responds as follows.

In April, we endorsed (subject to one amendment) a DMMA regulation extending Medicaid and CHIP coverage to some classes of pregnant women and children based on a change in federal law. See attached April 23, 2010 letter. DMMA then adopted the regulation in June with the recommended amendment. [13 DE Reg. 1540 (June 1, 2010)] CMS subsequently issued guidance via the attached State Health Official Letter #10-006 (July 1, 2010). The guidance includes a model State Plan amendment. DMMA is now revising the regulation adopted in June to conform to the latest guidance. DMMA has also submitted a revised State Plan amendment to CMS based on the model. At 364.

Since the original regulation expanded health care coverage while diverting some beneficiaries from a State-funded program to federally-subsidized programs; and, since the technical revisions are designed to conform to federal guidance, both Councils **endorse** the regulation.

Agency Response: DMMA appreciates the endorsement.

FINDINGS OF FACT:

The Department finds that the proposed changes as set forth in the November 2010 Register of Regulations should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation to amend the Division of Social Services Manual (DSSM) regarding Citizenship and Alienage, specifically, *Medicaid Coverage of "Lawfully Residing" Children and Pregnant Women under CHIPRA 214*, is adopted and shall be final effective January 10, 2011.

Rita M. Landgraf, Secretary, DHSS

DMMA FINAL ORDER REGULATIONS #10-57

REVISIONS

14320 Legally Residing Nonqualified Aliens

These are aliens who do not meet the definition of a qualified alien. Individuals formerly known as PRUCOL are now considered nonqualified aliens. Nonqualified aliens have to provide a Social Security Number (SSN) if one is available, or apply for a SSN if the applicant does not have one.

Legally residing nonqualified aliens include the following:

- ~~Aliens granted permission to remain and work in the U.S.~~
- ~~Individuals who have been paroled into the U.S. for less than 1 year~~
- ~~Applicants for immigration status such as applicants for asylum, adjustment to lawful permanent resident status, suspension of deportation~~
- ~~Aliens in Temporary Protected Status (TPS)~~
- ~~Aliens in temporary resident status~~
- ~~Family unity beneficiaries~~
- ~~Aliens under deferred enforced departure~~
- ~~Aliens in deferred action status~~
- ~~Aliens who are the spouses or children of U.S. citizens with approved visa petitions and pending adjustment of status application.~~

13 DE Reg. 1540 (06/01/10)

1. A citizen of a Compact of Free Association State (Federated States of Micronesia, Republic of the Marshall Islands, and the Republic of Palau) who has been admitted to the U.S. as a non-immigrant and is permitted by the Department of Homeland Security to reside permanently or indefinitely in the U.S.

2. An individual described in 8 CFR section 103.12(a)(4) who does not have a permanent residence in the country of their nationality and is in a status that permits the individual to remain in the U.S. for an indefinite period of time, pending adjustment of status. These individuals include:

a) an individual currently in temporary resident status as an Amnesty beneficiary pursuant to section 210 or 245A of the INA

b) an individual currently under Temporary Protected Status pursuant to section 244 of the INA and pending applicants for Temporary Protected Status who have been granted employment authorization

c) a family unity beneficiary pursuant to section 301 of Public Law 101-649 as amended by, as well as pursuant to, section 1504 of Public Law 106-554

d) an individual currently under Deferred Departure pursuant to a decision made by the President

e) an individual who is the spouse or child of a U.S. citizen whose visa petition has been approved and who has a pending application for adjustment of status.

3. An individual in non-immigrant classifications under the INA who is permitted to remain in the U.S. for an indefinite period, including the following as specified in section 101(a)(15) of the INA:

a) a parent or child of an individual with special immigrant status under section 101(a)(27) of the INA, as permitted under section 101(a)(15)(N) of the INA

- b) a fiancé of a citizen, as permitted under section 101(a)(15)(K) of the INA
 - c) a religious worker under section 101(a)(15)(R)
 - d) an individual assisting the Department of Justice in a criminal investigation, as permitted under section 101(a)(15)(S) of the INA
 - e) a battered alien under section 101(a)(15)(U)(see also section 431 as amended by PRWORA)
 - f) an individual with a petition pending for 3 years or more, as permitted under section 101(a)(15)(V) of the INA
4. An alien in nonimmigrant status who has not violated the terms of the status under which he or she was admitted or to which he or she has changed after admission.
 5. An alien who has been paroled into the U.S. pursuant to section 212(d)(5) of the INA for less than one year, except for an alien paroled for prosecution, for deferred inspection or pending removal proceedings.
 6. Aliens who have been granted employment authorization under 8 CFR 274a.12(c)(9), (10), (16), (18), (20), (22), or (24).
 7. Aliens currently in deferred action status.
 8. A pending applicant for asylum under section 208(a) of the INA or for withholding of removal under section 241(b)(3) of the INA or under the Convention Against Torture who has been granted employment authorization, and such an applicant under the age of 14 who has had an application pending for at least 180 days.
 9. An alien who has been granted withholding of removal under the Convention Against Torture.
 10. A child who has a pending application for Special Immigrant Juvenile status as described in section 101(a)(27)(J) of the INA.
 11. An alien who is lawfully present in the Commonwealth of the Northern Mariana Islands under 48 U.S.C. § 1806(e).
 12. An alien who is lawfully present in American Samoa under the immigration laws of American Samoa.

(Break In Continuity of Sections)

14350 Legal Immigrant Pregnant Women and Children under age 21

Section 214 of the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA) authorizes coverage under Medicaid or CHIP for certain alien pregnant women and children who are lawfully residing in the United States and are otherwise eligible. Delaware will cover these certain alien pregnant women under Medicaid and will cover these certain alien children under Medicaid or CHIP. Eligibility under this section will be implemented with the earliest effective date of July 1, 2010. Children who are in one of the legal alien groups must have their immigration status verified at each annual redetermination. The documentation provided for the initial application may be used.

The alien groups who may be determined eligible under this section are:

1. An alien who is lawfully admitted for permanent residence under the INA, who entered the U.S. on or after August 22, 1996, and is subject to the five-year bar under PRWORA.
2. An alien who is paroled into the United States under §212(d)(5) of the INA for a period of at least 1 year who, entered the U.S. on or after August 22, 1996, and is subject to the five-year bar under PRWORA.
3. An alien granted conditional entry pursuant to §203(a)(7) of the INA as in effect before April 1, 1980, who entered the U.S. on or after August 22, 1996, and is subject to the five-year bar under PRWORA.
4. A citizen of a Compact of Free Association State (Federated States of Micronesia, Republic of the Marshall Islands, and the Republic of Palau) who has been admitted to the U.S. as a non-immigrant and is permitted by the Department of Homeland Security to reside permanently or indefinitely in the U.S.
5. An individual described in 8 CFR section 103.12(a)(4) who does not have a permanent residence in the country of their nationality and is in a status that permits the individual to remain in the U.S. for an indefinite period of time, pending adjustment of status. These individuals include:
 - a) an individual currently in temporary resident status as an Amnesty beneficiary pursuant to section 210 or 245A of the INA

- b) an individual currently under Temporary Protected Status pursuant to section 244 of the INA and pending applicants for Temporary Protected Status who have been granted employment authorization
- c) a family unity beneficiary pursuant to section 301 of Public Law 101-649 as amended by, as well as pursuant to, section 1504 of Public Law 106-554
- d) an individual currently under Deferred Departure pursuant to a decision made by the President
- e) an individual who is the spouse or child of a U.S. citizen whose visa petition has been approved and who has a pending application for adjustment of status.
6. An individual in non-immigrant classifications under the INA who is permitted to remain in the U.S. for an indefinite period, including the following as specified in section 101(a)(15) of the INA:
- a) a parent or child of an individual with special immigrant status under section 101(a)(27) of the INA, as permitted under section 101(a)(15)(N) of the INA
- b) a fiancé of a citizen, as permitted under section 101(a)(15)(K) of the INA
- c) a religious worker under section 101(a)(15)(R)
- d) an individual assisting the Department of Justice in a criminal investigation, as permitted under section 101(a)(15)(S) of the INA
- e) a battered alien under section 101(a)(15)(U)(see also section 431 as amended by PRWORA)
- f) an individual with a petition pending for 3 years or more, as permitted under section 101(a)(15)(V) of the INA
7. An alien in nonimmigrant status who has not violated the terms of the status under which he or she was admitted or to which he or she has changed after admission.
8. An alien who has been paroled into the U.S. pursuant to section 212(d)(5) of the INA for less than one year, except for an alien paroled for prosecution, for deferred inspection or pending removal proceedings.
9. Aliens who have been granted employment authorization under 8 CFR 274a.12(c)(9), (10), (16), (18), (20), (22), or (24).
10. Aliens currently in deferred action status.
11. A pending applicant for asylum under section 208(a) of the INA or for withholding of removal under section 241(b)(3) of the INA or under the Convention Against Torture who has been granted employment authorization, and such an applicant under the age of 14 who has had an application pending for at least 180 days.
12. An alien who has been granted withholding of removal under the Convention Against Torture.
13. A child who has a pending application for Special Immigrant Juvenile status as described in section 101(a)(27)(J) of the INA.
14. An alien who is lawfully present in the Commonwealth of the Northern Mariana Islands under 48 U.S.C. § 1806(e).
15. An alien who is lawfully present in American Samoa under the immigration laws of American Samoa.
- 13 DE Reg. 1540 (06/01/10)**

DIVISION OF MEDICAID AND MEDICAL ASSISTANCE

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

ORDER

Public Assistance Reporting Information System (PARIS)

NATURE OF THE PROCEEDINGS:

Delaware Health and Social Services ("Department") / Division of Medicaid and Medical Assistance (DMMA) initiated proceedings to amend the Delaware Title XIX Medicaid State Plan regarding the *Public Assistance*

Reporting Information System (PARIS). 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 November 2010 *Delaware Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by November 30, 2010 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

SUMMARY OF PROPOSAL

The proposal amends the Delaware Title XIX Medicaid State Plan regarding the *Public Assistance Reporting Information System (PARIS)*.

Statutory Authority

- Qualifying Individual (QI) Program Supplemental Funding Act of 2008, Public Law 110-379 (Pub. L. 110-379)
- Section 19032(r) of the Social Security Act
- 42 CFR §§435.940 through 435.960, *Income and Eligibility Verification Requirements*

Background

Section 3 of the Qualifying Individual (QI) Program Supplemental Funding Act of 2008 (the QI Funding Act) amended section 1903(r) of the Social Security Act (the Act) to require that States have eligibility determination systems that provide for data matching through the Public Assistance Reporting Information System (PARIS) project or any successor system. PARIS is a system for matching data from certain public assistance programs, including State Medicaid programs, with selected Federal and State data for purposes of facilitating appropriate enrollment and retention in public programs. This provision took effect on October 1, 2009.

Based on the provisions of the QI Funding Act, all States are required to sign an agreement to participate in PARIS as a condition of receiving Medicaid funding for automated data systems (including the Medicaid Management Information System). Prior to passage of the QI Funding Act, participation in the PARIS project was voluntary. PARIS is still a voluntary program with respect to the Supplemental Nutrition Assistance Program (SNAP) and the Temporary Assistance For Needy Families (TANF).

PARIS, a federal and state partnership, is administered by the Department of Health and Human Service's Administration for Children and Families (ACF), which provides all fifty states, Washington D.C., and Puerto Rico with data to help them maintain program integrity and detect or deter improper payments. PARIS has three components: an interstate match, a match against the Department of Veterans Affairs (VA), and a match against federal civilian and military wage and benefit payments.

State Public Assistance Agencies (SPAAs) enroll in PARIS and sign one or more matching agreements which permit them to participate in quarterly matches of client eligibility and enrollment data files. Under those agreements, in the months of February, May, August, and November of each year, SPAA applicant and recipient data files are transmitted to the Department of Defense (DoD) Manpower Data Center. There, the data files are processed and the results transmitted to participating (SPAAs).

Delaware participates in the Interstate and Veterans Affairs matches.

Summary of Proposal

Federal law requires States to use the Public Assistance Reporting Information System (PARIS) when determining Medicaid eligibility. On June 21, 2010, the Centers for Medicare and Medicaid Services (CMS) issued State Medicaid Director Letter (SMDL) #10-009. This letter provides guidance on implementing the requirements of Section 3 of the QI Funding Act. In order to demonstrate compliance with the new requirements in section 1903 (r) of the Act, the Division of Medicaid and Medical Assistance (DMMA) will amend its Medicaid State plan to document its participation in PARIS at State plan Section 4.32(c).

The provisions of this amendment are subject to CMS approval.

Fiscal Impact Statement

These revisions impose no increase in cost on the General Fund.

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. The Division of Medicaid and Medical Assistance (DMMA) has considered each comment and responds as follows.

Consistent with the "Background" section in the regulation, federal law effective in 2009 requires states to sign an agreement to participate in a "Public Assistance Reporting Information System" ("PARIS") as a precondition of receiving Medicaid funding for automated data systems. The PARIS system is operational in all fifty states to "maintain program integrity and detect or deter improper payments". At 360. A June 21, 2010 CMS policy letter notes that PARIS has been operating since 1993. It permits states to identify cases in which persons are enrolled in Medicaid and other programs in more than one state. The CMS letter also recites that "PARIS may also be used as a tool to identify individuals who have not applied for Medicaid coverage, but who may be eligible based on their income." The text of the proposed DMMA regulation is based on the model attached to the CMS letter.

Since DMMA is already participating in PARIS, and the regulation is essentially required to qualify for federal funding for automated data systems, the Councils **endorse** the proposed regulation. In addition, we have the following questions:

- Does DMMA utilize the PARIS system for other public benefits (e.g. food benefits)?
- Does DMMA use PARIS as a tool to identify individuals who have not applied for Medicaid coverage, but who may be eligible based on their income?

Agency Response: DMMA appreciates your endorsement. In response to your additional questions, data matching is run on all public benefit programs. Also, Federal law requires states to use PARIS when determining Medicaid eligibility; other reasons/situations are not identified. And, although, PARIS is an information sharing system that shares public assistance data among States to detect/deter and prevent improper payments, the information shared is limited to whether an individual is collecting benefits in more than one State, including VA benefits.

FINDINGS OF FACT:

The Department finds that the proposed changes as set forth in the November 2010 *Register of Regulations* should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation to amend Delaware Title XIX Medicaid State Plan regarding the *Public Assistance Reporting Information System (PARIS)* is adopted and shall be final effective January 10, 2011.

Rita M. Landgraf, Secretary, DHSS

DMMA FINAL ORDER REGULATION #10-58**REVISION:**

Revision:

OMB Approval Number:

STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT

State: DELAWARE

INCOME AND ELIGIBILITY VERIFICATION SYSTEM

435.940
through 435.960
FR 5967

4.32 Income and Eligibility Verification System

- (a) The Medicaid agency has established a system for income and eligibility verification in accordance with the requirements of 42 CFR 435.940 through 435.960. 435.960)
- (b) ATTACHMENT 4.32-A describes, in accordance with 42 CFR 435.948(a)(6), the information that will be requested in order to verify eligibility or the correct payment amount and the agencies and the State(s) from which that information will be requested.
- (c) The State has an eligibility determination system that provides for data matching through the Public Assistance Reporting Information System (PARIS), or any successor system, including matching with medical assistance programs operated by other States. The information that is requested will be exchanged with States and other entities legally entitled to verify title XIX applicants and individuals eligible for covered title XIX services consistent with applicable PARIS agreements.

DIVISION OF MEDICAID AND MEDICAL ASSISTANCE

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

ORDER

Title XIX Medicaid-Related General Assistance (GA) Program and Temporary Assistance for Needy Families (TANF) Program Changes

NATURE OF THE PROCEEDINGS:

Delaware Health and Social Services (“Department”) / Division of Medicaid and Medical Assistance (DMMA) initiated proceedings to amend the Title XIX Medicaid State Plan and the Division of Social Services Manual regarding Medicaid-related General Assistance and TANF Changes. 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 November 2010 *Delaware Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by November 30, 2010 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

SUMMARY OF PROPOSAL

The proposal amends the Title XIX Medicaid State Plan and the Division of Social Services Manual (DSSM) to comply with the Department’s decision to eliminate the General Assistance (GA) payment for children living in the home of a non-relative adult and replace it with a payment under Temporary Assistance for Needy Families (TANF). This changes the category of Medicaid eligibility for these children.

Statutory Authority

- 1902(a)(10)(A)(ii) of the Social Security Act

- 1905(a)(i) of the Social Security Act
- Omnibus Budget Reconciliation Act 1990 (OBRA 90), Public Law 101-58
- 42 CFR §435.222, *Individuals under age 21 who meet the income and resource requirements*

Background

The American Recovery and Reinvestment Act (ARRA) of 2009, Public Law 111-5, provides eligible States with an increased Federal Medical Assistance Percentage (FMAP) through 12/31/2010. This increased FMAP was extended through 06/30/2011 under the Education, Jobs and Medical Assistance Act, Public Law 111-226.

To access the additional funds associated with the increased FMAP, each State must ensure that the eligibility standards, methodologies, or procedures under its Medicaid State Plan are not more restrictive during this period than those in effect on July, 1, 2008. The Centers for Medicare and Medicaid Services (CMS) issued guidance about the maintenance of effort requirements in State Medicaid Director Letter (SMDL) #09-005. As noted in the guidance, "CMS would consider changes in State eligibility policies to be more restrictive if the changes result in determinations of ineligibility for individuals who would have been considered eligible as of July 1, 2008".

Although this proposed regulation and State Plan Amendment will eliminate the General Assistance unrelated child category ("reasonable classifications of children"), no child will lose Medicaid eligibility. The income limit under the poverty-level related group is much higher than the income limit under the General Assistance unrelated child category.

Summary of Proposal

Children under age 18 in the care of a non-relative adult will no longer receive a General Assistance cash benefit. The receipt of a General Assistance cash benefit provided Medicaid coverage under 42 CFR §435.222 which allows the State to cover reasonable classifications of certain children. This is described in the State Plan at Attachment 2.2 A, pages 12-13a, and Supplement 1 to Attachment 2.2-A.

These children will no longer receive Medicaid under this "reasonable classifications" group. Instead, these children will receive Medicaid under the poverty-level related groups as mandated by the Omnibus Budget Reconciliation Act of 1990 (OBRA 1990), Public Law 101-508, and described at DSSM 16000.

Fiscal Impact Statement

These revisions impose no increase in cost on the General Fund.

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. The Division of Medicaid and Medical Assistance (DMMA) has considered each comment and responds as follows.

In August, 2010, the Councils commented on a related proposed regulation switching eligible children from GA to TANF. We noted the generally positive aspects of the proposal (e.g. increased cash benefit) but also identified some concerns. The Division of Medicaid & Medical Assistance adopted a final regulation in October with some amendments prompted by our commentary. [14 DE Reg. 304 (October 1, 2010)]

The Division is now issuing a second proposed regulation which is essentially a "housekeeping" measure which amends the Medicaid State Plan to eliminate child eligibility under GA. Our only concern is that DMMA is repealing some regulations which apply to young adults, i.e., Section 15100, second sentence; Section 16120, third through fifth sentences. The TANF regulation treats individuals as adults upon turning 18. See §3027 at 14 DE Reg. 304, 312 (October 1, 2010). Hence, an 18-19 year old is not a "child" for purposes of qualifying for TANF. Therefore, it is counterintuitive to repeal GA standards which apply to 18-19 year olds since they may still qualify for GA.

Agency Response: Actually, the Division of Social Services adopted the regulation published as final in the October 1, 2010 issue of the Delaware Register. In response to the "counterintuitive" statement, DMMA is repealing the regulations at Section 15100, second sentence, and Section 16120, third through fifth sentences,

because they are unnecessary. The Medicaid eligibility requirements for these young adults are at Section 16250. The General Assistance eligibility requirements for these young adults are at Section 3018.

No change to the regulation was made as a result of this comment.

FINDINGS OF FACT:

The Department finds that the proposed changes as set forth in the November 2010 *Register of Regulations* should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation regarding Medicaid-related General Assistance and TANF Changes is adopted and shall be final effective January 10, 2011.

Rita M. Landgraf, Secretary, DHSS

DMMA FINAL ORDER REGULATION #10-56a

REVISION:

Revision: CMS

SUPPLEMENT 1 TO ATTACHMENT 2.2-A

OMB No.

Page 1

STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT

State/Territory DELAWARE

REASONABLE CLASSIFICATIONS OF INDIVIDUALS UNDER THE AGE OF 21, 20, 19, AND 18

~~1. Individuals under age 18 who meet the requirements of, and are in receipt of benefits from, the General Assistance Program and who also meet all the requirements of the AFDC (Title IV-A) program except that they do not qualify as dependent children.~~

2. 1. Children for whom the Department of Services for Children, Youth and their Families (DSCYF) has custody or consent to place and who:

- a. have been removed from their own home and are in a medical facility for temporary planning period prior to placement*, and
- b. meet the financial eligibility standards as established by the State Plan for Title IV-A.

*The plan of care must specify placement will be made in a home or facility that is approved by DSCYF for CHILD CARE (i.e., not medical or detention facilities), to which a public agency is making payments for the specified child's care. A home approved by DSCYF may be either with a relative or non-relative, as long as public funds are paying for the child's care.

~~3.~~ 2. Children who, at the time of their birth, are placed in the care of private agencies for the purpose of adoption, to be covered from the date of their birth until their placement with the prospective adoptive parent(s). These children meet the financial eligibility standards as established by the State Plan for Title IV-A.

DMMA FINAL ORDER REGULATION #10-56b

REVISIONS:

13414 General Assistance RESERVED

~~Children under age 18 who receive General Assistance (GA) would be included in these optional groups.~~

*(Break In Continuity of Sections)*15100 General Assistance RESERVED

~~Any person aged 0 through 17 who is determined eligible for a General Assistance grant is also eligible for Medicaid coverage. Any individual under age 18 who is ineligible for a GA grant because of a budgeted need of \$.01 to \$9.99 is eligible for Medicaid.~~

~~GA recipients between age 18 and 19 can receive Federal Poverty Level related Medicaid. Uninsured GA recipients age 19 and over may be eligible as an adult in the expansion population under the *Diamond State Health Plan*. (See DSSM 16120)~~

*(Break In Continuity of Sections)*16120 General Assistance (GA) Recipients RESERVED

~~General Assistance is a DSS cash assistance program available to families and unemployable individuals who meet certain financial and technical eligibility requirements.~~

~~An individual age 18 and under who receives GA is categorically eligible for Medicaid. An individual between age 18 and 19 who receives GA is categorically eligible under the poverty level related program for children. An individual age 19 or over who receives GA must be uninsured as defined in this section in order to be found eligible for Medicaid. Enrollment in a MCO is a technical eligibility requirement for individuals age 19 and over who receive GA. GA recipients who are age 19 or over will not receive Medicaid benefits until they are enrolled in a MCO.~~

DEPARTMENT OF JUSTICE**DIVISION OF SECURITIES**

Statutory Authority: 6 Delaware Code, Section 7325 (6 Del.C. §7325)

ORDER**Rules and Regulations Pursuant to the Delaware Securities Act**

WHEREAS, on November 1, 2010, the *Delaware Registrar of Regulations*, pursuant to the request of the Securities Commissioner, caused proposed rules and regulations pursuant to the Delaware Securities Act to be published in the *Delaware Register of Regulations*. 14 DE Reg. 367 - 382 (11/1/10); and

WHEREAS, the proposed rules and regulations were held open for public comment until December 1, 2010; and

WHEREAS, no comments were received by the Commissioner during the comment period; and

WHEREAS, one comment was received by the Commissioner subsequent to the expiration of the comment period and was considered by the Commissioner prior to the issuance of the instant order;

NOW THEREFORE, IT IS HEREBY ORDERED this 20th day of December, 2010, that the following shall constitute the required summary of evidence and information submitted; the summary of findings of fact with respect to the evidence and information submitted; and decision to adopt the rules and regulations in the form attached hereto as Exhibit A.

IT IS FURTHER ORDERED that the effective date of these rules and regulations shall be January 14, 2011.

A. SUMMARY OF EVIDENCE AND INFORMATION SUBMITTED

On December 2, 2010, the Commissioner received an e-mail from Alan M. Parness, Esq. at Cadwalader, Wickersham & Taft in New York, New York, with comments regarding the proposed rules and regulations. Mr.

Parness questioned the reference to SEC Rule 505 in section 500 of the proposed rules and regulations on the ground that a security offered under SEC Rule 505 is not a federal covered security. Mr. Parness also suggested that there is no statutory basis for proposed rule 502, which provides that A[t]he exemption under section 7309(b)(9) of the Act is withdrawn as to any security offered or sold in Delaware.

B. SUMMARY OF FINDINGS OF FACT

1. The language in subsections (a) through (e) of section 100 summarizing the provisions of the Delaware Securities Act is stricken as redundant.

2. Section 101, which describes the regulatory functions of the Delaware Securities Division, is repealed as unnecessary and redundant.

3. Section 102, which describes the general organization and operations of the Securities Division, is repealed as unnecessary and redundant.

4. A new section 102 is added to describe the process for obtaining interpretive opinions from the Securities Commissioner.

5. A new section 103 is added to address the vicarious liability of principals for violations of the Securities Act by their agents.

6. Section 202, which describes the business hours of the Securities Division, is repealed as unnecessary.

7. Section 205, which governs ex parte communications in administrative proceedings, is amended to clarify that ex parte communications with the Commissioner shall be prohibited upon the filing of a proposed decision by an administrative hearing officer. This change is being made to clarify that the prohibition on ex parte communications does not apply prior to the filing of a proposed decision by an administrative hearing officer.

8. The disclosure provisions at sections 227, 228, and 229 for administrative proceedings are repealed as unduly burdensome to the parties in such proceedings.

9. Sections 264 and 265 are amended to make clear that the Commissioner may issue summary orders *sua sponte*.

10. Section 304(b) is amended to make clear that no administrative subpoena under the Securities Act, except upon request by the Securities Division, may be issued to a complaining witness.

11. Section 402, which creates a special registration procedure for small company offerings, is repealed. Since its adoption in 1998, the registration procedure under section 402 has been a seldom used procedure for eligible offerings under the rule.

12. The proposed revision to section 500 (which governs the filing requirements for federal covered securities) to add a reference to SEC Rule 505 is not adopted, because securities offered under SEC Rule 505 are not federal covered securities.

13. Section 502, which imposes certain conditions on limited offerings being made under section 7309(b)(9) of the Securities Act, is repealed, and the limited offering exemption under section 7309(b)(9) is withdrawn. The General Assembly has by plain and unambiguous language in section 7309(b)(9) provided that Athe Commissioner may by rule or order, as to *any security or transaction or any type of security or transaction*, withdraw the exemption under section 7309(b)(9). Concerns raised by the commenter regarding the effect of the withdrawal of this exemption on the efforts of small businesses to raise capital can and should, in the opinion of the Commissioner, be addressed by way of a separate order of the Commissioner.

C. DECISION ADOPTING RULES AND REGULATIONS

Pursuant to 29 Del.C. §10118(b)(3), upon consideration of the information submitted to the Securities Commissioner, and based upon the findings of fact with respect to the information submitted, the Rules and Regulations Pursuant to the Delaware Securities Act, in the form attached hereto as Exhibit A, are adopted effective January 14, 2011. The rules and regulations are adopted pursuant to the authority granted in 6 Del.C. §§7303, 7309(b)(9), 7309A(b), 7319(b), and 7325(b).

Peter O. Jamison, III, Securities Commissioner

Rules and Regulations Pursuant to the Delaware Securities Act

(Break in Continuity of Sections)

Part E. Exemptions from Registration

500 Registration Not Required of Federal Covered Securities

[Federal covered securities, as defined in Section 7302(a)(17) of the Act, are not required to be registered under Section 7304 of the Act. Notwithstanding this rule, however, notice filings are required for registered investment company offerings under Rule 403; and for offers or sales of securities in Delaware pursuant to SEC Rule 506, 17 C.F.R. §230.506. ~~Federal covered securities, as defined in Section 7302(a)(17) of the Act, are not required to be registered under Section 7304 of the Act. Notwithstanding this rule, however, notice filings are required for registered investment company offerings under Rule 403; and for offers or sales of securities in Delaware pursuant to SEC Rule 505 (17 C.F.R. sec. 230.505), and SEC Rule 506 (17 C.F.R. sec. 230.506).~~]

1 DE Reg 1978 (6/1/98)

*Please note that no additional changes were made to the regulation as originally proposed and published in the November 2010 issue of the *Register* at page 367 (14 DE Reg. 367). Therefore, the final regulation is not being republished. A copy of the final regulation is available at:

[Rules and Regulations Pursuant to the Delaware Securities Act](#)

VICTIMS' COMPENSATION ASSISTANCE PROGRAM ADVISORY COUNCIL

Statutory Authority: 11 Delaware Code, Section 9004 (11 Del.C. §9004)
1 DE Admin. Code 301

ORDER

301 Victims' Compensation Assistance Program Rules and Regulations

Introduction

The Victims Compensation Assistance Program Advisory Council of the State of Delaware hereby adopts this Report and Order, pursuant to 29 Del.C. §10118, for the purpose of final enactment of the amended regulations attached hereto. The proposed changes would add an additional regulation, numbered 28.0, relating to payment of claims, to Section 301 of Title One of the Administrative Code. This regulation would require that the Victims Compensation Assistance Program ("VCAP") pay all medical providers at 80% of the usual and customary charge for services. This amount would be considered payment in full, and the medical provider who accepted payment from VCAP would be unable to collect any additional monies from the victim, or from third parties. Enactment of this regulation would help preserve VCAP funds and would bring VCAP more in line with how private health insurers and other government programs reimburse medical providers.

Summary of Comments

Public hearings on the proposed regulation were held in Wilmington on November 22, 2010, and in Dover on November 23, 2010. No one appeared at either location to offer comments on the proposed regulation. Therefore, no transcript was prepared for review by the Advisory Council.

A written submission was received from Daniese McMullin-Powell, Chair of the State Council for Persons with Disabilities ("SCPD"). SCPD endorsed the proposed regulation as "straightforward and easy to understand". The comment pointed out that the rate of reimbursement was fair, as compared to other programs. Further, the proposal protects victims from so-called "balance billing" by providers.

A letter was also submitted on behalf of the Governor's Advisory Council for Exceptional Citizens ("GACEC") by the Chair, Terri A. Hancharick, endorsing the proposed regulation.

These comments were reviewed and discussed by the Advisory Council at its December 14, 2010 meeting.

Findings of Fact

The Advisory Council, upon review of the comment received and further discussion, determined that no changes in the draft proposal were necessary, and that the new regulation could be submitted for publication as drafted.

The Advisory Council further determined that similar such regulations covering reimbursement for mental health and dental services should be deferred for discussion and possible action in the future.

The final draft of the proposed rule reflects an existing policy and practice of VCAP and its predecessor, the Violent Crimes Compensation Board, dating back to at least 1992. However, in the past the rate of reimbursement has been negotiated with individual medical providers on an *ad hoc* basis, and has not always been uniform or sufficient to resolve claims. The proposal represents an effort by the Advisory Council to adopt regulations that better reflect the operations, procedures, and standards of VCAP with respect to compensation of victims, and that treat all providers in the same way, for purposes of reimbursement.

Decision of the Advisory Council

The Advisory Council reviewed the comments received at its meeting on December 14, 2010 and voted to adopt the proposed new rule, as drafted, with no changes.

Text of Rules Adopted

The final version of the proposed amended regulations of the Advisory Council is attached hereto.

ADOPTED, this 14th day of December, 2010, by the undersigned members of the Victims' Compensation Assistance Program Advisory Council:

Gail Riblett
Adrian Wilson
Debra Reed
Patty D'Angelo

Brian Hartman
Stephanie Hamilton
Patricia Dailey Lewis
Valerie Marek

***Please note that no changes were made to the regulation as originally proposed and published in the November 2010 issue of the *Register* at page 383 (14 DE Reg. 383). Therefore, the final regulation is not being republished. A copy of the final regulation is available at:**

301 Victims' Compensation Assistance Program Rules and Regulations

FINAL REGULATIONS

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 1302

Secretary's Order No.: 2010-A-0042

1302 Delaware Regulations Governing Hazardous Waste**Approving Amendments to the Delaware Regulations Governing Hazardous Waste,
7 DE Admin. Code 1302**

Date of Issuance: December 21, 2010

Effective Date of the Amendment: January 21, 2011

I. Background:

A public hearing was held on Wednesday, December 1, 2010, at 6:00 p.m. at the DNREC Richardson & Robbins Building Auditorium to receive comment on proposed amendments to the Delaware *Regulations Governing Hazardous Waste* (hereinafter referred to as "RGHW"). The State of Delaware is authorized by the U.S. Environmental Protection Agency (hereinafter referred to as "EPA") to administer federal authority as part of its State hazardous waste management program. In order for Delaware to maintain its program delegation and authority, EPA requires Delaware to maintain a program that is equivalent to and no less stringent than the federal program. To accomplish this, the State is proposing to make miscellaneous changes to the RGHW that reflect recent changes in federal regulations, correct existing errors, add clarification, and/or otherwise enhance its current hazardous waste regulations.

The Department is proposing amendments to the following sections of its existing *Regulations Governing Hazardous Waste*: (1) Adoption of the federal requirements for the export of batteries to OECD countries; (2) Adoption of federal corrections to the Uniform Manifest rules; (3) Addition of clarifying language regarding subsequent notifications (§262.12); (4) Strike confusing date regarding existing Recordkeeping deadline (§262.40); (5) Allow use of amended SPCC plan as a Contingency Plan (§264.52); (6) Clarify TSD submittal of manifest copies to the generator State (§§264 and 265.71); (7) Strengthen secondary containment by adding requirement for coating and water stops for tanks (§§264 and 265.193); and (8) Add requirement regarding written record of shipments of used oil (§279.24).

The Department published the proposed regulatory amendments in the November 1, 2010 *Delaware Register of Regulations*. Due to the fact that the proposed changes to RGHW are required by the EPA, are self explanatory, and are not controversial, no workshop to explain these changes to the public was held by the Department. Instead, a letter was sent to all interested persons (i.e., the regulated community throughout Delaware) on August 4, 2010, encouraging the public to review the proposed amendments on the Department's web page, and to submit any comments prior to or at the hearing. No comments of any kind were received from the public or the regulated community regarding these proposed amendments during any phase of this proceeding. Proper notice of the hearing was provided as required by law.

Subsequent to the public hearing held on December 1, 2010, the Department's presiding Hearing Officer, Lisa A. Vest, prepared her report and recommendation in the form of a Hearing Officer's Memorandum to the Secretary dated December 13, 2010, and that Report in its entirety is expressly incorporated herein by reference.

II. Findings:

The Department has provided sound reasoning with regard to the proposed amendments to Delaware's *Regulations Governing Hazardous Waste*, as reflected in the Hearing Officer's Memorandum of December 1, 2010, which is attached hereto and expressly incorporated into this Order in its entirety. Moreover, the following findings and conclusions are entered at this time:

1. The Department has jurisdiction under its statutory authority, 7 **Del.C.** Chapters 60 and 63, to make a determination in this proceeding;
2. The Department provided adequate public notice of the proceeding and the public hearing in a manner required by the law and regulations;
3. The Department held a public hearing in a manner required by the law and regulations;
4. The Department considered all timely and relevant public comments in making its determination;
5. The Department has reviewed this proposed amendment in the light of the Regulatory Flexibility Act, and believes the same to be lawful, feasible and desirable, and that the recommendations as proposed should be applicable to all Delaware citizens equally;
6. Promulgation of these proposed amendments would update Delaware's requirements, where appropriate, to be consistent with the federal requirements, thus bringing Delaware into compliance with EPA standards;
7. The addition of clarifying language, as well as the correction of clerical errors currently found in Delaware's existing regulations, will strengthen and provide better clarity and a fuller understanding of the regulatory language contained within this regulation to the general public and the regulated community;
8. The Department has an adequate record for its decision, and no further public hearing is appropriate or necessary;
9. The Department's proposed regulation, as published in the November 1, 2010 *Delaware Register of Regulations* and set forth within Attachment "A" of the Hearing Officer's Memorandum and attached hereto, is adequately supported, not arbitrary or capricious, and is consistent with the applicable laws and regulations. Consequently, it should be approved as a final regulation, which shall go into effect twenty days after its publication in the next available issue of the *Delaware Register of Regulations*;
10. The Department shall submit the proposed regulation as a final regulation to the Delaware Register of Regulation for publication in its next available issue, and shall provide written notice to the persons affected by the Order.

III. Order:

Based on the record developed, as reviewed in the Hearing Officer's Memorandum dated December 13, 2010 and expressly incorporated herein, it is hereby ordered that the proposed amendments to the State of Delaware's *Regulations Governing Hazardous Waste* be promulgated in final form in the customary manner and established rule-making procedure required by law.

IV. Reasons:

The promulgation of the amendments to the State of Delaware's *Regulations Governing Hazardous Waste* will update Delaware's requirements, where appropriate, to be consistent with the federal requirements, thus bringing Delaware into compliance with EPA standards. Again, the State is required to adopt these amendments in order to maintain its hazardous waste program authorization and remain current with the Federal RCRA hazardous waste program. Additionally, those changes being made to provide additional clarifying language, as well as to correct clerical errors currently found in Delaware's existing regulations, will provide better clarity and a fuller understanding of the regulatory language contained within this regulation to the general public and the regulated community.

In developing this regulation, the Department has balanced the absolute environmental need for the State of Delaware to promulgate regulations concerning this matter with the important interests and public concerns surrounding the same, in furtherance of the policy and purposes of 7 **Del.C.** Chapters 60 and 63.

Collin P. O'Mara, Secretary

***Please note that no changes were made to the regulation as originally proposed and published in the November 2010 issue of the *Register* at page 384 (14 DE Reg. 384). Therefore, the final regulation is not**

being republished. A copy of the final regulation is available at:

1302 Delaware Regulations Governing Hazardous Waste

DEPARTMENT OF SAFETY AND HOMELAND SECURITY
OFFICE OF HIGHWAY SAFETY

Statutory Authority: 21 Delaware Code, Section 4185(b), and 29 Delaware Code, Chapter 101
(21 Del.C. §4185(b) & 29 Del.C., Ch. 101)

ORDER

1206 Approved Motorcycle Helmets and Eye Protection

I. NATURE OF PROCEEDINGS

Pursuant to its authority under 21 Del. C. §4185(b) and 29 Del. C., Ch. 101, the State of Delaware, Department of Safety and Homeland Security proposed to amend regulations. The Department's purpose in proposing amended regulations was to more clearly specify what motorcycle helmet and eye protection are approved for use in Delaware by the Secretary of the Department.

Notice of public comment period of thirty (30) days related to the Department's proposed amended regulations was published in the Delaware Register of Regulations for November 1, 2010.

II. PUBLIC COMMENTS

The Department received the following public comments in response to its notice of intention to adopt the proposed amended regulations and offers the following responses thereto:

A public comment was received concerning the Federal Motor Vehicle Safety Standards (FMVSS) and their application to importers, manufacturers, distributors, and retailers of new motor vehicles and new motor vehicle equipment. The commenter asserts that the Code of Federal Regulations, FMVSS, and USC Title 49, Chapter 301 is the jurisdiction of the Federal government. The commenter further asserts that if states adopt an FMVSS they are required to adopt it in its entirety. Congress did not intend to preempt all state laws regarding motorcycle helmet use. The State of Delaware is adopting the safety standard in FMVSS 218 in its entirety.

A public comment was received asserting that without a reference to any standard applicable to consumers and end users, no list of approved helmets (by make and model number), no instructions to the citizens of Delaware who choose to manufacture and certify helmets for their own use, and no instructions pertaining to used helmets, the regulation will be unenforceable. The commenter further asserts this regulation will not withstand judicial scrutiny and cites the 1972 US Supreme Court case *Grayned v. City of Rockford*. The language used in the proposed amended regulation is not vague because all that is required of a person buying a motorcycle helmet is to look at the helmet to see if it has the required labels. The court in *Grayned* held that a statute is void for vagueness if its prohibitions are not clearly defined such that the average consumer does not have adequate notice as to what is prohibited. In the case of *City of Bremerton v. Spears*, 949 P.2d 347, Jan., 1998, the Washington Supreme Court held, en banc, that the state's Motorcycle Helmet law was not unconstitutionally vague in that it provided fair and adequate notice to the defendant of what the Motorcycle Helmet requirements were and upheld the defendant's conviction for his failure to comply with the Motorcycle Helmet law. The language in the proposed rules and regulations, developed by the Office of Highway Safety and the Department of Safety and Homeland Security, reflects the language of the regulations in *City of Bremerton* and, therefore, meets the standard set forth in *City of Bremerton*.

Two public comments were received asking the following questions:

Does the State intend to apply these standards to used motor vehicles and used motor vehicle equipment? No, this regulation is not intended to govern the sale of used equipment. It is responsibility of the consumer to ensure they are purchasing compliant equipment.

Will the State mandate additional requirements for consumers and motor vehicle operators and passengers? We cannot comment on what may or may not happen in the future.

Will the State "grand-father in" existing motor vehicles and motor vehicle equipment? If not, does the State intend to initiate a "buy-back" program of existing non-compliant equipment? The regulation will apply to all motorcycle riders on its effective date. There will not be a buy-back program.

A public comment was received concerning the possibility of setting a bad precedent with regard to enforcement against consumers and motor vehicle operators. The commenter suggested the burden should lie with manufacturers, importers, distributors, and retailers and that was the intent of USC Title 49, Chapter 301. While there is a burden on the manufacturers, etc to be compliant, it is also the responsibility of the consumer to ensure they are making purchases from a reputable retailer.

A public comment was received asserting the label terminology in the proposal is repetitive of the label section of FMVSS 218 and seems unnecessary. The intent of this regulation is to clarify the necessary requirements for helmets and eye protection as indicated in Title 21, Section 4185(b).

A public comment was received concerning the question of the State's intent to introduce regulations to govern labeling of used items, when the Federal government does not. The commenter believes this is beyond the proper role of government. This regulation is not intended to govern the sale of used merchandise. It is responsibility of the consumer to ensure they are purchasing compliant equipment.

A public comment was received regarding the difficulty of the average citizen or law enforcement officer to read the standard set forth in FMVSS 218, and understand its requirements. The commenter believes this will lead to arbitrary enforcement. Delaware law enforcement officers are professionals and will enforce the law as appropriate.

A public comment was received concerning riders being forced to comply with various helmet laws from state to state when traveling and indicated this violates 14th Amendment protections. There are other laws that vary from state to state (such as seat belt use and permits to carry concealed weapons). It is incumbent on the traveler to be know the laws of any state through which they intend to travel and to comply with those laws.

A public comment was received asserting that the current law in Title 21 stipulates the Secretary of Safety and Homeland Security will establish a list of approved helmets and eye protection. This regulation does neither. The commenter sees this regulation as an attempt to correct an illegal rule currently in Title 21. The intent of this regulation is to clarify the necessary requirements for helmets and eye protection as indicated in Title 21, Section 4185(b).

A public comment was received requesting how the State proposes to guarantee the public a helmet meeting the proposed standards will protect a rider in a collision. No helmet manufacturer makes the claim that any helmet will unequivocally protect a rider in the event of a collision. The State of Delaware will not make that guarantee either.

A public comment was received suggesting motorcyclists be allowed their civil liberties, including their 9th Amendment right to self-governance, particularly in making decisions regarding their own safety and selection of safety equipment. The proposed amended regulations are reasonable public safety measures designed to reduce the costs to society of avoidable head and eye injuries.

A public comment was received asking if there is a difference between non-breakable and safety or shatter-proof eye wear. Further, the commenter asked how a law enforcement officer will test for this or inspect the eye wear at a roadside stop. In an effort to further clarify the intent of the Title 21, Section 4185(b), the Department of Safety and Homeland Security will amend the Regulation by changing Section 2.1 to read, "2.1 Any goggles or glasses with protective lenses. Protective lenses are those that at least cover the orbital bone of the eye. This excludes contact lenses." The Department contends that these enhancements to the Regulation do not substantively change the meaning as outlined in the Regulation published November 1, 2010.

A public comment was received asserting that carrying a helmet is "stupid" and that other neighboring states are rescinding their motorcycle helmet laws. The commenter indicates there are studies to both support and contradict the benefit of helmet use. Delaware law is not routinely established or changed based on what our neighboring states are doing. The latest NHTSA studies indicate a motorcyclist increases his/her odds of surviving

a crash by 37% when wearing a helmet. Riders who choose to carry the helmet rather than wear it do so at their own risk.

A public comment was received indicating that helmet laws adversely affect motorcycle sales, thereby reducing the income of the State through motorcycle registrations. The commenter cited "many economic studies." The Division of Motor Vehicles participated in the revision of this regulation and cited no concerns.

The Governor's Advisory Council for Exceptional Citizens and the State Council for Persons with Disabilities both commented that motorcycle helmets have an overall effectiveness of 37% in preventing fatalities in potentially fatal crashes and that riders who crash without helmets are three times more likely to have brain injuries. NHTSA studies indicate this is true.

The Governor's Advisory Council for Exceptional Citizens and the State Council for Persons with Disabilities both also commented that there is a major problem with novelty helmets and fake "DOT" stickers. The Council asserts that this makes enforcement difficult. The Council suggests addressing novelty helmets and fake "DOT" stickers in the regulation and offered the following suggestions:

Without limitation, the following helmets are categorically disapproved:

1.2.1.1. "Novelty" helmets which do not meet or exceed the standards in §1.1.1;

1.2.1.2. Helmets affixed with a DOT symbol not installed by the helmet's manufacturer; and

1.2.1.3. Helmets with counterfeit labels in lieu of the label affixed by the helmet's manufacturer pursuant to the Federal standards identified in §1.1.1.

The Department rejects the request to amend the regulation as outlined above.

While Department recognizes the escalating problems with novelty helmets, if applied as outlined in Exhibit A, this regulation will not recognize novelty helmets as acceptable.

The Governor's Advisory Council for Exceptional Citizens and the State Council for Persons with Disabilities both suggested inserting the language "most current" before the phrase "FMVSS 218" throughout the regulation in the event the existing Federal standard changes. The Department agrees this is a logical inclusion in the regulation and will add the recommended language.

III. FINDINGS AND CONCLUSIONS

The public was given the required notice of the Division's intent to adopt the proposed amended regulations and was given the opportunity to provide the Division with comments concerning them. Thus, the Division concludes that its consideration of the proposed regulations was entirely within its prerogatives and statutory authority and, having received and considered public comments that did not lead to substantive change, is now free to adopt the proposed regulations.

IV. ORDER

AND NOW, this _____ day of December, 2010 it is hereby ordered that:

The proposed regulations are adopted;

The text of the proposed regulations shall be in the form attached hereto as Exhibit A;

The effective date of this Order is ten days from the date of its publication in the Delaware Register of Regulations in accordance with 29 Delaware C. §10118(e); and

The Department reserves unto itself the authority to issue such other and further orders concerning its practices and procedures as may be just and proper.

IT IS SO ORDERED.

By: Elizabeth Olsen, Deputy Secretary

Department of Safety and Homeland Security

By: Jana Simpler, Director, Office of Highway Safety

Department of Safety and Homeland Security

~~Regulation 30~~ **1206** Approved Motorcycle Helmets and Eye Protection

1.0 Types of Approved Helmets.

1.1 Pursuant to **21 Del.C., §4185**, the types of helmets approved by the Secretary of the Department of ~~Public Safety and Homeland Security~~ are ones that:

~~1.1.1~~ **[Helmets which]** Meet or exceed the Federal Motor Vehicle Safety Standard (FMVSS) 218 (D.O.T.) Standard located at 49 Code of Federal Regulations Section 571.218; and meet the [following] Federal Motor Vehicle Safety Standard 218, labeling requirements.

~~Helmets which meet or exceed the A.N.S.I.Z90.1A 1973 Standard has amended.~~

~~Helmets used in the State should be labeled so that enforcement officers can identify approved helmets. This label, indicating the helmet, manufacturer's name or brand name (where brand name is different from the manufacturer's name) and the model name or number, should be placed at the outside or inside lower rear of each helmet in letters of not less than one quarter inch in height.~~

~~All helmets are to be either reflectorized by the manufacturer, or reflectorized by material purchased by owner and applied to the helmet. It must be applied so it is legible from all angles and the helmet when being worn. It must be securely affixed to left side, right side and rear of helmet, and should cover an area of at least four square inches in each of the specified areas.~~

~~1.2.1~~ Each helmet shall be labeled permanently and legibly, in a manner such that the label(s) can be read easily without removing padding or any other permanent part, with the following:

~~1.2.1.1~~ Manufacturer's name or identification.

~~1.2.1.2~~ Precise model designation.

~~1.2.1.3~~ Size.

~~1.2.1.4~~ Month and year of manufacture. This may be spelled out (e.g., June 1988), or expressed in numerals (e.g. 6/99).

~~1.2.1.5~~ The symbol DOT, constituting the manufacturer's certification that the helmet conforms to the applicable Federal Motor Vehicle Safety Standard. This symbol shall appear on the outer surface, in a color that contrasts with the background, in letters at least three-eighths inch (one centimeter) high.

~~1.2.2~~ Each helmet shall include the following information for the purchaser:

~~1.2.2.1~~ Shell and liner constructed of (identify type(s) of materials).

~~1.2.2.2~~ Helmet can be seriously damaged by some common substances without damage being visible to the user. Apply only the following: (Recommended cleaning agents, paints, adhesives, etc., as appropriate.)

~~1.2.2.3~~ Make no modifications to the helmet. Fasten helmet securely. If helmet experiences a severe blow, return it to the manufacturer for inspection, or destroy it and replace it.

~~1.2.2.4~~ Any additional relevant safety information should be included at the time of purchase by means of an attached tag, brochure, or other suitable means.

~~1.2.2.5~~ If a motorcycle helmet meeting the above federal requirements is equipped with an electronic device for transmitting sound, the speaker portion affixed to the helmet, must not enter or completely block the ear canals.

2.0 Approved Types of Eye Protection

2.1 Pursuant to **21 Del.C., §4185**, the types of eye protection approved by the Secretary of the Department of ~~Public Safety and Homeland Security~~ are as follows:

2.1.1 Any type of goggles ~~[equipped with non-breakable lenses~~ or glasses with protective lenses. **Protective lenses are those that at least cover the orbital bone of the eye. This excludes contact lenses; or]**

2.1.2 A face shield. ~~for~~

~~2.1.3 Safety glasses excluding contact lenses.] Do NOT approve contact lens or any type of eye glasses unless the eye glasses are equipped with unbreakable lens. Windshields are highly recommended as an additional measure.~~

3.0 Reaffirming original eye protection requirement.

This Regulation reaffirms the original approval for eye protection, as issued by the Motor Vehicle Division on July 11, 1968, and updates the types of helmets which were also approved at that time.

DEPARTMENT OF STATE

DIVISION OF PROFESSIONAL REGULATION

1600 Commission On Adult Entertainment Establishments

Statutory Authority: 24 Delaware Code, Section 1604 (24 Del.C. §1604)

24 DE Admin. Code 1600

1600 Commission on Adult Entertainment Establishments

ORDER

Pursuant to 24 Del.C. §1604, the Commission on Adult Entertainment Establishments issues this Order adopting a proposed revision to its rules and regulations. Following notice and a public hearing on April 22, 2010, the Board makes the following findings and conclusions:

Summary of the Evidence

The Board posted public notice of the proposed amendment in the April 1, 2010 *Register of Regulations* and for two consecutive weeks in *The News Journal* and *Delaware State News*.

The amendment was proposed to add a definition of “substantial portion” to the rules and regulations. This revision implements the recent amendment to the Commission’s licensing law, Chapter 16 of Title 24 of the Delaware Code, with respect to adult oriented retail establishments. The proposed rule change establishes a new Section 2.0 to the Commission’s rules and regulations titled “Adult Oriented Retail Establishments” and adopts a new Rule 2.1 reading as follows:

The Commission has determined that as used in 24 Del.C. §1602(3) the term “substantial portion” means fifty percent (50%) or more of the (i) retail floor space open to the public; or (ii) gross receipts earned by the retail establishment.

The public was given notice and an opportunity to provide the Board with comments in writing and by testimony on April 22, 2010, at the public hearing on the proposed amendment to the Board’s Rules.

Findings of Fact and Conclusions

The public was given notice and an opportunity to provide the Board with comments in writing and by testimony on April 22, 2010, at the public hearing. No comments were received by writing. One member of the public did provide comments that were received by testimony at the public hearing and considered by the Commission.

The Board concludes that the proposal should be adopted to establish a new Section 2.0 to the Commission’s rules and regulations titled “Adult Oriented Retail Establishments” and adopt a new Rule 2.1 to provide a definition of “substantial portion.”

The effective date of this Order will be ten (10) days from the publication of this Final Order in the *Register of Regulations* on January 1, 2011.

It is so ordered this 22nd day of April 2010.

James Nutter, Chairman

1600 Commission on Adult Entertainment Establishments

1.0 Sanctions for Violations

- 1.1 Pursuant to 24 **Del.C.** §1618(c), the Commission may, following a hearing, impose civil fines and/or license suspensions for violations of the following statutes:
 - 1.1.1 24 **Del.C.** §1608
 - 1.1.2 24 **Del.C.** §1610
 - 1.1.3 24 **Del.C.** §1611
 - 1.1.4 24 **Del.C.** §1617
 - 1.1.5 24 **Del.C.** §1622
 - 1.1.6 24 **Del.C.** §1629
- 1.2 The Commission may, in its discretion, impose fines of no less than \$250.00 and no more than \$1000.00 and/or license suspensions of no less than one (1) day and no more than sixty (60) days for each violation of the laws set forth at Rule 1.1.
- 1.3 If a penalty imposed by the Commission, pursuant to this rule, is not complied with pursuant to the terms of the Commission's Order, the Commission shall convene a hearing for the licensee to show cause why the license should not be revoked and/or additional penalties imposed.
- 1.4 Nothing in this rule shall prohibit the Commission from imposing a license revocation in lieu of or in addition to any penalty established under this rule, if license revocation is a penalty authorized by statute for the specific offense(s).

2.0 **Adult Oriented Retail Establishments**

The Commission has determined that as used in 24 **Del.C.** §1602(3) the term "**substantial portion**" means fifty percent (50%) or more of the (i) retail floor space open to the public; or (ii) gross receipts earned by the retail establishment.

13 DE Reg. 1294 (04/01/10)

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

2700 Board of Registration for Professional Land Surveyors

ORDER

Introduction

The Delaware Board of Professional Land Surveyors ("Board"), in accordance with 24 **Delaware Code** Section 2706(a), proposed revisions to its rules and regulations which describe minimum technical standards for licensees.

The Board published a notice for a public hearing regarding such proposed changes, which included the proposed revisions as they would appear if adopted, at 13 Delaware Register 244.

This public hearing was held September 17, 2009 at the Cannon Building, 861 Silver Lake Boulevard, Dover, Delaware.

Following extensive commentary at that hearing, and Board discussion thereafter, the Board subsequently decided to continue its deliberations. These continued deliberations led to another public hearing regarding additional proposed changes to these regulations, held pursuant to duly published notice, on August 24, 2010 (14 DE Register 102).

Thereafter, the Board continued its deliberations on the proposed regulations. At its regularly scheduled Board meeting held October 21, 2010, the Board decided to adopt certain changes to these regulations, in the form accompanying this Order.

Summary of the Evidence and Information Submitted

The September 2009 public hearing was well-attended, with speakers describing their support or opposition to the proposed changes, especially with respect to the proposed monument-setting requirement for Mortgage Inspection Plans (now proposed to be referred to as Mortgage Survey Plans. These Plans are used in New Castle County, but are not permitted to be used in Kent and Sussex County under the existing regulations.

Some speakers objected to the proposed requirement to set two corners, while others suggested that all four corners should be set. Others suggested that no corners needed to be set for certain kinds of communities, such as age-restricted developments or townhouses within cities.

At least one commenter suggested that the changes amounted to a restraint of trade on the profession, without a countervailing assurance of additional public safety if enacted. Others expressed their views of the relative costs and benefits of the additional monument-setting procedure.

Several of those commenting also objected to a proposed section relating to accessing surveyors' files to confirm compliance with the PLS regulations. Board members noted the issue, and agreed to alter the regulation to confirm that this would only arise in the context of a specific complaint about compliance.

Additional comments were received relating to the form of a waiver document, which the regulations call for execution whenever these Plans are prepared.

At the August 24, 2010 public hearing, testimony came in from additional witnesses, including two real estate attorneys and several surveyors. The attorneys described their assessment of the likely impact of the proposed regulatory changes on the title insurance companies operating in Delaware, and those with whom they deal. The surveyors' comments also discussed the proposed changes from their perspective on how the new regulations would affect their surveying business.

Findings of Facts

The Board finds that it is appropriate to amend 24 **DE Admin. Code** 2700 regarding minimum technical standards for licensees, in the form described in the attached revisions. These changes take into account the concerns expressed by the speakers at the public hearings, the written comments also received by the Board, and the issues discussed by the Board members during their extensive deliberations over the proposed changes. The Board does not consider any changes agreed to since the second full public hearing to include any substantive alterations in the proposed regulations.

Decision to Amend the Regulations

At its regularly scheduled Board meeting held October 21, 2010, after continued discussion and votes regarding each proposed change in the regulations, the Board concluded that it is appropriate to amend the existing regulations, in the form attached to this Order.

Effective Date of Order

The actions described above were adopted by the Board at its October 21, 2010 meeting. The effective date of this Order shall be ten (10) days from the date this Order is published in the *Delaware Register of Regulations*.

SO ORDERED BOARD OF PROFESSIONAL LAND SURVEYORS

Steven Sellers, Professional Member	Laurence McBride, Professional Member
Michael Szymanski, Professional Member	Mary Chvostal, Public Member
James Bielicki, Jr., Professional Member	Frank Szczuka, Public Member

2700 Board of Registration for Professional Land Surveyors

(Break in Continuity of Sections)

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. An ALTA/ACSM Land Title Survey shall be titled in accordance to the current published ALTA/ACSM standard. A Subdivision Survey shall be titled as required by the governing regulatory agency. 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, (Deed Record and/or Will Record Number), 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.
- 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. **[When no recorded rights-of-way or easements are provided, it shall be so noted on the plan.]**
- 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.]~~ A written property description is not required when there are no changes to the property description used as a basis for said surveys. When preparing a property description in conjunction with a Mortgage Survey Plan, said description shall be based

upon and refer to the record plat and not the 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 ["Parent"] property that is the subject of the subdivision shall be set and/or identified in accordance to 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. [For an ALTA/ACSM Land Title Survey, all boundary corners of the subject property shall be set and/or identified in accordance to 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 Plan (MIP)~~ (MSP)

- 12.6.1 Purpose. The purpose of ~~an MIP~~ an 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 **[in connection with a conveyance or a mortgage]**.
- 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

FINAL REGULATIONS

~~inspected surveyed~~ property. The plat shall be titled "Mortgage Survey Plan"; no other plan title is acceptable.

12.7 The ~~Approval 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 waiver shall be in 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)

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 [all] the corner markers set and have been requested to prepare an MIP the preparation of a Mortgage Survey Plan (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 [and the cost of a Boundary survey may differ from that charged for an MSP. I am also aware that there may be a cost difference between the MSO and boundary survey.]~~ 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)

_____ (Signature of Witness)

I hereby certify that by virtue of the signature of the ultimate user on this waiver that the ultimate user is aware of the potential impact of not having corner markers set, and that I have 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 or a retrievable scanned copy of said 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**] a waiver [**of a specified property upon the Board's request**] in connection with a complaint [**filed with respect to involving**] said property.

12.7.2.7 [**The Board may periodically review a licensee's records to determine compliance with this section.**] 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 agrees to**] 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. **[and the subject property. Two described boundary corners of the subject property are not required when the subject property is part of a townhouse (row house) community constructed prior to 1980, or a community designated as "55 or over", or a condominium community. A subject property within said communities will require a minimum of two described boundary control points, 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.
- 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 a ~~consumer~~ ultimate user 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 that no additional changes were made to the regulation as originally proposed and published in the August 2010 issue of the *Register* at page 102 (14 DE Reg. 102). Therefore, the final regulation is not being republished. A copy of the final regulation is available at:**

2700 Board of Registration for Professional Land Surveyors

GOVERNOR'S EXECUTIVE ORDERS

STATE OF DELAWARE
EXECUTIVE DEPARTMENT
DOVER

**EXECUTIVE ORDER
NUMBER TWENTY-TWO**

TO: HEADS OF ALL STATE DEPARTMENTS AND AGENCIES
RE: WAIVER AND REASSIGNMENT OF ALLOCATION OF RECOVERY ZONE FACILITY BOND VOLUME CAP

WHEREAS, the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) ("ARRA"), which became effective February 17, 2009, authorized state and local governments to issue certain Recovery Zone Economic Development Bonds and Recovery Zone Facility Bonds; and

WHEREAS, the Internal Revenue Service released Notice 2009-50, which provided guidance for the issuance of Recovery Zone Bonds along with the allocation of volume cap for Recovery Zone Economic Development Bonds and Recovery Zone Facility Bonds; and

WHEREAS, Kent County received an allocation under ARRA of \$22,446,000 in Recovery Zone Economic Development Bonds for governmental projects and \$33,668,000 in Recovery Zone Facility Bonds for private activity projects; and

WHEREAS, Kent County defined recovery zones according to ARRA on August 11, 2009, adopting Resolution No. 3057; and

WHEREAS, Kent County Levy Court allocated its Recovery Zone Economic Development Bond volume cap to certain public works projects on September 28, 2010; and

WHEREAS, Kent County Levy Court allocated a portion of its Recovery Zone Facility Bond volume cap to certain qualifying projects and wishes to reassign \$20 million of its remaining volume cap; and

WHEREAS, Internal Revenue Service Notice 2009-50 provides that, upon waiver of any portion of volume cap by a county, the State in which such county is located "shall be authorized to reallocate the waived volume cap in any reasonable manner as it shall determine in good faith in its discretion;"

NOW, THEREFORE, I, JACK A. MARKELL, by virtue of the authority vested in me as Governor of the State of Delaware, do hereby DECLARE and ORDER that:

1. Pursuant to Resolution No. 3179 adopted by the Kent County Levy Court on October 26, 2010, \$20 million of Kent County 's remaining Recovery Zone Facility Bond volume cap allocation remains unused and is hereby transferred to the State for further disposition.

2. \$20 million of the Recovery Zone Facility Bond volume cap is hereby allocated to Sussex County for use by NRG's Indian River Plant project, which includes the financing of air quality control systems for the reduction of SO₂, NO_x and mercury emissions.

APPROVED this 17th day of November, 2010

Jack A. Markell,
Governor

**EXECUTIVE ORDER
NUMBER TWENTY-THREE**

TO: HEADS OF ALL STATE DEPARTMENTS AND AGENCIES
RE: WAIVER AND REASSIGNMENT OF ALLOCATION OF RECOVERY ZONE FACILITY BOND VOLUME CAP

WHEREAS, the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) ("ARRA"), which became effective February 17, 2009, authorized state and local governments to issue certain Recovery Zone Economic Development Bonds and Recovery Zone Facility Bonds; and

WHEREAS, the Internal Revenue Service released Notice 2009-50, which provided guidance for the issuance of Recovery Zone Bonds along with the allocation of volume cap for Recovery Zone Economic Development Bonds and Recovery Zone Facility Bonds; and

WHEREAS, New Castle County received an allocation under ARRA of \$50,910,000 in Recovery Zone Economic Development Bonds for governmental projects and \$76,365,000 in Recovery Zone Facility Bonds for private activity projects; and

WHEREAS, the New Castle County Council defined recovery zones according to ARRA on July 29, 2009, pursuant to Substitute No. 1 to Resolution No. 09-123; and

WHEREAS, the New Castle County Council allocated its Recovery Zone Economic Development Bond volume cap to certain public works projects; and

WHEREAS, the New Castle County Council allocated a portion of its Recovery Zone Facility Bond volume cap to certain qualifying projects and wishes to reassign \$12,215,000 of its remaining volume cap; and

WHEREAS, Internal Revenue Service Notice 2009-50 provides that, upon waiver of any portion of volume cap by a county, the State in which such county is located "shall be authorized to reallocate the waived volume cap in any reasonable manner as it shall determine in good faith in its discretion;"

NOW, THEREFORE, I, JACK A. MARKELL, by virtue of the authority vested in me as Governor of the State of Delaware, do hereby DECLARE and ORDER that:

1. Pursuant to Resolution No. 10-206 adopted by the New Castle County Council on November 23, 2010, \$12,215,000 of New Castle County 's remaining Recovery Zone Facility Bond volume cap allocation remains unused and is hereby transferred to the State for further disposition.

2. \$12,215,000 of the Recovery Zone Facility Bond volume cap is hereby allocated to Sussex County for use by NRG's Indian River Plant project, which includes the financing of air quality control systems for the reduction of SO₂, NO_x and mercury emissions.

APPROVED this 29th day of November, 2010

Jack A. Markell,
Governor

GENERAL NOTICES

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)

PUBLIC NOTICE

1. TITLE OF SIP REVISION(S):

State Implementation Plan (SIP) Revision: Supplement to Delaware's September 17, 2009 CAA Section 110 "Infrastructure" State Implementation Plan (SIP) Submission.

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

On September 17, 2009 Delaware submitted to the United States Environmental Protection Agency (EPA) a SIP revision to satisfy the requirements of Section 110(a)(1) and 110(a)(2) of the Clean Air Act (CAA) for the National Ambient Air Quality Standards (NAAQS) for Fine Particles (PM_{2.5}), which was promulgated by the EPA on October 17, 2006 (71 FR 61224). EPA released guidance after our September 17, 2009 SIP submittal which required a "technical analysis" that demonstrates States meet 110(a)(2)(D)(i)(I) of the Act. The purpose of this SIP revision is to supplement our September 17, 2009 SIP revision with a technical analysis that satisfies that EPA requirement.

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:

The public comment period for this proposed SIP revision will extend through at least February 1, 2011. Interested parties may submit comments in writing during this time frame to Jack Sipple, Division of Air Quality, Blue Hen Corporate Center, 655 S. Bay Road Dover, DE 19901, and/or statements and testimony may be presented either orally or in writing at the public hearing to be held on Tuesday, February 1, 2011, beginning at 6:00 pm, in DNREC's Auditorium, R & R Building, 89 Kings Hwy, Dover, DE 19901.

7. PREPARED BY:

John Sipple, (302) 739-9402, December 8, 2010

Email address: john.sipple@state.de.us

Proposed Delaware State Implementation Plan (SIP) Revision Supplement to Delaware's September 17, 2009 CAA Section 110 "Infrastructure" State Implementation Plan (SIP) Submission

1. SUMMARY AND PURPOSE

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.

This document is a revision to Delaware's SIP. The purpose of this SIP revision is to supplement our September 17, 2009 SIP revision that was submitted to satisfy the requirements of Section 110(a)(1) and 110(a)(2) of the Clean Air Act (the Act) pursuant to the National Ambient Air Quality Standards (NAAQS) for Fine Particles (PM_{2.5}) promulgated by the United States Environmental Protection Agency (EPA) on October 17, 2006 (71 FR 61224).

Under the CAA, States are required to submit SIP revisions to satisfy Section 110(a)(1) and 110(a)(2) by no later than three years from the date EPA promulgates a new or revised NAAQS or face findings of failure to submit. Therefore, the September 17, 2009 SIP submission made by the Department was timely. However, on September 25, 2009, EPA issued a guidance document entitled, "Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 2006 24-Hour Fine Particle (PM_{2.5}) National Ambient Air Quality Standards (NAAQS)," which provided guidance on addressing the "infrastructure" elements for SIPs required under Sections 110(a)(1) and 110(a)(2) of the Act for the 2006 24-hour PM_{2.5} NAAQS. According to this guidance document, any state's SIP submission to address the infrastructure element related to interstate transport found at 110(a)(2)(D)(i)(I) must be supported by an "adequate technical analysis." This guidance document further states that it is EPA's intention to complete a rule to address interstate transport in the eastern portion of the continental United States (the Transport Rule). This rule would replace the vacated Clean Air Interstate Transport Rule (CAIR) and would assist states with obligations to address interstate transport that significantly contributes to nonattainment in another state.

However, Delaware could not wait for EPA's SIP guidance or the CAIR replacement rule without facing findings of failure to submit for not meeting the October 17, 2009 due date for submittal of the 110(a)(1) and 110(a)(2) infrastructure SIP elements pursuant to EPA's October 17, 2006 promulgation of the 24-hour NAAQS for PM_{2.5}. Therefore, Delaware made a timely SIP submission in which the Department cited to its own SIP-approved regulations to reduce PM_{2.5} precursor emissions of sulfur dioxide (SO₂) and nitrogen oxides (NO_x) from electric generating units, industrial boilers, and peaking units to address the interstate transport requirements of 110(a)(2)(D)(i)(I).

To be clear, Delaware's September 17, 2009 SIP submittal did not include the "technical analysis" called for in EPA's September 25, 2009 guidance document because 1) the EPA guidance was issued too late in the process, as discussed above, and 2) because after review of the guidance Delaware believed the EPA required technical analysis was in line with an analysis of whether or not emission from the state significantly impact any area, with the result of the analysis being either they do or they do not impact. And, if they do impact then the state must take action to address the impact.

In the development of Delaware's SIP-approved regulations to reduce PM_{2.5} precursor emissions of SO₂ and NO_x from electric generating units, industrial boilers, and peaking units to address the interstate transport requirements of 110(a)(2)(D)(i)(I), Delaware started with the assumption that it did significantly impact downwind areas. With this assumption, Delaware moved forward and regulated NO_x and SO₂ emissions from its large EGU and industrial boilers, to include EGUs with small annual emission but high daily emissions (i.e., typically referred to as high energy demand day units) with Best Available Control Technology (BACT) level controls. Because of this Delaware believed it has clearly mitigated significant transport and adequately addressed CAA 110 requirements.¹

Since the time of our September 17, 2009 SIP submittal, EPA proposed the Transport Rule (August 2, 2010). In that proposal, EPA concluded that the State of Delaware was to be included among the states covered by the Transport Rule. Given Delaware's stringent SIP-approved EGU, peaking unit and large boiler control regulations,

1. This does not imply that Delaware believes transport is limited to EGU and large boiler emissions. To the contrary, Delaware believes programs like reasonably available control technology (RACT), new source review (NSR), transportation conformity, etc. are needed in all upwind areas to mitigate transport. This position is portrayed clearly in Delaware's December 2009 CAA 126 petition. However, in the context of EPA transport rule, which is the impetus for this SIP revision, BACT level controls on EGUs are clearly adequate to mitigate significant impact on downwind states.

this was not expected. On October 1, 2010, the Department submitted timely comments to EPA's rulemaking docket for the proposed Transport Rule including extensive technical data and information to support our contention that Delaware should not be included in the Transport Rule. It is our belief that the comments, data, and information we submitted on the proposed Transport Rule are more than sufficient to satisfy EPA's September 25, 2009 guidance that a SIP submitted to address 110(a)(2)(D)(i)(I) include an adequate technical analysis.

Despite the above, in the best interests of the State of Delaware, the Department is hereby using the comments, data, and information we submitted on the Transport Rule to form the basis of a technical analysis in support of our September 17, 2009 SIP revision to comply with EPA's September 25, 2009 guidance document. Upon completion of the CAA's required public participation procedures, the Department will formally submit this technical analysis as a supplement to its September 17, 2010 SIP submission to address satisfy 110(a)(2)(D)(i)(I) for interstate transport along with the associated administrative materials required by 40 CFR Part 51 Appendix v.

1.1 BACKGROUND

This document supplements our September 17, 2009 SIP by adding more detail as to how Delaware meets the requirements of Clean Air Act ("CAA") §110(a)(2)(D)(i)(I),² addressing interstate transport by demonstrating that Delaware has fulfilled its requirements to control sources that 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 which address downwind contributions (interstate transport) from Delaware sources.

Delaware's September 17, 2009 submittal indicated that its implementation plan 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. Specifically, under 110(a)(2)(D)(i)(I) major stationary sources for the annual and 24-hr PM_{2.5} NAAQS 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. As provided in the PM_{2.5} NSR Implementation Rule (73 FR 28321), NNSR in New Castle County for PM_{2.5} 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_{2.5} PSD activities will continue to be administered using PM₁₀ as a surrogate for PM_{2.5}, without consideration of precursors, until no later than May 16, 2011 when changes to 7 DE Admin. Code 1125 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_x 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 impose BACT level controls, and have been approved by the EPA as revisions to Delaware's SIP.

As mentioned previously, on September 25, 2009 EPA issued a Memo³ which includes guidance on the technical analysis. The Memo discusses the analysis, elements therein and states, "*Information to support the states determination with respect to significant contribution to nonattainment might include, but not limited to, information concerning emissions in the state, meteorological conditions in the state and the potentially impacted states, moni-*

2. §110(a)(2)(D)(i)(I) states, "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)."

3. Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 2006 24-Hour Fine Particle (PM_{2.5}) National Ambient Air Quality Standards (NAAQS),"

tored ambient concentrations in the state and the potentially impacted states, the distance to the nearest area that is not attaining the standard, and air quality modeling.” Therefore, this analysis will discuss:

- Evaluation of EPA’s proposed Transport Rule (TR) modeling to help provide weight-of-evidence that Delaware is not a significant contributor to downwind states
- Delaware vs. EPA TR emissions analysis to help provide weight-of-evidence that Delaware is not a significant contributor to downwind states
- Monitoring data
- Recent and significant Delaware control measures that mitigate transport

While reading this analysis, we ask the reader to remember that:

1. Delaware EGU projections are less than the EGU budgets in the proposed TR. Since those budgets are the level of SO₂ and NO_x emissions that states must meet to remedy their “significant contribution,” based on EPA modeling, and we demonstrate Delaware EGUs will meet those budgets in 2012, it follows that Delaware has met its requirements to address downwind transport.

2. Delaware does not have the staff or resources to gather regional data, project emissions, and subsequently model downwind contributions from sources to every downwind county in the eastern U.S. Delaware further believes that expectation for such an analysis to be conducted by every state is entirely unreasonable and technically impractical. Therefore, **for purposes of this technical analysis Delaware Division of Air Quality (DAQ) will combine an EPA-Delaware emission analysis with EPA’s modeling used for the TR.**

1.2 Responsibilities.

The agency with direct responsibility for preparing and submitting this document is Delaware Department of Natural Resources and Environmental Control (DNREC), Division of Air Quality (DAQ), under the Division Director, Ali Mirzakhaili, P.E. The working responsibility for Delaware’s air quality planning falls within DAQ’s Planning Branch, under the Program Manager, Ronald Amirikian. The Planning Branch is instrumental in completing this document. Specifically,

- Jack Sipple, M.S., is the project leader and responsible for emission projections, as well as principal author of this SIP revision;
- Ron Amirikian, Planning Branch Manager, QA
- Dave Fees, P.E., Managing Engineer, DAQ Emission Inventory Program, is the supporting lead for the 2005 base year emission inventory;
- Bob Clausen, EGU analysis and projections;
- Betsy Frey, M.S., is the supporting lead for PM_{2.5} monitoring data;
- Mark Prettyman, Environmental Scientist, supporting staff and data management

2. TRANSPORT RULE MODELING AND CONTRIBUTION ASSESSMENT

On August 2, 2010 EPA proposed the TR to address downwind contributions of sulfur dioxides and nitrogen oxides. In that Rule, EPA 2012 “Base Case” emissions were modeled to determine whether States met a threshold for “linkage” and thus meet the criteria for “significant contribution to, and/or interference with maintenance” to downwind areas. The results of EPA’s modeling in Table 1 suggest that Delaware’s downwind contribution exceeds one or both of these thresholds. The “significant” thresholds are 0.20 and 0.35 ug/m³ for the annual and 24-hr NAAQS, respectively.

Table 1. Delaware’s largest contribution to downwind areas based on EPA modeling in the TR

NAAQS	Largest Downwind Contribution to Nonattainment (ug/m ³)	Largest Downwind Contribution to Maintenance (ug/m ³)	Affected Counties (Linkages) for Nonattainment	Affected Counties (Linkages) for Maintenance

GENERAL NOTICES

Annual	0.20	0.14	Lancaster, PA York, PA	None
Daily	0.50	0.36	Union, PA Dauphin, PA	Cumberland, PA New York, NY

As we will show later in this document, the 2005 base year that EPA used in the projections was flawed, because those emissions were significantly higher than what Delaware submitted in its 2005 Periodic Emissions Inventory. Furthermore, the EPA 2012 projections were based on those EPA 2005 inflated numbers, which resulted in inflated 2012 numbers. And finally, because recent Delaware control initiatives were not included in the EPA's 2012 projections they were even further inflated. Subsequently, these inflated projections were used by EPA to model and assess whether states significantly contribute. But inflated projections used in any contribution assessment yields inflated contributions. Therefore, Delaware believes that if EPA used up-to-date and accurate emissions data (i.e. the Delaware PEI and recent Delaware control measures), EPA modeling would have shown that Delaware does not significantly contribute to downwind areas.

3. EMISSIONS

Delaware compared its 2005 Periodic Emissions Inventory (PEI) with EPA's 2005 NEI (and 2002) emissions used in their assessment of significant contributions for the TR. Delaware then projected its 2005 PEI emissions to 2012, and compared them to EPA's 2012 Base Case emissions. Delaware's sulfur dioxide (SO₂) and nitrogen oxides (NOx) emissions are significantly overstated in the TR contribution assessment. 2005 and 2012 emissions can be found in the attachments to this document (attachment 1 contains the emission summary tables).

EPA used the 2005 National Emissions Inventory (NEI), Version 2 for point sources, and 2002 emissions for a few other categories, such as nonpoint sources. Alternatively, DAQ used a more recent and refined 2005 inventory PEI for the 2005 emissions analysis. EPA also used NMIM and MOVES, which are discussed in more detail below. The results of our comparison show that 2005 emissions differences between EPA's TR 2005 emissions and DAQ's 2005 PEI are insignificant for EGUs and non-EGU point sources, but significant in the nonpoint and nonroad categories. EPA apparently used a "top-down" approach for the nonpoint and marine vessels. Delaware used state-specific data, i.e. a "bottom-up" approach. Bottom-up approaches have always been the preferred method for emission calculations. Table 2 summarizes the 2005 differences, with a discussion of each sector afterwards.⁴

Table 2 2005 Emissions

2005 SO₂	EGU	NonEGU	Nonpoint	Nonroad	Onroad	Total
Transport Rule	32,378	34,859	5,859	11,648	422	85,166
DE PEI Emissions	31,745	34,686	1,034	2,755	422	70,642
DE Emission Difference (tpy)	-633	-173	-4,825	-8,893	0	-14,524
% Difference	2%	0%	82%	76%	0%	17%
2005 NO_x	EGU	NonEGU	Nonpoint	Nonroad	Onroad	Total
Transport Rule	11,917	5,567	3,259	15,567	22,569	58,879
DE PEI Emissions	11,397	5,999	2,317	11,728	22,569	54,010
DE Emission Difference	-520	432	-942	-3,839	0	-4,869
% Difference	4%	-8%	29%	25%	0%	8%

3.1 2005 Source Sector Discussion

4. DAQ emission tables can be found in the attachments (summaries, EGUs, non-EGUs, marine vessels and fuel combustion).

3.1.1 EGUs: EPA and Delaware PEI EGUs emission differences are insignificant for 2005.

3.1.2 Non-EGU Point: No difference in 2005.

3.1.3 Nonpoint: The nonpoint category in Table 2 shows significant differences between EPA and DAQ 2005 emissions. The large discrepancy most likely lies with differences in how the several fuel combustion categories (industrial, commercial, and residential) were calculated. EPA assumed 2002 emissions for the TR 2005 fuel combustion sources, without growth.⁵

DAQ calculated its emissions using Delaware-specific 2005 fuel sales data obtained from the US Department of Energy's Energy Information Administration (EIA) publications and emission factors obtained from AP-42 and other EPA documents. Delaware also backs out fuel usage already reported under the point source or nonroad source sectors. EPA may have double-counted the fuel combustion emissions.

Another possible reason for the difference between DAQ methods for fuel combustion and those employed by EPA, is that we concluded (since the 2002 inventory) that fuel used by industrial and commercial non-stationary equipment (forklifts, aerial lifts, floor sweepers/scrubbers, etc.) was contained in the EIA state energy industrial and commercial sector usages, instead of in the off-highway sector. Since emissions from these equipment types are included in the NONROAD model, we needed to back their fuel usage out of the EIA total. This did have a fairly significant effect.

3.1.4 Nonroad:

The nonroad 2005 emission differences were very large, particularly for SO₂ as shown in Table 2. As will be discussed later, this is due to differing methods for marine vessel calculations. However, all of the non-road categories are addressed here:

1. *Nonroad equipment (the NMIM model):* EPA used NMIM, but Delaware could not find data on EPA's website whereby we could "separate" non-road equipment emissions from marine, aircraft and locomotive (MAR).

However, since DAQ also used NMIM for 2005 (and national defaults for the bigger NO_x sub-categories), we believe that 2005 EPA vs. DAQ emissions differences in nonroad equipment (NMIM) category are most likely insignificant, and thus not a key factor in the total nonroad emissions differences.

2. *Locomotives and non-C3 Marine:* EPA used 2002 emissions.⁶ Delaware has refined the 2005 PEI to use more recent emission factors and activity data.

3. *Aircraft Emissions:* EPA used the 2005 NEI version. Delaware has refined its 2005 PEI to use more recent emission factors and/or activity data.

4. *C3 Marine Vessels:* This is the sub-category likely responsible for the large differences between EPA and DAQ nonroad 2005 numbers (and thus 2012), i.e., EPA 2005 SO₂ is 11,648 tpy while DAQ is 2,755 tpy. EPA 2005 NO_x is 15,567 tpy and DAQ's is 11,728 tpy. Delaware knows from experience that this category is largely responsible for SO₂ emissions from nonroad sources, and a little less so for NO_x. In fact, marine vessel SO₂ emissions rank only behind EGUs and large industrial boilers.

EPA obtained their 2005 emissions for the TR from the EPA rule called "Control of Emissions from New Marine Compression-Ignition Engines at or Above 30 Liters per Cylinder", usually described as the Emissions Control Area (ECA) study, originally called SO₂ ("S") ECA.⁷ Because EPA relied on rule development emissions, DAQ believes EPA's method is a "top-down" approach, and does not estimate emissions to the level of detail undertaken by Delaware DAQ staff, which uses local activity data. More importantly, Delaware has learned from discussions with OAQPS that **EPA allocated C3 marine vessels to States out to 200 nautical miles**. That is well beyond our state boundaries. Below is a summary of Delaware's methods, including improvements to the methodology for 2005 as compared to Delaware's 2002 inventory.

5. *Technical Support Document (TSD) for the Transport Rule Docket.* ID No. EPA-HQ-OAR-2009-0491. Table 2-1. Sectors Used in the TR Emissions Modeling Platform.

6. *Technical Support Document (TSD) for the Transport Rule Docket.* ID No. EPA-HQ-OAR-2009-0491. Table 2-1. Sectors Used in the TR Emissions Modeling Platform.

7. *Technical Support Document (TSD) for the Transport Rule Docket.* ID No. EPA-HQ-OAR-2009-0491. Table 2-1. Sectors Used in the TR Emissions Modeling Platform.

GENERAL NOTICES

The Delaware inventory for CMVs includes exhaust emissions from ocean-going vessels, tow and tug boats, ferries, and dredges, and is reported to EPA under the following SCCs: 2280002100, 2280002200, 2280003100, and 2280003200. Delaware accounts for vessel cruising, maneuvering, and hoteling time-in-mode and engine energy output in kilowatt-hours. For most of the length of the Delaware Bay and River, emissions are split between Delaware and New Jersey since the state boundary coincides with the shipping channel. The state boundary for the northern portion of New Castle County extends to low mean time on the New Jersey side of the river and thus all emissions from vessel traveling this stretch of river are included in Delaware's inventory.

Delaware obtains individual ship movement data from the Maritime Exchange, and is able to use this information to determine which vessels berth at Delaware ports and which vessels transit Delaware waters on their way to ports in Philadelphia, Camden, and other ports north of the Delaware state line. The use of individual ship movement data was first obtained and used for the 2005 inventory. ***Previous inventories relied on annual ship movement data obtained from the US Army Corps of Engineers' (USACE) Waterborne Commerce of the United States publication.*** The use of the Maritime Exchange data enabled Delaware to determine vessels that made multiple berths within the Delaware River and Bay. Prior to 2005, each vessel movement provided by the USACE publication was treated as a separate transit of Delaware waters from the mouth of the Delaware Bay to the Delaware/Pennsylvania state line.

A second important change to the methodology was to eliminate the assumption that every vessel traveling up and down the Delaware River and Bay was escorted by a tug boat. In conversations with personnel at the Maritime Exchange, few vessels receive an escort the length of the bay. CMVs are met by a tug a few miles before reaching port in order to assist the vessel maneuvering into port and up to its berth.

As a result of these important changes, the 2005 emissions were reduced by 40% or more from 2002 estimates, suggesting another reason why the large discrepancies exist between the EPA TR 2005 and DAQ's PEI.

3.1.5 Onroad: Delaware does not have the ability to run MOVES in time for the comment due date. Therefore, we accept EPA's 2005 onroad emissions as-is for purposes of this analysis.

4.0 Delaware 2012 Projections (as projected by DAQ)

DAQ used our 2005 PEI as the base year for the 2012 projections. EPA used the 2005 NEI version 2, 2002 emissions, MOVES and NMIM in the base year, as described above. Because we have shown that EPA's nonroad and nonpoint emissions are significantly higher for SO₂ and NO_x in 2005, it follows that EPA's 2012 projections for those categories would likely be higher too. Table 3 illustrates the magnitude of those differences. Each source sector is discussed afterwards in more detail.

Table 3 2012 Projected Emissions

2012 SO₂	EGU	NonEGU	Nonpoint	Nonroad	Onroad	Total
Transport Rule	7,841	10,974	5,858	14,193	98	38,964
DE Projections	7,356	5,941	1,034	2,201	98	16,630
DE Emission Difference	-485	-5,033	-4,824	-11,992	0	-22,334
% Difference	6%	46%	82%	84%	0%	57%
2012 NO_x	EGU	NonEGU	Nonpoint	Nonroad	Onroad	Total
Transport Rule	4,639	5,567	3,248	15,511	10,700	39,665
DE Projections	2,418	4,504	2,315	10,370	10,700	30,307
DE Emission Difference	-2,221	-1,063	-933	-5,141	0	-9,358
% Difference	48%	19%	29%	33%	0%	24%

4.1 2012 Source Sector Discussion

4.1.1 EGUs

EPA used IPM, which is a tool for predicting future regional strategies and emissions. DAQ's understanding of the IPM used for the TR is that it projects current controls using an out-dated Delaware NEEDS database, regional growth as well as non-enforceable controls (ex. new units that we know won't come online or current units shutting down that we know won't shutdown, such as Unit 3 at Conectiv). DAQ EGU projections used essentially the same methods inherent to IPM, except we have state specific data and information based on discussions with Delaware sources, which we believe is better than the EPA data.

In accordance with the definition of EGU in the rule, Delaware's population of EGU's consists of the following units: Christiana Units 11 and 14, Edge Moor Units 1, 2, 3, and 4, Hay Road Units 1, 2, 3, 5, 6, and 7, VanSant 11, McKee Run Unit 3, NRG Dover Units 2 and 3, Indian River Units 1, 2, 3 and 4, and Beasley Unit 1. These units are principally comprised of municipal and merchant generating units that operate within the PJM network. Operation of the generating units is primarily on an economic dispatch basis, which includes operational incentive in the southern part of the Delmarva Peninsula that experiences transmission constraints during a significant portion of the year. The northern part of the state also suffers some transmission constraint issues, primarily during high demand periods. Delaware as a state is a net importer of electricity, typically generating less than 50% of the electric load within the Delaware borders.

For this review, 2009 was selected as the base year for two reasons; 1) 2009 represented the latest available data and included EGU operation in compliance with recent state regulatory requirements, and 2) region-specific information was available from PJM to predict 2012 generation requirements. For determining the 2009 generation and emissions data for the population of Delaware's generating units, data from EPA's CAMD database was utilized. Generation data for each of the units came from annual CAMD data. In order to be more representative of emission controls that came into effect for some of the units on May 1, 2009 in response to Delaware regulatory requirements, NO_x and SO₂ emission data was taken to be the 2009 CAMD ozone season data. To determine the electric demand increase, PJM's January 2010 Load Forecast Report was consulted. Delaware is part of PJM's DPL region. In PJM report, PJM predicted increases in annual electric consumption for the: 1.4% above 2009 for 2010, 1.4% above 2010 for 2011, and 1.5% above 2011 for 2012. These increases along with the 2009 CAMD data were utilized to estimate the 2012 generation for the Delaware EGUs on a facility and unit basis.

For the purpose of this evaluation, the 2012 generation for the Christiana Units 11 and 14 was assumed to be that grown from the 2009 data. The 2012 NO_x and SO₂ emission rates were assumed to remain the same as the 2009 data, as there are no known plans for changes in emission controls for these units through 2012.

The recent new owner of Edge Moor Unit 3 has indicated that Edge Moor Unit 3 will no longer fire coal fuel, but will operate on its current alternate fuels of residual fuel oil, natural gas, and landfill gas. Because this unit also is the normal steam supply for an adjacent industrial plant, its operation is not as directly dependent upon economic dispatch as other units in the region. As the unit will already be on line for support of the industrial facility and not subject to startup/shutdown costs, it will remain able to pick up economic dispatch/opportunity load, tending to keep the overall capacity factor at approximately historic levels in spite of a change in fuel costs. Regarding NO_x emissions, the unit was assumed to come in compliance with the requirements of Delaware's 7 DE Admin Code 1146, 0.125 lb. /MMBTU. Regarding SO₂ emissions, it was assumed that the SO₂ emission rate would be that demonstrated by Edge Moor Unit 5 during 2009, as Edge Moor Unit 5 already fired the same set of fuels that Edge Moor 3 will be utilizing with similar fuel costs and constraints.

The recent new owner of Edge Moor Unit 4 has indicated that the Edge Moor Unit 4 will no longer fire coal fuel, but will operate in its current alternate fuels of residual oil, natural gas, and landfill gas. Because of the increase in fuel costs, it is assumed that this unit's position in the economic dispatch hierarchy will change and the unit will be called on PJM less frequently. For this review, Edge Moor Unit 4's annual capacity factor was assumed to be 3%, which is similar to other oil/gas steam units in the area. Regarding NO_x emissions, the unit was assumed to come in compliance with the requirements of Delaware's 7 DE Admin Code 1146, 0.125 lb. /MMBTU. Regarding SO₂ emissions, it was assumed that the SO₂ emission rate would be that demonstrated by Edge Moor Unit 5 during 2009, as Edge Moor Unit 5 already fired the same set of fuels that Edge Moor 4 will be utilizing with similar fuel costs and constraints. The drop in generation from the 2009 level for this unit is assumed to be picked up evenly by the adjacent six Hay Road 1-6 combustion turbines and associated combined cycle steam units.

For the purposes of this evaluation, the 2012 generation for Edge Moor Unit 5 was assumed to be that grown from the 2009 data. The 2012 SO₂ emission rates were assumed to remain the same as the 2009 data, as there are no known plans for changes in SO₂ controls for this unit through 2012. Regarding NO_x emissions, the unit was assumed to come in compliance with the requirements of Delaware's 7 DE Admin Code 1146, 0.125 lb./MMBTU.

For the purposes of this evaluation, the 2012 generation for each of the six Hay Road units was the 2009 values increased for generation growth and to also include the generation dropped from Edge Moor Unit 4 as described above (the generation increase was evenly split between the six units). NO_x and SO₂ emission rates for 2012 were assumed to remain the same as the 2009 values as there are no known plans for the addition of any controls prior to 2012.

Indian River Units 1 and 2 were assumed to be mothballed prior to 2012 in compliance with an existing consent decree.

For the purposes of this evaluation, generation levels for Indian River Unit 3 and 4 were evaluated together to account for the loss in generation associated with the Indian River Units 1 and 2 due to IR 1&2 shutdown, and to account for transmission constraints during high electric demand with Indian River Units 1 and 2 out of service. Therefore the 2012 generation levels for both Indian River Units 3&4 increased noticeably due to both generation growth and to account for the makeup for the Indian River Units 1 and 2 shutdowns. The evaluation indicated that there were 1008 hours where the generation requirements appeared to exceed the ability of Indian River Units 3 and 4. It was assumed that this shortfall in generation had to be made up by Kent County units due to grid reliability, stability, and voltage control reasons. McKee Run Unit 3 was evaluated to be able to assume 80,976 MWh of the estimated shortfall, and the remaining shortfall (16,267 MWh) was assigned evenly to the two NRG Dover CT units. The 2012 generation values for McKee Run Unit 3 and NRG Dover Units 2 and 3 were revised to reflect these increases.

For the purposes of this evaluation, the 2012 Indian River Unit 3 SO₂ and NO_x emission rates were assumed to be unchanged from the 2009 values.

For the purposes of this evaluation, the 2012 Indian River Unit 4 NO_x and SO₂ emission rates were assumed to comply with an existing consent decree's emission rate limitations of 0.2 lb/MMBTU for SO₂ and 0.1 lb/MMBTU for NO_x.

For the purposes of this evaluation, the 2012 generation from McKee Run Unit 3 was assumed to increase from 2009 due to both generation growth and the shortfall related to the Indian River units, as discussed above. The 2012 NO_x and SO₂ emission rates were assumed to be the same as 2009 as there are no known plans for additional emission controls prior to 2012.

For the purposes of this evaluation, the 2012 VanSant Unit 11 generation was increased from 2009 due to generation growth, and the 2012 NO_x and SO₂ emission rates were assumed to be the same as 2009 as there are no known plans for additional emission controls prior to 2012.

For the purposes of this evaluation, the 2012 generation for NRG Dover Units 2 and 3 was increased from 2009 due to both generation growth and the shortfall from the Indian River facility as discussed above (shortfall was evenly split between the two units). The 2012 NO_x and SO₂ emission rates were assumed to remain the same as 2009 as there are no known plans for additional emission controls prior to 2012.

For the purposes of this evaluation, the 2012 generation for the Beasley Unit 1 was increased from 2009 due to generation growth. The 2012 NO_x and SO₂ emission rates were assumed to remain the same as 2009 as there are no known plans for additional emission controls prior to 2012.

2012 EGU emissions are summed in Table 3. Detailed data is available in the attachment 1 to this document. Table 4 shows that even if DAQ EGU 2012 emissions are assumed to be the same as EPA's 2012 IPM projections, which is not a good assumption given the Delaware specific data discussed above, the overall differences are still significant (The table also reflects removal of OTW NO_x CAPS at the refinery in the non-EGU sector).

Table 4 2012 Projected Emissions Substituting EPA IPM runs for DE projected EGUs

2012 SO ₂	EGU	NonEGU	Nonpoint	Nonroad	Onroad	Total
Transport Rule	7,841	10,974	5,858	14,193	98	38,964
DE Projections	7,841	5,941	1,034	2,201	98	17,115
DE Emission Difference	0	-5,033	-4,824	-11,992	0	-21,849
% Difference	0%	46%	82%	84%	0%	56%
2012 NO _x	EGU	NonEGU	Nonpoint	Nonroad	Onroad	Total
Transport Rule	4,639	5,567	3,248	15,511	10,700	39,665
DE Projections	4,639	4,934	2,315	10,370	10,700	32,958
DE Emission Difference	0	-633	-933	-5,141	0	-6,707
% Difference	0%	11%	29%	33%	0%	17%

4.1.2 Non-EGU Point Sources

DAQ followed EPA's methods and assumed zero growth for non-EGU point sources, and then applied controls as discussed shortly. There is a significant difference in SO₂ and NO_x, as shown in Table 3. This is due to control strategies which will be discussed later in this document, which presumably the EPA was unaware of when developing the Rule.

Non-EGU Point Source Controls

The following is a list of significant SO₂ and NO_x controls, which Delaware has adopted to further reduce emissions by 2012.

- A May 2010 agreement between the Department and the Delaware City Refining Company placing a facility-wide NO_x cap of 2,225 tons per year (TPY). This yields a 10% reduction by 2012 and a 40% reduction by 2014.
- Dover Air Force Base - Ceased using residual fuel oil in March 2010; will replace central boiler plant with small natural gas-fired package boilers. Boilers No. 1 – 4 retired.
- DuPont Stine-Haskell Laboratory - Removed Boilers 3 and 4 (fuel oil # 6)
- DuPont Wilmington Office Building - Issued construction permits for natural gas conversion with # 6 fuel as back up (permitted up to 10% # 6 usage)
- Mountaire Farms of Delaware Inc. -Millsboro - Switching to Nat Gas
- SPI Poly-OLs - Boiler No. 1 removed
- Invista - Boilers 1 and 3 (coal) will be retired by 2012, Boiler 2 (coal/# 6) was retired on 12/09 (Consent Decree)
- Dow Reich hold Specialty Latex LLC – Shutdowns of: Flare, #6 Fuel Oil Fired Boiler, Natural Gas & #6 Fuel Oil Fired Boiler, Emergency Generator

4.1.3 Nonpoint Sources

Delaware did not grow or control nonpoint source emissions for the 2012 projections – our 2012 projections are the same as our 2005 PEI. Previously, we discussed how SO₂ and NO_x were primarily from fuel combustion for Delaware area sources.

Note that DAQ has historical sales information from the U.S. Energy Information Administration (EIA) which shows 2009 distillate and residual fuel-sales in Delaware have decreased by 45% and 57%, respectively since 2000. See Figures 1 and 2. Regardless, DAQ assumed zero growth for those categories to be conservative. If we included the negative growth in our projections, the 2012 emissions would be even less. But we took the conservative approach.

Figure 1

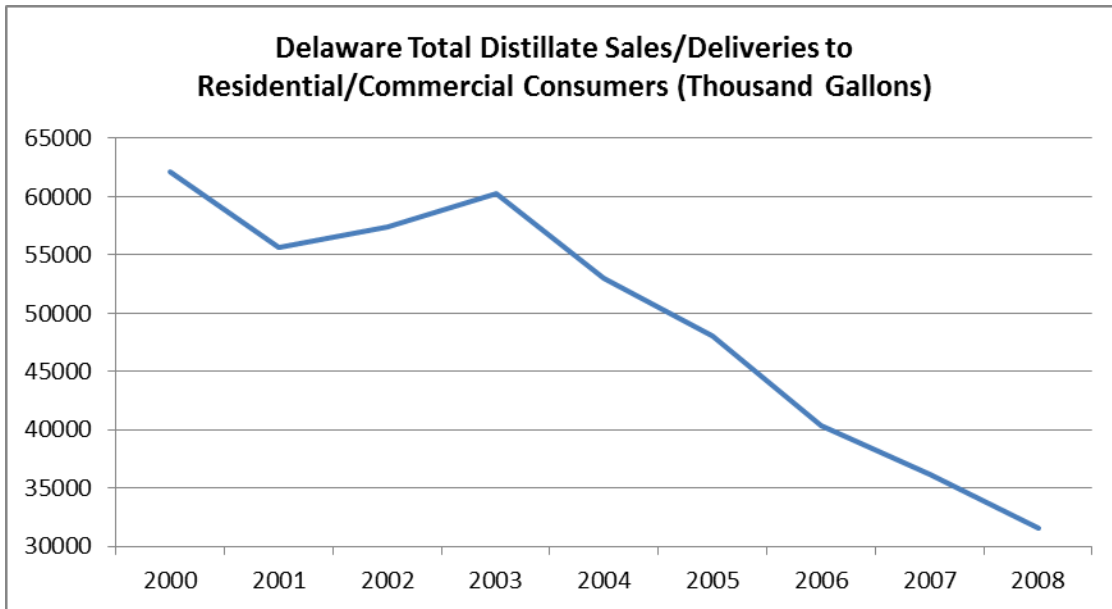
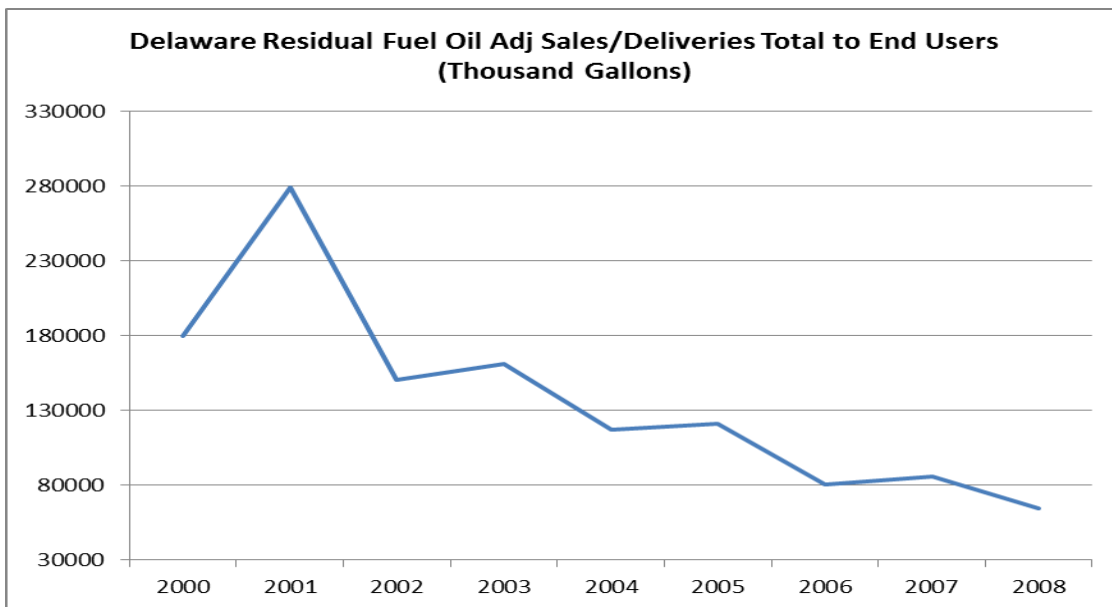


Figure 2



4.1.4 Nonroad Mobile Sources

Locomotives and non-C3 Marine: Delaware assumed no growth and controls. Therefore, the 2012 emissions are the same as 2005. This results in a conservative projection, since the Nonroad Rule is not taken into account.

Aircraft Emissions: Delaware assumed no growth and controls, because the large majority of NO_x is from Dover Air Force Base (aircraft SO₂ emissions are insignificant). We determined a 2007-2013 growth factor of 1.00 for Dover Air Force Base as part of our 2006 PM_{2.5} and Ozone SIP development process. Therefore, we assume 2012 emissions are the same as 2005.

Nonroad Equipment

Nonroad equipment (NMIM): Delaware relied upon 2012 projections developed as part of MANEVU's consultation process for Regional Haze SIPs for this category, due to time constraints. Those estimates were peer-reviewed by OTC/MANEVU states.

EPA's NMIM2005 model and NONROAD2005 model was used to estimate annual emission projections of non-road engines in all MANE_VU states, including Delaware as part of the Regional Haze consultation process. A Contractor was hired to facilitate the projections (MACTEC).

The controls for non-road mobile engines (except aircraft, locomotives, and marine vessels) that were applied when projecting 2012 emissions include all relevant federal rules, such as fuel sulfur content rule, gasoline Reid Vapor Pressure (RVP) requirements, and reformulated fuel programs. Controls for the 2012 emissions include all relevant federal rules and requirements, as outlined below.

(1) Phase I and Phase II Emissions Standards for Gasoline-Powered Non-Road Utility Engines, Federal Rule

This standard promulgated by the EPA applies to VOC emissions from small non-road, spark-ignition (i.e., gasoline-powered) utility engines, as authorized under 42 U.S.C. §7547. The measure affects gasoline-powered (or other spark-ignition) lawn and garden equipment, construction equipment, chain saws, and other such utility equipment as chippers and stump grinders, wood splitters, etc., rated at or below 19 kilowatts (an equivalent of 25 or fewer horsepower). Phase 2 of the rule applied further controls on handheld and non-handheld outdoor equipment. See References 4-2, 4-3, and 4-4.

(2) Emissions Standards for Diesel-Powered Non-Road Utility Engines of 50 or More Horsepower, Federal Rule

This standard promulgated by the EPA applies to VOC and NOX emissions from non-road, compression-ignition (i.e., diesel-powered) utility engines, as authorized under 42 U.S.C. § 7547. The measure affects diesel-powered (or other compression-ignition) construction equipment, industrial equipment, etc., rated at or above 37 kilowatts (37 kilowatts is approximately equal to 50 horsepower). See References 4-5, 4-6, and 4-7.

(3) Emissions Standards for Spark Ignition (SI) Marine Engines, Federal Rule

This standard promulgated by the EPA applies to exhaust PM, VOC and NOx emissions from new spark-ignition (SI) gasoline marine engines, including outboard engines, personal watercraft engines, and jet boat engines. Of nonroad sources studied by EPA, gasoline marine engines were found to be one of the largest contributors of hydrocarbon (HC) emissions (30 percent of the nationwide nonroad total).

(4) Emissions Standards for Large Spark Ignition Engines, Federal Rule

This EPA measure controls VOC and NOx emissions from several groups of previously unregulated nonroad engines, including large industrial spark-ignition engines.

The starting point for the emission projections was Version 3 of the MANE_VU 2002 Nonroad emission inventory (*Documentation of the MANE-VU 2002 Nonroad Sector Emission Inventory, Version 3, Draft Technical Memorandum*, March 2006). MACTEC's approach to developing emission projections for these sources was to use combined growth and control factors developed from emission projections for U.S. EPA's Clean Air Interstate Rule (CAIR) development effort. MACTEC obtained emission projections developed for the CAIR rule. MACTEC then calculated the combined growth and control factors by determining the ratio of emissions between 2002 and each of the MANE-VU projection years (2009, 2012, and 2018). The CAIR emissions were available for 2001, 2010, 2015 and 2020. Thus, they developed intermediate year estimates using linear interpolation between the actual CAIR years and the MANE-VU years.

Using this approach MACTEC developed State/county/SCC/pollutant growth/control factors for use in projecting the MANE-VU base year data to the out-years. These values were then used to multiply times the base year value to obtain the projected values. Since the development of the CAIR factors included both growth and controls, no separate control factors were developed for these sources except where exceptions to this method were used for States that requested alternative growth/control methods. Because emissions from aircraft, commercial marine vessels, and locomotives are not projected by the NONROAD model, emission projections for these sources were developed separately, as described below.

Commercial Marine Vessels:

C3 Marine Vessels: EPA grew base year 2002 emissions were grown to future years without Emissions Control Area (ECA) or International Marine Organization (IMO) global NO_x and SO₂ controls.⁸ Delaware grew 2005 emissions to 2012 to include growth and controls per EPA "Regulatory Impact Analysis: Control of Emissions of Air Pollution from Category 3 Marine Diesel Engines, EPA420-R-09-019."

For the purpose of emission regulations, marine engines are divided into three categories based on displacement (swept volume) per cylinder. Category 1 and Category 2 marine diesel engines typically range in size from about 500 to 8,000 kW (700 to 11,000 hp). These engines are used to provide propulsion power on many kinds of vessels including tugboats, push boats, supply vessels, fishing vessels, and other commercial vessels in and around ports. They are also used as stand-alone generators for auxiliary electrical power on many types of vessels. Category 3 marine diesel engines typically range in size from 2,500 to 70,000 kW (3,000 to 100,000 hp). These are very large marine diesel engines used for propulsion power on ocean-going vessels such as container ships, oil tankers, bulk carriers, and cruise ships.

The majority of vessels in this category are powered by diesel engines that are either fueled with distillate or residual fuel oil blends. For the purpose of emission inventories, EPA has assumed that Category 3 vessels primarily use residual blends while Category 1 and 2 vessels typically used distillate fuels.

EPA developed regional emission inventories for Category 1 & 2 vessel and Category 3 vessels for calendar years 2002 through 2040. The data DAQ used to develop the 2012 emission projections (for both a baseline and controlled scenario) are documented in Regulatory Impact Analysis: Control of Emissions of Air Pollution from Locomotive Engines and Marine Compression Engines Less than 30 Liters Per Cylinder, EPA420-R-08-001a (<http://www.epa.gov/otaq/regs/nonroad/420r08001a.pdf>), Regulatory Impact Analysis: Control of Emissions of Air Pollution from Category 3 Marine Diesel Engines, EPA420-R-09-019 (<http://www.epa.gov/otaq/regs/nonroad/marine/ci/420r09019.pdf>) and Proposal to Designate an Emissions Control Area for Nitrogen Oxides, Sulfur Oxides, and Particulate Matter, EPA-420-R-09-007 (<http://www.epa.gov/otaq/regs/nonroad/marine/ci/420r09007-chap2.pdf>). DAQ used the EPA data from these RIAs to develop separate growth and control factors for Category 1 & 2 vessels (diesel) and Category 3 vessels (residual).

CMV Diesel Growth Factors

EPA used a variety of data sources to project fuel consumption by Category 1 & 2 engines, account for the impact of existing engine regulations (i.e., the 2004 Clean Air Nonroad Diesel Rule that will decrease the allowable levels of sulfur in fuel used in locomotives by 99 percent) and marine vessel fleet composition to develop baseline inventory projections for all years up to 2040. Using the EPA-provided baseline inventory projections, we calculated growth factors for each pollutant based on the ratio of the future year baseline emissions (2012) to the 2005 estimated emissions (emissions data from EPA 420-R-08-001a, May 2008). *CMV Diesel Control Factors*

In March 2008, EPA finalized a three part program that will dramatically reduce emissions from marine diesel engines below 30 liters per cylinder displacement. The 2008 final rule includes the first-ever national emission standards for existing marine diesel engines, applying to engines larger than 600kW when they are remanufactured. The rule also sets Tier 3 emissions standards for newly-built engines that are phasing in from 2009.

Using the EPA-provided controlled inventory projections, we calculated controlled factors for each pollutant (emissions data from EPA 420-R-08-001a, May 2008).

CMV Residual Oil Growth Factors

EPA's Emissions TSD, states "*Class 3 commercial marine vessel sector (seca_c3): base year 2002 emissions grown to future years without Emissions Control Area (ECA) or International Marine Organization (IMO) global NO_x and SO₂ controls and did not apply sulfur controls for C3 marine engines in 2012.*"⁹

DAQ re-projected this category's emissions using our 2005 PEI. EPA used a variety of data sources to project fuel consumption by Category 3 engines, to account for the impact of existing engine regulations (i.e., the 2003 Tier

8. *Technical Support Document (TSD) for the Transport Rule Docket.* ID No. EPA-HQ-OAR-2009-0491. Page 12.

9. *Technical Support Document (TSD) for the Transport Rule Docket.* ID No. EPA-HQ-OAR-2009-0491. Page 12, bullet 2.

1 Marine Diesel Engines rule and marine vessel fleet composition to develop baseline inventory projections for all years up to 2040. EPA projected emissions for nine U.S. regions. The East Coast Region extends roughly from the Florida Keys to the Maine/Canada border. Using the EPA-provided baseline inventory projections for the East Coast Region in EPA420-R-09-019, DAQ calculated growth factors for each pollutant based on the ratio of the 2012 East Coast baseline emissions in 2012 to the 2005 estimated emissions.

CMV Residual Oil Control Factors

On December 22nd, 2009, EPA announced final emission standards under the Clean Air Act for new marine diesel engines with per-cylinder displacement at or above 30 liters (called Category 3 marine diesel engines) installed on U.S.-flagged vessels. The final engine standards are equivalent to those adopted in the amendments to Annex VI to the International Convention for the Prevention of Pollution from Ships (a treaty called "MARPOL"). The emission standards apply in two stages: near-term standards for newly-built engines will apply beginning in 2011, and long-term standards requiring an 80 percent reduction in nitrogen dioxides (NOx) will begin in 2016. EPA also adopted changes to the diesel fuel program to allow for the production and sale of diesel fuel with up to 1,000 ppm sulfur for use in Category 3 marine vessels. The regulations generally forbid production and sale of fuels with more than 1,000 ppm sulfur for use in most U.S. waters, unless operators achieve equivalent emission reductions in other ways.

On March 26, 2010, the International Maritime Organization (IMO) officially designated waters off North American coasts as an emissions control area (ECA) in which stringent international emission standards will apply to ships. In practice, implementation of the ECA means that ships entering the designated area would need to use compliant fuel for the duration of their voyage that is within that area, including time in port as well as voyages whose routes pass through the area without calling on a port. The North American ECA includes waters adjacent the Atlantic extending up to 200 nautical miles from east coast of the United States. The quality of fuel that complies with the ECA standard will change over time. From effective date in August, 2012 until 2015, fuel used by all vessels operating in designated areas cannot exceed 1.0 percent sulfur (10,000 ppm). (Beginning in 2015, fuel used by vessels operating in these areas cannot exceed 0.1 percent sulfur (1,000 ppm). Beginning in 2016, NOx aftertreatment requirements become applicable).

Using the EPA inventory projections in EPA 420-R-09-019, we calculated 2005-2012 NOx combined growth and control factors. The growth and control factor calculations are provided in the spreadsheets.

DAQ took a somewhat different approach for SO₂, however. DAQ contacted U.S. EPA, Office of Transportation and Air Quality, Assessment and Standards Division (ASD) and learned that 10,000 ppm (1%) sulfur limits will not "enter into force" until August 1, 2012. As a result, we used EPA 420-R-09-019 to determine growth, but developed our own control factor based on existing residual fuel averages of 2.7% sulfur.¹⁰ Dividing the 1% limits that take effect on August 1, 2012 by 2.7% gives a control factor of 0.37. DAQ multiplied the growth factor by the control factor (1.00) to 2005 PEI emissions to give 1,536 tpy from January 1 through July 31, 2012, and the control factor (0.37) by the growth factor to give 406 tpy for the remainder of the year, for a total of 1,804 tpy. See

Table 5 C-3 Marine Engine SO₂ Emissions from residual fuel oil

Date	2005 Emissions	05_12 Growth	Control Factor	Growth + Control	2012 tpy
Jan 1 - July 31 tons	1,100	1.40	1.00	1.40	1,536
Aug 1 - Dec 31 tons	786	1.40	0.37	0.52	406
Totals	1,886				1,942

10. U.S. Environmental Protection Agency Current Methodologies in Preparing Mobile Source Port-Related Emission Inventories, Final Report, Table 2-9. April 2009. ICF International

4.1.5 Onroad Mobile Sources:

EPA used the MOVES model to estimate Delaware 2005 emissions and 2012 projections. Due to time constraints, Delaware Division of Air Quality (DAQ) assumed for purposes of this study that the mobile emissions generated by MOVES are accurate for 2005 and 2012. Therefore, no differences occur as shown in Tables 2 and 3.

5. DELAWARE MEETS PROPOSED TRANSPORT RULE BUDGETS

Despite that EPA inventories for DE are inflated, EPA's TR indicates that Delaware has met its obligations to mitigate transport, i.e.:

Without variability limits, EPA proposes at 40 CFR 97.410 a 2012 Delaware NO_x budget of 6,206 TPY, and at 40 CFR 97.710 a 2012 Delaware SO₂ budget of 7,784 TPY. EPA has indicated that a state's emissions budget "...is the quantity of emissions that would remain in that state from covered sources after elimination of that portion of each state's significant contribution and interference with maintenance that EPA has identified in today's proposal, before accounting for the inherent variability in power system operations... The state emissions budget is a mechanism for converting the quantity of emissions that a state must reduce (i.e., the state's significant contribution and interference with maintenance) into enforceable control requirements. In other words, it provides a quantity of emissions to use in developing a remedy..."

EPA's 2012 base case emissions for Delaware EGU's are 4,639 TPY for NO_x and 7,841 TPY for SO₂. Since the EPA is establishing Delaware's EGU budgets at a level that is not less than its 2012 base case emissions, Delaware has already met its obligation to remedy downwind contributions for NO_x and SO₂, using EPA's own numbers.¹¹

Furthermore, Delaware calculated its own 2010 EGU projections, which are more accurate than EPA's IPM method (DAQ has first-hand knowledge of our sources plans, recent permits and agreements). As can be seen in table 3, DAQ 2012 projections are 7,356 tpy and 2,418 for SO₂ and NO_x, respectively. These are less than EPA's budgets in the TR (7,784 tpy SO₂ and 6,206 tpy NO_x), and thus provide additional evidence to EPA's projections of our EGUs, that Delaware has mitigated its significant contribution to downwind sources.

6. MONITORING DATA SHOWS ATTAINMENT

The EPA Guidance Memo suggests that States include a discussion of monitors in their analysis. As can be seen from Tables 6 - 11 all monitors in DE, NJ, Southeastern PA and the NY CMSA are attainment using 2007-2009 design values,¹² including those counties for which the TR showed a linkage to Delaware.¹³ **DNREC emphasises that all of these counties are in attainment prior to:**

- Delaware's Phase II (SO₂ controls) multi-pollutant regulation taking effect in 2012
- Invista coal unit shutdown for Units 1 and 2
- Indian River Units 1, 2 and 3 coal-unit shutdowns
- Connecticut Edgemoor Power Plant – Unit 3 and 4 switching from coal to natural gas/# 6 oil backup
- Reductions from implementation of the final transport rule

11. The difference between the EPA 2012 base case SO₂ inventory and the budget for Delaware is 57 TPY. By Delaware correcting the problems with the inventory 1) overall modeled contributions would be much less given that EPA's 2012 SO₂ projections are inflated on the order of 57%, and 2) Delaware's 2012 EGU projection will be less than the budget.

12. A few monitors in PA, NY and NJ were either shut down or had incomplete data for one year. However, the latest data shows those monitors in attainment nonetheless. Also, all monitors in MD are in attainment, based on discussions with MARAMA.

13. The Dauphin County, PA monitor was not operational in 2009 so DAQ averaged 2007-2008 for purposes of this analysis. NOTE: this average is not meant to mean "design value" for that monitor. Nonetheless the data shows compliance with the NAAQS for 2009 (see Tables 12 and 13).

Table 6 Delaware 2007-2009 annual monitoring data

PM2.5 values	New Castle County				Kent County	Killens	Sussex County
	Blifite	MLK-a	Nwrk-a	Lums	Dover		Seaford
2007	13.4	14.4	13.4	12.5	12.1	12.1	13.2
2008	13.0	13.5	12.6	11.6	11.2	11.3	12.2
2009	10.2	11.2	10.6	10.0	9.4	9.5	9.7

Table 7 Delaware annual 3-yr design values 2007-2009

PM2.5 design values	New Castle County				Kent County	Killens	Sussex County
	Blifite	MLK-a	Nwrk-a	Lums	Dover		Seaford
2007-2009	12.2	13.0	12.2	11.3	10.9	11.0	11.7

Table 8 Delaware 24-hr 2007-2009 monitoring data

PM2.5 98th percentiles	New Castle County				Kent County	Killens	Sussex County
	Blifite	MLK-a	Nwrk-a	Lums	Dover		Seaford
2007	32.3	33.6	31.0	29.6	30.2	30.9	32.5
2008	30.1	34.8	28.6	28.1	28.7	27.6	27.0
2009	23.2	28.4	23.4	20.6	19.4	20.7	20.2

Table 9 Delaware 24-hr 3-yr design values 2007-2009

PM2.5 3-yr Averages	New Castle County				Kent County	Killens	Sussex County
	Blifite	MLK-a	Nwrk-a	Lums	Dover		Seaford
2007-2009	29	32	28	26	26	26	27

Table 10 Philadelphia CMSA monitoring data – daily and annual

PHILADELPHIA NONATTAINMENT AREA				Daily PM2.5				Annual PM2.5			
State	County	Monitor Site	AQS Monitor ID	2007	2008	2009*	2007-09 DV**	2007	2008	2009*	2007-09 DV**
NJ	Camden	Camden Trailer	34 007 0003	34	34	37	35	12.2	13.7	13.6 (no Q4)	13.1

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	Camden	Pennsauken	34 007 1007	35	28	25	29	14.0	11.8	9.5	11.7
	Gloucester	Gibbstown	34 015 5001	31	27	22	27	13.4	11.5	9.3	11.4
DE	New Castle	Bellefonte	10 003 1003	32	30	23	29	13.4	13.0	10.2	12.2
	New Castle	MLK-a	10 003 2004	34	35	28	32	14.4	13.5	11.2	13
	New Castle	Nwrk-a	10 003 1012	31	29	23	28	13.4	12.6	10.6	12
	New Castle	Lums	10 003 1007	30	28	21	26	12.5	11.6	10.0	11
PA	Bucks	Bristol	42 017 0012	35	31	26	31	13.0	13.5	10.8	12.4
	Chester	New Garden	42 029 0100	38	32	31	34	14.1	14.7	14.2	14.3
	Delaware	Chester	42 045 0002	35	29	27	30	14.5	14.7	12.1	13.7
	Montgomer y	Norristown	42 091 0013	30	24	27	27	13.1	12.1	10.4	11.9
	Philadelphi a	LAB	42 101 0004	35	35	26	32	13.7	13.0	10.9	12.5
	Philadelphi a	NEA	42 101 0024	34	31	26	30	12.9	12.0	9.9	11.6
	Philadelphi a	CHS, Broad St.	42 101 0047	35	33	29	32	14.4	13.5	11.1	13.0
	Philadelphi a	RIT-F	42 101 0055	NA	35	29	NA	NA	13.5	11.3	NA
	Philadelphi a	FAB-FA	42 101 0057	33	33	28	31	12.0	13.3	11.1	12.1
	Philadelphi a	Elmwood, Amtrak	42 101 0136	32	NA	NA	NA	13.3	NA	NA	NA
Notes											
* = 98th percentile for the year, not final											
** =Design Value=average of three year period, not final. Three years of annual mean concentrations for PM2.5 are used to calculate the design value at a monitor.											
NA = Data Not Available											
SD = Monitor Shutdown											
Data sources are either from the State Agency or AirData (EPA's public query system that accesses AQS)											

Table 11 New York nonattainment area

NEW YORK NONATTAINMENT AREA				Daily PM2.5				Annual PM2.5			
State	County	Monitor Site	AQS Monitor ID	07	08	09*	07-09 DV**	07	08	09*	07-09 DV**
CT	Fairfield	Roosevelt School	09 001 0010	30	32	31	31	12.7	11.9	10.2	11.6

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	Fairfield	Danbury	09 001 1123	30	28	32	30	12.0	11.7	9.6	11.1
	Fairfield	Norwalk	09 001 3005	32	26	31	30	11.9	11.8	9.9	11.2
	Fairfield	Westport	09 001 9003	29	31	34	31	10.9	10.2	9.5	10.2
	New Haven	Woodward Avenue	09 009 0026	30	31	34	31	11.6	11.5	9.8	11.0
	New Haven	James Street	09 009 0027	31	32	35	32	11.5	11.3	10.2	11.0
	New Haven	State Street	09 009 1123	31	32	35	32	12.3	12.1	10.4	11.6
	New Haven	New Haven	09 009 2008	29	25	29	28	10.8	10.6	8.9	10.1
	New Haven	Bank Street	09 009 2123	33	28	34	32	12.0	11.7	9.8	11.2
NJ	Bergen	Fort Lee	34 003 0003	35	32	27	31	13.3	11.6	9.0	11.3
	Essex	Newark Cultural Center	34 013 0015	35	29	SD	NA	13.4	13.7	SD	NA
	Hudson	Jersey City Primary	34 017 1002	35	32	29	32	13.2	12.1	10.3	11.9
	Hudson	Union City	34 017 2002	93	33	25	33	15.1	13.3	10.7	13.0
	Mercer	Trenton	34 021 0008	33	31	23	29	12.1	11.2	9.2	10.8
	Mercer	Washington Crossing	34 021 8001	27	28	25	27	10.2	10.0	7.8	9.3
	Middlesex	New Brunswick	34 023 0006	30	29	21	27	12.3	10.9	8.0	10.4
	Morris	Morristown	34 027 0004	32	24	22	26	11.5	9.4	8.1	9.7
	Morris	Chester	34 027 3001	31	24	21	26	10.4	8.8	7.1	8.8
	Passaic	Paterson	34 031 0005	37	29	26	30	13.5	11.4	8.9	11.3
	Union	Elizabeth Turnpike Primary	34 039 0004	35	34	28	32	13.9	12.9	11.2	12.7
	Union	Elizabeth Downtown	34 039 0006	36	31	26	31	13.1	12.4	9.3	11.6
	Union	Rahway	34 039 2003	33	30	25	29	13.2	12.0	9.3	11.5
NY	Bronx	Morrisania	36 005 0080	36	33	30	33	15.6	13.5	12.7	13.9
	Bronx	200th Street And Southern Blvd, Botanical Garden	36 005 0083/ 0133	33	NA	27	30	13.2	11.7	10.0	11.6
	Bronx	E. 156th St.	36 005 0110	34	33	31	32	12.7	11.8	10.8	11.8
	Brooklyn	JHS 126	36 047 0122	34	31	27	31	13.9	12.0	10.7	12.2
	Nassau	Cedarhurst	36 059 0008	29	29	26	28	11.1	10.9	9.0	10.3

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	New York	PS 59	36 061 0056	37	33	NA	NA	16.1	15.9	NA	NA
	New York	Post Office,350 Canal Street	36 061 0062	35	NA	NA	NA	15.8	NA	NA	NA
	New York	JHS 45	36 061 0079	34	33	29	32	13.6	12.4	10.5	12.2
	New York	PS 19	36 061 0128	38	26	29	31	15.6	13.1	12.0	13.6
	New York	PS 124	36 061 0134	37	32	29	33	13.3	13.2	11.6	12.7
	Queens	Newburgh, 55 Broadway	36 071 0002	30	31	21	27	10.6	9.6	7.9	9.4
	Queens	Queens College	36 081 0124	32	31	27	30	11.4	11.0	9.6	10.7
	Staten Island	Port Richmond	36 085 0055	33	29	25	29	13.0	12.1	9.8	11.6
	Staten Island	Susan Wagner HS	36 085 0067	29	28	23	27	11.5	10.8	8.5	10.3
	Suffolk	East Farmingdale/ Babylon	36 103 0001	29	27	22	26	10.9	10.1	8.1	9.7
	Westcheste r	Mamaroneck	36 119 1002	31	31	27	29	11.7	11.0	9.1	10.6
Notes											
* = 98th percentile for the year, not final											
** =Design Value=average of three year period, not final. Three years of annual mean concentrations for PM2.5 are used to calculate the design value at a monitor.											
NA = Data Not Available											
SD = Monitor Shutdown											
Data sources are either from the State Agency or AirData (EPA's public query system that accesses AQS)											

Table 12 Delaware Linkages 2007-2009 24-hr design values/average

	2007	2008	2009	2007-09 AVG
Union, NJ				32
34-039-0004				
Dauphin, PA	35.6	34.3	NA	35 (07-08 avg)
42-043-0401				
Lancaster, PA				35
42-071-0007				
York, PA				32
42-133-0008				
Cumberland, PA				33
42-041-0101				
New York, NY				32
36-061-0079				

Table 13 Delaware Linkages 2007-2009 annual design value/average

	2007	2008	2009	2007-09 AVG
Union, NJ				13
34-039-0004				
Dauphin, PA				14
42-043-0401	14.28	13.28	NA	(07-08 avg)
Lancaster, PA				14
42-071-0007				
York, PA				14
42-133-0008				
Cumberland, PA				13
42-041-0101				
New York, NY				12
36-061-0079				

From Table 1, we saw that the TR says that Delaware will significantly contribute to Lancaster, PA; York, PA, Union, PA; Dauphin, PA, Cumberland, PA and New York, NY in 2012 (i.e. "Linkages"). However, these counties are already in attainment as shown in shown in Tables 13 and 14.

Futhermore, because all the monitors in Delaware, and the CMSAs for Philadelphia and New York have a 2007-2009 design value meeting both the 1997 and 2006 PM2.5 NAAQS, we find it difficult to believe that we would contribute 0.50 ug/m3 in 2012 per table 1 - to **any** downwind area. To do so would require our worst year (2007-2009) to be much higher than MLK's 2008 98th percentile of 34.8 ug/m³ (see Table 9).

DAQ also notes that the nearest nonattaining monitor using 2007-2009 data is in Allegheny County, PA (approximately 250 mi from central Delaware).¹⁴ However, Delaware is not "linked" to Allegheny County.

7. CONTROL MEASURES

Delaware has complied with §110(a)(2)(D)(i)(I) through promulgation of:

- 7 DE Admin. Code 1146, Electric Generating Unit Multi-Pollutant Regulation,
- 7 DE Admin. Code 1142, Section 2, Control of NO_x 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

Each of the above is based on Best Available Control Technology (BACT), and significantly reduces emissions from Delaware's largest EGUs, industrial boilers, and peaking units. These regulations have been approved by the EPA as revisions to Delaware's SIP.

8. SUMMARY:

14. Based on air travel distance between Dover to Pittsburgh. Both cities are the approximate centroid to Delaware, and Allegheny County. <http://www.travelmath.com/flight-distance/from/Dover,+DE/to/Pittsburgh,+PA>

EPA-IPM 2012 EGU NO_x emission projections for Delaware are less than the budgets in the EPA's proposed Transport Rule. EPA-IPM 2012 EGU SO₂ emission projections for Delaware are 57 tpy higher than the budgets in the EPA's proposed Transport Rule (but we have shown EPA 2012 SO₂ projections are also approximately 22,000 tpy over-estimated). Delaware DAQ 2012 projections for NO_x and SO₂ are less than the budgets in the proposed Transport Rule. ***The EPA TR budgets are those 2012 EGU emission levels that when met; demonstrate that States have mitigated their significant downwind contributions to nonattainment areas and/or interfere with maintenance of the NAAQS. The refore, co nsidering the tr ansport budgets alone , Delawa re ha s mitigated its significant contribution to downwind areas.***

Delaware believes that if EPA used up-to-date and accurate emissions data (i.e. the Delaware PEI), and projected recent Delaware control measures, the TR modeling would have shown that Delaware does not significantly contribute to downwind areas

The counties shown in EPA's TR that have "linkages" to Delaware have been in attainment for the last three years¹⁵. In fact, all counties in Delaware, and the New York and Philadelphia CMSAs have 2007-2009 design values that meet both the 1997 and 2006 PM_{2.5} NAAQS.

Eight (8) of nine (9) coal units operating, that were operating in 2005, will be shut down or switching to cleaner fuels during the years 2009 to 2014. The remaining unit (Indian River Unit 4) will be controlled by SCR for NO_x and scrubbers for SO₂.

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_x Emissions from Industrial Boilers and Process Heaters at Petroleum Refineries; and 7 **DE A dmin. Co de** 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 impose BACT level controls, and have been approved by the EPA as revisions to Delaware's SIP.

For the above reasons, and with the above technical analysis, Delaware believes it has demonstrated that it has mitigated its significant downwind transport and satisfied CAA 110(a)(2)(D)(i)(I) requirements.

Appendices

1.0 Emission Table Summaries, EGUs, and Projections

Fuel Combustion

- 2 a Commercial_Fuel_Combustion
- 2 b Residential_Fuel_Combustion
- 2 c Industrial_Fuel_Combustion

Nonroad (marine vessels)

- 3 a Commercial_Marine_Vessel
- 3 b Towboats_&_Tugboats
- 3 c Dredging
- 3 d Ferries

4. Permit Changes

Croda Boiler

15. Dauphin County did not have monitor data for 2009. However, 2007-2008 annual data was in attainment and in 2008 (latest year of data) was in attainment for the 24-hr NAAQS, with trends going downward from 2006.

Dupont Stine Haskell Blr 3
Montaire Farms fuel switch
Invista Permit Cancel

5 **Invista Consent Decree**

6 **Final Agreement – DNREC and DE City Refinery**

DIVISION OF AIR AND WASTE MANAGEMENT

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

PUBLIC NOTICE

Proposed Delaware State Implementation Plan (SIP) Revision Demonstration that Amendments to Section 2.0 of 7 DE Admin Code 1142, *Control of NO_x Emissions from Industrial Boilers and Process Heaters at Petroleum Refineries* Do not Interfere with Any Applicable Requirement of the Clean Air Act

December 7, 2010

1. Introduction

In November 2009, Delaware promulgated Section 2.0 of 7 DE Admin Code 1142, Control of NO_x Emissions from Industrial Boilers and Process Heaters at Petroleum Refineries. In June 2010, Section 2.0 of 1142 was approved by the Environmental Protection Agency (EPA) into Delaware's State Implementation Plan (SIP) (75 FR 31711).

The purpose of Section 2.0 of 7 DE Admin Code 1142 is to reduce nitrogen oxides (NO_x) emissions from large industrial boilers and process heaters that are located at petroleum refineries. This reduction in NO_x emissions from the affected units would aid in the attainment and maintenance of any national ambient air quality standard (NAAQS), and any other applicable requirement that is affected by NO_x emissions. NAAQSs and applicable requirements that are affected by NO_x emissions are:

- **Ozone NAAQS.** NO_x emissions impact air quality relative to ozone. This is because ozone is formed through a reaction in the atmosphere between NO_x and volatile organic compounds (VOC) in the presence of heat and sunlight (i.e., NO_x and VOC are precursors to the formation of ozone). The air quality in Delaware is designated under Section 107 of the Clean Air Act (CAA) as not meeting the 1997 health based NAAQS of 0.08 ppm for ozone. In addition, the EPA issued a revised 8-hour ozone NAAQS of 0.075 ppm in March 2008, and has proposed to reconsider that revised NAAQS in January of 2010. The air quality in Delaware is anticipated to be designated as non-attainment under the new ozone NAAQS.

Under the 1997 ozone NAAQS the entire state of Delaware is included as part of a Philadelphia based non-attainment area (NAA). Delaware submitted to the EPA an attainment demonstration SIP in July 2007 which demonstrated that the NAA would attain compliance with that NAAQS by 2010. EPA has not yet issued area designations for the 2008 revised NAAQS, and has not yet finalized its reconsideration of the 2008 revised NAAQS.

- **Fine Particulate Matter (PM_{2.5}) NAAQS.** NO_x emissions contribute to the formation of nitrate particulates in the atmosphere, and nitrate particles are PM_{2.5} (i.e., they are particles with an aerodynamic

diameter of 2.5 microns or less). The air quality in New Castle County Delaware is designated under Section 107 of the CAA as not meeting the 1997 health based NAAQS for PM_{2.5}. In addition, the EPA issued a revised PM_{2.5} NAAQS in 2006.

Under the 1997 NAAQS New Castle County Delaware is included as part of a Philadelphia based NAA. Delaware submitted to the EPA an attainment demonstration SIP in April 2008 which demonstrated that the NAA would attain compliance with the NAAQS by 2010¹⁶. Relative to the 2006 PM_{2.5} NAAQS, New Castle County Delaware is designated as non-attainment for the daily standard, and is included as part of the Philadelphia based NAA. The attainment demonstration SIP is due in December 2012.¹⁷

- **Visibility.** NO_x emissions contribute to the formation of PM_{2.5}, and PM_{2.5} is a visibility impairing pollutant under the federal regional haze program. Visibility impairing emission from Delaware have been determined to “significantly”¹⁸ impact one (1) federal class 1 area, Brigantine National Wildlife Area, in New Jersey.

The State of Delaware submitted to the EPA in September 2009 a Visibility SIP that met the requirements of Part C to Title I of the CAA. This SIP primarily relied upon SO₂ reductions, because sulfate was determined by the Regional Planning Organizations to be the main cause of visibility impairment in Class I areas. However, the SIP also partially relied on reductions in NO_x emissions to demonstrate that Delaware has met its 2018 visibility related goals.

- **Nitrogen Dioxide (NO₂) NAAQS.** NO_x emissions, by definition, directly impact ambient NO₂ concentrations. The air quality in Delaware is designated under Section 107 of the CAA as meeting the current annual NO₂ NAAQS. In February 2010, the EPA revised the annual NO₂ NAAQS and issued a new hourly NO₂ NAAQS.

EPA has not issued designations of areas under the 2010 revised NAAQS, and State recommendations for designation of areas are due to the EPA in January 2011.

Section 2.0 of 7 DE Admin Code 1142 does not limit emissions of any pollutant other than NO_x. Section 2.0 covers nine (9) emission units at the Delaware City Refinery, and imposes compliance dates between 2007 and 2012, depending on the particular emission unit.

In 2009 the operations of equipment at the Delaware City Refinery were discontinued, and in 2010 the refinery ownership changed from Premcor Refining Group Inc. to Delaware City Refining Company, LLC (“DCRC”). Two actions related to this change in ownership impact Delaware’s SIP:

- On May 28, 2010, the Delaware Department of Natural Resources and Environmental Control (the Department) reached an enforcement settlement with Premcor. This settlement, among other things,

16. Based on 2007-2009 monitoring data, New Castle County has attained the 1997 NAAQS for the annual and daily standard.

17. Based on 2007-2009 monitoring data, New Castle County has already attained the 2006 PM_{2.5} NAAQS.

18. As a result of the consultation process, the Middle Atlantic and Northeast Visibility Union (MANE-VU) States defined contributions to Class I areas as “significant” if a State contributed at least 2 percent of total sulfate observed on the 20 percent worst visibility days in 2002. Based on the MANE-VU Contribution Assessment and the application of the “≥ 2% SO₂ rule,” emissions from Delaware were determined to contribute to visibility degradation exclusively to the Brigantine Wilderness Class I area (note that NO_x was not the primary pollutant of concern in this round of Regional Haze SIPs)

terminated the 2008 FCCU NO_x Agreement which had required the Premcor fluid catalytic cracking unit CO boiler to meet a 20 parts per million (ppm) NO_x emission limitation by May 1, 2009.¹⁹

- On May 31, 2010 the Department and DCRC reached an agreement on DCRC's acquisition, restart and operation of the Delaware City Refinery. One element of that agreement provides that the Department will propose to revise Section 2.0 of 7 DE Admin Code 1142 to provide for a facility-wide NO_x emission cap compliance alternative.

In a separate regulatory process, Delaware is proposing to revise Section 2.0 of 7 DE Admin Code 1142 to (1) provide for the control of NO_x from the Fluid Catalytic Cracking Unit CO boiler to the level that was previously required by the 2008 consent agreement, and (2) provide for a facility-wide NO_x emission cap compliance alternative. The purpose of this SIP revision is to demonstrate that these revisions to Section 2.0 of 7 DE Admin Code 1142 will not interfere with attainment or maintenance of any NAAQS, or any other applicable requirement of the CAA.

Questions or comments regarding this SIP revision should be addressed to Ronald A. Amirikian, Planning Branch Manager, Division of Air Quality, Delaware Department of Natural Resources and Environmental Control, at (302) 739-9402 or ronald.amirikian@state.de.us.

2. Impact Analysis

Section 2.0 of 7 DE Admin Code 1142 sets emission limits only for the pollutant NO_x, and only impacts the Delaware City Refinery (i.e., the Delaware City Refinery is the only petroleum refinery within the State of Delaware). This analysis considers the effect the revisions to Section 2.0 of 7 DE Admin Code 1142 have on applicable requirements for which NO_x emissions are a precursor or pollutant of interest. That is, the pollutants ozone, PM_{2.5}, visibility, and NO₂.

2.1 Baseline NO_x emissions from the Delaware City Refinery.

Ozone. 2002 is the SIP base year for planning associated with the 1997 0.08 ppm ozone NAAQS. Actual 2002 base year NO_x emissions from the Delaware City Refinery were 3,555 TPY. For the 2008 revised NAAQS, which is currently being reconsidered, a SIP planning base year has not yet been determined. The most current emission inventory is 2008, and actual 2008 NO_x emissions from the Delaware City Refinery were 2,525 TPY.

PM_{2.5}. 2002 is the SIP base year for planning associated with the 2008 PM_{2.5} 15 ug/m³ annual, and the 65 ug/m³ daily NAAQSs. Base year 2002 NO_x emissions are identical to those identified under ozone above. For the 2008 revised NAAQS, a SIP planning base year has not yet been determined. The most current emission inventory is 2008, and actual 2008 NO_x emissions from the Delaware City Refinery were those identified under ozone above.

Visibility. 2002 is the SIP base year for planning associated with Delaware's 2008 Visibility SIP. Base year 2002 NO_x emissions are those identified under ozone above.

NO₂. For the 2010 revised NAAQS, area designation has not yet occurred, and a SIP planning base year has not yet been determined. The most current emission inventory is 2008, and actual 2008 NO_x emissions from the Delaware City Refinery were those identified under ozone above.

2.2 Projected NO_x emissions from the Delaware City Refinery under current (i.e., before revision) Section 2.0 of 7 DE Admin Code 1142.

19. 2008 Consent Decree with Premcor Refinery at Delaware City, The FCCU NO_x Agreement

Ozone. Delaware's 2007 Ozone SIP demonstrates that compliance with the 1997 0.08ppm ozone NAAQS will be achieved in 2009, based on 2009 projected emission levels. 2002 was the SIP base year, and 2002 base year NO_x emissions (see 2.1 above) were projected to 2009 by applying factors that account for projected growth and controls. The projection calculations are explained in detail in the 2007 ozone SIP.

The following five (5) emission units received post-2002/Pre-2009 emission controls that were relied upon in the 2007 ozone SIP calculations²⁰:

- Boiler 1 (Unit 80-1) – 80% control from 7 DE Admin Code 1142²¹
- Boiler 2 (Unit 80-2) – 80% control from 7 DE Admin Code 1142
- Crude Unit vacuum Heater (Unit 21-H-2) – 60% control from 1142
- Fluid Catalytic Cracking Unit CO Boiler – 86.7% control from 2008 Consent Decree²²
- Methanol Plant Heater 41-H-1 – 100% control from 2003 shut down

Resultant 2009 attainment year emissions from the Delaware City Refinery (i.e., those after the application of growth, the 41-H-1 shutdown, the control of Units 80-1, 80-2, 21-H-2, and the Cracker CO boiler) were estimated at 2,855 TPY.

PM_{2.5}. Delaware's 2008 PM_{2.5} SIP demonstrates that compliance with the 1997 15 ug/m³ annual, and the 65 ug/m³ daily standards will be achieved in 2009, based on 2009 projected emission levels. 2002 was the SIP base year, and 2002 base year NO_x emissions (see 2.1 above) were projected to 2009 by applying factors that account for projected growth and controls. The projection calculations are those discussed under ozone above.

Visibility. Delaware's 2009 Visibility SIP is based on 2018 projected emission levels.

Section 2.0 of 7 DE Admin Code 1142 provides for compliance dates between 2009 and 2012. In 2012 the requirements of 7 DE Admin Code are fully implemented. As part of Delaware's 2009 Visibility SIP, 2002 NO_x emissions from the Delaware City Refinery were projected to be 2,761 TPY, and 2,774 TPY, for 2012 and 2018, respectively.

The 1142 related NO_x controls relied upon in the Visibility SIP were:

- Boiler 1 (Unit 80-1) – 80% control from 7 DE Admin Code 1142
- Boiler 2 (Unit 80-2) – 80% control from 7 DE Admin Code 1142
- Crude Unit vacuum Heater (Unit 21-H-2) – 60% control from 1142
- Fluid Catalytic Cracking Unit CO Boiler – 86.7% control from 2008 Consent Decree
- Methanol Plant Heater 41-H-1 – 100% control from 2003 shut down
- Boilers 80-3 and 80-4 – 100% control from shutdown on or before May 1, 2011.²³

20. Note that the Crude Unit Atmospheric Heater (Unit 21-H-701) is regulated by 7 DE Admin. Code 1142. 1142 imposes a limit of 0.04 lb/mmbtu, however, this limit was previously imposed in 1996 as a LAER limit pursuant to 7 DE Admin Code 1125. Unit 21-H-701 will remain subject to the 0.04 lb/mmbtu limit independent of 7 DE Admin Code 1142 because it was a NSR derived limitation

21. 2.0 of 7 DE Admin Code 1142, Control of NO_x Emissions From Industrial Boilers and Process Heaters at Petroleum Refineries, Effective 2008. Note: this regulation was revised effective 11/11/2009, and the 11/11/2009 revision was approved into the DE SIP at 75 FR 31711 on June 4, 2010.

22. Consent Decree with Premcor Refinery at Delaware City, The FCCU NO_x Agreement.

23. Note that in the current Delaware SIP Boilers 3 and 4 are not required to shutdown, and the allowable emission rate for Boilers 1, 3 and 4 were finalized at 0.015 lb/mmbtu limit, 24-hour rolling average basis. See also footnote 4.

NO₂ For the 2010 revised NAAQS, area designation has not yet occurred. The 2002 and 2008 actual NO_x emissions, and the 2009, 2012 and 2018 projected NO_x emissions discussed above are used to evaluate the impact that the revisions to Section 2.0 of 7 DE Admin Code 1142 would have on future NO₂ NAAQS planning.

2.3. Revision to Section 2.0 of 7 DE Admin Code 1142.

Delaware is revising Section 2.0 of 7 DE Admin Code 1142 to (1) provide for the control of NO_x emissions from the Fluid Catalytic Cracking Unit CO Boiler (Unit 23-H-3) that was previously required under a 2008 consent decree, and (2) provide for, as an option, compliance with a facility-wide NO_x cap as an alternative to unit specific NO_x emission limitations.

The initial facility-wide cap is being established at the level of Premcor's actual 2008 NO_x emissions (i.e., 2,525 TPY), and will decline in two step decreases, as follows:

- 2,525 tons per year, evaluated over each twelve (12) consecutive month rolling period, for any twelve (12) month rolling period ending on or before January 2014.
- 2,225 tons per year, evaluated over each twelve (12) consecutive month rolling period, commencing with the twelve (12) month rolling period beginning on December 31, 2013 and ending on December 31, 2014.
- 1,650 tons per year, evaluated over each twelve (12) consecutive month rolling period, commencing with the twelve (12) month rolling period beginning on December 31, 2014 and ending on December 31, 2015.

Under the revised Section 2.0 of 7 **DE Admin. Code** 1142, either all of the unit specific NO_x emission limitations apply or the facility-wide cap apply at all times (i.e., there is no gap in compliance).

2.4. Impact of Revised 7 **DE Admin. Code** 1142 on ozone, PM_{2.5}, visibility and NO₂, (i.e., the requirements for which NO_x emissions are a precursor or pollutant of interest).

The addition of emission limits to Section 2.0 of 7 DE Admin Code 1142 applicable to Unit 23-H-3 do not in any way change the emission limits for this unit. That is, the emissions limit for Unit 23-H-3 do not change, but only the vehicle by which these emission limits will be enforced is changing (i.e., it will be enforced through Section 2.0 of 7 **DE Admin. Code** 1142 instead of a consent agreement). In other words, no change is being made that could upset the status quo.

With the revision to 2.0 of 7 DE Admin Code 1142 described in 2.3 above, the Delaware City Refinery may comply by either (1) complying with all of the unit specific emission limitations specified in 7 **DE Admin. Code** 1142, or (2) complying with the applicable facility-wide NO_x emission cap.

- Complying with all of the unit specific emission limitations specified in 7 **DE Admin. Code** 1142.

This is the current compliance mechanism in Section 2.0 of 7 **DE Admin. Code** 1142. Therefore, since overall no change is being made to the unit specific emission rates this compliance option would not impact any NAAQS or applicable requirement (i.e., no change is being made that could upset the status quo).

- Complying with the applicable facility-wide NO_x emission cap.

Under this compliance option, emission units will not be subjected to the unit specific emission limitations of Section 2.0 of 7 **DE Admin. Code** 1142, and instead the entire facility will be subject to a facility-wide NO_x cap.

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Compliance with the 7 **DE Admin. Code** 1142 facility-wide caps is required monthly, on a 12-month rolling basis. For standards where compliance is demonstrated on an annual or longer basis, an annual cap is generally consistent with a NAAQS with an annual averaging period.

The NO₂ and PM_{2.5} NAAQS both have a standard which is averaged on an “annual” basis. For the NO₂ annual NAAQS, this is the arithmetic average of all of the reported 1-hour values (40 CFR Part 50, Appendix S). For both of the PM_{2.5} annual NAAQSs (1997 and 2006), the annual standard design value, which is based upon 3 years of valid annual means, is compared to the NAAQS (40 CFR Part 50 Appendix N). The design value is an average of three annual means over three consecutive years. An annual mean is the average of the average values for each of the four quarters in a calendar year; the average value for each quarter is the average of the daily values for that quarter.

As long as the cap set by 7 **DE Admin. Code** 1142 is lower than a baseline condition (i.e., 7 **DE Admin. Code** 1142 before amendment), a conclusion that the revised Section 2.0 of 7 **DE Admin. Code** 1142 will cause no worsening of air quality is supported.

The table below summarizes the Delaware City Refinery NO_x emission data presented in 2.1 and 2.2 above.

Year	NO _x (TPY)
2002 (actual)	3,555
2008 (actual)	2,525
2009 (projected)	2,855
2012 (projected)	2,761
2018 (projected)	2,774

As discussed in 2.3 above, the facility-wide NO_x cap will start at 2,525 TPY, and decline to 1,650 TPY in 2015. This declining cap option provides for emissions that are lower than the actual and projected emission levels under the current unit specific control option. This indicates that the facility-wide NO_x emission cap compliance option will not negatively impact the 1997 and 2006 annual PM_{2.5} NAAQSs, the 2010 annual NO₂ NAAQS, and visibility related goals

- Complying with the applicable facility-wide NO_x emission cap – Additional Analysis.

For standards where compliance is demonstrated on a more frequent basis, additional analysis is needed. This is because a 12-month rolling total could provide for higher emissions on a seasonal or a daily basis.

The 1997 and 2008 ozone NAAQSs is directly related to the highest concentration averaged over an 8-hour period in any one (calendar) day. The 2010 daily NO₂ NAAQS is determined by comparing the 1-hour primary standard design value, which is the average of three annual 98th percentile values, to the NAAQS (40 CFR Part 50, Appendix S). Likewise, compliance with the 1997 and 2006 24-hour PM_{2.5} NAAQSs is determined by comparing the 24-hour standard design value, which is an average the annual 98th percentile values for each of three years (40 CFR Part 50 Appendix N).

In addition to the comparison between the actual and projected emissions and the facility-wide cap discussed above, seasonal variations were evaluated. The Department analyzed monthly crude oil throughputs from the crude oil tank farm, which is an indicator of the capacity factor of the refinery. Historical throughput is useful data to analyze because such data supports a conclusion that utilization

will not drastically vary by month in the future. Four (4) years, 2005 through 2008, were evaluated (see table below).

	Crude Tank Farm Throughput (%)			
	2005	2006	2007	2008
January	8.4	7.6	8.7	10.2
February	7.6	8.0	6.7	8.3
March	6.9	8.1	8.2	9.8
April	8.2	8.5	8.2	8.3
May	9.4	8.7	8.7	7.8
June	9.1	8.4	8.6	9.4
July	9.4	8.6	9.0	10.0
August	8.8	8.8	8.8	10.0
September	9.5	8.5	7.8	10.0
October	8.4	8.5	8.7	10.1
November	6.7	8.2	8.2	3.9*
December	7.7	8.3	8.4	2.2*

**Note: November and December of 2008 are determined to be not representative of normal operations. The refinery was running as significantly reduced rates during these months because the crude unit had its turnaround in November 2008 and the Coker was down. Because of this 2008 was not evaluated further.*

Based on 2005, 2006 and 2007 crude tank farm throughput, the Department concludes there is a slight bias high during the ozone season months. However, given the monthly deviation is slight (36-month average percent is 8.3, and the standard deviation from the average is 0.7), and given that the facility-wide NO_x caps are less than the recent actual and projected emissions, the Department concludes that refinery operations in the future will be essentially uniform throughout the year, and the 12-month rolling caps are consistent with NAAQS and other applicable requirements.

In addition to crude oil throughputs from the crude oil tank farm, the Department has also analyzed the variability of daily emissions from the Delaware City Refinery. This was done by analyzing actual historical NO_x emissions for the refinery units that are covered by 7 DE Admin. Code 1139, "Nitrogen Oxides (NO_x) Budget Trading Program." The NO_x emissions from units subject to 7 DE Admin Code 1139 are monitored by continuous emission monitoring systems (CEMS). Historical NO_x emissions data for these units were obtained from EPA's Clean Air Market's Division (CAMD) at <http://camddata-andmaps.epa.gov/gdm> for calendar years 2005 through 2007.

- Analysis of Daily Average NO_x Emissions:

The daily average NO_x emissions for all units reporting to CAMD, in TPD, for CY2005, 2006, and 2007, by month, are as follows:

	Daily Average NO_x Emissions (TPD)		
	2005	2006	2007

GENERAL NOTICES

January	8.6	5.7	7.3
February	8.7	8.4	7.4
March	8.1	8.3	6.8
April	8.2	8.0	6.7
May	8.3	8.3	6.2
June	8.8	7.9	6.8
July	7.7	6.2	7.1
August	7.0	5.7	7.6
September	7.5	6.3	6.7
October	6.0	8.2	7.2
November	5.0	7.9	7.2
December	6.2	6.1	7.5
Stdev	1.2	1.1	0.4
Average	7.5	7.2	7.0

The daily average NO_x emissions for each month between January 2005 and December 2007 is within one (1) standard deviation of the annual average daily NO_x emissions for each month for all three (3) years, except for June 2005 (which is 1.03 standard deviations from the average). This indicates there is little variation in daily NO_x emissions from month to month, and that operations under a 12-month rolling total facility-wide NO_x cap will not result in high daily NO_x emissions during times of bad air quality, and would not negatively impact applicable requirements.

- **Analysis of Highest Single Day NO_x Emissions:**

The highest single day's NO_x emissions for all units reporting to CAMD, in TPD, for calendar years 2005, 2006, and 2007, by month, are as follows:

	Highest Single Day NO_x Emissions (TPD)		
	2005	2006	2007
January	11.0	7.5	8.8
February	9.8	9.4	9.1
March	10.5	9.5	8.2
April	9.4	11.4	13.0
May	10.8	9.4	7.2
June	11.1	9.1	7.9
July	9.6	7.8	8.6
August	8.5	7.1	8.9
September	9.4	8.1	8.1
October	11.3	10.2	8.9
November	6.5	10.0	9.0
December	8.3	7.2	8.6
Stdev	1.4	1.3	1.4
Average	9.7	8.9	8.8

Delaware's air quality is generally worst in the hot summer months of June, July and August. The highest single day NO_x emission from the Delaware City Refinery were generally outside of this period. In all three (3) of the years analyzed the highest daily NO_x emissions occurred during months where air quality is generally good in Delaware (i.e., October for 2005, and April for 2006 and 2007). In addition, only in three (3) months out of the thirty-six (36) months (i.e., October 2005, April 2006, and April 2007) analyzed did the highest single day NO_x emission exceed the highest single day annual average plus one (1) standard deviation. This indicates that operations under a 12-month rolling total facility-wide NO_x cap will not provide for high emissions on bad air quality days, and will not negatively impact applicable requirements.

- Analysis of the Number of Days that NO_x Emissions exceed Annual Average plus 1 standard deviation:

The table below shows the number of days where daily NO_x emissions were greater than the annual average emissions plus one (1) standard deviation.

	Number of Days NO_x Emissions Were Greater Than Annual Average Plus 1 Standard Deviation		
	2005	2006	2007
January	4	4	9
February	4	5	5
March	2	8	2
April	4	2	3
May	4	5	4
June	6	5	4
July	5	2	5
August	4	7	3
September	6	8	4
October	5	3	4
November	5	5	4
December	3	6	4

Out of these three (3) years, the maximum number of days that the daily NO_x emissions exceed the mean/average plus one (1) standard deviation was only 9 (January 2007). On only seven (7) out of these thirty-six (36) months did the daily NO_x emissions exceed one (1) standard deviation more than 5 times. And, the number of times the daily NO_x emissions exceeded one (1) standard deviation is constant from month to month.

The above analysis indicates that relative to the 1997 ozone NAAQS, the planning assumptions used in the 2007 attainment demonstration SIP would not be undermined by the revisions to Section 2.0 of 7 DE Admin. Code 1142. This is because refinery operations do not vary significantly from month to month, and actual emissions levels do not vary significantly over an ozone season or do not vary significantly on a daily basis within the months of the ozone season. Relative to the 2008 ozone NAAQS, planning is now underway but base year and attainment years have not yet been set. Preservation of the status quo air quality will prevent interference with Delaware's obligations to develop timely attainment demonstrations, and no interference with the ozone NAAQS (i.e., no change is being made that would upset the status quo).

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Relative to the daily standard of the 2006 PM_{2.5} NAAQS (which sets a lower threshold than the 1997 daily NAAQS and would address the daily standard under the 1997 NAAQS for which New Castle County is in attainment), the above analysis also indicates that the planning assumptions used in the 2008 attainment demonstration SIP would not be undermined by the revisions to Section 2.0 of 7 **DE Admin. Code** 1142 (i.e., a 12-month rolling cap is consistent with attainment because refinery utilization and emissions do not vary significantly from month to month or from day to day).

Relative to the NO₂ NAAQS, area designations have not yet occurred. Because refinery operations do not vary significantly from month to month, and actual emissions levels do not vary significantly over the year, preservation of the status quo air quality will prevent interference with Delaware's obligations to develop timely attainment demonstrations, and no interference with the NO₂ NAAQS (i.e., no change is being made that would upset the status quo).

3. Conclusion

Delaware concludes that the revisions to Section 2.0 of 7 **DE Admin Code** 1142 to 1) include the NO_x control requirement for the Fluid Catalytic Cracking Unit CO boiler that were previously provided for in a 2008 consent agreement and 2) provide for a facility-wide NO_x cap compliance alternative will not interfere with attainment or maintenance of any NAAQS or any other applicable requirement of the CAA

DEPARTMENT OF STATE PUBLIC SERVICE COMMISSION

Statutory Authority: 26 Delaware Code, Section 209(a) (26 **Del.C.** §209(a))
26 **DE Admin. Code** 3008

IN THE MATTER OF THE ADOPTION OF RULES
AND REGULATIONS TO IMPLEMENT THE
PROVISIONS OF 26 *DEL. C. CH. 10* RELATING
TO THE CREATION OF A COMPETITIVE
MARKET FOR RETAIL ELECTRIC SUPPLY
SERVICE (OPENED APRIL 27, 1999; RE-
OPENED JANUARY 7, 2003; RE-OPENED
SEPTEMBER 22, 2009; RE-OPENED
SEPTEMBER 7, 2010)

PSC REGULATION DOCKET NO. 49

ORDER NO. 7875

This 7th day of December, 2010, the Commission determines and Orders the following:

WHEREAS, the Commission has promulgated regulations entitled *Regulations Governing Service Supplied by Electrical Corporations*. See 26 Del. Admin. C. § 3001, *et seq.* (the "Regulations");¹ and

WHEREAS, included in the Regulations are certain rules pertaining to "net energy metering" (the "Net Energy Metering Rules"); and

WHEREAS, on July 28, 2010, Senate Bill No. 267, as amended by Senate Amendment No. 2 ("SB267"), was enacted into law; and

WHEREAS, SB267 amends 26 *Del. C.* §§ 1001 and 1014, mostly to provide electric customers the opportunity to aggregate individual meters for the purpose of allocating net metering credits to electricity accounts other than the account hosting an energy generating facility. SB267 also provides community choice aggregation provisions for community-owned energy generating facilities that are established by a group of customers. Recognizing that not all customers own properties that are favorable for energy generating facilities, the community-owned net

metering provisions of SB267 will allow a group of customers to invest and participate in distributed renewable energy facilities; and

WHEREAS, the amendments to Sections 1001 and 1014 effected by SB267 require certain amendments to the Net Energy Metering Rules; and

WHEREAS, Commission Staff proposed revisions to the Regulations that effect the changes required by SB267, as well as make certain other clarifications to the existing Regulations not related to those bills; and

WHEREAS, on September 7, 2010, the Commission entered Order No. 7832, re-opening this docket, publishing the revisions to the Regulations proposed by Staff, setting a hearing on the revisions for December 7, 2010, and inviting comments to the proposed revisions by September 30, 2010; and

WHEREAS, the Commission timely received comments to Staff's proposed revisions from several interested parties, including Delmarva Power & Light Company; and

WHEREAS, due to the substantive nature of the comments received, Staff has recommended that the Commission cancel the December 7, 2010 hearing and set up a procedure affording the parties an opportunity to reply to the comments received by the Commission and thereafter participate in a workshop to discuss how the Regulations should be modified as a result of SB267 and the various comments; and

WHEREAS, Staff has informed the Commission that Staff has provided specific notice of the above-suggested procedure to the parties who submitted comments and also provided general notice to the public through an update to the Commission's website.

NOW THEREFORE, IT IS ORDERED BY THE AFFIRMATIVE VOTE OF NOT FEWER THAN THREE COMMISSIONERS:

1. Based upon Staff's recommendations, the Commission cancels the hearing in this matter that was originally scheduled for December 7, 2010. The Commission further orders that, on or before January 14, 2011, any party who timely submitted comments to the proposed revisions to the Commission's *Rules For Certification And Regulation Of Electric Suppliers*, adopted by PSC Order No. 5207 (Aug. 31, 1999) and revised from time to time (the "Regulations"), or a party who has filed for and been granted intervention in the instant docket, may submit further comments in reply to comments timely submitted by other parties in this proceeding.

2. That on or before February 17, 2011, the parties shall meet and confer in a workshop to consider the proposed revisions to the Regulations and the comments and reply comments that have been timely filed with the Commission. Only parties that have timely filed comments and/or filed for and been granted intervention in the instant docket will be allowed to participate in the workshop.

3. That, following the above workshop, Staff will report back to the Commission with recommendations regarding further procedures, including whether a hearing should be scheduled and/or whether the matter should be referred to a hearing examiner for further consideration.

4. That, pursuant to 26 *Del. C.* §§114 and 1012(c)(2), all electric suppliers and electric public utilities are hereby notified that they will be charged the costs incurred in connection with this proceeding under the provisions of 26 *Del. C.* §114(b)(1).

5. The Commission reserves the jurisdiction and authority to enter such further Orders in this matter as may be deemed necessary or proper.

BY ORDER OF THE COMMISSION:

Arnetta McRae, Chair

Jeffrey J. Clark, Commissioner

Joann T. Conaway, Commissioner

Jaymes B. Lester, Commissioner

Dallas Winslow, Commissioner

ATTEST:

Alisa Carrow Bentley, Secretary

1. The Regulations have been amended several times since their original passage in 1999. See PSC Order Nos. 538 (Oct. 1, 1999), 7023 (Sept. 5, 2006), 7078 (Jan. 1, 2007), and 7435 (Sept. 2, 2008).

DEPARTMENT OF AGRICULTURE
HARNESS RACING COMMISSION
501 Harness Racing Rules and Regulations
PUBLIC NOTICE

The Delaware Harness Racing Commission, pursuant to 3 **Del.C.** §10005, proposes to change its Rules 2.3.2 and 5.1.22.4. The Commission will hold a public hearing on the proposed rule changes on February 8, 2010. Written comments should be sent to Hugh J. Gallagher, Administrator of Harness Racing, Department of Agriculture, 2320 South DuPont Highway, Dover, DE 19901. Written comments will be accepted for thirty (30) days from the date of publication in the *Register of Regulations* on January 1, 2011.

The proposed changes are for the purpose of updating the Rules and to more accurately reflect current policies, practices and procedures. Copies are published online at the *Register of Regulations* website: http://regulations.delaware.gov/services/current_issue.shtml

A copy is also available for inspection at the Harness Racing Commission office.

DEPARTMENT OF EDUCATION
PUBLIC NOTICE

The State Board of Education will hold its monthly meeting on Thursday, January 20, 2011 at 1:00 p.m. in the Townsend Building, Dover, Delaware.

DEPARTMENT OF HEALTH AND SOCIAL SERVICES
DIVISION OF MEDICAID AND MEDICAL ASSISTANCE
Long-Term Care Program – Pre-Admission Screening and Resident Review
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 Medicaid and Medical Assistance (DMMA) is amending Long-Term Care program policies in the Division of Social Services Manual (DSSM) regarding *Pre-Admission Screening and Resident Review*.

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, Planning & Policy Development Unit, Division of Medicaid and Medical Assistance, 1901 North DuPont Highway, P.O. Box 906, New Castle, Delaware 19720-0906 or by fax to 302-255-4425 by January 31, 2011.

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.

DIVISION OF SOCIAL SERVICES
Fair Hearing Practices and Procedures
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 the Division of Social Services Manual (DSSM) regarding *Fair Hearing Practices and Procedures*.

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 January 31, 2011.

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.

DIVISION OF SOCIAL SERVICES
Food Supplement Program
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 policies in the Division of Social Services Manual (DSSM) regarding the Food Supplement Program regarding *Mandatory Verification*.

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 Friday, January 31, 2010.

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.

DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL
DIVISION OF AIR AND WASTE MANAGEMENT
1124 Control of Volatile Organic Compound Emissions
PUBLIC NOTICE

The Clean Air Act (CAA) Section 182(b)(2) requires that all ozone non-attainment areas, including Delaware, must develop or update relevant regulations to implement Reasonably Available Control Technology (RACT) controls on emission sources covered in EPA's Control Techniques Guidelines (CTG) or Alternate Control Techniques (ACT), and submit the regulations to EPA as State Implementation Plan (SIP) revisions.

In September 2006, the EPA updated its CTG for offset lithographic printing industry by adding control requirements for letterpress printing activities. To reflect the new requirements in EPA's 2006 updated CTG, the DAQ revised 7 **DE Admin. Code** 1124 Section 47.0 "Offset Lithographic Printing" in early 2010. After a relevant public comment period, a public hearing was held on June 2, 2010.

Public comments were received before and on the June 2, 2010 hearing on the revision to Section 47.0. Based on these comments, the DAQ has determined that some changes to the proposed Section 47.0 that was addressed in the June 2, 2010 hearing should be made. Major new changes are those in Sections 47.1.2, 47.3.1, 47.5.4.4, 47.5.5, 47.6.1.2.2, and 47.6.3.1. To provide the opportunity for public to review and comment on these new changes, the DAQ is now publishing a new proposed revision to Section 47.0, establishing a new public comment period, and will hold a public hearing on February 1, 2011. Since a sufficient comment period was provided to the public prior to the June 2, 2010 hearing, the public is advised that the February 1, 2011 hearing will address only comments on those major new changes, which are also printed in red text in the newly proposed Section 47.0 as posted at DAQ's website <http://www.awm.delaware.gov/Info/Regs/Pages/AQMPlansRegs.aspx>.

A public hearing will be held on February 1, 2011, beginning at 6:00 pm, in DNREC's Auditorium, R & R Building, 89 Kings Hwy, Dover, Delaware 19901.

DIVISION OF AIR AND WASTE MANAGEMENT**1142, Control of NO_x Emissions from Industrial Boilers and Process Heaters at Petroleum Refineries****PUBLIC NOTICE**

The Department of Natural Resources and Environmental Control (DNREC), Division of Air Quality, will conduct a public hearing on proposed amendments to Section 2.0 of 7 **DE Admin. Code** 1142, "*Control of NO_x Emissions from Industrial Boilers and Process Heaters at Petroleum Refineries.*" These amendments are based on a May 31, 2010 agreement between DNREC and the Delaware City Refining Company, LLC ("DCRC") which states that DNREC will propose to revise Section 2.0 of 7 **DE Admin. Code** 1142 to provide for a facility-wide NO_x emission cap compliance alternative to the existing unit specific NO_x emission limitations.

In addition, DNREC will propose a document for submittal to the Environmental Protection Agency (EPA) as a State Implementation Plan (SIP) revision. This document, "*Demonstration that Amendments to Section 2.0 of 7 **DE Admin. Code** 1142, Control of NO_x Emissions from Industrial Boilers and Process Heaters at Petroleum Refineries, Do not Interfere with Any Applicable Requirement of the Clean Air Act (CAA)*" demonstrates that these amendments to 7 **DE Admin. Code** 1142 will not interfere with attainment or maintenance of any National Ambient Air Quality Standard (NAAQS), or any other applicable requirement of the CAA.

The public hearing on this proposed amendments to 7 **DE Admin. Code** 1142, and the associated SIP revision, will be held February 1, 2011, beginning at 6:00 p.m., in DNREC's R&R Bldg. Auditorium, 89 Kings Highway, Dover, Delaware 19901.
