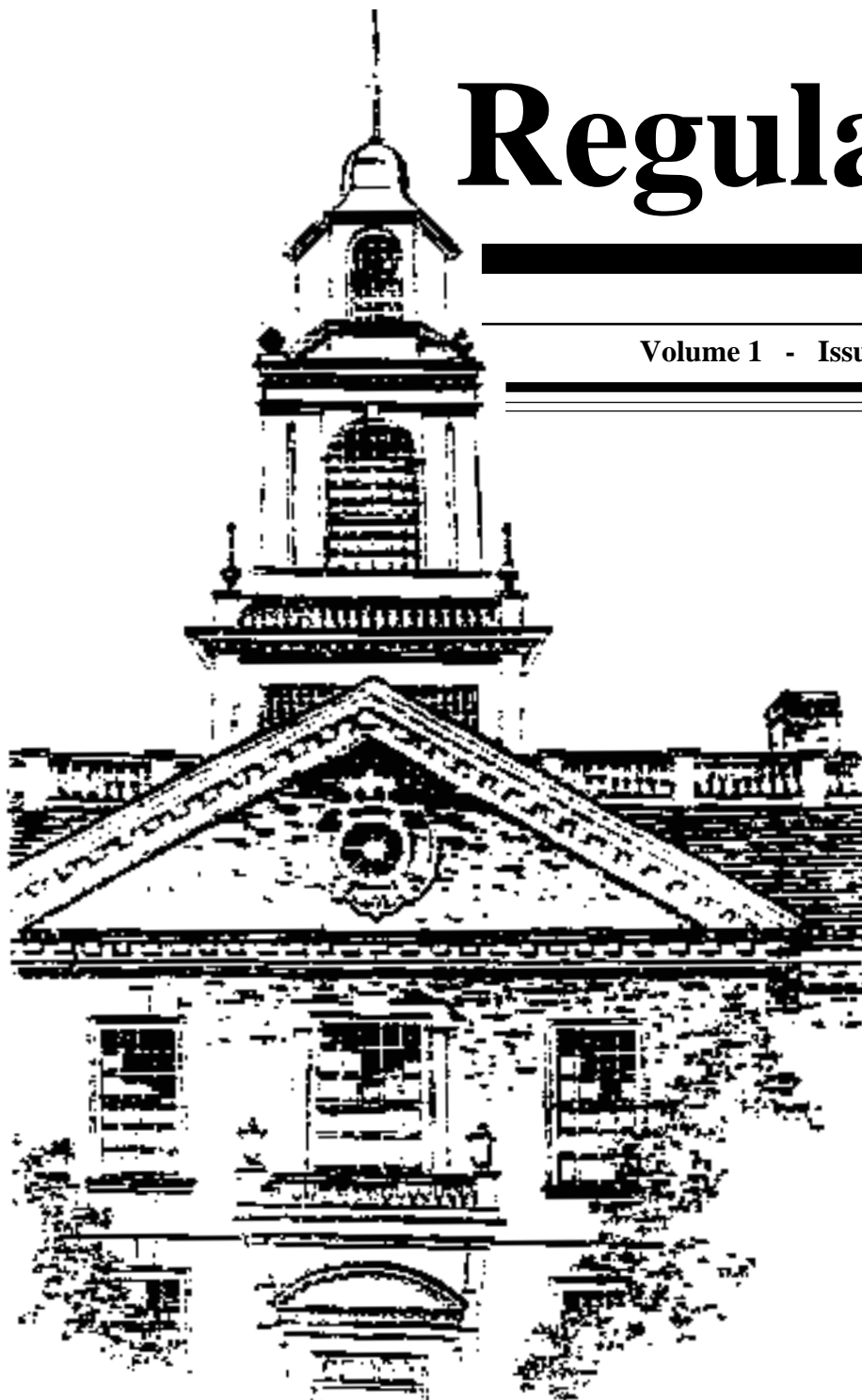


# Delaware Register of Regulations



Issue Date: March 1, 1998

Volume 1 - Issue 9

Pages 1256 - 1480

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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 February 15, 1998.

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# INFORMATION ABOUT THE DELAWARE REGISTER OF REGULATIONS

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## DELAWARE REGISTER OF REGULATIONS

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

The Delaware Register will publish any regulations that are proposed to be adopted, amended or repealed and any emergency regulations promulgated.

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

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

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## CITATION TO THE DELAWARE REGISTER

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

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

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## CITIZEN PARTICIPATION IN THE REGULATORY PROCESS

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and other interested parties may participate in the process by which administrative regulations are adopted, amended or repealed, and may initiate the process by which the validity and applicability of regulations is determined.

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file notice and full text of such proposals, together with copies of the existing regulation being adopted, amended or repealed, with the Registrar for publication in the Register of Regulations pursuant to §1134 of this title.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

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

# INFORMATION ABOUT THE DELAWARE REGISTER OF REGULATIONS

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

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

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

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

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

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

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

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

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Regulation No. 5.1101etal.0006, Estimated Franchise Tax Report Federal Savings Banks not headquartered in Delaware.....	1:3 <b>Del.R.</b> 231 (Prop.) 1:5 <b>Del.R.</b> 486 (Final)
Regulation No. 5.1101etal.0007, Final Franchise Tax Report Federal Savings Banks not headquartered in Delaware.....	1:3 <b>Del.R.</b> 232 (Prop.) 1:5 <b>Del.R.</b> 487 (Final)
Regulation No. 5.1101.etal.0008, Instructions for calculation of Employment Tax Credits.....	1:3 <b>Del.R.</b> 233 (Prop.) 1:5 <b>Del.R.</b> 488 (Final)
Regulation No. 5.1101etal.0009, Instructions for preparation of Franchise Tax for Resulting Branches in this state of out-of-state banks .....	1:3 <b>Del.R.</b> 235 (Prop.) 1:5 <b>Del.R.</b> 490 (Final)
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Regulation No. 5.131.0002, Procedures Governing the Creation & Existence of an Interim Bank .....	1:5 <b>Del.R.</b> 592 (Prop.)
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	1:7 Del.R. 870 (Final)
Regulation No. 5.844.0009, Application by an out-of-state bank holding company to acquire a Delaware bank or bank holding company .....	1:5 Del.R. 605 (Prop.)
	1:7 Del.R. 873 (Final)
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Regulation Docket No. 47, Notice of Proposed Rule making Concerning  
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    Merit Employee Relations Board Regulations ..... 1:3 **Del.R.** 274 (Final)

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**THE FULL-TEXT OF THE FOLLOWING FINAL REGULATIONS WERE NOT PUBLISHED IN THE FEBRUARY ISSUE OF THE REGISTER. THE ORDER AND FINAL REGULATIONS FOLLOW**

**DEPARTMENT OF LABOR  
DIVISION OF INDUSTRIAL AFFAIRS**

Statutory Authority: 29 Delaware Code,  
Section 8503(7) (29 **Del.C.** §8503(7))

**BEFORE THE DEPARTMENT OF LABOR**

IN RE	NATURE OF THE
ADOPTION OF	PROCEEDINGS
REGULATIONS	SUMMARY OF THE
REGARDING	EVIDENCE FINDINGS
THE IMPLEMENTA-	OF FACT, CONCLU-
TION OF 19 Del.C. 708	SIONS OF LAW
11 Del.C. 8563 & 564	DECISION TO ADOPT

**ORDER**

**Nature of the Proceedings**

1. Pursuant to notice in accordance with 29 Del. C. § 10115, the Department of Labor proposed Regulations to provide guidance to employers and applicants regarding the implementation of 19 Del. C. § 708, 11 Del. C. §8563 and 11 Del. C. §8564.

2. A public hearing was held on Monday, November 25, 1997, in Conference Room 049 of the Department of Labor Office Building, 4425 North Market Street, Wilmington, Delaware, the time and place designated to receive written and oral comments.

3. As designated by the Secretary of Labor, Darrell J. Minott, Karen Peterson, Director of the Division of Industrial Affairs, was present to receive testimony and evidence at the November 25, 1997 hearing in Wilmington, Delaware.

**Summary of the Evidence**

Those individuals testifying at the November 25, 1997 hearing in Wilmington, Delaware, and a summary of said testimony is as follows:

4. Mr. Joseph Letnaunchyn, President and Chief Executive Officer of the Delaware Healthcare Association, provided general comments on the regulatory process and comments on specific provisions of the regulations. He offered the following suggestions:

Regulation II A. (SERVICE LETTER) which defines persons for whom the service letter must be obtained

should be changed. He stated that the Regulation should be modified to indicate that service letters must be obtained only for persons seeking employment in a health care facility or child care facility that affords direct access to persons receiving care;

Regulation II A. (SERVICE LETTER) should be modified to specify the minimal information which must be included in the reference letter for a person seeking employment who was not previously employed or was self-employed. Alternatively, Mr. Letnaunchyn proposed that the Regulation specify that, "... the information contained in a reference letter should be considered acceptable based on the judgment of the designated representative of the health care provider or day care facility that receives, and relies on, such reference letter.";

The Department of Labor should further clarify or define the term "good faith" effort in Regulation III C. (1) (a);

Regulation IV. B. 1 regarding the method of contacting the Department of Children, Youth and Their Families for the Child Abuse Registry Check is unclear and should contain more specific information;

Regulation V. B. 1 regarding the method of contacting the Ombudsman's Office for the Adult Abuse Registry Check is unclear and should contain more specific information;

The Regulations should address the responsibilities of temporary agencies that supply employees to health care providers and day care facilities; and,

The Regulations should clarify that health care providers who operate any type of school-based programs must comply with the State's hiring practices and reporting requirements for educational facilities and are not required to comply with the provisions of Titles 11 and 19, as specified in this legislation.

Mr. Letnaunchyn submitted a written copy of his comments which was made a part of the record by Director Peterson. A copy of his submission is attached as Exhibit "A".

5. A written submission was received at the hearing from Pauline D. Koch, Administrator, Office of Child Care Licensing. In her submission, Ms. Koch requested that Regulation II. (DEFINITIONS) Section C. be changed from "...the Department of Services for Children, Youth and their Families" to "...the Department of Services for Children, Youth and Their Families." She further requested that Regulation IV B. 1. b. be changed to, "The employer must contact in writing the Department of Services for Children, Youth and Their Families."

She further proposed that the title of the Department in Regulation IV. C. and VI. B. 2 be changed from "...the Division of Children, Youth and Their Families" to "...the Department of Services for Children, Youth and

Their Families". A copy of Ms. Koch's submission is included as Exhibit "B".

6. Prior to the hearing, a written submission was received from Robert Stewart, Esquire, recommending changes to the text, such as underlining all subheadings. Mr. Stewart also proposed adding the words "and fully releasing the employer from liability for doing so" to Regulation II. C. subsections 1. b. and 2.b.; Regulation IV. B. subsection 1. a. and 2. b.; and Regulation V. B. subsection 1. a and 2. b. Mr. Stewart also suggested numerous minor changes and additions to the wording of the Regulations. A copy of Mr. Stewart's written submission is attached as Exhibit "C".

7. Director Peterson stated that the record would be held open for a period of thirty (30) days following the hearing in order to receive further written submissions. No further written submissions were received.

#### Findings of Fact

Recommendations were given to the Secretary of Labor following the public hearing process and consideration of all oral testimony and written documentation received. The Department of Labor's findings regarding the issues raised at the hearing are as follows:

8. The Department of Labor will correct the numbering of the Regulations by re-numbering Regulation II. ("SERVICE LETTER") as Regulation III.

9. The proposal that Regulation III. A. be amended for clarification is accepted.. The word "person" will be changed to "person seeking employment (as defined in Regulation I. A.)" in order to conform with the statute.

10. The proposal that Regulation III A. be changed to add the words "... information contained in the letters of reference should be considered acceptable based on the judgment of the designated representative of the health care provider or day care facility that receives, and relies on, such reference letter." is rejected. Authority for this language is not contained within the statute.

11. The proposal that the last sentence of Regulation III C. 1. a. further clarify methods by which employers can prove "good faith effort" is accepted. The new last sentence will read, "In order to prove that the service letter form has been sent, an employer may send the form by fax, Certified Mail or other means which provides proof of mailing, faxing, delivery or receipt."

12. The proposal to change Regulation IV. B. 1. and V. B. 1. is accepted (in part) and rejected (in part).

Regulation IV. B. 1.c. will be changed to add the words "in writing".

The last sentence of Regulation V. A. will be changed to "The Adult Abuse Registry check shall be performed by the Department of Health and Social Services/

Division of Services for Aging and Adults With Physical Disabilities."

Regulation V. B. 1. b. will be changed to, "The employer must contact the Department of Health and Social Services/Division of Services for Aging and Adults With Physical Disabilities. The employer may contact that Division by telephone."

The Department of Labor has no authority or jurisdiction to further define the methods of contacting or receiving the Child Abuse Registry check or the Adult Abuse Registry check.

13. The proposal to add language so that Regulation III. A. and IV. A. conform with the statute regarding the responsibility of temporary agencies to comply with these sections is accepted. In addition, the Department will add the statutory language regarding temporary agencies to Regulation III. C. 2. a.

14. The proposal that the Regulations clarify that health care providers who operate any type of school-based programs comply with the State's hiring practices and reporting requirements for educational facilities and are not required to comply with the provisions of Titles 11 and 19, as specified in the legislation is rejected. Authority for this language is not contained in the statutes.

15. The proposals of Pauline D. Koch, Administrator, Office of Child Care Licensing are accepted. These changes involve corrections and a minor clarification.

16. Mr. Stewart's proposal that the words "and fully releasing the employer from liability from doing so" be added to Regulations II. C. subsections 1. b. and 2.b.; Regulation IV B. subsection 1. a. and 2. b.; and Regulation V. B. subsection 1. a and 2. b. is rejected. Authority for this language is not contained in the statutes.

17. The proposal that the subheadings be underlined is accepted.

18. In addition to those changes stated above, the Department has made other minor changes to the text to correct and/or clarify the Regulations where necessary. These changes appear in Regulation III. C. 1. subsections b. and e.; Regulation III. C. 2. subsection b.; Regulation III C. 3. subsection a. and b.; Regulation VI. B. 2. and 3.; Regulation VI. C. 1.; and Regulation VII. A. 3., 4. and 6.

19. The Department has changed the last sentence of Regulation IX. to conform with the Administrative Procedures Act, specifically 29 Del. C. §10118 (e). That section states, in part, that, "The effective date of an order which adopts... a regulation shall be not less than 10 days from the date the order adopting... a regulation has been published in its final form in the Register of Regulations..." The last sentence of Regulation IX. will state, "These regulations shall take effect ten (10) days after the date of publication in the State's Register of Regulations."

Conclusions of Law

20. The Department of Labor proposed Regulations to provide guidance to employers and applicants regarding the implementation of 19 Del. C. § 708, 11 Del. C. §§8563 and §8564 pursuant to its authority granted in 29 Del. C. § 8503.

Decision To Adopt

21. It is the decision and order of the Department of Labor that the Regulations as amended by the above findings, a true and correct copy of which are attached hereto as Exhibit "D", are hereby ADOPTED.

SO ORDERED, this 9th day of January, 1998.  
Darrell J. Minott, Secretary of Labor

DELAWARE DEPARTMENT OF LABOR  
DIVISION OF INDUSTRIAL AFFAIRS

REGULATIONS

SPECIAL EMPLOYMENT PRACTICES RELATING TO HEALTH CARE AND CHILD CARE FACILITIES (19 DEL.C. §5708 and 11 DEL.C. §8563)

ADULT ABUSE REGISTRY CHECK (11 DEL.C. §8564)

Pursuant to 29 Del.C. §8503(7), the Department of Labor hereby promulgates the following regulations to provide guidance to employers and applicants regarding the implementation of 19 Del.C. §708, 11 Del.C. §8563 and 11 Del.C. §8564.

I. INTRODUCTION.

The General Assembly enacted two laws, "SPECIAL EMPLOYMENT PRACTICES RELATING TO HEALTH CARE AND CHILD CARE FACILITIES" (19 DEL.C. §708 and 11 DEL.C. §8563) and "ADULT ABUSE REGISTRY CHECK" (11 DEL.C. §8564) in order to provide a degree of protection for the "vulnerable" population in hospitals, nursing homes, child care facilities and other institutions. Together, the two laws require employers to obtain a reference check, or "service letter", and check two registries to insure that they are not hiring individuals with a past history of violent behavior in the workplace, or individuals who have engaged in abuse or neglect to adults or children in their care.

II. DEFINITIONS.

The words, terms and phrases used in these Regulations shall have the meaning ascribed to them in this section, except where the context clearly indicates a different meaning.

A. "PERSON SEEKING EMPLOYMENT" means any person applying for employment in a health care or child care facility that affords direct access to persons receiving care at such a facility, or a person applying for licensure to operate a child care facility.

B. "HEALTH CARE FACILITY" means any custodial or residential facility where health, nutritional, or personal care is provided for persons, including nursing homes, hospitals, home health care agencies, and adult day care facilities.

C. "CHILD CARE FACILITY" means any child care facility which is required to be licensed by the Department of Services for Children, Youth, and their Families.

D. "DIRECT ACCESS" means the opportunity to have personal contact with persons receiving care during the course of one's assigned duties.

III. SERVICE LETTER.

A. REQUIREMENTS.

No employer who operates a health care facility or child care facility shall hire any person **seeking employment (as defined in Regulation I. A. above)** without obtaining one or more service letter(s) for that person. The employer must obtain a service letter from the person's current or most recent previous employer. In addition, if the person seeking employment was employed in a health care and/or child care facility within the past five (5) years, the employer shall also obtain a service letter from such employer(s). If the person seeking employment has not been previously employed, or was self-employed, then the employer must require the person seeking employment to provide letters of reference from two adults who are familiar with the person, but are not relatives.

**[Any temporary agency responsible for providing temporary employees to a health care facility or a child care facility, when such employees qualify as "persons seeking employment" as defined in Section I. A of these regulations, is considered an employer and is responsible for complying with the requirements of this section.]**

B. SERVICE LETTER FORM.

The required service letter shall be a form provided by the Department of Labor, Office of Labor Law Enforcement. The service letter form shall be signed by the current or previous employer and shall be filled out by that employer. The service letter form is a checklist requiring information



about the type of work performed by the employee; the duration of the employment; the nature of the employee's separation from employment; and information as to any reasonably substantiated incidents involving violence, threat of violence, abuse or neglect by the person seeking employment.

### C. DUTIES.

#### 1. Duties of the hiring employer.

a. Service letter(s). The employer must obtain the required service letter(s) by sending a service letter form to all of the current or previous employers named by the person seeking employment. The employer must make a "good faith" attempt to locate the current or previous employers and to obtain the service letter from such employer(s). In order to prove that the service letter form has been sent, an employer may **send the form by fax, Certified Mail or other means which provides proof of mailing, transmission, delivery or receipt**.

b. Full release from person seeking employment. The employer must obtain a signed statement from the person seeking employment wherein that person authorizes a full release for the employer to obtain information from the current and/or previous employer(s).

c. Complete disclosure of information from person seeking employment. The employer must obtain a signed statement from the person seeking employment that the information he/she has given on the application represents a full and complete disclosure of information about his/her current and previous employment, and that all information contained in the employment application is true and complete to the best of the knowledge and belief of the person seeking employment.

d. Acknowledgment from person seeking employment. The employer must obtain a signed acknowledgment from the person seeking employment that he/she understands that failure to provide a full and complete disclosure is a violation of the law.

e. Exigent circumstances. When exigent circumstances exist, and an employer covered by this law must fill a position in order to maintain the required level of service, the employer may hire a person seeking employment on a conditional basis **pending the receipt of the completed service letter(s) for that person.** The continued employment of that person, however, is conditioned upon the receipt of the required service letter(s). In addition, the person hired **on a conditional basis** must be informed in writing and **shall** acknowledge, **in writing**, that his/her continued employment **is conditional and** is contingent upon the receipt of the required service letter(s).

#### 2. Duties of the person seeking employment.

a. Provision of necessary information. The person seeking employment must provide all of the

necessary information about his/her current or past employers so that the service letter(s) can be obtained. **[If the person seeking employment was employed by a temporary agency, he or she shall list on the employment application the temporary agency and all employers for which he or she did temporary work pursuant to such employment.]**

b. Full release. The person seeking employment must sign a statement wherein he/she authorizes a full release for the employer to obtain information from the current or previous employment.

c. Complete disclosure of information. The person seeking employment must provide complete and full disclosure of information and must sign a statement in which he/she attests that information given in his/her application represents a full and complete disclosure of information about his/her current or previous employer and is true and correct to the best of his/her knowledge and belief.

d. Acknowledgment. The person seeking employment must sign an acknowledgment that he/she understands that failure to provide a full and complete disclosure of employment information is a violation of the law.

e. Acknowledgment when hired on a conditional basis. When the person seeking employment is hired on a conditional basis, he/she must acknowledge in writing that his/her employment is conditional and contingent upon the receipt of the service letter(s).

#### 3. Duties of the employer receiving the service letter form.

a. Completion of service letter form. The employer must complete the service letter form, providing complete and truthful information about the person named on the service letter form. The law, specifically 19 Del. C. §708(b)(10), provides that a person who discloses information about a current or former employee is immune from civil liability for such disclosure.

b. Return of the service letter form. The employer receiving the service letter form must complete it and return the service letter to the hiring employer within ten (10) business days from the date the request was received.

## IV. CHILD ABUSE REGISTRY CHECK.

### A. REQUIREMENTS

No employer who operates a health care facility or child care facility shall hire any person without requesting and receiving the results of a Child Abuse Registry check for that person. The Child Abuse Registry check shall relate to substantiated cases of child abuse or neglect reported after August 1, 1994. The results of the Child

Abuse Registry check shall be obtained from the Child Abuse Registry as established by 16 Del.C. §905.

**[Any temporary agency responsible for providing temporary employees to a health care facility or child care facility, when such employees qualify as “persons seeking employment” as defined in Section I.A. of these Regulations, is considered an employer and is responsible for complying with the requirements of this section.]**

B. DUTIES.

1. Duties of the hiring employer.

a. Full release from person seeking employment. The employer must obtain a signed statement from the person seeking employment wherein that person authorizes a full release for the employer to obtain the information provided pursuant to the Child Abuse Registry check.

b. Obtaining the Child Abuse Registry check. The employer must contact **[in writing]** the Division of Children, Youth, and Their Families to request and receive the Child Abuse Registry check.

c. Exigent Circumstances. When exigent circumstances exist and an employer covered by this law must fill a position in order to maintain the required level of service, the employer may hire a person seeking employment on a conditional basis after the employer has requested a Child Abuse Registry check. The continued employment of that person, however, is conditioned upon the receipt of the Child Abuse Registry check. Any person hired on a conditional basis must be informed in writing, and must acknowledge in writing that his/her employment is conditional and contingent upon the receipt of the Child Abuse Registry check.

2. Duties of the person seeking employment.

a. Provision of necessary information. The person seeking employment must provide any and all necessary information so that the Child Abuse Registry check can be completed.

b. Full Release. The person seeking employment must sign a statement wherein he/she authorizes a full release for the employer to obtain the information provided pursuant to the Child Abuse Registry check.

c. Acknowledgment when hired on a conditional basis. When the person seeking employment is hired on a conditional basis, he/she must acknowledge in writing that his/her employment is conditional and contingent upon the receipt of the Child Abuse Registry check.

C. REGULATIONS AND PROCEDURES.

Specific Regulations and procedures for the Child Abuse Registry check shall be promulgated by the Division of Children, Youth, and Their Families.

V. ADULT ABUSE REGISTRY CHECK.

A. REQUIREMENTS.

No employer who operates a health care facility or child care facility shall hire any person without requesting and receiving an Adult Abuse Registry check for that person. The Adult Abuse Registry check shall relate to substantiated cases of adult abuse or neglect. The Adult Abuse Registry check shall be performed by the Department of Health and Social Services/ Division of Services for Aging and Adults With Physical Disabilities.

B. DUTIES.

1. Duties of the hiring employer,

a. Full release from person seeking employment. The employer must obtain a signed statement from the person seeking employment wherein that person authorizes a full release for the employer to obtain the information provided pursuant to the Adult Abuse Registry check.

b. Obtaining the Adult Abuse Registry check. The employer must contact the Department of Health and Social Services /Division of Services for Aging and Adults With Physical Disabilities to request and receive the Adult Abuse Registry check. The employer may contact that Division by telephone.

c. Exigent circumstances. When exigent circumstances exist and an employer covered by this law must fill a position in order to maintain the required level of service, the employer may hire a person seeking employment on a conditional basis after the employer has requested an Adult Abuse Registry check. The continued employment of that person, however, is conditioned upon receipt of the Adult Abuse Registry check. Any person hired on a conditional basis must be informed in writing, and must acknowledge in writing that his/her employment is conditional and contingent upon the receipt of the Adult Abuse Registry check.

2. Duties of the person seeking employment.

a. Provision of all necessary information. The person seeking employment must provide any and all necessary information so that the Adult Abuse Registry check can be completed.

b. Full release. The person seeking employment must sign a statement wherein he/she authorizes a full release for the employer to obtain the information provided pursuant to the Adult Abuse Registry check.

c. Acknowledgment when hired on a conditional basis. When the person seeking employment is hired on a conditional basis, he/she must acknowledge in writing that his/her employment is conditional and

contingent upon the receipt of the Adult Abuse Registry check.

### C. REGULATIONS.

Specific Regulations and procedures relating to the Adult Abuse Registry check shall be promulgated by the Division of Health and Social Services.

## VI. ENFORCEMENT.

### A. COMPLAINT.

Any person may file a complaint with the Office of Labor Law Enforcement alleging a violation of any provision of these laws. The complaint shall be in writing, and shall set forth the specifics of any alleged violation. The complaint shall be directed to the Administrator of the Office of Labor Law Enforcement.

Upon receipt of the complaint, the Administrator of the Office of Labor Law Enforcement will assign the complaint to an investigator.

### B. INVESTIGATION.

The Office of Labor Law Enforcement may serve notice to the employer informing them of the complaint and requiring proof of compliance with the provisions of these laws. Evidence that may be requested to establish whether an employer has complied with the provisions of these laws includes, but is not limited to, the following:

1. Service letter(s) for each employee hired after January 1, 1998 (or proof that the employer has made a good faith attempt to obtain such service letter(s)).

2. Verification from the Department of Services Children, Youth and Their Families /Division of Family Services that the employer has requested and/or received the required check of the Child Abuse Registry as required by 11 Del.C. §8563.

3. Verification from the Division of Services for Aging and Adults with Physical Disabilities that the employer has requested and/or received the required check of the Adult Abuse Registry as required by 11 Del.C. §8564.

4. Copies of all statements and acknowledgments signed by the person seeking employment.

5. Application forms, personnel records or any other related documents.

### C. Determination.

1. Upon completion of the investigation, the Office of Labor Law Enforcement will determine whether a violation has occurred. The Office of Labor Law

Enforcement may issue a notice requiring corrective action and may notify the Department of Services for Children Youth and Their Families/Division of Family Services and/or the Department of Health and Social Services/Division of Services for Aging and Adults With Physical Disabilities. Such notice will give a specified date on which compliance is required.

2. Upon proof that corrective action has been taken, the Office of Labor Law Enforcement may issue a warning letter or may forward the matter to the Department of Justice for further legal action.

## VII. VIOLATIONS AND PENALTIES.

### A. Violations of the law shall include the following:

1. Failure by the hiring employer to obtain the service letter(s) or make a good faith attempt to do so;

2. Failure by the hiring employer to obtain the required statements and acknowledgments from the person seeking employment;

3. Failure by the hiring employer to request and receive the Child Abuse Registry check (Information about this violation will be forwarded to the Department of Services for Children Youth and Their Families/Division of Family Services);

4. Failure by the hiring employer to request and receive the Adult Abuse Registry check (Information about this violation will be forwarded to the Department of Health and Social Services/Division of Services for Aging and Adults With Physical Disabilities);

5. Failure by the person seeking employment to provide complete and full disclosure of all information regarding current or previous employers;

6. Failure by the person seeking employment to provide a full and complete disclosure of any information necessary to obtain the Child Abuse Registry check and the Adult Abuse Registry check (Information about this violation will be forwarded to the appropriate agency);

7. Failure by the person seeking employment to sign the required statements and acknowledgments;

8. Failure by the employer receiving a service letter form to provide full and complete disclosure about the person seeking employment;

9. Failure by the employer receiving a service letter form to complete and return the service letter form.

### B. PENALTIES.

Violations of any of the provisions of these laws may result in civil penalties of not less than \$1,000 nor more than \$5,000.

## VIII. SEVERABILITY.

If any of the provisions of 19 Del.C. §708, 11 Del.C. §8563, 11 Del.C. §8564, or these Regulations, or any portion thereof, is held to be unconstitutional, the remaining provisions shall remain in full force and effect.

held invalid, the remainder of the laws and these Regulations shall not be affected by such holding and shall remain in full force and effect.

#### IX. SUBSEQUENT MODIFICATION OF REGULATIONS.

The Secretary of Labor may, upon his/her own motion or upon the written request of any member of the public setting forth reasonable grounds therefore, revoke or modify these regulations, after an opportunity has been given to members of the public to present their views on the proposed changes. These regulations shall take effect ten (10) days after publication in the State Register of Regulations.

Darrell J. Minott, Secretary of Labor

Approved and adopted this 9th day of January, 1998.

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**THE FINAL REGULATION NO. 37 (“NO<sub>x</sub> BUDGET PROGRAM”) THAT WAS PUBLISHED IN THE FEBRUARY ISSUE OF THE REGISTER DID NOT REFLECT ALL CHANGES THAT WERE MADE AFTER THE REGULATION WAS PROPOSED AND WHEN IT WAS ADOPTED. THEREFORE, THE REGULATION IS REPUBLISHED IN ITS ENTIRETY**

## DEPARTMENT OF NATURAL RESOURCES & ENVIRONMENTAL CONTROL

### AIR QUALITY MANAGEMENT SECTION

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

**Secretary's Order No. 97-A-0044**

Re: Regulation No. 37 (“NO<sub>x</sub> Budget Program”) of the Delaware Regulations Governing the Control of Air Pollution

Date of Issuance: December 29, 1997

#### I. Background

On December 8, 1997, a public hearing was held to receive comments on a proposed new Regulation No. 37, which establishes a NO<sub>x</sub> Budget Program for Delaware. This regulation is necessary to implement a September 27, 1994 MOU among 11 states and the District of Columbia which constitute the Ozone Transport Region. In an effort to reduce summertime ozone concen-

trations, these states have committed to a regional program to cap NO<sub>x</sub> emissions and encourage trading of emissions allowances on a regional basis in order to substantially reduce NO<sub>x</sub> emissions and corresponding ozone levels. Each state was assigned a NO<sub>x</sub> budget based on 1990 emission levels after extensive consultations among regulatory agencies and affected sources throughout the region. A model rule was developed as of May 1, 1996, which then formed the basis for this rulemaking. Proper notice of the hearing was provided as required by law. In addition, considerable efforts were made in the two months leading up to this hearing to alert all potentially affected sources of the requirements in this proposed program, which has not changed since the 1994 MOU in terms of NO<sub>x</sub> reductions, deadlines or the 1990 baseline. Following the hearing on December 8, the record was left open for three days to receive additional comments from the regulated community. Thereafter, AQM prepared a detailed response document in draft form which was submitted to the Hearing Officer on December 17, 1997, in an effort to expedite review of this matter. A final version of that response document was received on December 19, 1997, with no substantive changes from the draft, but with corrections of typographical errors, etc., and formal approval of Division Management.

This regulation will affect fossil fuel fired boilers or indirect heat exchangers with a max. rated heat input capacity equal to or greater than 250 MMBTU/hr; and all electric generating units with a rated output equal to or greater than 15MW.

#### II. Findings

1. Proper notice of the hearing was provided as required by law.

2. The AQM Response Document, dated December 18, 1997, and submitted on December 19, 1997, contains an accurate summary of comments in the record along with reasoned responses and sound recommendations for action by the Secretary on proposed Regulation No. 37. While many of the comments from affected sources have some merit, nevertheless AQM's Response Document provides a legally defensible record for this rulemaking.

3. A Hearing Officer's Report, dated December 22, 1997, which incorporates the Response Document by reference, recommends promulgation of Regulation 37 after appropriate amendments are made, consistent with AQM's Response Document.

4. The changes to be made as referenced in item 3 above, are not substantial and thus the agency does not need to repropose the regulation change.

5. While supporting AQM's positions on all substantive issues raised by this rulemaking, nevertheless, the Hearing Officer suggested additional consulta-

tion with Department of Justice attorneys regarding the burden of proof imposed on affected sources under §18.b of the proposed regulation before any enforcement action is undertaken.

### III. Order

In view of the above findings, it is hereby ordered that the proposed Regulation No. 37 of the Delaware Regulations Governing the Control of Air Pollution be amended to reflect those changes specified in AQM's Response Document and that the regulation be promulgated in accordance with the customary process as required by law. It is understood that the provisions of § 18.b will not be enforced until such time as further legal review has been completed and necessary changes are made in that provision, if needed, to comply with due process requirements.

### V. Reasons

This Regulation is based on a long-standing MOU and Model Rule developed over several years in close coordination with all regulatory agencies and affected sources within the State Ozone Transport Region. Its provisions, therefore, come as no surprise to the parties involved and are necessary to address serious concerns about ground-level ozone in Delaware and throughout the region, in furtherance of the policies and purposes of 7 Del. C. Chapter 60.

Signed: Christophe A.G. Tulou  
Christophe A. G. Tulou, Secretary

NO<sub>x</sub> Budget Program  
Regulation No. 37  
December 18, 1997

#### Section 1 - General Provisions

a. The purpose of this regulation is to implement Delaware's portion of the Ozone Transport Commission's (*OTC*) September 27, 1994 Memorandum of Understanding (*MOU*) by establishing in the State of Delaware a NO<sub>x</sub> Budget Program.

b. A NO<sub>x</sub> *allowance* is an authorization to emit NO<sub>x</sub>, valid only for the purposes of meeting the requirements of this regulation.

1. All applicable state and federal requirements remain applicable.

2. A NO<sub>x</sub> *allowance* does not constitute a security or other form of property.

c. On or after May 1, 1999, the *owner or operator* of each *budget source* shall, not later than December 31 of each calendar year, hold a quantity of NO<sub>x</sub> *allowances* in the *budget source's current year NATS account* that is equal

to or greater than the total NO<sub>x</sub> emitted from that *budget source* during the period May 1 through September 30 of the subject year.

d. *Allowance transfers* between *budget sources* sharing a common *owner or operator* and/or *authorized account representative* are subject to all applicable requirements of this regulation, including the *allowance transfer* requirements identified in Section 11 of this regulation.

e. Offsets required for new or modified sources subject to non-attainment new source review must be obtained in accordance with Regulation 25 of Delaware's "Regulations Governing the Control of Air Pollution" and Section 173 of the Clean Air Act. *Allowances* are not considered offsets within the context of this regulation.

f. Nothing in this regulation shall be construed to limit the authority of the Department to condition, limit, suspend, or terminate any *allowances* or authorization to emit.

g. The Department shall maintain an up to date listing of the NO<sub>x</sub> sources subject to this regulation.

1. The listing shall identify the name of each NO<sub>x</sub> *budget source* and its annual *allowance allocation*, if any.

2. The Department shall submit a copy of the listing to the *NATS Administrator* by January 1 of each year, commencing in 1999.

#### Section 2 - Applicability

a. The NO<sub>x</sub> Budget Program applies to any *owner or operator* of a *budget source* where that source is located in the State of Delaware.

b. Any person who owns, operates, leases, or controls a stationary NO<sub>x</sub> source in Delaware not subject to this program, by definition, may choose to *opt into* the NO<sub>x</sub> Budget Program in accordance with the requirements of Section 8 of this regulation. Upon approval of the *opt-in* application by the Department, the person shall be subject to all terms and conditions of this regulation.

c. A *general account* may be established in accordance with Section 7 of this regulation. The person responsible for the *general account* shall be responsible for meeting the requirements for an *Authorized Account Representative* and applicable *account* maintenance fees.

#### Section 3 - Definitions

For the purposes of this regulation, the following definitions apply. All terms not defined herein shall have the meaning given them in the Clean Air Act and

Regulation 1 of the State of Delaware "Regulations Governing the Control of Air Pollution".

a. *Account* means the place in the *NO<sub>x</sub> Allowance Tracking System* where allowances held by a *budget source* (*compliance account*), or allowances held by any person (*general account*), are recorded.

b. *Account number* means the identification number assigned by the *NO<sub>x</sub> Allowance Tracking System (NATS) Administrator* to a *compliance* or *general account* pursuant to Section 10 of this regulation.

c. *Administrator* means the Administrator of the U.S. EPA. The Administrator of the U.S. EPA or his designee(s) shall manage and operate the *NO<sub>x</sub> Allowance Tracking System* and the *NO<sub>x</sub> Emissions Tracking System*.

d. *Allocate* or *Allocation* means the assignment of allowances to a *budget source* through this regulation; and as recorded by the Administrator in a *NO<sub>x</sub> Allowance Tracking System compliance account*.

e. *Allowance* means the limited authorization to emit one ton of NO<sub>x</sub> during a specified *control period*, or any *control period* thereafter subject to the terms and conditions for use of *banked allowance* as defined by this regulation. All allowances shall be allocated, transferred, or used as whole allowances. To determine the number of whole allowances, the number of allowances shall be rounded down for decimals less than 0.50 and rounded up for decimals of 0.50 or greater.

f. *Allowance deduction* means the withdrawal of allowances for permanent retirement by the *NATS Administrator* from a *NO<sub>x</sub> Allowance Tracking System account* pursuant to Section 16 of this regulation.

g. *Allowance transfer* means the conveyance to another account of one or more allowances from one [person][account] to another by whatever means, including but not limited to purchase, trade, auction, or gift in accordance with the procedures established in Section 11 of this regulation, effected by the submission of an allowance transfer request to the *NATS Administrator*.

h. *Alternative monitoring system* means a system or component of a system, designed to provide direct or indirect data of mass emissions per time period, pollutant concentrations, or volumetric flow as provided for in Section 13 of this regulation.

i. *Authorized Account Representative (AAR)* means the responsible person who is authorized, in writing, to transfer

and otherwise manage allowances as well as certify reports to the *NATS* and the *NETS*.

j. *Banked Allowance* means an allowance which is not used to reconcile emissions in the designated year of allocation but which is carried forward into the next year and flagged in the *compliance* or *general account* as "banked".

k. *Banking* means the retention of unused allowances from one control period for use in a future control period.

l. *Baseline* means, except for the purposes of Section 12(d) (Early Reductions) of this regulation, the NO<sub>x</sub> emission inventory approved by the Ozone Transport Commission on June 13, 1995, and revised thereafter, as the official 1990 baseline emissions of May 1 through September 30 for purposes of the NO<sub>x</sub> Budget Program.

m. *Boiler* means a unit which combusts fossil fuel to produce steam or to heat water, or any other heat transfer medium.

n. *Budget* or *Emission Budget* means the numerical result in tons per control period of NO<sub>x</sub> emissions which results from the application of the emission reduction requirement of the OTC MOU dated September 27, 1994, and which is the maximum amount of NO<sub>x</sub> emissions which may be released from the budget sources collectively during a given control period.

o. *Budget source* means a fossil fuel fired boiler or indirect heat exchanger with a maximum heat input capacity of 250 MMBTU/Hour, or more; and all electric generating units with a generator nameplate capacity of 15 MW, or greater. (Although not a budget source by definition, any person who applies to opt into the NO<sub>x</sub> Budget Program shall be considered a budget source and subject to applicable program requirements upon approval of the application for opt-in.)

p. *Clean Air Act* means the federal Clean Air Act (42 U.S.C. 7401-7626).

q. *Compliance account* means the account for a particular budget source in the *NO<sub>x</sub> Allowance Tracking System*, in which are held current and/or future year allowances.

r. *Continuous Emissions Monitoring System (CEMS)* means the equipment required by this regulation used to sample, analyze, and measure which will provide a permanent record of emissions expressed in pounds per million British Thermal Units (Btu) and tons per day. The following systems are component parts included in a

continuous emissions monitoring system: nitrogen oxides pollutant concentration monitor, diluent gas monitor (oxygen or carbon dioxide), a data acquisition and handling system, and flow monitoring systems (where appropriate).

s. *Control period* means the period beginning May 1 of each year and ending on September 30 of the same year, inclusive.

t. *Current year* means the calendar year in which the action takes place or for which an *allocation* is designated. For example, an *allowance allocated* for use in 1999 which goes unused and becomes a *banked allowance* on January 1, 2000 can be used in the "Current Year" 2000 subject to the conditions for *banked allowance* use as stated in this regulation.

u. *Early Reduction Allowance* means an *allowance* credited for a NO<sub>x</sub> emission reduction achieved during the *control periods* of either 1997 or 1998, or both.

v. *Electric generating unit* means any *fossil fuel fired* combustion unit which provides electricity for sale or use.

w. *Excess emissions* means emissions of nitrogen oxides reported by a *budget source* during a particular *control period*, rounded to the nearest whole ton, which is greater than the number of *allowances* which are available in that *budget source's NO<sub>x</sub> Allowance Tracking System compliance account* on December 31 of the calendar year for the subject NO<sub>x</sub> control season. For the purpose of determining whole tons on *excess emissions*, the number of tons of *excess emissions* shall be rounded down for decimals less than 0.50 and rounded up for decimals of 0.50 or greater.

x. *Existing budget source* means a *budget source* that operated at any time during the period beginning May 1, 1990 through September 30, 1990.

y. *Fossil fuel* means natural gas, petroleum, coal or any form of solid, liquid or gaseous fuel derived wholly, or in part, from such material. **[This definition does not include CO derived from any source.]**

z. *Fossil fuel fired* means the combustion of *fossil fuel* or any derivative of *fossil fuel* alone, or, if in combination with any other fuel, where *fossil fuel* comprises 51% or greater of the annual *heat input* on a BTU basis.

aa. *General Account* means an *account* in the *NATS* that is not a *compliance account*.

bb. *Heat input* means heat derived from the combustion

of any fuel in a *budget source*. *Heat input* does not include the heat derived from preheated combustion air, recirculated flue gas, or exhaust from other sources.

cc. *Indirect heat exchanger* means combustion equipment in which the flame and/or products of combustion are separated from any contact with the principal material in the process by metallic or refractory walls, which includes, but is not limited to, steam boilers, vaporizers, melting pots, heat exchangers, column reboilers, fractioning column feed preheaters, reactor feed preheaters, and fuel-fired reactors such as steam hydrocarbon reformer heaters and pyrolysis heaters.

dd. *Maximum heat input capacity* means the ability of a *budget source* to combust a stated maximum amount of fuel on a steady state basis, as determined by the greater of the physical design rating or the actual maximum operating capacity of the *budget source*. *Maximum heat input capacity* is expressed in millions of British Thermal Units (MMBTU) per unit of time which is the product of the gross caloric value of the fuel (expressed in MMBTU/pound) multiplied by the fuel feed rate in the combustion device (expressed in pounds of fuel/time).

ee. *Nameplate capacity* means the maximum electrical generating output that a generator can sustain when not restricted by seasonal or other deratings.

ff. *New budget source* means a NO<sub>x</sub> source that is a *budget source*, by definition, that did not operate between May 1, 1990 and September 30, 1990, inclusive. A NO<sub>x</sub> source, that is a *budget source* by definition, that was constructed prior to or during the period May 1, 1990 through September 30, 1990, but did not operate during the period May 1, 1990 through September 30, 1990, shall be treated as a *new budget source*.

gg. *NO<sub>x</sub> Allowance Tracking System (NATS)* means the computerized system established and used by the *Administrator* to track the number of *allowances* held and used by any person.

hh. *NO<sub>x</sub> Emissions Tracking System (NETS)* means the computerized system established and used by the *Administrator* to track and provide a permanent record of NO<sub>x</sub> emissions from each *budget source*.

ii. *Non-Part 75 Budget Source* means any *budget source* not subject to the requirements for emissions monitoring adopted pursuant to Regulation 36 of the State of Delaware "Regulations Governing the Control of Air Pollution".

jj. *Off budget* means not subject to this regulation.

kk. *Off budget source* means any source of NO<sub>x</sub> emissions that is not included in the NO<sub>x</sub> Budget Program as either a *budget source*, by definition, or as an *opt in source*.

ll. *Opt in* means to choose to voluntarily participate in the NO<sub>x</sub> Budget Program, and comply with the terms and conditions of this regulation.

mm. *Opt-in-baseline* means the Department approved *heat input* and/or NO<sub>x</sub> emissions for use as a basis for *allowance allocation* and deduction.

nn. *OTC* means the Ozone Transport Commission.

oo. *OTC MOU* means the Memorandum of Understanding that was signed by representatives of eleven states and the District of Columbia on September 27, 1994.

pp. *OTR* means the Ozone Transport Region as designated by Section 184(a) of the Clean Air Act.

qq. *Owner or Operator* means any person who is an owner or who operates, controls or supervises a *budget source* and shall include, but not be limited to, any holding company, utility system or plant manager of a *budget source*.

rr. *Quantifiable* means a reliable and replicable basis for calculating the amount of an emission reduction that is acceptable to both the Department and to the Administrator of the U.S.EPA.

ss. *Part 75 Budget Source* means any *budget source* subject to the requirements for emissions monitoring adopted pursuant to Regulation 36 of the State of Delaware "Regulations Governing the Control of Air Pollution".

tt. *Real* means a reduction in the rate of emissions, quantified retrospectively, net of any consequential increase in actual emissions due to shifting demand.

uu. *Recorded* with regard to an *allowance transfer or deduction* means that an *account* in the *NATS* has been updated by the *Administrator* with the particulars of an *allowance transfer or deduction*.

vv. *Regional NO<sub>x</sub> budget* means the maximum amount of NO<sub>x</sub> emissions which may be released from all *budget sources*, collectively throughout the *OTR*, during a given *control period*.

ww. *Repowering*, for the purpose of *early reduction credit* means either: 1) Qualifying Repowering Technology as

defined by 40 CFR, Part 72 or; 2) the replacement of a *budget source* by either a new combustion source or the purchase of heat or power from the owner of a new combustion source, provided that: a) The replacement source (regardless of owner) is on the same, or contiguous property as the *budget source* being replaced; b) The replacement source has a maximum heat output rate that is equal to or greater than the maximum heat output rate of the *budget source* being replaced; or, c) The replacement source has a power output rate that is equal to or greater than the power output rate of the combustion source being replaced; and d) The replacement source incorporates technology capable of controlling multiple combustion pollutants simultaneously with improved fuel efficiency and with significantly greater waste reduction relative to the performance of technology in widespread commercial use as of November 15, 1990.

xx. *Submitted* means sent to the appropriate authority under the signature of the *authorized account representative* or alternate *authorized account representative*. An official U.S. Postal Service postmark, or electronic time stamp, shall establish the date of submittal.

yy. *Surplus* means that, at the time the reduction was made, the emission reduction was not required by Delaware's SIP, was not relied upon in an applicable attainment demonstration, was not required by state or federal permit or order, and was made enforceable in a permit that was issued after the date of the *OTC MOU* (September 27, 1994).

zz. *Use* means, for purposes of emission reductions moved off budget, that approval of the Department has been obtained to apply the emission reduction at a source.

#### Section 4 - Allowance Allocation

a. This program establishes NO<sub>x</sub> emission *allowances* for each NO<sub>x</sub> *control period* beginning May 1, 1999 through the NO<sub>x</sub> *control period* ending September 30, 2002. *Allowance allocation* levels for each of these annual NO<sub>x</sub> *control periods* are based on actual May 1, 1990 to September 30, 1990 actual NO<sub>x</sub> mass emissions.

b. The NO<sub>x</sub> Budget Program does not establish NO<sub>x</sub> emission *allowances* for any NO<sub>x</sub> *control period* subsequent to the year 2002 NO<sub>x</sub> *control period*. NO<sub>x</sub> emission *allowances* for each NO<sub>x</sub> *control period* subsequent to the year 2002 NO<sub>x</sub> *control period* will be established through amendment of this regulation.

c. NO<sub>x</sub> *allowance allocations* to *budget sources* may be made only by the Department in accordance with Section



4, Section 8, and Section 12 of this regulation.

d. Appendix A of this regulation identifies the *budget sources* and identifies the number of *allowances* each *budget source* is allocated. *Allowance allocations* to each of the *budget sources* was determined as follows:

1. Unless otherwise noted in Appendix A of this regulation, the document EPA-454/R-95-013, "1990 OTC NO<sub>x</sub> Baseline Emission Inventory" served as the basis for determination of the number of *OTC MOU Allowances* allocated to each *existing budget source*.

i. Each *existing budget source's OTC MOU Allowance allocation* for NO<sub>x</sub> *control periods* during the period May 1, 1999 to September 30, 2002, inclusive, was identified in the referenced document, Appendix B, Final OTC NO<sub>x</sub> Baseline Inventory, Delaware, Point-Segment Level Data, Phase II Target (Point Level).

ii. The identified values were rounded to the nearest whole *allowance* by rounding down for *allowances* less than 0.5 and rounding up for decimals of 0.5 or greater.

2. Exceptional Circumstances *Allowances*, as granted by the *OTC* and as identified in the document EPA-454/R-95-013, "1990 OTC NO<sub>x</sub> Baseline Emission Inventory" for the *existing budget sources*, are identified in Appendix A. These Exceptional Circumstance *Allowances* were adjusted for the appropriate NO<sub>x</sub> emission rate reduction requirement prior to inclusion in Appendix A.

3. The *OTC* allocated to the state of Delaware an additional 86 *allowances*, referred to as reserve *allowances*, prior to application of NO<sub>x</sub> emission rate reduction requirements, as its share of a total 10,000 ton reserve. Application of *OTC* required emission reductions resulted in a total of 35 Reserve *Allowances* available for distribution, as identified in the document EPA-454/R-95-013, "1990 OTC NO<sub>x</sub> Baseline Emission Inventory".

i. Each of the 28 *existing budget sources* identified in Appendix A as the *existing budget sources* were allocated one (1) reserve *allowance*.

ii. One (1) additional reserve *allowance* was allocated to each of the four organizations with *existing budget sources*. The additional reserve *allowance* for each of the four organizations was added to the respective *existing budget source* with the greatest *heat input* rating.

iii. The remaining three (3) reserve *allowances* shall be held by the Department unused for the NO<sub>x</sub> *control periods* between May 1, 1999 and September 30, 2002.

iv. Reserve *Allowances* are applicable only for the NO<sub>x</sub> *control periods* during the period May 1, 1999 to September 30, 2002, inclusive. Reserve *Allowances* do not exist for NO<sub>x</sub> *control periods* subsequent to the year 2002.

4. The final NO<sub>x</sub> *allowance allocation* for each of the 28 *existing budget sources*, for each of the NO<sub>x</sub> *control periods* during the period of May 1, 1999 and September 30, 2002, is the sum of the values determined in Sections

4(d)(1) - (3) and is identified in Appendix A. For the *existing budget sources* that were not identified in the document "1990 OTC NO<sub>x</sub> Baseline Emissions Inventory", the final *allowance allocation* includes an *allowance allocation* determined in accordance with the procedures identified in Section 4(f)(2)(i) - (ii) of this regulation.

5. Known operating NO<sub>x</sub> sources, that are *budget sources* by definition, that did not operate in the May 1, 1990 to September 30, 1990 period are identified in Appendix A with a final *allowance allocation* of zero (0) *allowances*.

e. *Budget sources* that receive a NO<sub>x</sub> emission *allowance allocation* and subsequently cease to operate shall continue to receive *allowances* for each *control period* unless the *allowances* are reduced under Section 4(g) of this regulation or a request to reallocate *allowances* has been approved in accordance with Section 11 of this regulation.

f. Any NO<sub>x</sub> source, that is a *budget source* by definition, and that is not included in Attachment A of this regulation and which operated at any time between May 1, 1990 and September 30, 1990, inclusive, shall comply with the requirements of this regulation prior to operating in any NO<sub>x</sub> *control period*.

1. The owner or operator shall submit to the Department an application including, as a minimum, the following information:

i. Identification of the source by plant name, address, and plant combustion unit number or equipment identification number.

ii. The name, address, telephone and facsimile number of the *authorized account representative* and, if desired, of an alternative authorized account representative.

iii. A list of the owners and operators of the source.

iv. A description of the source, including fuel type(s), maximum rated heat input capacity and electrical output rating where applicable.

v. Documentation of the May 1, 1990 - September 30, 1990 mass emissions (in tons), including:

A. Quantification of the mass emissions (in tons).

B. A description of the method used to determine the NO<sub>x</sub> emissions.

C. Under no circumstances shall the emissions exceed any applicable federal or state emission limit.

vi. Documentation of the May 1, 1990 - September 30, 1990 *heat input* (in MMBTU), including:

A. Quantification of the *heat input* (in MMBTU/hr).

B. A description of the method used to determine the *heat input*.

C. The *heat input* shall be consistent with the *baseline control period* NO<sub>x</sub> mass emissions determined in Section 4(f)(1)(v) of this regulation.

vii. Determination of the May 1, 1990 - September 30, 1990 NO<sub>x</sub> emission rate, consistent with the guidelines of the "Procedures for Development of the OTC NO<sub>x</sub> Baseline Emission Inventory", using the mass emissions identified in Section 4(f)(1)(v) of this regulation and the *heat input* identified in Section 4(f)(1)(vi) of this regulation.

viii. An emission monitoring plan in accordance with Section 13 of this regulation.

ix. A statement that the *submitted* information is representative of the true emissions during the May 1, 1990 - September 30, 1990 and that the source was operated in accordance with all applicable requirements during that time.

x. The following statement: "*I am authorized to make this submission on behalf of the owners and operators of the budget source for which this submission is made. I certify under penalty of law that I have personally examined, and am familiar with, the statements and information submitted in this document and all its attachments. Based on my inquiry of those individuals with primary responsibility for obtaining the information, I certify that the statements and information are to the best of my knowledge and belief true, accurate, and complete. I am aware that there are significant penalties for submitting false statements and information or omitting required statements and information, including the possibility of fine or imprisonment.*"

xi. Signature of the *authorized account representative* or alternate *authorized account representative* and date of signature.

2. For sources that notify the Department that they are subject to this regulation within six months of the effective date of this regulation, the Department shall *allocate* NO<sub>x</sub> emissions *allowances* to the source as follows:

i. For *fossil fuel fired boilers* and *indirect heat exchangers* with a maximum *heat input* capacity of 250 MMBTU/hr or more, *allowance allocations* shall be determined as follows:

A. For sources located in New Castle and Kent counties, *allowance allocations* shall be based on the more stringent of the following:

1. The less stringent of:

a. The actual May 1, 1990 to September 30, 1990 mass emissions reduced by 65%; or,

b. The mass emissions resulting from the multiplication of the actual May 1, 1990 to September 30, 1990 heat input by a NO<sub>x</sub> emissions rate of 0.20 lb/MMBTU.

2. If an approved RACT emissions limit results in emissions that are lower than the less stringent of the limits calculated in Sections 4(f)(2)(i)(A)(1)(i) and 4(f)(2)(i)(A)(1)(ii), then the RACT value shall be the emissions limit for the NO<sub>x</sub> Budget Program.

B. For sources located in Sussex county, *allowance allocations* shall be based on the more stringent of the

following:

1. The less stringent of:

a. The actual May 1, 1990 to September 30, 1990 mass emissions reduced by 55%; or,

b. The mass emissions resulting from the multiplication of the actual May 1, 1990 to September 30, 1990 heat input by a NO<sub>x</sub> emissions rate of 0.20 lb/MMBTU.

2. If an approved RACT emissions limit results in emissions that are lower than the less stringent of the limits calculated in Sections 4(f)(2)(i)(B)(1)(i) and 4(f)(2)(i)(B)(1)(ii), then the RACT value shall be the emissions limit for the NO<sub>x</sub> Budget Program.

ii. For *electric generating units* with a rated output of 15 MW or more that is not affected by Section 4(f)(2)(i) of this regulation, *allowance allocations* shall equal the more stringent of the May 1, 1990 to September 30, 1990 actual emissions or that derived from the application of an approved RACT limit to the actual May 1, 1990 to September 30 heat input value.

3. Within 60 days of receipt of the submittal, the Department shall review the submittal and take the following actions:

i. If the Department does not approve the submittal, the *authorized account representative* identified in the submittal shall be notified in writing of the finding and the reason(s) for the finding.

ii. If the Department approves the submittal, the Department shall:

A. Notify in writing the *authorized account representative* identified in the submittal.

B. The Department shall notify the *OTC* of the *allowance allocation* and authorize the *NATS Administrator* to open a *compliance account* for the subject source.

4. Any subject source that does not notify the Department within six months of the effective date of this regulation or that can not quantify its May 1, 1990 - September 30, 1990 emissions rate or heat input shall be treated as a new *budget source* in accordance with Section 9 of this regulation.

5. Compliance with Section 4(f) of this regulation does not imply compliance nor sanction noncompliance with this regulation for prior NO<sub>x</sub> *control period* operation.

g. If, after the effective date of this regulation, a *budget source* reduces *control period* emissions and said emission reductions are to be *used* by a source that is not a *budget source* (i.e. the emissions are moved off *budget*), that *budget source* shall request that the Department reduce its current year and future year allocation.

1. The request shall be *submitted* to the Department not later than the date that the request to *use* the emissions reduction at the *off budget source* is *submitted*, and shall include the following information, as a minimum:

i. The *compliance account* number of the *budget source* providing the emissions reduction.

ii. Identification of the NO<sub>x</sub> source that is to *use* the emissions reduction, including:

A. Name and mailing address of the source.

B. Name, mailing address, and telephone number of a knowledgeable representative from that source.

iii. Identification of the calendar date for which the reduction of *current year* and future year allocations is to be effective, which shall not be later than the effective date of the *use* of the emissions reduction.

iv. A statement documenting the physical changes to the *budget source* or changes in the methods of operating the *budget source* which resulted in the reduction of NO<sub>x</sub> emissions.

v. Quantification and justifying documentation of the NO<sub>x</sub> emissions reduction, including a description of the methodology used to verify the emissions reduction.

vi. The quantity of *current year* and future year allocations to be reduced, which is the portion of the *control period* emissions reduction that is to move off budget.

vii. Certification by the *authorized account representative* or alternate *authorized account representative* including the following statement in verbatim: "I am authorized to make this submission on behalf of the owners or operators of the NO<sub>x</sub> source and I hereby certify under penalty of law, that I have personally examined the foregoing and am familiar with the information contained in this document and all attachments, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including possible fines and imprisonment."

viii. Signature of the *authorized account representative* or alternate *authorized account representative* of the *budget source* providing the emissions reduction and the date of signature.

2. Within 30 days of receipt of the submittal, the Department shall review the submittal and take the following actions:

i. If the Department does not approve the request, the *authorized account representative* identified on the submittal shall be notified in writing of the finding and the reason(s) for the finding.

ii. If the Department approves the request, the Department shall notify in writing the *authorized account representative* identified on the request and the following provisions apply:

A. The Department shall authorize the *NATS Administrator* to deduct from the *compliance account* of the *budget source* providing the emissions reduction the

quantity of *current year* and future year *allowances* to be reduced.

B. The deducted *current year* and future year *allowances* shall be permanently retired from the NO<sub>x</sub> Budget Program.

#### Section 5 - Permits

a. Within 120 days of the effective date of this regulation, the *owner or operator* of an *existing budget source* shall request amendment of any applicable construction or operating permit issued, or application for any permit submitted, in accordance with the State of Delaware "Regulations Governing the Control of Air Pollution". The amendment request shall include the following:

1. A condition(s) that requires the establishment of a *compliance account* in accordance with Section 6 of this regulation.

2. A condition(s) that requires NO<sub>x</sub> mass emission monitoring during NO<sub>x</sub> *control periods* in accordance with Section 13 of this regulation.

3. A condition(s) that requires NO<sub>x</sub> mass emission reporting and other reporting requirements in accordance with Section 15 of this regulation.

4. A condition(s) that requires end-of-season *compliance account* reconciliation in accordance with Section 16 of this regulation.

5. A condition(s) that requires compliance certification in accordance with Section 17 of this regulation.

6. A condition(s) that prohibits the source from emitting NO<sub>x</sub> during each NO<sub>x</sub> *allowance control period* in excess of the amount of NO<sub>x</sub> *allowances* held in the source's *compliance account* for the NO<sub>x</sub> *allowance control period* as of December 31 of the subject year.

7. A condition(s) that authorizes the transfer of *allowances* for purposes of compliance with this regulation, containing reference to the source's *NATS compliance account* and the *authorized account representative* and alternate *authorized account representative*, if any.

b. Permit revisions/amendments shall not be required for changes in emissions that are authorized by *allowances* held in the *compliance account* provided that any transfer is in compliance with this regulation by December 31 of each year, is in compliance with the authorization for transfer contained in the permit, and does not affect any other applicable state or federal requirement.

c. Permit revisions/amendments shall not be required for changes in *allowances* held by the source which are acquired or transferred in compliance with this regulation and in compliance with the authorization for transfer in the permit.

d. Any equipment modification or change in operating practices taken to meet the requirements of this program shall be performed in accordance with all applicable state and federal requirements.

#### Section 6 - Establishment of Compliance Accounts

a. The *owner or operator* of each *existing budget source*, and each *new budget source*, shall designate one *authorized account representative* and, if desired, one alternate *authorized account representative* for that *budget source*. The *authorized account representative* or alternate *authorized account representative* shall submit to the Department an "Account Certificate of Representation".

1. For *existing budget sources*, initial designations shall be *submitted* no more than 30 days following the effective date of this regulation.

2. For *new budget sources*, initial designations shall be *submitted* no less than 90 days prior to the first hour of operation in a  $\text{NO}_x$  *control period*.

3. An *authorized account representative* or alternative account representative may be replaced at any time with the submittal of a new "Account Certificate of Representation". Notwithstanding any such change, all submissions, actions, and inactions by the previous *authorized account representative* or alternate *authorized account representative* prior to the date and time the *NATS Administrator* receives the superseding "Account Certificate of Representation" shall be binding on the new *authorized account representative*, on the new alternate *authorized account representative*, and on the *owners and operators* of the *budget source*.

4. Within 30 days following any change in *owner or operator*, *authorized account representative*, or any alternate *authorized account representative*, the *authorized account representative* or the alternate *authorized account representative* shall submit a revision to the "Account Certificate of Representation" amending the outdated information.

b. The "Account Certificate of Representation" shall be signed and dated by the *authorized account representative* or the alternate *authorized account representative* for the  $\text{NO}_x$  *budget source* and shall contain, as a minimum, the following information:

1. Identification of the  $\text{NO}_x$  *budget source* by plant name, address, and plant combustion unit number or equipment identification number for which the certification of representation is *submitted*.

2. The name, address, telephone and facsimile number of the *authorized account representative* and alternate *authorized account representative*, if applicable.

3. A list of the owners and operators of the  $\text{NO}_x$  *budget*

*source*.

4. A description of the source, including fuel type(s), *maximum heat input capacity*, and electrical output rating where applicable.

5. The following statement: "*I am authorized to make this submission on behalf of the owners and operators of the budget source for which this submission is made. I certify under penalty of law that I have personally examined, and am familiar with, the statements and information submitted in this document and all its attachments. Based on my inquiry of those individuals with primary responsibility for obtaining the information, I certify that the statements and information are to the best of my knowledge and belief true, accurate, and complete. I am aware that there are significant penalties for submitting false statements and information or omitting required statements and information, including the possibility of fine or imprisonment.*"

6. Signature of the *authorized account representative* or alternate *authorized account representative* and date of signature.

c. The Department shall review all *submitted* "Account Certificate of Representation" forms. Within 30 days of receipt of the "Account Certificate of Representation", the Department shall take one of the following actions:

1. If not approved by the Department, the Department shall notify in writing the *authorized account representative* identified in the "Account Certificate of Representation" of the reason(s) for disapproval.

2. If approved by the Department, the Department shall forward the "Account Certificate of Representation" to the *NATS Administrator* and authorize the *NATS Administrator* to open a *compliance account* for the *budget source*.

d. *Authorized account representative* and alternate *authorized account representative* designations or changes become effective upon the logged date of receipt of a completed "Account Certificate of Representation" by the *NATS Administrator*. The *NATS Administrator* shall acknowledge receipt and the effective date of the designation or changes by written correspondence to the *authorized account representative*.

e. The alternate *authorized account representative* shall have the same authority as the *authorized account representative*. Correspondence from the *NATS Administrator* shall be directed to the *authorized account representative*.

f. Only the *authorized account representative* or the alternate *authorized account representative* may request transfers of  $\text{NO}_x$  *allowances* in a *NATS account*. The *authorized account representative* shall be responsible

for all transactions and reports *submitted* to the NATS.

#### Section 7 - Establishment of General Accounts

a. An *authorized account representative* and alternate *authorized account representative*, if any, shall be designated for each *general account* by the *general account* owners. Said representative shall have obligations similar to that of an *authorized account representative* of a *budget source*.

b. Any person or group of persons may open a *general account* in the NATS for the purpose of holding and transferring *allowances*. That person or group of persons shall submit to the Department an application to open a *general account*. The *general account* application shall include the following minimum information:

1. Organization or company name to be used for the general account name listed in the NATS, and type of organization (if applicable).

2. The name, address, telephone, and facsimile number of the *account's authorized account representative* and alternate authorized account representative, if applicable.

3. A list of all persons subject to a binding agreement for the *authorized account representative* or alternate *authorized account representative* to represent their ownership interest with respect to the *allowances* held in the *general account*.

4. The following statement: "I certify that I was selected under the terms of an agreement that is binding on all persons who have an ownership interest with respect to allowances held in the NO<sub>x</sub> allowance tracking system (NATS) account. I certify that I have all necessary authority to carry out my duties and responsibilities on behalf of the persons with ownership interest and that they shall be fully bound by my actions, inactions, or submissions under this regulation. I shall abide by my fiduciary responsibilities assigned pursuant to the binding agreement. I am authorized to make this submission on behalf of the persons with an ownership interest for whom this submission is made. I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all its attachments. Based on my inquiry of those individuals with primary responsibility for obtaining the information, I certify that the information is to the best of my knowledge and belief true, accurate, and complete. I am aware that there are significant penalties for submitting false material information, or omitting material information, including the possibility of fine or imprisonment for violations."

5. Signature of the *general account's authorized account representative* or alternate *authorized account representative* and date of signature.

c. The Department shall review all *submitted general account* and revised *general account* applications. Within 30 days of receipt of the application, the Department shall take one of the following actions:

1. If not approved by the Department, the Department shall notify in writing the *authorized account representative* identified in the *general account* application of the reason(s) for disapproval.

2. If approved by the Department, the Department shall forward the *general account* application to the NATS Administrator and authorize the NATS Administrator to open/revise a *general account* in the organization or company name identified in the *general account* application.

d. No *allowance transfer* shall be recorded for a *general account* until the NATS Administrator has established the new *account*.

e. The *authorized account representative* or alternate *authorized account representative* of an established *general account* may transfer *allowances* at any time in accordance with Section 11 of this regulation.

f. An *authorized account representative* or alternative account representative of an existing *general account* may be replaced by submitting to the Department a revised *general account* application in accordance with Section 7(b) of this regulation.

g. The *authorized account representative* or alternate *authorized account representative* of a *general account* may apply to the Department to close the *general account* as follows:

1. By submitting a copy of an *allowance transfer* request to the NATS Administrator authorizing the transfer of all *allowances* held in the *account* to one or more other *accounts* in the NATS and/or retiring *allowances* held in the *account*.

2. By submitting to the Department, in writing, a request to delete the *general account* from the NATS. The request shall be certified by the *authorized account representative* or alternate *authorized account representative*.

3. Upon approval, the Department shall authorize the NATS Administrator to close the *general account* and confirm closure in writing to the *general account's authorized account representative*.

#### Section 8 - Opt In Provisions

Except as provided for in Section 4(g) of this regulation, the owner or operator of any stationary source in the state of Delaware that is not subject to the NO<sub>x</sub> Budget Program

by definition, may choose to *opt into* the NO<sub>x</sub> Budget Program as follows:

a. The *owner or operator* of a stationary source who chooses to *opt into* the NO<sub>x</sub> Budget Program shall submit to the Department an *opt-in* application. The *opt-in* application shall include, as a minimum, the following information:

1. Identification of the *opt-in* source by plant name, address, and plant combustion unit number or equipment identification number.

2. The name, address, telephone and facsimile number of the *authorized account representative* and, if desired, of an alternative authorized account representative.

3. A list of the owners and operators of the *opt-in* source.

4. A description of the *opt-in* source, including fuel type(s), maximum rated heat input capacity and electrical output rating where applicable.

5. Documentation of the *opt-in-baseline control period* mass emissions (in tons).

i. The *opt-in-baseline control period* emissions shall be the lower of the average of the mass emissions from the immediately preceding two consecutive NO<sub>x</sub> *control periods* and the allowable emissions.

A. If the mass emissions from the preceding two *control periods* are not representative of normal operations, the Department may approve use of an alternative two consecutive NO<sub>x</sub> *control periods* within the five years preceding the *date of the opt-in* application.

B. If the *opt-in* source does not have two consecutive years of operation, the *owner or operator* shall identify the lower of the permitted allowable NO<sub>x</sub> emissions and any applicable Federal or State emission limitation as the *opt-in-baseline* emissions.

ii. The documentation shall include:

A. Identification of the time period represented by the emissions data.

B. Quantification of the *opt-in-baseline control period* mass emissions (in tons).

C. A description of the method used to determine the *opt-in-baseline control period* NO<sub>x</sub> emissions.

6. Documentation of the *opt-in-baseline* NO<sub>x</sub> *control period heat input* (in MMBTU).

i. The *opt-in-baseline control period heat input* shall be consistent with the *opt-in-baseline control period* NO<sub>x</sub> mass emissions determined in Section 8(a)(5) of this regulation.

ii. The documentation shall include:

A. Quantification of the *opt-in-baseline control period heat input* (in MMBTU/hr).

B. A description of the method used to determine the *opt-in-baseline control period heat input*.

7. Determination of the *opt-in-baseline* NO<sub>x</sub> emission rate, consistent with the guidelines of the "Procedures for

Development of the OTC NO<sub>x</sub> Baseline Emission Inventory", using the *opt-in-baseline control period* mass emissions identified in Section 8(a)(5) of this regulation and the *opt-in-baseline* NO<sub>x</sub> *control period heat input* identified in Section 8(a)(6) of this regulation.

8. An emission monitoring plan in accordance with Section 13 of this regulation.

9. A statement that the source was operated in accordance with all applicable requirements during the *control periods*.

10. The following statement: "*I am authorized to make this submission on behalf of the owners and operators of the budget source for which this submission is made. I certify under penalty of law that I have personally examined, and am familiar with, the statements and information submitted in this document and all its attachments. Based on my inquiry of those individuals with primary responsibility for obtaining the information, I certify that the statements and information are to the best of my knowledge and belief true, accurate, and complete. I am aware that there are significant penalties for submitting false statements and information or omitting required statements and information, including the possibility of fine or imprisonment.*"

11. Signature of the *authorized account representative* or alternate *authorized account representative* and date of signature.

b. Within 60 days of receipt of any *opt-in* application, the Department shall take the following actions:

1. The Department shall review the application for completeness and accuracy and:

i. Verify that the monitoring methods used to determine the *opt-in-baseline control period* NO<sub>x</sub> mass emissions and the *opt-in-baseline* NO<sub>x</sub> *control period heat input* are consistent with those described in Section 13 of this regulation.

ii. Verify that the *opt-in-baseline* emissions were calculated in accordance with the guidelines in the "Procedures for Development of the OTC NO<sub>x</sub> Baseline Emission Inventory".

2. If the Department disapproves the *opt-in* application, the *authorized account representative* identified in the *opt-in* application shall be notified in writing of the determination and the reason(s) for the application not being approved.

3. If the Department determines that the *opt-in* application is acceptable, the Department shall request the OTC Stationary/Area Source Committee to review the application. Within 30 days of receiving the OTC Stationary/Area Source Committee comments, the Department shall consider the comments and take the following action:

i. If it is determined that the *opt-in* application does

not properly justify opting the source into the NO<sub>x</sub> Budget Program, the Department shall notify the *authorized account representative* in writing of the determination and the reason(s) for the application not being accepted.

ii. If it is determined that the *opt-in* application justifies opting the source into the NO<sub>x</sub> Budget Program, the Department shall notify the *authorized account representative* in writing of that determination.

c. The Department shall assign an *allowance allocation* to any *owner or operator* that has been approved by the Department to *opt into* the NO<sub>x</sub> Budget Program.

1. The *allowance allocation* for an *opt-in* source, that is not considered a *budget source* by definition, shall be equal to the more stringent of the *opt-in-baseline control period* emissions or the allowable NO<sub>x</sub> emissions from the source.

2. The *allowance allocation* for an *opt-in* source that has a maximum *heat input* rating of 250 MMBTU/hr shall be determined as follows:

i. For sources located in New Castle and Kent counties, *allowance allocations* shall be based on the more stringent of the following:

A. The less stringent of:

1. The *opt-in-baseline* actual mass emissions reduced by 65%; or,

2. The mass emissions resulting from the multiplication of the actual *opt-in-baseline* heat input by a NO<sub>x</sub> emissions rate of 0.20 lb/MMBTU.

B. If any permitted NO<sub>x</sub> emissions limit results in emissions that are lower than the less stringent of the limits calculated in Sections 8(c)(2)(i)(A)(1) and 8(c)(2)(i)(A)(2), then the permitted emissions limit shall be used to determine the emissions limitation for the NO<sub>x</sub> Budget Program.

ii. For sources located in Sussex county, *allowance allocations* shall be based on the more stringent of the following:

A. The less stringent of:

1. The *opt-in-baseline* actual mass emissions reduced by 55%; or,

2. The mass emissions resulting from the multiplication of the actual *opt-in-baseline* heat input by a NO<sub>x</sub> emissions rate of 0.20 lb/MMBTU.

B. If any permitted NO<sub>x</sub> emissions limit results in emissions that are lower than the less stringent of the limits calculated in Sections 8(c)(2)(ii)(A)(1) and 8(c)(2)(ii)(A)(2), then the permitted emissions limit shall be used to determine the emissions limitation for the NO<sub>x</sub> Budget Program.

3. If the *owner or operator* of an *opt-in* source is required to obtain NO<sub>x</sub> emissions offsets in accordance with Regulation 25 of the State of Delaware "Regulations Governing the Control of Air Pollution", the *allowance*

*allocation* calculated under Section 8(c)(1) or (2) of this regulation shall be reduced by the portion of the *control period* emission reduction that is associated with any *budget source*.

4. The *allowance allocation* associated with the *opt-in* source shall be added to Delaware's NO<sub>x</sub> *budget* prior to *allocation* of *allowances* to the *opt-in* source. This regulation shall be revised to reflect changes in the number of allowances in the NO<sub>x</sub> Budget Program.

5. Under no circumstances shall the *allocation* of *allowances* to a source which chooses to *opt into* the program require adjustments to the *allocation* of *allowances* to *budget sources* in the NO<sub>x</sub> Budget Program.

d. Upon the approval of the *opt-in* application and assignment of an *allowance allocation*, the Department shall authorize the *NATS Administrator* to open a *compliance account* for the *opt-in* source in accordance with Section 10 of this regulation.

e. **[Within 30 days of approval to opt into the NO<sub>x</sub> Budget Program]**, any *owner or operator* approved to *opt into* the NO<sub>x</sub> Budget Program shall apply for a permit, or the modification of applicable permits, in accordance with Section 5 of this regulation.

f. Upon approval of the *opt-in* application and establishment of the *compliance account*, the *owner or operator* of the source shall be subject to all applicable requirements of this regulation including the requirements for *allowance transfer* or deduction, emissions monitoring, record keeping, reporting, and penalties.

**[1. A certification test notice and test protocol shall be submitted to the Department no later than 90 days prior to anticipated performance of the certification testing.**

**2. Certification testing shall be completed prior to operation in the next NO<sub>x</sub> control period following approval of the source to opt into the NO<sub>x</sub> Budget Program.**

**3. A certification test report meeting the requirements of the OTC document "NO<sub>x</sub> Budget Program Monitoring Certification and Reporting Instructions" shall be submitted to the Department no later than 45 days following the performance of the certification testing.]**

g. Any *owner or operator* approved to *opt into* the NO<sub>x</sub> Budget Program that did not have two consecutive years of operation upon initial application and determined *opt-in-baseline* emissions in accordance with Section 8(a)(5)(i)(B) of this regulation shall submit to the Department a revised *opt-in* application.

1. The revised *opt-in* application shall be *submitted* no more than 60 days following first completion of operation in two consecutive NO<sub>x</sub> *control periods*.

2. The revised *opt-in* application shall provide actual

operating information, including NO<sub>x</sub> mass emissions and *heat input*, for each of the two NO<sub>x</sub> *control periods*.

3. **[Within 60 days of receipt on any revised opt-in application]**, the Department shall review the revised *opt-in* application.

i. If the Department does not approve the revised *opt-in* application:

A. The Department shall notify the *opt-in source's authorized account representative* of the determination in writing and indicate the reason(s) for the determination.

B. The *opt-in source's authorized account representative* shall resolve the Department's comments and an updated revised *opt-in* application shall be submitted to the Department no more than 60 days from the Department's request.

C. Upon approval of any updated revised *opt-in* application, the Department shall process the application in accordance with Section 8(g)(3)(ii) of this regulation.

ii. If the Department is in concurrence with the revised *opt-in* application, the following actions shall be taken:

A. The Department shall request the OTC Stationary/Area Source Committee to comment on the revised *opt-in* application. ~~and shall consider any comments offered by the OTC Stationary/Area Source Committee.~~ **[Within 30 days of receiving the OTC Stationary/Area Source Committee comments, the Department shall consider the comments and take action in accordance with Section 8(g)(ii)(B) or Section 8(g)(3)(ii)(C) of this regulation.]**

B. If it is determined that the revised *opt-in* application shall not be approved:

1. The Department shall notify the *opt-in source's authorized account representative* of the determination in writing and indicate the reason(s) for the determination.

2. The *opt-in source's authorized account representative* or alternate *authorized account representative* shall resolve the Department's comments and an updated revised *opt-in* application shall be submitted to the Department no more than 60 days from the Department's request.

3. Upon approval of any updated revised *opt-in* application, the Department shall process the application in accordance with Section 8(g)(3)(ii)(C) of this regulation.

C. If it is determined that the revised *opt-in* shall be approved, the following actions shall be taken:

1. If the initial *allocation* was lower than that indicated in the revised application:

a. The Department shall revise the NO<sub>x</sub> *budget* to reflect the *allocation* determination identified in the revised *opt-in* application.

b. The Department shall authorize the *NATS Administrator* to revise the *allocation* to the subject source's *compliance account*.

c. The Department shall not authorize any

additional allowances to cover any shortfall in the two *opt-in-baseline* NO<sub>x</sub> *control periods*. Any violation of a permit condition or of this regulation may result in an enforcement action.

2. If the initial *allocation* was higher than that indicated in the revised application:

a. The Department shall revise the NO<sub>x</sub> *budget* to reflect the *allocation* determination identified in the revised *opt-in* application.

b. The Department shall authorize the *NATS Administrator* to revise the *allocation* to the subject source's *compliance account*.

c. The Department shall authorize the *NATS Administrator* to deduct the excess *allowances allocated* to the *opt-in* source, calculated as the difference between the actual *allocated allowances* and the *allowances allocated* on the basis of the revised *opt-in* application for the years of operation in NO<sub>x</sub> *control periods*.

h. Any *owner or operator* who chooses to *opt into* the NO<sub>x</sub> Budget Program can not opt-out of the program unless NO<sub>x</sub> emitting operations at the *opt-in* source have ceased, and the *allowance* adjustment provisions of Section 8(i) of this regulation apply.

i. Any *owner or operator* who chooses to *opt into* the NO<sub>x</sub> Budget Program and who subsequently chooses to cease or curtail operations during any NO<sub>x</sub> *allowance control period* after opting-in shall be subject to an *allowance* adjustment equivalent to the NO<sub>x</sub> emissions decrease that results from the shut down or curtailment.

1. The *NETS Administrator* shall compare actual *heat input* data following each NO<sub>x</sub> *control period* with the *opt-in-baseline heat input* for each *opt-in* source.

2. The *NATS Administrator* shall calculate and deduct *allowances* equivalent to any decrease in the *opt-in* source's *heat input* below its *opt-in-baseline heat input*. This deduction shall be calculated using the average of the two most recent years *heat input* compared to the *heat input* used in the *opt-in-baseline* calculation.

3. The *NATS Administrator* shall notify the NO<sub>x</sub> *budget source's authorized account representative* and the Department of any such deductions.

4. This adjustment affects only the *current year allocation* and shall not effect the NO<sub>x</sub> *budget source's allocations* for future years.

5. No deduction shall result from reducing NO<sub>x</sub> emission rates below the rate used in the *opt-in allowance* calculation.

6. A source that is to be repowered or replaced can be opted into the NO<sub>x</sub> Budget Program without the shutdown/curtailment deductions. The *heat input* for the repowered or replaced source can be substituted for the present



year's activity for the *opt-in* NO<sub>x</sub> allowance adjustment calculation.

j. For replacement sources, all sources under common control in the State of Delaware to which production may be shifted shall be opted-in together.

k. When an *opt-in* source undergoes reconstruction or modification such that the source becomes a *budget source* by definition:

1. The *opt-in* source's *authorized account representative* or alternate *authorized account representative* shall notify the Department within 30 days of completion of the modification or reconstruction.

2. The Department shall authorize the *NATS Administrator* to deduct *allowances* equal to those allocated to the *opt-in* source in the NO<sub>x</sub> *control period* for the calendar year in which the *opt-in* source becomes a *budget source* by definition.

3. The Department shall authorize the *NATS Administrator* to deduct all *allowances* that were allocated pursuant to Section 8(c) of this regulation to the *opt-in* source, for all future years following the calendar year in which the *opt-in* source becomes a *budget source* by definition. This regulation shall be revised to reflect changes in the number of allowances in the NO<sub>x</sub> Budget Program.

4. The reconstructed or modified source shall be treated as a *new budget source* in accordance with Section 9 of this Regulation.

#### Section 9 - New Budget Source Provisions

a. NO<sub>x</sub> *allowances* shall not be created for new NO<sub>x</sub> sources that are *budget sources* by definition. The *owner or operator* is responsible to acquire any required NO<sub>x</sub> *allowances* from the *NATS*.

b. The *owner or operator* of a *new budget source* shall establish a compliance account and be in compliance with all applicable requirements of this regulation prior to the commencement of operation in any NO<sub>x</sub> *control period*. *New budget sources* shall:

1. Request a [permit/]permit amendment[~~/revision~~] in accordance with Section 5 of this regulation [no less than 90 days prior to operation in any NO<sub>x</sub> control period].

2. Submit a monitoring plan to the Department, in accordance with Section 13 of this regulation, no later than 90 days prior to the anticipated performance of monitoring system certification.

3. Install and operate an approved monitoring system(s) to measure, record, and report hourly and cumulative NO<sub>x</sub> mass emissions.

4. [Submit to the Department a certification test notice

and protol no later than 90 days prior to the anticipated performance of the certification testing.]

[4] [5]. Complete the monitoring system certification prior to operation in any NO<sub>x</sub> *control period*.

[6. Submit to the Department a certification test report meeting the requirements of the OTC document "NO<sub>x</sub> Budget Program Monitoring Certification and Reporting Instructions" no later than 45 days following the performance of the certification testing.]

#### Section 10 - NO<sub>x</sub> Allowance Tracking System (NATS)

a. The NO<sub>x</sub> *allowance tracking system* is an electronic recordkeeping and reporting system which is the official database for all NO<sub>x</sub> *allowance* deduction and transfer within this program. The *NATS* shall track:

1. The *allowances* allocated to each *budget source*.

2. The *allowances* held in each *account*.

3. The *allowances* deducted from each *budget source* during each *control period*, as requested by a transfer request submitted by the *budget source's authorized account representative* or alternate *authorized account representative* in accordance with Section 16(b) of this regulation.

4. *Compliance accounts* established for each *budget source* to determine the compliance for the source, including the following information:

i. The *account number* of the *compliance account*.

ii. The name(s), address(es), and telephone number(s) of the *account owner* (s).

iii. The name, address, and telephone number of the *authorized account representative* and alternate *authorized account representative*, as applicable.

iv. The name and street address of the associated *budget source*, and the state in which the *budget source* is located.

v. The number of *allowances* held in the *account*.

5. *General accounts* opened by individuals or entities, upon request, which are not used to determine compliance, including the following information:

i. The *account number* of the *general account*.

ii. The name(s), address(es) and telephone number(s) of the *account owner*(s).

iii. The name, address, and telephone number of the *authorized account representative* and alternate *authorized account representative*, as applicable.

iv. The number of *allowances* held in the *account*.

6. *Allowance transfers*.

7. Deductions of *allowances* by the *NATS Administrator* for compliance purposes, in accordance with Section 16(d) of this regulation.

b. The *NATS Administrator* shall establish *compliance* and *general accounts* when authorized to do so by the

Department pursuant to Sections 6, 7, and 8 of this regulation.

c. Each *compliance account* and *general account* shall have a unique identification number and each *allowance* shall be assigned a unique serial number. Each *allowance* serial number shall indicate the year of *allocation*.

#### Section 11 - Allowance Transfer

a. *Allowances* may be transferred at any time during any year, not just the *current year*.

b. The transfer of *allowances* between *budget sources* in different states for purposes of compliance is contingent upon the adoption and implementation by those states of ~~{comparable and consistent}~~ NO<sub>x</sub> *budget* program regulations, and their participation in the *NATS*. ~~{A program is considered comparable and consistent if it is approved by the EPA for incorporation in the subject states' state implementation plan (SIP).}~~

c. Transfer requests shall be *submitted* to the *NATS Administrator* on a form or electronic media, as directed by the *NATS Administrator*, and shall include the following information:

1. The *account number* of the originating *account* and the acquiring *account*.

2. The name(s) and address(es) of the owner(s) of the originating *account* and the acquiring *account*.

3. The serial number of each *allowance* being transferred.

4. The following statement from the *authorized account representative* or alternate *authorized account representative* of the originating *account*, in verbatim: "*I am authorized to make this submission on behalf of the owners or operators of the budget source and I hereby certify under penalty of law, that I have personally examined the foregoing and am familiar with the information contained in this document and all attachments, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including possible fines and imprisonment.*"

5. Signature of the *authorized account representative* or alternate *authorized account representative* of the originating *account* and the date of signature.

d. The *Authorized account representative* or alternate *authorized account representative* for the originating *account* shall further provide a copy of the transfer request to each *owner or operator* of the *budget source*.

e. Transfer requests shall be processed by the *NATS Administrator* in order of receipt.

f. A transfer request shall be determined to be valid by the *NATS Administrator* if:

1. Each *allowance* listed in the transfer request is held by the originating *account* at the time the transfer is to be *recorded*.

2. The acquiring party has an *account* in the *NATS*.

3. The transfer request has been certified by the person named as *authorized account representative* or alternate *authorized account representative* for the originating *account*.

g. Transfer requests judged valid by the *NATS Administrator* shall be completed and *recorded* in the *NATS* by deducting the specified *allowances* from the originating *account* and adding them to the acquiring *account*.

h. Transfer requests judged to be invalid by the *NATS Administrator* shall be returned to the *authorized account representative* indicated on the transfer request along with documentation why the transfer request was judged to be invalid.

i. The *NATS Administrator* shall provide notification of an *allowance* transfer to the *authorized account representatives* of the originating *account*, the *authorized account representative* of the acquiring *account*, and the Department, including the following information:

1. The effective date of transfer.

2. Identification of the originating *account* and acquiring *account* by name as well as by *account number*.

3. The number of *allowances* transferred and their serial numbers.

j. The *authorized account representative* or alternate *authorized account representative* of a *compliance account* or a *general account* may request that some or all allocated *allowances* be transferred to another *compliance account* or to a *general account* for the current year, any future year, block of years, or for the duration of the program. The *authorized account representative* or alternate *authorized account representative* of the originating *account* shall submit a request for transfer that states this intent to the *NATS Administrator*, and the transfer request shall conform to the requirements of this Section. In addition, the request for transfer shall be *submitted* to the Department with a letter requesting that the *budget* be revised to reflect the change in *allowance* allocations.

k. Upon request by the Department any *authorized account representative* or alternate *authorized account*

*representative* shall make available to the Department information regarding transaction cost and *allowance* price.

#### Section 12 - Allowance Banking

a. The *banking* of *allowances* is permitted to allow retention of unused *allowances* from one year to a future year in either a *compliance account* or a *general account*.

b. Except for *allowances* created under Section 12(d) of this regulation, *allowances* not used under Section 16 of this regulation shall be held in a *compliance account* or *general account* and designated as “*banked*” *allowances* by the *NATS Administrator*.

c. The use of *banked allowances* shall be restricted as follows:

1. By March 1 of each year the *NATS Administrator* shall divide the total number of *banked allowances* by the regional  $\text{NO}_x$  *budget*.

i. If the total number of *banked allowances* in the *NATS* is less than or equal to 10% of the regional  $\text{NO}_x$  *budget* for the *current year control period*, all *banked allowances* can be deducted in the *current year* on a 1-for-1 basis.

ii. If the total number of *banked allowances* in the *NATS* exceeds 10% of the regional  $\text{NO}_x$  *budget* for the *current year control period*, *budget sources* shall be notified by the *NATS Administrator* of the *allowance* ratio which must be applied to *banked allowance* in each *compliance account* and *general account* to determine the number of *allowances* available for deduction in the *current year control period* on a 1-for-1 basis and the number of *allowances* available for deduction on a 2-for-1 basis.

2. Where a finding has been made by the *NATS Administrator* that *banked allowances* exceed 10% of the *current year regional NO<sub>x</sub> budget*, each *NATS compliance account* and *general account* of *banked allowances* shall be subject to the following *banked allowance* deduction protocol:

i. A ratio shall be established according to the following formula:

$$0.10 \times \text{the regional NO}_x \text{ Budget}$$

the total number of *banked allowances* in the region

ii. The ratio calculated in Section 12(c)(2)(i) of this regulation shall be applied to the *banked allowances* in each *account*. The resulting number is the number of *banked allowances* in the *account* which can be used in the *current year control period* on a 1-for-1 basis. *Banked*

*allowances* in excess of this number, if used, shall be used on a 2-for-1 basis.

d. The *owner or operator* of an *existing budget source* may apply to the Department to receive *early reduction allowances* for actual  $\text{NO}_x$  reductions occurring in 1997 and/or 1998.

1. No later than October 1, 1998, the *authorized account representative* or alternate *authorized account representative* from any *budget source* seeking *early reduction allowances* shall submit to the Department an application that includes, at a minimum, the following information:

i. Identification of the *budget source*.

ii. Identification of the calendar time period for which *early reduction allowances* are being sought (i.e. May 1 - September 30, 1997, May 1 - September 30, 1998, or both).

iii. Identification of the *baseline NO<sub>x</sub> control period* emission limit (tons), which shall be the more stringent of the following:

A. The level of control required by the *OTC MOU*;

B. The lower of the permitted allowable emissions for the source and the allowable emissions identified in the state implementation plan (SIP);

C. The actual emissions for the 1990 *control period*,

or;

D. The actual emissions for the average of two representative year *control periods* within the first five years of operation if the *budget source* did not commence operation until after 1990.

iv. The *baseline NO<sub>x</sub> control period heat input* (MMBTU) corresponding to the *baseline NO<sub>x</sub> control period* emission limit (tons) determined in Section 12(d)(1)(iii) of this regulation.

v. The actual *NO<sub>x</sub> control period NO<sub>x</sub> emissions* (tons) occurring in 1997 and/or 1998, as applicable.

vi. The actual *NO<sub>x</sub> control period heat input* (MMBTU) occurring in 1997 and/or 1998, as applicable.

vii. The calculated *NO<sub>x</sub> control period emissions rate* (lb/MMBTU), as determined using the *control period NO<sub>x</sub> emissions* identified in Section 12(d)(1)(v) of this regulation multiplied by 2000 to obtain actual emissions in pounds (lbs), divided by the *control period heat input* (MMBTU) identified in Section 12(d)(1)(vi) of this regulation.

viii. The amount of *NO<sub>x</sub> emissions early reduction allowances* shall be calculated by subtracting the actual *control period NO<sub>x</sub> emissions* (in tons), identified in Section 12(d)(1)(v) of this regulation, from the *baseline NO<sub>x</sub> emissions limit* (in tons) identified in Section 12(d)(1)(iii) of this regulation.

ix. If the actual *control period heat input*, as identified in Section 12(d)(1)(vi) of this regulation, is less than the *baseline NO<sub>x</sub> control period heat input*, as

identified in Section 12(d)(1)(iv) of this regulation, the NO<sub>x</sub> emissions *early reduction allowances* determined in Section 12(d)(1)(viii) of this regulation shall be corrected as follows:

A. The actual *control period heat input* (MMBTU), as identified in Section 12(d)(1)(vi) of this regulation, shall be subtracted from the *baseline NO<sub>x</sub> control period heat input* (MMBTU), as identified in Section 12(d)(1)(iv) of this regulation, to obtain the *heat input* correction.

B. The *heat input* correction (MMBTU) is multiplied by the calculated NO<sub>x</sub> *control period* emissions rate (lb/MMBTU) determined in Section 12(d)(1)(vii) of this regulation. The resulting value is divided by 2000 to obtain tons of NO<sub>x</sub>.

C. The corrected NO<sub>x</sub> emissions *early reduction allowance* is the result of subtracting the results of Section 12(d)(1)(ix)(B) of this regulation from the NO<sub>x</sub> emissions *early reduction allowances* calculated in Section 12(d)(1)(viii) of this regulation.

x. A statement indicating the *budget source* was operating in accordance with all applicable requirements during the applicable NO<sub>x</sub> *control period* including:

A. Whether the monitoring plan that was *submitted* in accordance with Section 13 of this regulation was maintained to reflect the actual operation and monitoring of the unit and contains all information necessary to attribute monitored emissions to the *budget source*. If *early reduction allowances* are being sought for a *control period* prior to the implementation of monitoring in accordance with Section 13(a) of this regulation, a monitoring plan prepared in accordance with Section 13(a) of this regulation shall be *submitted* describing the monitoring method in use during the *control period* for which *early reduction allowances* are being sought.

B. Whether all the emissions from the *budget source* were monitored, or accounted for, throughout the NO<sub>x</sub> *control period* and reported.

C. Whether the information that formed the basis for certification of the emissions monitoring plan has changed affecting the certification of the monitoring.

D. If a change in the monitoring method is reported under Section 12(d)(1)(x)(C) of this regulation, specify the nature of the change, the reason for the change, when the change occurred, and what method was used to determine emissions during the period mandated by the change.

xi. A statement documenting the specific physical changes to the *budget source* or changes in the methods of operating the *budget source* which resulted in the reduction of emissions.

xii. The following statement: "*I certify under penalty of law that I have personally examined, and am familiar with, the statements and information submitted in this document and all its attachments. Based on my inquiry of*

*those individuals with primary responsibility for obtaining the information, I certify that the statements and information are to the best of my knowledge and belief true, accurate, and complete. I am aware that there are significant penalties for submitting false statements and information or omitting required statements and information, including the possibility of fine or imprisonment.*"

xiii. Signature of the *authorized account representative* or alternate *authorized account representative* and date of signature.

2. *Early reduction allowance* requests shall be reviewed by the Department.

i. If the Department determines that the emissions reductions were not enforceable, *real*, *quantifiable*, or *surplus*, the Department shall notify the *budget source's authorized account representative* in writing, indicating the reason(s) the request for *early reduction allowances* is being denied.

ii. If the Department determines that the emissions reductions are enforceable, *real*, *quantifiable*, and *surplus*:

A. The Department shall request the *OTC Stationary/Area Source Committee* to comment on the generation of potential *early reduction allowances*.

B. The Department shall consider the *OTC Stationary/Area Source Committee* comments and either:

1. Notify the *budget source's authorized account representative* in writing denying the request for *early reduction allowances* and indicate the reason(s) for the determination; or

2. Notify the *budget source's authorized account representative* in writing that the requested emissions reduction *allowances* shall be added to the *budget source's account*; and

3. Authorize the *NATS Administrator* to add the *allowances* to the *budget source's account* as 1999 *allowances*.

3. Reductions associated with *repowering* of a *budget source* are eligible for *early reduction credit* provided that the permit for construction of the replacement source was issued after the date of the *OTC MOU* (September 27, 1994), and the *budget source* being replaced ceases operation in 1997 or 1998.

4. On or before May 1, 1999, the Department shall publish a report which documents the applicable sources and the number of *early reduction credits* awarded.

### Section 13 - Emission Monitoring

a. NO<sub>x</sub> emissions from each *budget source* shall be monitored in accordance with this section and in accordance with the requirements of the *OTC documents* titled "Guidance for Implementation of Emissions Monitoring Requirements for the NO<sub>x</sub> Budget Program",

dated January 28, 1997, and “NO<sub>x</sub> Budget Program Monitoring Certification and Reporting Instructions”, dated July 3, 1997. The provisions of these documents are hereby adopted by reference.

b. Monitoring systems are subject to initial performance testing and periodic calibration, accuracy testing, and quality assurance/quality control testing as specified in the *OTC* document titled “Guidance for Implementation of Emissions Monitoring Requirements for the NO<sub>x</sub> Budget Program”. If an *owner or operator* uses certified monitoring systems under Part 75 to meet the requirements of this program and maintains and operates those monitoring systems according to the requirements of Part 75, it is not necessary to re-perform initial certification tests to ensure the accuracy of these components under the NO<sub>x</sub> Budget Program.

c. During a period when valid data is not being recorded by devices approved for use to demonstrate compliance with the requirements of this section, the *owner or operator* shall provide substitute data in accordance with the requirements of:

1. For *Part 75 budget sources*, the procedures of 40 CFR Part 75, Subpart D, and Part 1 of the *OTC* document titled “Guidance for Implementation of Emissions Monitoring Requirements for the NO<sub>x</sub> Budget Program”.

2. For *non-Part 75 budget sources*, the procedures of Part 2 of the *OTC* document “Guidance for Implementation of Emission Monitoring Requirements for the NO<sub>x</sub> Budget Program” [except for those provisions in this document that allow alternative methods or procedures. Any alternative methods or procedures must be reviewed by the Department and the EPA].

d. The *owner or operator* of a NO<sub>x</sub> *budget source* shall meet the following emissions monitoring deadlines:

1. All existing *Part 75 NO<sub>x</sub> budget sources* not required by the NO<sub>x</sub> Budget Program to install additional monitoring equipment, or required to only make software changes to implement the additional requirements of this program, shall meet the monitoring requirements of the NO<sub>x</sub> Budget Program as follows:

i. By meeting all current Part 75 monitoring requirements during the NO<sub>x</sub> *control period* during each calendar year.

ii. By monitoring hourly and cumulative NO<sub>x</sub> mass emissions for the NO<sub>x</sub> *control period* in each calendar year starting in 1999 in accordance with the *OTC* documents “Guidance for Implementation of Emissions Monitoring Requirements for the NO<sub>x</sub> Budget Program” and “NO<sub>x</sub> Budget Program Monitoring Certification and Reporting Instructions”.

2. All existing *Part 75 budget sources* required to install

and certify new monitoring systems to meet the requirements of the NO<sub>x</sub> Budget Program shall meet the monitoring requirements of this program as follows:

i. By meeting all current Part 75 monitoring requirements during the NO<sub>x</sub> *control period* during each calendar year.

ii. Monitoring systems required to be installed by the NO<sub>x</sub> Budget Program shall be installed and monitoring and recording hourly mass emissions data on and after July 30, 1998.

iii. By monitoring hourly and cumulative NO<sub>x</sub> mass emissions using certified monitoring systems for each NO<sub>x</sub> *control period* each calendar year starting in 1999 in accordance with the *OTC* documents “Guidance for Implementation of Emissions Monitoring Requirements for the NO<sub>x</sub> Budget Program” and “NO<sub>x</sub> Budget Program Monitoring Certification and Reporting Instructions”.

3. All *existing non-Part 75 budget sources* shall meet the monitoring requirements of the NO<sub>x</sub> Budget Program as follows:

i. Monitoring systems required to be installed by the NO<sub>x</sub> Budget Program shall be installed and monitoring and recording hourly emissions data on July 30, 1998.

ii. By monitoring hourly and cumulative NO<sub>x</sub> mass emissions using certified monitoring systems for each NO<sub>x</sub> *control period* of each calendar year starting in 1999 in accordance with the *OTC* documents “Guidance for Implementation of Emissions Monitoring Requirements for the NO<sub>x</sub> Budget Program” and “NO<sub>x</sub> Budget Program Monitoring Certification and Reporting Instructions”.

e. The *owner or operator* of a *budget source* subject to 40 CFR Part 75 shall demonstrate compliance with this section with a certified Part 75 monitoring system.

1. The *authorized account representative* or alternate *authorized account representative* shall submit to the Department a monitoring plan prepared in accordance with 40 CFR Part 75 and the additional requirements of the *OTC* document “Guidance for the Implementation of Emission Monitoring Requirements for the NO<sub>x</sub> Budget Program” and the *OTC* document “NO<sub>x</sub> Budget Program Monitoring Certification and Reporting Instructions”.

i. All existing *Part 75 budget sources* not required to install additional monitoring equipment shall submit to the Department a complete hardcopy monitoring plan containing monitoring plan changes and additions required by the NO<sub>x</sub> Budget Program no later than July 30, 1998. These *Part 75 budget sources* shall also submit to the Department a complete electronic monitoring plan upon request by the Department.

ii. For any *Part 75 budget source* required to install and certify new monitoring systems, submit to the Department a complete hardcopy monitoring plan acceptable to the Department at least 45 days prior to the

initiation of certification tests for the new system(s). These *Part 75 budget sources* shall also submit to the Department a complete electronic monitoring plan upon request by the Department.

iii. For *new budget sources* under 40 CFR Part 75, submit to the Department the NO<sub>x</sub> Budget Program information with the hardcopy Acid Rain Program monitoring plan no later than 90 days prior to the projected Acid Rain Program participation date. These *new Part 75 budget sources* shall also submit to the Department a complete electronic monitoring plan upon request by the Department.

2. The *authorized account representative* or alternate *authorized account representative* shall obtain certification of the NO<sub>x</sub> emissions monitoring system in accordance with 40 CFR Part 75 and the additional requirements of the *OTC* document "Guidance for the Implementation of Emission Monitoring Requirements for the NO<sub>x</sub> Budget Program" and the *OTC* document "NO<sub>x</sub> Budget Program Monitoring Certification and Reporting Instructions".

i. If the *Part 75 budget source* uses certified monitoring systems under Part 75 to meet the requirements of the NO<sub>x</sub> Budget Program and maintains and operates those monitoring systems according to the requirements of Part 75, it is not necessary to re-perform initial certification tests to ensure the accuracy of the monitoring systems under the NO<sub>x</sub> Budget Program.

A. Formula verifications must be performed to demonstrate that the data acquisition system accurately calculates and reports NO<sub>x</sub> mass emissions (lb/hr) based on hourly *heat input* (MMBTU/hr) and NO<sub>x</sub> emission rate (lb/MMBTU).

B. Formula verifications shall be *submitted* to the Department no later than July 30, 1998.

ii. If it is necessary for the *owner or operator* of a *Part 75 budget source* to install and operate additional NO<sub>x</sub> or flow systems or fuel flow systems because of stack and unit configuration, the *owner or operator* must certify the monitoring systems using the procedures of 40 CFR Part 75.

A. Successful certification testing of the monitoring system in accordance with the requirements of 40 CFR Part 75 shall be completed no later than April 30, 1999.

B. A certification test notice and protocol shall be *submitted* to the Department for approval no later than 90 days prior to the anticipated performance of the certification testing.

C. A certification report meeting the requirements of the *OTC* document "NO<sub>x</sub> Budget Program Monitoring Certification and Reporting Instructions" shall be *submitted* to the Department no later than 45 days following the performance of the certification testing.

3. If the *Part 75 budget source* has a flow monitor certified

under Part 75, NO<sub>x</sub> emissions in pounds per hour shall be determined using the Part 75 NO<sub>x</sub> *CEMS* and the flow monitor. The NO<sub>x</sub> emission rate in pounds per million BTU shall be determined using the procedure in 40 CFR Part 75, Appendix F, Section 3. The hourly *heat input* shall be determined by using the procedures in 40 CFR Part 75, Appendix F, Section 5. The NO<sub>x</sub> emissions in pounds per hour shall be determined by multiplying the NO<sub>x</sub> emissions rate (in pounds per million BTU) by the *heat input* rate (in million BTU per hour).

4. If the *Part 75 budget source* does not have a certified flow monitor, but does have a certified NO<sub>x</sub> *CEMS*, the NO<sub>x</sub> emissions rate in pounds per hour shall be determined by using the NO<sub>x</sub> *CEMS* to determine the NO<sub>x</sub> emission rate in pounds per million BTU and the *heat input* shall be determined by using the procedures in 40 CFR Part 75, Appendix D. The NO<sub>x</sub> emissions rate (in pounds per hour) shall be determined by multiplying the NO<sub>x</sub> emissions rate (in pounds per million BTU) by the *heat input* rate (in million BTU per hour).

5. If the *Part 75 budget source* uses the procedures in 40 CFR Part 75, Appendix E, to determine the NO<sub>x</sub> emission rate, the NO<sub>x</sub> emissions in pounds per hour shall be determined by multiplying the NO<sub>x</sub> emissions rate (in pounds per million BTU) determined using the Appendix E procedures times the *heat input* (in million BTU per hour) determined using the procedures in 40 CFR Part 75, Appendix D.

6. If the *Part 75 budget source* uses the procedures in 40 CFR Part 75, Subpart E, to determine NO<sub>x</sub> emission rate, the NO<sub>x</sub> emissions in pounds per hour shall be determined using the alternative monitoring method approved under 40 CFR Part 75, Subpart E, and the procedures contained in the *OTC* document titled "Guidance for Implementation of Emission Monitoring Requirements for the NO<sub>x</sub> Budget Program".

7. The relevant procedures of the *OTC* document "Guidance for the Implementation of Emission Monitoring Requirements for the NO<sub>x</sub> Budget Program" shall be employed for unusual or complicated stack configurations.

f. The *owner or operator* of a *budget source* not subject to 40 CFR Part 75 shall seek the use of a NO<sub>x</sub> monitoring method to comply with this regulation as follows:

1. The *authorized account representative* or alternate *authorized account representative* shall prepare and submit to the Department for approval a hardcopy monitoring plan for each NO<sub>x</sub> *budget source*. Upon request by the Department, the *authorized account representative* or alternate *authorized account representative* shall also submit to the Department a complete electronic monitoring plan. Sources subject to the program on July 1, 1998 shall submit the complete monitoring plan no later than April 30, 1998. Sources becoming subject to the *budget*

program after July 1, 1998 must submit a complete monitoring plan no later than 90 days prior to projected initial participation date. The monitoring plan shall be prepared in accordance with the requirements of the *OTC* documents "Guidance for the Implementation of the Emission Monitoring Requirements for the NO<sub>x</sub> Budget Program" and "NO<sub>x</sub> Budget Program Monitoring and Certification and Reporting Instructions", and shall contain the following information, as a minimum:

- i. A description of the monitoring method to be used.
- ii. A description of the major components of the monitoring system including the manufacturer, serial number of the component, the measurement span of the component and documentation to demonstrate that the measurement span of each component is appropriate to measure all of the expected values. This requirement applies to all monitoring systems including NO<sub>x</sub> *CEMS* which have not been certified pursuant to 40 CFR Part 75.
- iii. An estimate of the accuracy of the system and documentation to demonstrate how the estimate of accuracy was determined. This requirement applies to all monitoring systems that are not installed/being installed in accordance with the requirements of 40 CFR Part 75.
- iv. A description of the tests that will be used for initial certification, initial quality assurance, periodic quality assurance, and relative accuracy.
- v. If the monitoring method of determining *heat input* involves *boiler* efficiency testing, a description of the tests to determine *boiler* efficiency.
- vi. If the monitoring method uses fuel sampling, a description of the test to be used in the fuel sampling program.
- vii. If the monitoring method utilizes a generic default emission rate factor, the monitoring plan shall identify the generic default emission rate factor and provide documentation of the applicability of the generic default emission rate factor to the *non-Part 75 budget source*.
- viii. If the monitoring method utilizes a unit specific default emission rate factor the monitoring plan shall include the following:
  - A. All necessary information to support the emission rate including:
    1. Historical fuel use data and historical emissions test data if previous testing has been performed prior to May 1, 1997 to meet other state or federal requirements and the testing was performed using Department approved methods and protocols; or
    2. If emissions testing is performed to determine the emission rate, include a test protocol explaining the test to be conducted. All test performed on or after May 1, 1997 must meet the requirements of 40 CFR Part 75, Appendix E, and the requirements of the *OTC* document "Guidance for Implementation of Emission Monitoring Requirements for the NO<sub>x</sub> Budget Program".

B. Procedures which will be utilized to demonstrate that any control equipment in operation during the testing to develop source specific emission factors, or during development of load-based emission curves, are in use when those emission factors are applied to estimate NO<sub>x</sub> emissions.

C. Alternative uncontrolled emission rates to be used to estimate NO<sub>x</sub> emissions during periods when control equipment is not being used or is inoperable.

ix. If the monitoring method utilizes fuel flow meters to determine *heat input* and said meters have not been certified pursuant to 40 CFR Part 75, the monitoring plan shall include a description of all components of the fuel flow meter, the estimated accuracy of the fuel flow meter, the most recent calibration of each of the components and the original accuracy specifications from the manufacturer of the fuel flow meter.

x. The *submitted* complete monitoring plan shall meet all of the provisions of Part 2, Section II of the *OTC* document "Guidance for the Implementation of the Emission Monitoring Requirements for the NO<sub>x</sub> Budget Program" and the *OTC* document "NO<sub>x</sub> Budget Program Monitoring Certification and Reporting Instructions".

2. The *authorized account representative* or alternate *authorized account representative* shall obtain certification of the NO<sub>x</sub> emissions monitoring system in accordance with the requirements of the *OTC* documents "Guidance for the Implementation of the Emission Monitoring Requirements for the NO<sub>x</sub> Budget Program" and "NO<sub>x</sub> Budget Program Monitoring Certification and Reporting Instructions".

i. The certification testing shall be successfully completed no later than April 30, 1999.

ii. A certification test notice and protocol shall be *submitted* to the Department no later than 90 days prior to the anticipated performance of the certification testing.

iii. A certification report meeting the requirements of the *OTC* document "NO<sub>x</sub> Budget Program Monitoring Certification and Reporting Instructions" shall be *submitted* to the Department no later than 45 days following the performance of the certification testing.

3. The *owner or operator* of a *non-Part 75 budget source* shall monitor NO<sub>x</sub> emissions in accordance with one of the following requirements:

i. Any *non-Part 75 budget source* that has a maximum rated *heat input* capacity of 250 MMBTU/hr or greater which is not a peaking unit as defined in 40 CFR 72.2, or whose operating permit allows for the combustion of any solid fossil fuel, or is required to install a NO<sub>x</sub> *CEMS* for the purposes of meeting either the requirements of 40 CFR Part 60 or any other Department or Federal requirement, shall install, certify, and operate a NO<sub>x</sub> *CEMS*. Any *budget source* that has previously installed a NO<sub>x</sub> *CEMS* for the purposes of meeting either the requirements of 40 CFR

Part 60 or any other Department or Federal requirement shall certify and operate the NO<sub>x</sub> CEMS.

A. The NO<sub>x</sub> CEMS shall be used to measure stack gas NO<sub>x</sub> concentration and the NO<sub>x</sub> emissions rate in lb/MMBTU calculated in accordance with the procedures in 40 CFR Part 75, Appendix F.

B. Any *non-Part 75 budget source* utilizing a NO<sub>x</sub> CEMS shall meet the following requirements from the OTC document "Guidance for the Implementation of Emission Monitoring Requirements for the NO<sub>x</sub> Budget Program":

1. Initial certification requirements identified in Part 2, Section III.

2. Quality assurance requirements identified in Part 2, Section IV.

3. Re-certification requirements identified in Part 2, Section V.

ii. The *owner or operator* of a *non-Part 75 budget source* not required to install a NO<sub>x</sub> CEMS in accordance with Section 13(f)(3)(i) of this regulation may elect to install a NO<sub>x</sub> CEMS meeting the requirements of 40 CFR Part 75 or Section 13(f)(3)(i) of this regulation.

iii. The *owner or operator* of a *non-Part 75 budget source* that is not required to have a NO<sub>x</sub> CEMS may request approval from the Department to use any of the following methodologies to determine the NO<sub>x</sub> emission rate:

A. The *owner or operator* of a *non-Part 75 budget source* may request the use of an alternative monitoring methodology meeting the requirements of 40 CFR Part 75, Subpart E. The Department must approve the use of an *alternative monitoring system* before such system is operated to meet the requirements of the NO<sub>x</sub> Budget Program. If the methodology must be incorporated into a permit pursuant to Regulation 30 of Delaware's "Regulations Governing the Control of Air Pollution", the methodology must also be approved by the EPA.

B. The *owner or operator* of a *boiler* or combustion turbine *non-Part 75 budget source* may request the use of the procedures contained in 40 CFR Part 75, Appendix E, to measure the NO<sub>x</sub> emission rate, in lb/MMBTU, consistent with the requirements identified in Part 2 of the OTC document "Guidance for the Implementation of Emission Monitoring Requirements for the NO<sub>x</sub> Budget Program".

C. The *owner or operator* of a combustion turbine *non-Part 75 budget source* may request the use of default emission factors to determine NO<sub>x</sub> emissions, in pounds per MMBTU, as follows:

1. For oil-fired combustion turbines, the generic default emission factor is 1.2 pounds of NO<sub>x</sub> per MMBTU.

2. For gas-fired combustion turbines, the generic default emission factor is 0.7 pound of NO<sub>x</sub> per MMBTU.

3. The *owner or operator* of oil-fired and gas-fired combustion turbines may perform testing, in accordance with Department approved methods, to determine unit

specific maximum potential NO<sub>x</sub> emission rates in accordance with the requirements of Part 2 of the OTC document "Guidance for Implementation of Emission Monitoring Requirements for the NO<sub>x</sub> Budget Program."

D. The *owner or operator* of a *boiler non-Part 75 budget source* may request the use of default emission factors to determine NO<sub>x</sub> emissions, in pound per MMBTU, as follows:

1. For oil-fired *boilers*, the generic default emission factor is 2.0 pounds of NO<sub>x</sub> per MMBTU.

2. For gas-fired *boilers*, the generic default emission factor is 1.5 pound of NO<sub>x</sub> per MMBTU.

3. The *owner or operator* of oil-fired and gas-fired *boilers* may perform testing, in accordance with Department approved methods, to determine unit specific maximum potential NO<sub>x</sub> emission rates in accordance with the requirements of the OTC document "Guidance for Implementation of Emission Monitoring Requirements for the NO<sub>x</sub> Budget Program".

4. The *owner or operator* of a *non-Part 75 budget source* may determine *heat input* in accordance with the following guidelines:

i. The *owner or operator* of a *non-Part 75 budget source* using a NO<sub>x</sub> CEMS to measure NO<sub>x</sub> emission rate may elect to measure stack flow and diluent (O<sub>2</sub> or CO<sub>2</sub>) concentration and use the procedures of 40 CFR Part 75, Appendix F, to determine the hourly *heat input*. For flow monitoring systems, the *non-Part 75 budget source* must meet all applicable requirements of 40 CFR Part 75.

ii. The *owner or operator* of a *non-Part 75 budget source* combusting only oil and/or natural gas may determine hourly *heat input* rate by monitoring fuel flow and conducting fuel sampling.

A. The *owner or operator* of a *non-Part 75 budget source* may monitor fuel flow by using fuel flow meter systems certified under 40 CFR Part 75, Appendix D, or as defined in Part 2, Section III of the OTC document "Guidance for Implementation of Emissions Monitoring Requirements for the NO<sub>x</sub> Budget Program".

B. The *owner or operator* of a *non-Part 75 budget source* combusting oil may perform oil sampling and testing in accordance with the requirements of 40 CFR Part 75 or Part 2, Section I(C)(2) of the OTC document "Guidance for the Implementation of Emissions Monitoring Requirements for the NO<sub>x</sub> Budget Program".

C. The *owner or operator* of a *non-Part 75 budget source* combusting gas must determine the heating value of the gas in accordance with the requirements of 40 CFR Part 75 or the methodologies approved in Part 2, Section I(C)(2) of the OTC document "Guidance for the Implementation of Emissions Monitoring Requirements for the NO<sub>x</sub> Budget Program".

iii. The *owner or operator* of a *non-Part 75 budget source* electrical generating unit less than 25 megawatts



rated capacity that combusts only oil or gas may petition the Department to determine *heat input* by measuring fuel used on a frequency of greater than one hour but no less than weekly.

A. The fuel usage must be reported on an hourly basis by apportioning the fuel based on electrical load in accordance with the following formula:

$$\text{Hourly fuel usage} = \text{Hourly electrical load} \times \text{total fuel usage}$$

Total electrical load

B. The *owner or operator* of a *non-Part 75 budget source* combusting oil may perform oil sampling and testing in accordance with the requirements of 40 CFR Part 75 or Part 2, Section I(C)(2) of the *OTC* document "Guidance for the Implementation of Emissions Monitoring Requirements for the NO<sub>x</sub> Budget Program".

C. The *owner or operator* of a *non-Part 75 budget source* combusting gas must determine the heating value of the gas in accordance with the requirements of 40 CFR Part 75 or the methodologies approved in Part 2, Section I(C)(2) of the *OTC* document "Guidance for the Implementation of Emissions Monitoring Requirements for the NO<sub>x</sub> Budget Program".

iv. The *owner or operator* of a *non-Part 75 budget source* that combusts only oil and/or gas and has elected to use a unit-specific or generic default NO<sub>x</sub> emission rate, may petition the Department to determine hourly *heat input* based on fuel use measurements for a specified period that is longer than one hour.

A. The petition must include a description of the periodic measurement methodology, including an assessment of its accuracy.

B. Each time period must begin on or after May 1 and conclude on or before September 30 of each calendar year.

C. To determine hourly input, the *owner or operator* shall apportion the long term fuel measurements to operating hours during the *control period*.

D. Fuel sampling and analysis must conform to the requirements of Part 2, Section I(C)(2) of the *OTC* document "Guidance for Implementation of Emission Monitoring Requirements for the NO<sub>x</sub> Budget Program".

v. The *owner or operator* of a *non-Part 75 budget source* that combusts any fuel other than oil or natural gas may petition the Department to use an alternative method of determining *heat input*, including:

A. Conducting fuel sampling and analysis and monitoring fuel usage.

B. Using *boiler* efficiency curves and other monitored information such as *boiler* steam output.

C. Any other method approved by the Department and which meets the requirements identified in Part 2,

Section I, of the *OTC* document "Guidance for the Implementation of Emission Monitoring Requirements for the NO<sub>x</sub> Budget Program".

vi. The *owner or operator* of a *non-Part 75 budget source* may petition the Department to use a unit-specific maximum hourly *heat input* based on the higher of the manufacturer's rated capacity or the highest observed hourly *heat input* in the period beginning five years prior to the program participation date. The Department may approve a lower maximum *heat input* if an *owner or operator* demonstrates that the highest observed hourly *heat input* in the last five years is not representative of the unit's current capabilities because modifications have been made limiting its capacity permanently.

vii. Methods used for determination of *heat input* are subject to both applicable initial and periodic relative accuracy and quality assurance testing requirements in accordance with the following provisions of the *OTC* document "Guidance for Implementation of Emissions Monitoring Requirements for the NO<sub>x</sub> Budget Program":

A. Initial certification requirements identified in Part 2, Section III.

B. Quality assurance requirements identified in Part 2, Section IV.

C. Re-certification requirements identified in Part 2, Section V.

5. Once the NO<sub>x</sub> emission rate in pounds per million BTU has been determined in accordance with Section 13(f)(3) of this regulation and the *heat input* rate in MMBTU per hour has been determined in accordance with Section 13(f)(4) of this regulation, the two values shall be multiplied together to result in NO<sub>x</sub> emissions in pounds per hour and reported to the *NETS* in accordance with Section 15 of this regulation.

6. The relevant procedures of the *OTC* document "Guidance for Implementation of Emission Monitoring Requirements for the NO<sub>x</sub> Budget Program" shall be employed for unusual or complicated stack configurations.

#### Section 14 - Recordkeeping

The *owner or operator* of any *budget source* shall maintain, for a period of at least five years, copies of all measurements, tests, reports, data, and other information required by this regulation.

#### Section 15 - Emissions Reporting

a. The *Authorized account representative* or alternate *authorized account representative* for each *budget source* shall submit to the *NETS Administrator*, electronically in a format which meets the requirements of the EPA's Electronic Data Reporting (EDR) convention, emissions and operating information ~~for the second and third calendar quarter of~~

each year} in accordance with the *OTC* documents "Guidance for the Implementation of Emission Monitoring Requirements for the NO<sub>x</sub> Budget Program" and "NO<sub>x</sub> Budget Program Monitoring Certification and Reporting Instructions".

1. All *existing Part 75 budget sources* not required to install additional monitoring equipment shall meet the reporting requirements of the NO<sub>x</sub> Budget Program as follows:

i. By meeting all current Part 75 reporting requirements and reporting the additional unit identification information as required by the NO<sub>x</sub> Budget Program (100 and 500 level records) beginning with submittal of the quarterly report for the third calendar quarter of 1998.

ii. It is not necessary to submit hourly NO<sub>x</sub> mass emissions data in 1998.

iii. Beginning with the quarterly report for the second quarter of 1999, report all Part 75 required information and all additional information required by the NO<sub>x</sub> Budget Program including:

A. Additional unit identification information.

B. Hourly NO<sub>x</sub> mass emissions in pounds per hour based on reported hourly *heat input* and hourly NO<sub>x</sub> emission rate.

C. Cumulative NO<sub>x</sub> *control period* NO<sub>x</sub> mass emissions in tons per NO<sub>x</sub> *control period*.

D. Additional monitoring plan information related to the NO<sub>x</sub> Budget Program.

E. Certification status information as required by the NO<sub>x</sub> Budget Program.

2. Beginning with the quarterly report for the third quarter of 1998, all *Part 75 budget sources*, that are required to install and certify new monitoring systems to meet the requirements of the NO<sub>x</sub> Budget Program, shall meet the reporting requirements of the NO<sub>x</sub> Budget Program by meeting all current Part 75 reporting requirements and the additional reporting requirements of the NO<sub>x</sub> Budget Program including *submittal* of the following information:

i. Additional unit identification information.

ii. Hourly NO<sub>x</sub> mass emissions in pounds per hour based on reported hourly *heat input* and hourly NO<sub>x</sub> emission rate.

iii. Cumulative NO<sub>x</sub> *control period* NO<sub>x</sub> mass emissions in tons per NO<sub>x</sub> *control period*.

iv. Additional monitoring plan information related to the NO<sub>x</sub> Budget Program.

v. Certification status information as required by the NO<sub>x</sub> Budget Program.

3. All *non-Part 75 budget sources* shall meet the reporting requirements of the NO<sub>x</sub> Budget Program by reporting all information required by the NO<sub>x</sub> Budget Program as well as reporting hourly and cumulative NO<sub>x</sub> mass emissions beginning with the quarterly report for the third quarter of 1998.

b. The *authorized account representative* or alternate *authorized account representative* of a *budget source* subject to 40 CFR Part 75 shall submit NO<sub>x</sub> Budget Program quarterly data to the U.S. EPA as part of the quarterly reports *submitted* for the compliance with 40 CFR Part 75.

c. The *authorized account representative* or alternate *authorized account representative* of a *budget source* not subject to 40 CFR Part 75 shall submit NO<sub>x</sub> budget program quarterly data to the U.S. EPA as follows:

1. For *non-Part 75 budget sources* not utilizing NO<sub>x</sub> *CEMS*, submit two quarterly reports each year, one for the second quarter and one for the third quarter.

2. For *non-Part 75 budget sources* using any NO<sub>x</sub> *CEMS* based measurement methodology, submit a complete quarterly report for each quarter in the year.

3. The submission deadline is thirty days after the end of the calendar quarter. If the thirtieth day falls on a weekend or federal holiday, the reporting deadline is midnight of the first day following the holiday or weekend.

d. Should a *budget source* be permanently shutdown, the *authorized account representative* or alternate *authorized account representative* may submit a written request the Department for an exemption from the requirements of Sections 13 and 14 of this regulation. The shutdown exemption request shall identify the *budget source* being shutdown and the date of permanent shutdown. Within 30 days of receipt of the shutdown exemption request, the Department shall:

1. If the Department does not approve the shutdown exemption request, the *authorized account representative* shall be notified in writing, including the reason(s) for not approving the request.

2. If the Department approves the shutdown exemption request:

i. The *authorized account representative* shall be notified in writing.

ii. The Department shall notify the *NETS Administrator* of the approved shutdown request.

#### Section 16 - End-of Season Reconciliation

a. *Allowances* may be used for compliance with this program in a designated compliance year by being in a *compliance account* as of December 31 of the subject year, or by being identified in an *allowance transfer* request that is *submitted* by December 31 of the subject year.

b. Each year during the period November 1 through December 31, inclusive, the *authorized account representative* or alternate *authorized account representative* shall request the *NATS Administrator* to

deduct *current year allowances* from the *compliance account* equivalent to the  $\text{NO}_x$  emissions from the *budget source* in the most recent *control period*. This request shall be *submitted* by the *authorized account representative* or alternate *authorized account representative* to the *NATS Administrator* by not later than December 31. This request shall identify the *compliance account* of the *budget source* and the serial number of each of the *allowances* to be deducted.

1. *Allowances* allocated for the current  $\text{NO}_x$  *control period* may be used without restriction.

2. *Allowances* allocated for future  $\text{NO}_x$  *control periods* may not be used.

3. *Allowances* which were allocated for any preceding  $\text{NO}_x$  *control period* which were banked may be used in the current *control period*. *Banked allowance* shall be deducted against  $\text{NO}_x$  emissions in accordance with the ratio of  $\text{NO}_x$  *allowances* to emissions as specified in Section 12 of this regulation.

c. If the emissions from a *budget source* in the current *control period* exceed the *allowances* held in that *budget source's compliance account* for that *control period*:

1. The *budget source* shall obtain additional *allowances* by December 31 of the subject year so that the total number of *allowances* in the *compliance account* meeting the criteria of Section 16(b)(1) through (3) of this regulation, including *allowances* identified in any *allowance transfer* request properly *submitted* to the *NATS Administrator* by December 31 of the subject year, equals or exceeds the *control period* emissions of  $\text{NO}_x$  rounded to the nearest whole ton.

2. If there is an insufficient number of  $\text{NO}_x$  *allowances* available for  $\text{NO}_x$  *allowance deduction*, the source is out of compliance with this regulation and subject to enforcement action and penalties pursuant to Section 18 of this regulation.

d. If by the December 31 compliance deadline the *authorized account representative* or alternate *authorized account representative* either makes no  $\text{NO}_x$  *allowance deduction* request, or a  $\text{NO}_x$  *allowance deduction* request insufficient to meet the *allowances* required by the actual emissions, a violation of this regulation may have occurred and the *NATS Administrator* may deduct the necessary number of  $\text{NO}_x$  *allowances* from the *budget source's compliance account*. The *NATS Administrator* shall provide written notice to the *authorized account representative* that  $\text{NO}_x$  *allowances* were deducted from the source's *account*.

e. The *authorized account representative* or alternate *authorized account representative* may notify the *NATS Administrator* of any claim that the *NATS Administrator*

made an error in recording transfer information that was *submitted* in accordance with Section 11 of this regulation, provided that such claim of error notification is *submitted* to the *NATS Administrator* by no later than 15 business days following the date of the notification by the *NATS Administrator* pursuant to actions taken in accordance with Section 16(d) of this regulation.

1. Such claim of error notification shall be in writing and shall include:

i. A description of the error alleged to have been made by the *NATS Administrator*.

ii. A proposed correction of the alleged error.

iii. Any supporting documentation or other information concerning the alleged error and proposed corrective action.

iv. The following statement: "I certify under penalty of law that I have personally examined, and am familiar with, the statements and information submitted in this document and all its attachments. Based on my inquiry of those individuals with primary responsibility for obtaining the information, I certify that the statements and information are to the best of my knowledge and belief true, accurate, and complete. I am aware that there are significant penalties for submitting false statements and information or omitting required statements and information, including the possibility of fine or imprisonment."

v. Signature of the *authorized account representative* or alternate *authorized account representative* and date of signature.

2. The *NATS Administrator*, at the *NATS Administrator's* sole discretion based on the documentation provided, shall determine what changes, if any, shall be made to the *account(s)* subject to the alleged error. Not later than 20 business days after receipt of a claim of error notification, the *NATS Administrator* shall submit to the *authorized account representative* and to the Department a written response stating the determination made, any action taken by the *NATS Administrator*, and the reason(s) for the determination and actions.

3. The *NATS Administrator* may, without prior notice of a claim of error and at the *NATS Administrator's* sole discretion, correct any errors in any account on the *NATS Administrator's* own motion. The *NATS Administrator* shall notify the *authorized account representative* and the Department no later than 20 business days following any such corrections.

#### Section 17 - Compliance Certification

a. For each  $\text{NO}_x$  *allowance control period*, the *authorized account representative* or alternate *authorized account representative* of each *budget source* shall submit to the Department an annual compliance certification.

b. The compliance certification shall be *submitted* no later than December 31 of each year.

c. The compliance certification shall contain, at a minimum, the following information:

1. Identification of the *budget source*, including the *budget source's* name and address, the name of the *authorized account representative* and alternate *authorized account representative*, if any, and the *NATS account number*.

2. A statement indicating whether or not emissions data was *submitted* to the *NETS Administrator* pursuant to Section 15 of this regulation.

3. A statement indicating whether or not the *budget source* held sufficient  $\text{NO}_x$  *allowances*, as determined in Section 16 of this regulation, in its *compliance account* for the  $\text{NO}_x$  *allowance control period* as of December 31 of the subject year, or by being identified in an *allowance transfer* request that was *submitted* by December 31 of the subject year, to equal or exceed the *budget source's* actual emissions as reported to the *NETS Administrator* for the *control period*.

4. A statement of certification whether the monitoring plan which governs the *budget source* was maintained to reflect actual operation and monitoring of the *budget source* and contains all information necessary to attribute monitored emissions to the *budget source*.

5. A statement of certification that all emissions from the *budget source* were accounted for, either through the applicable monitoring or through application of the appropriate missing data procedures.

6. A statement whether the facts that form the basis for certification of each monitor or monitoring method approved in accordance with Section 13 of this regulation have changed.

7. If a change is required to be reported in accordance with Section 17(c)(6) of this regulation, specify the nature of the change, when the change occurred, and how the *budget source's* compliance status was determined subsequent to the change, including what method was used to determine emissions when a change mandated the need for monitor re-certification.

8. The following statement in verbatim, "*I certify under penalty of law that I have personally examined, and am familiar with, the statements and information submitted in this document and all its attachments. Based on my inquiry of those individuals with primary responsibility for obtaining the information, I certify that the statements and information are to the best of my knowledge and belief true, accurate, and complete. I am aware that there are significant penalties for submitting false statements and information or omitting required statements and information, including the possibility of fines or*

*imprisonment.*"

9. Signature of the *budget source's authorized account representative* or alternate *authorized account representative* and the date of signature.

d. The Department may verify compliance by whatever means necessary, including but not limited to:

1. Inspection of facility operating records.

2. Obtaining information on *allowance deduction* and transfers from the *NATS Administrator*.

3. Obtaining information on emissions from the *NETS Administrator*.

4. Testing emission monitoring devices.

5. Requiring the *budget source* to conduct emissions testing using testing methods approved by the Department.

#### Section 18 - Failure to Meet Compliance Requirements

a. If the emissions from a *budget source* exceed *allowances* held in the *budget source's compliance account* for the *control period* as of December 31 of the subject year, the *NATS Administrator* shall deduct *allowances* from the *budget source's compliance account* for the next *control period* at a rate of three (3) *allowances* for every one (1) ton of *excess emissions*.

1. The *NATS Administrator* shall provide written notice to the *budget source's authorized account representative* that  $\text{NO}_x$  *allowances* were deducted from the *budget source's* account.

2. The *authorized account representative* or alternate *authorized account representative* may notify the *NATS Administrator* of any claim that the *NATS Administrator* made an error in recording *submitted* transfer information in accordance with Section 16(e) of this regulation.

b. In addition to  $\text{NO}_x$  *allowance deduction* penalties under Section 18(a) of this regulation, the Department may enforce the provisions of this regulation under 7 Del. C. Chapter 60. For the purposes of determining the number of days of violation, any *excess emissions* for the *control period* shall presume that each day in the *control period* (153 days) constitutes a day in violation unless the *budget source* can demonstrate, to the satisfaction of the Department, that a lesser number of days should be considered.

#### Section 19 - Program Audit

a. The Department shall conduct an audit of the  $\text{NO}_x$  Budget Program prior to May 1, 2002, and at a minimum every three years thereafter. The audit shall include the following:

1. Confirmation of emissions reporting accuracy through validation of  $\text{NO}_x$  *allowance* monitoring and data acquisition systems at the *budget source*.

2. Examination of the extent to which *banked*

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*allowances* have, or have not, contributed to emissions in excess of the *budget* for each *control period* covered by the audit.

3. An analysis of the geographic distribution of emissions as well as hourly and daily emission totals in the context of ozone control.

4. An assessment of whether the program is providing the level of emissions reductions anticipated and included in the SIP.

b. The Department shall prepare a report on the results of the audit. The Department shall seek public input on the conclusions contained in the audit report and provide for a public notice, public comment period, and allow for the request to hold a public hearing on the conclusions contained in the report.

c. In addition to the Department audit, the Department may seek a third party audit of the program. Such an audit could be implemented by the Department or could be performed on a region-wide basis under the supervision of the *OTC*.

d. Should an audit result in recommendations for program revisions at the state level, the Department shall consider the audit recommendations, in consultation with the *OTC*, and if found necessary, propose the appropriate program revisions as changes to current procedures or modifications to this regulation.

#### Section 20 - Program Fees

The *authorized account representative* or alternate *authorized account representative* of each *compliance account* and each *general account* shall pay fees to the Department consistent with the fee schedule established from time to time by the Delaware General Assembly, should a fee schedule be established.

# ERRATA

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## NO<sub>x</sub> BUDGET PROGRAM --- APPENDIX "A"

COMPANY	FACILITY and PLANT POINT	OTC IDENTIFIED ALLOWANCES	EXCEPTIONAL CIRCUMSTANCES ALLOWANCES	RESERVE ALLOWANCES	FINAL ALLOWANCES	SOURCE TYPE
DELMARVA POWER	Christiana Sub 001	6	-0-	1	7	Non-Part 75
	Christiana Sub 002	6	-0-	1	7	Non-Part 75
	Delaware City 002	1	-0-	1	2	Non-Part 75
	Edge Moor 001	1	-0-	1	2	Non-Part 75
	Edge Moor 002	241	-0-	1	242	Part 75
	Edge Moor 003	345	-0-	1	346	Part 75
	Edge Moor 004	621	28	1	650	Part 75
	Hay Road 001	49	-0-	1	50	Non-Part 75
	Hay Road 002	34	-0-	1	35	Non-Part 75
	Hay Road 3*	-0-	-0-	-0-	-0-	Part 75
	Indian River 001	340	-0-	1	341	Part 75
	Indian River 002	397	-0-	1	398	Part 75
	Indian River 003	834***	-0-	1	835	Part 75
	Indian River 004	1,652	-0-	2	1,654	Part 75
	Indian River 10**	-0-	-0-	1	2	Non-Part 75
	Madison Str. 001	-0-	-0-	1	1	Non-Part 75
West Sub 001	2	-0-	1	3	Non-Part 75	
DFD Operating Services	McKee Run 001	72***	-0-	1	73	Non-Part 75
	McKee Run 002	44***	-0-	1	45	Non-Part 75
	McKee Run 003	184	-0-	2	186	Part 75
	VanSant 1*	-0-	-0-	-0-	-0-	Part 75
FIRST STATE	Co-Gen 1**	-0-	-0-	2	203	Non-part 75
STAR ENTERPRISE	Delaware City 006****	-0-	-0-	1	94	Non-Part 75
	Delaware City 019**	20	-0-	1	105	Non-Part 75
	Delaware City 034	70	-0-	1	21	Non-Part 75
	Delaware City 067	93	-0-	1	71	Non-Part 75
	Delaware City 068	206	-0-	1	207	Non-Part 75
	Delaware City 069	227	-0-	1	228	Non-Part 75
	Delaware City 070	214	-0-	2	216	Non-Part 75
	Delaware City 072	-0-	-0-	-0-	-0-	Non-Part 75
	Delaware City 074	117	-0-	1	118	Non-Part 75
	Delaware City 105	-0-	-0-	-0-	-0-	Non-Part 75
<b>TOTAL:</b>		<b>5,776</b>	<b>28</b>	<b>32</b>	<b>6,142</b>	

NOTES: (\*) These Units did not start operation until after 1990.

(\*\*) Units operated in the 1990 NO<sub>x</sub> control period but were not included in the "1990 OTC Baseline Emissions Inventory".

(\*\*\*) OTC MOU allowances corrected from "1990 OTC Baseline Emissions Inventory" due to use of incorrect RACT factor.

(\*\*\*\*) OTC MOU allowances corrected from "1990 OTC Baseline Emissions Inventory" due to incorrect reporting of 1990 fuel use information.

NO<sub>x</sub> BUDGET PROGRAM APPENDIX "B"

COMPANY	FACILITY or PLANT POINT	1990 BASELINE HEAT INPUT (10 <sup>6</sup> BTU)	1990 BASELINE NO <sub>x</sub> EMISSIONS (Tons)	1990 BASELINE EMISSION RATE (lb/mmBTU)	RACT NO <sub>x</sub> EMISSIONS (Tons)
DELMARVA POWER	Christiana Sub 001	16,245	5.8	0.709	5.8
	Christiana Sub 002	15,447	5.5	0.709	5.5
	Delaware City 002	1,612	0.6	0.703	0.6
	Edge Moor 001	1,835	0.7	0.708	0.7
	Edge Moor 002	2,409,836	655.8	0.545	648.1
	Edge Moor 003	3,451,182	928.7	0.540	516.0
	Edge Moor 004	6,213,944	1,436.8	0.463	1,147.3
	Hay Road 001	938,341	49.0	0.105	49.0
	Hay Road 002	631,111	33.6	0.106	33.6
	Hay Road 3*	-0-	-0-	-0-	-0-
	Indian River 001	1,816,612	755.6	0.828	755.6
	Indian River 002	2,134,257	882.3	0.828	882.3
	Indian River 003	4,521,301	1,853.7	0.819	762.1
	Indian River 004	8,747,546	3,671.6	0.838	1,830.8
	Indian River 10**	-0-	-0-	-0-	-0-
	Madison Street 001	1,079	0.4	0.706	0.4
	West Sub 001	6,105	2.2	0.709	2.2
DFD	McKee Run 001	344,472	91.6	0.524	55.0
	McKee Run 002	211,742	56.3	0.505	33.8
	McKee Run 003	1,724,601	411.7	0.447	321.8
	VanSant 1*	-0-	-0-	-0-	-0-
FIRST STATE	Co-Gen 1**	-0-	-0-	-0-	-0-
STAR ENTERPRISE	Delaware City 006**	-0-	-0-	-0-	-0-
	Delaware City 019	318,601	20.1	0.126	20.1
	Delaware City 034	1,100,470	69.5	0.126	69.5
	Delaware City 067	931,712	229.0	0.486	116.5
	Delaware City 068	1,820,133	588.5	0.647	345.8
	Delaware City 069	2,002,309	647.4	0.647	440.5
	Delaware City 070	1,888,905	610.7	0.647	368.3
	Delaware City 072	-0-	-0-	-0-	-0-
	Delaware City 074	1,847,552	116.7	0.126	116.7
	Delaware City 105	-0-	-0-	-0-	-0-

NOTES: Data as identified in "1990 OTC NO<sub>x</sub> Baseline Emission Inventory",  
Final OTC NO<sub>x</sub> Baseline Inventory, Point-Segment Level Data.

(\*) These Units did not start operation until after 1990.

(\*\*) Indian River Point 10, First State Co-Gen 1, and Delaware City 006 were not included in the Reference Document, but were operating in the 1990 NO<sub>x</sub> control period.

## Symbol Key

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

## Emergency Regulations

Under 29 **Del.C.** §10119, if an agency determines that an imminent peril to the public health, safety or welfare requires the adoption, amendment or repeal of a regulation with less than the notice required by 29 **Del.C.** §10115, then the following rules shall apply: (1) The agency may proceed to act without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable; (2) The order adopting, amending or repealing a regulation shall state in writing the reasons for the agency's determination that such emergency action is necessary; (3) the order effecting such action may be effective for a period of not longer than 120 days and may be renewed once for a period not exceeding 60 days; (4) When such an order is issued without any of the public procedures otherwise required or authorized by Chapter 101 of Title 29, the agency shall state as part of the order that it will receive, consider and respond to petitions by any interested person for the reconsideration or revision thereof; and (5) The agency shall submit a copy of the emergency order to the Registrar for publication in the next issue of the Register of Regulations.

## **DEPARTMENT OF HEALTH & SOCIAL SERVICES**

Statutory Authority: Public Law 104-193

### **IN THE MATTER OF:**

**REVISION OF REGULATION  
CONTAINED IN DSSM 9910**

### NATURE OF THE PROCEEDINGS:

Delaware Health and Social Services has determined that a threat to the public welfare exists if revision of regulations contained in DSSM Section 9910 is not implemented without prior notice or hearing. Failure to do so would jeopardize the agency from meeting the required mandatory participation rates and thus threaten full federal funding for Delaware under the Temporary Assistance for Needy Families (TANF) program.

### SUMMARY OF PROPOSED REVISIONS:

- Replaces food stamp workfare penalties with the ABC workfare program requirements and penalties.
- Allows the agency to use the food stamp allotment along

with the ABC benefit in determining the number of hours a household is required to participate in workfare, which is a work experience program in which participants work to earn their benefits.

### NATURE OF PROPOSED REVISIONS:

9910 Simplified Food Stamp Program

DSS was approved by Food and Nutrition Service, under the United States Department of Agriculture, to operate a Simplified Food Stamp Program (SFSP). The SFSP permits a state to substitute certain TANF rules and procedures for food stamp rules. Delaware's SFSP has two components:

1. the alignment of ABC's Self-Sufficiency sanctions for Food Stamps; and
2. work for your welfare (workfare) program rules.

Households in which all members, or one or more members, receive ABC may participate in the SFSP. Non-Public Assistance (NPA) households will not participate in the SFSP.

The SFSP will follow all the regular food stamp rules for determining eligibility and certifying households. Under the SFSP, there are four basic changes in the food stamps rules



## EMERGENCY REGULATIONS

that will affect certain ABC households who receive food stamps, as follows:

- Replaces food stamp work exemptions with ABC exemptions;
- Replaces current Employment and Training (E & T) and job quit requirements and penalties with ABC requirements and penalties; and
- Applies a food stamp sanction for parents who fail to cooperate with school officials to ensure attendance for children under 16; and
- Replaces food stamp workfare penalties with the ABC workfare program requirements and penalties.

### WORKFARE

#### WORK FOR YOUR WELFARE (WORKFARE) PROGRAM

Work for Your Welfare (workfare) is defined as a work experience program in which participants work to earn their benefits. Workfare is a requirement for those ABC recipients who are able to work but, for whatever reason, are not working after receiving ABC benefits for 24 months. Those in workfare must participate for a predetermined number of hours each week and complete 10 hours of job search activities per week.

The number of hours required is based on the ABC grant and the food stamp allotment divided by the minimum wage. Each benefit will separately be divided by the minimum wage (\$5.15/hour). The hours from each benefit will be totaled and then divided by 4.33. For every hour that a participant fails to perform, the ABC check will first be reduced by \$5.15. If the ABC grant reduces to zero, any workfare sanction amount will be used to reduce the food stamp allotment. The failure to do job search will also result in a progressive 1/3 grant and allotment reduction sanction.

One-parent households will be required to work the hours determined by dividing the grant and food stamps by the minimum wage. The maximum participation hours is 25 hours per week and, in addition, each participant is required to complete 10 hours of job search activities every week. The maximum required work hours for one-parent families will increase to 30 hours per week for FFY 1999.

Two-parent households will be required to work the hours determined by dividing the grant and food stamps by the minimum wage. The number of participation hours for the

two-parent family is 35 hours per week if they do not receive child care and 55 hours per week if they do receive child care. One parent may participate for the whole 35 hours, or both parents may share. If child care is provided, the 55 hours can be shared by both parents with one parent working at least a minimum of 20 hours, such as 35/20 or 30/25. (10/45 is not acceptable.)

The food stamp allotment will only be used as necessary to require the one and two-parent households to work a maximum of 25 or 35 hours per week. The ABC benefits will be reduced to zero before the food stamp is affected. The food stamp benefits will only be reduced according to the portion of the allotment used in the calculation of the hours. If the food stamp allotment is reduced by \$5.15 for each hour not worked and the remaining benefit is less than \$1, no benefit will be issued.

Workfare households will not be double penalized for the same violation. Households that fail to work the required number of hours, while meeting job search requirements, will have their benefits reduced by \$5.15 for each hour not worked. There is no noncompliance sanction applied for failure to work the required number of hours.

Households that fail to work the required number of hours and fail to complete the job search activities will have their benefits reduced by \$5.15 for each hour it fails to work. The household will also have the 1/3 grant/allotment reduction sanction applied for failing to complete job search activities.

When calculating the number of hours, fractions will be rounded down to the nearest quarter hour. When calculating the amount of the benefits to be removed, the exact amount is subtracted from the grant or food stamp allotment. The remaining benefit is rounded down to the nearest dollar to determine the amount of the benefit the household will receive.

For the ABC grants, if the household fails to work at all, no ABC benefit will be issued. For the food stamp allotments, only the portion of the allotment used to require the number of hours of participation will be subtracted.

Until the DCIS system can automate the process for applying the workfare sanction reduction and 1/3 reduction sanction, staff will continue to do this manually. In the manual process, the worker first reduces the grant and allotment by the workfare sanction and then applies any applicable 1/3 sanctions, plus other sanctions. When automated, the system will first apply any applicable 1/3 sanctions, plus other sanctions, and then reduce the grant and allotment by the workfare sanction amount.

## CALCULATION PROCESSES

To determine the hours of participation:

1. The pre-sanctioned ABC grant is divided by minimum wage of \$5.15, and the result is rounded down to the nearest ¼ hour.
2. The food stamp allotment is divided by minimum wage of \$5.15, and the result is rounded down to the nearest ¼ hour.
3. The two results (#1 and #2), added together, are the monthly number of hours for which the family/household is required to participate.
4. The monthly number of hours (#3) is divided by 4.33 to get a weekly number of hours, rounded down to the nearest ¼ hour.
5. Compare the weekly number of hours (#4) to the maximum required for a one or two-parent household. Use the lesser number for the weekly number of hours.
6. The weekly number of hours (#5) is divided by 5 to get the daily participation requirement, rounded down to the nearest ¼ hour.
7. Consult the yearly table for the number of days the participant is required to do workfare. Multiply that number by the daily participation rate (#6) to determine the monthly required participation rate. (1998 table is attached to this section.)

Manual determination of the workfare sanction amount:

1. Subtract the actual hours of participation for a month from the required hours for the same month.
2. Any amount greater than zero is multiplied by \$5.15, resulting in the workfare sanction amount.
3. Subtract the workfare sanction amount (#2) from the ABC grant amount.
4. Subtract any 1/3 E& T/school attendance sanctions from amount in #3 before subtracting any \$68 or \$50 sanctions.
5. If the subtraction of the workfare sanction amount reduces the ABC benefit to zero and there is a remaining amount, this amount will be subtracted from the food stamp allotment after the application of any aligned sanctions.\*

\*Only the portion of the food stamp allotment used to determine the participation hours can be subtracted from the

food stamp allotment. (If there is a \$100 workfare sanction amount left over after the grant reduced to zero, but only \$75 of the allotment was used to determine the hours of participation, only \$75 can be subtracted from the allotment.)

System automated determination of workfare sanction amount:

1. Subtract the actual hours of participation for a month from the required hours for the same month.
2. Any amount greater than zero is multiplied by \$5.15, resulting in the workfare sanction amount.
3. Subtract any 1/3 E& T/school attendance sanctions from grant before subtracting any \$68 or \$50 sanctions.
4. Subtract the workfare sanction amount (#2) from the post-sanctioned ABC grant amount (#3).
5. If the subtraction of the workfare sanction amount reduces the ABC benefit to zero and there is a remaining amount, this amount will be subtracted from the food stamp allotment after the application of any aligned sanctions.\*

\*Only the portion of the food stamp allotment used to determine the participation hours can be subtracted from the food stamp allotment. (If there is a \$100 workfare sanction amount leftover after the grant reduced to zero, but only \$75 of the allotment was used to determine the hours of participation, only \$75 can be subtracted from the allotment.)

Examples of the Workfare Process:

1. One-parent family receives \$338 in ABC benefits and a \$321 food stamp allotment. \$338 divided by \$5.15 equals 65.5 hours. \$321 divided by \$5.15 equals 62.25 hours. The total hours equal 127.75. The 127.75 monthly number of hours is divided by 4.33 to get a weekly number of 29.5 hours per week. The one-parent family is only required to work 25 hours per week, divided by 5 equals 5 hours per day. There is also a 10 hour per week job search activity requirement. The client will be doing workfare hours between March 12 and April 11 which is 22 days. 22 days multiplied by 5 hours per day equals 110 hours per month.

a) Parent only worked 88 hours for the month and completed job search activities. The 20 hours (110 - 88 = 22) multiplied by \$5.15 equals \$113.30. The \$338 grant is reduced by \$114. The household receives a \$224 grant and \$321 in food stamps.

b) Parent only worked 88 hours for the month and failed to complete the job search activities. Manually, the

# EMERGENCY REGULATIONS

grant is reduced by \$114 and then the 1/3 grant/allotment reduction is applied to the remaining grant and food stamps. The grant reduces to \$42 and the food stamps to \$214. When automated, the 1/3 sanction is first applied and then the grant is reduced by \$114. The grant reduces to \$111 and the food stamps to \$214.

c) Parent worked all the required hours but failed to complete the job search activities. The 1/3 grant/allotment reduction is applied to each benefit. The grant reduces to \$225 and food stamps to \$214.

d) Parent only worked 28 hours. 80 hours multiplied by \$5.15 equals \$422.25. The grant of \$338 is reduced to zero. The number of hours to apply to the food stamp benefit is determined by subtracting the number of grant hours from the total monthly hours the parent was required to work (110 - 65.5 = 44.5) 44.5 hours multiplied by \$5.15 equals \$229.18. The \$321 in food stamps is reduced by \$229 which equals a benefit of \$92.

2. Two-parent family of six receives \$544 in ABC benefits and \$534 in food stamps. \$544 divided by \$5.15 equals 105.5 hours. \$534 divided by \$5.15 equals 103.5 hours. The combined hours total 209. 209 divided by 4.33 equal 48.25 hours a week. The family does not receive child care and is only required to work 35 hours per week and 10 hours of job search. 35 hours divided by 5 days equals 7 hours per day. The family will be doing workfare hours between March 12 and April 11, which has 22 days. Multiply 7 hours a day by 22 days which equals 154 hours for the month.

a) The family only works 100 hours, and completes the job search activities. 154 hours minus 100 hours equal 54 hours not worked. 54 hours multiplied by \$5.15 equals \$278.10. The grant is reduced by \$278 which leaves a grant of \$266. The food stamps increase to \$582 because the reduction of the grant for failure to work is not a sanction.

b) The family works 50 hours, and fails to complete job search activities. 104 hours multiplied by \$5.15 equals \$535.60. Manually, the grant is reduced to \$8, and then a 1/3 sanction is applied, making the grant \$5. A 1/3 sanction is applied to the food stamps, which leaves a \$388 benefit. When automated, the 1/3 sanction is applied to the grant first, followed by the reduction due to not working, reducing the grant to zero. The monthly hours of 154 minus 105.5 grant hours equals 48.5 hours to reduce the food stamps with. The food stamps are reduced by 1/3 to \$356, then the \$249.78 workfare reduction makes the benefit \$106.

## SUMMARY

- Household will work a pre-determined number of hours in order to receive their ABC and Food Stamp benefits.
- Hours not worked will result in a reduction in benefits based on the numbers of hours they failed to work.
- Failure to complete job search activities will result in 1/3 reduction sanctions.
- Food stamps are calculated using the post-sanctioned grant before subtracting any sanctions or hours.
- Food stamp benefits are not sanctioned (Riverside) when just the grant is reduced for not working and they have completed the job search activities.
- Manual calculations require the reduction of hours to be subtracted before any 1/3 reduction sanctions are applied.
- When automated, the 1/3 reduction sanctions (and any other sanctions) will be applied before the reduction of hours.
- When the ABC grant reduces to zero and a workfare sanction amount remains, the remainder, or a portion of the remainder, is subtracted from the food stamp allotment. Only the portion of the food stamp allotment that was needed to meet the required hours of participation can be subtracted.

## FINDING OF FACT

The Department finds that these changes should be made in the best interest of the general public of the State of Delaware. The Department will receive, consider, and respond to petitions by any interested person for the reconsideration or revision thereof. Such petitions must be forwarded by March 31, 1998 to the Director, Division of Social Services, P. O. Box 906, New Castle, DE 19720.

THEREFORE, IT IS ORDERED, that the proposed revision to the regulation be adopted on an emergency basis, without prior notice or hearing, and shall become effective immediately.

*to be signed by Feb. 27, 1998*

GREGG C. SYLVESTER, MD  
SECRETARY

February 6, 1998

Gregg C. Sylvester, MD, Secretary

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## DEPARTEMENT OF HEALTH & SOCIAL SERVICES

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

### IN THE MATTER OF:

REVISION OF REGULATIONS  
OF THE MEDICAID/MEDICAL  
ASSISTANCE PROGRAM  
CONTAINED IN THE EPSDT  
PROVIDER MANUAL

### NATURE OF THE PROCEEDINGS:

Delaware Health and Social Services has determined that a detriment to the public health and welfare exists if revision of the policy contained in the Medicaid Early and Periodic Screening, Diagnosis and Treatment Provider manual is not implemented without prior notice or hearing. Failure to do so would tend to limit availability of dental services for children, the provision of which are not only Federally mandated but also appropriate and cost effective as preventive medical care.

### NATURE OF PROPOSED REVISION:

#### EPSDT Provider Specific Policy Manual

\*Dental services will be reimbursed at ~~75% of the providers usual and customary charge to private pay patients~~ a negotiated rate.

### FINDING OF FACT

The Department finds that this change should be made in the best interest of the general public of the State of Delaware. The Department will receive, consider, and respond to petitions by any interested person for the reconsideration or revision thereof.

\* Denotes modified regulation

THEREFORE, IT IS ORDERED, that the proposed revision to the regulation be adopted on an emergency basis, without prior notice or hearing, and shall become effective immediately.

Symbol Key

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

Proposed Regulations

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

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**DEPARTMENT OF  
ADMINISTRATIVE SERVICES  
DIVISION OF PROFESSIONAL REGULATION  
DELAWARE BOARD OF PROFESSIONAL  
COUNSELORS OF MENTAL HEALTH**

Statutory Authority: 24 Delaware Code,  
Section 3007(a)(1) (24 **Del.C.** 3007(a)(1))

PLEASE TAKE NOTICE, pursuant to 29 Del. C. Chapter 101 and 24 Del. C. Section 3007(a)(1), the Delaware Board of Professional Counselors of Mental Health proposes to adopt new Rules and Regulations to replace the existing Rules and Regulations. The regulations will define meetings and elections, licensure by certification, licensure by reciprocity, licensure of associate counselors of mental health, application and fee, affidavit and time limit, renewal of licensure, reactivation of licensure, return to active status, and temporary suspension pending hearing.

A public hearing will be held on the proposed Rules and Regulations on April 3, 1998 at 1:00 p.m. in the Second Floor Conference Room A of the Cannon Building, 861 Silver Lake Boulevard, Dover, Delaware. The Board will receive and consider input, in writing, from interested persons on the proposed rules and

regulations. The final date for interested persons to submit comments shall be at the above-scheduled public hearing. Anyone wishing to obtain a copy of the proposed regulations, or to make comments at the public hearing should notify the Board's Administrative Assistant Gayle Franzolino by calling (302) 739-4522 Ext. 220, or writing to the Delaware Board of Professional Counselors of Mental Health, P. O. Box 1401, Cannon Building, Dover, Delaware 19903.

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STATE OF DELAWARE  
BOARD OF PROFESSIONAL COUNSELORS OF  
MENTAL HEALTH  
PROPOSED RULES AND REGULATIONS

I. MEETINGS AND ELECTIONS

(1) Meetings - Regular meetings of the Board shall be held on a monthly basis as needed, at least in June and December, at a time and place designated by the Board.

(2) Election of Officers - The Board shall elect officers annually at the regular December meeting

II. LICENSURE BY CERTIFICATION

Applicants for LPCMH licensure by certification shall fulfill the following requirements:

(1) Certification - The applicant shall be certified by NBCC as a National Certified Counselor (NCC), by ACMHC as a Certified Clinical Mental Health Counselor (CCMHC), or by a certifying organization.

Certifying Organization - A certifying organization shall be defined as a national mental health specialty certifying organization acceptable to the Board. This shall include the National Board for Certified Counselors, Inc. (NBCC), Academy of Clinical Mental Health Counselors (ACMHC), formerly the National Academy for Certified Clinical Mental Health Counselors (NACCMHC), and other organizations that meet all of the following criteria:

(a) The organization shall be a national professional mental health organization recognized as setting national standards of clinical competency.

(b) The organization shall require the applicant to take a standardized examination designed to test his/her understanding of the principles involved in the mental health specialty for which he/she is being certified. Certification shall be based upon the applicant's attaining the minimum passing score set by the organization.

(c) The organization shall prescribe a code of ethics substantially equivalent to that of the NBCC.

(d) The organization shall require the minimum of a master's degree in the counseling or behavioral science field.

This certification shall be verified by the "NBCC Certification Form," the "ACMHC Certification Form" or the "Certifying Organization Certification Form," submitted directly to the Board by the certifying organization.

(2) Graduate Transcript - The applicant's master's degree in a counseling or behavioral science field, required by his/her certifying organization for certification, shall be documented by an official transcript submitted directly to the Board by the accredited educational institution granting the degree..

(3) Clinical Experience - Clinical experience shall be defined as the accumulation of hours spent providing mental health counseling services in a professional mental health counseling setting, including face-to-face interaction with clients and other matters directly related

to the treatment of clients.

Designated Objective Agent - A designated objective agent shall be a professional colleague, supervisor or other individual with personal knowledge of the extent of the professional practice of the applicant, who certifies or attests to such professional practice. Under no circumstances shall a spouse, former spouse, parent, step-parent, grand-parent, child, step-child, sibling, aunt, uncle, cousin or in-law of the applicant be acceptable as a designated objective agent.

Thirty (30) graduate semester hours or more attained beyond the master's degree, may be substituted for up to 1,600 hours of the required clinical experience, provided that hours are clearly related to the field of counseling and are acceptable to the Board. Graduate credit hours shall be verified by an official transcript submitted directly to the Board by the accredited educational institution at which the course work was done.

Supervised clinical experience or post-master's degree alternative shall be verified by the "Professional Experience Reference Form" or the "Verification of Self Employment" form.

(4) Supervised Clinical Experience - Supervised clinical experience shall be the accumulation of hours spent providing mental health counseling services while under the supervision of an approved clinical supervisor. Supervised clinical experience acceptable to the Board shall be defined as follows:

(a) Supervised clinical experience shall consist of 1,600 hours of clinical experience concurrent with 100 hours of clinical supervision over a period of no more than four (4) years.

(b) In no case shall the applicant have less than 1,600 hours of the required post- master's degree supervised professional clinical experience.

Clinical Supervision - Clinical supervision shall be ongoing, regularly scheduled meetings with a designated, approved clinical supervisor for the purpose of oversight, guidance and review of clinical practice. Consultation and/or informal case reviews are not acceptable as clinical supervision. Clinical supervision may take place in individual and/or group settings, defined as follows:

(a) Individual Supervision - Individual supervision shall consist of one-to-one, face-to-face meetings between supervisor and supervisee.

(b) Group Supervision - Group supervision shall consist of face-to-face meetings between supervisor and no more than six (6) supervisees.

Supervisory Setting - No more than forty (40) hours of group supervision shall be acceptable toward the 100-hour requirement. The entire 100-hour requirement may be fulfilled by individual supervision.

Supervision shall be verified by the "Clinical Supervision Reference Form," submitted directly to the Board by the approved clinical supervisor .

### III. LICENSURE BY RECIPROCITY

Applicants for LPCMH licensure by reciprocity (i.e., those requesting licensure based upon active licensure status in another state) shall meet the following requirements:

(1) Proof of Licensure Status - The applicant shall hold an active professional counseling license in good standing from another state. Verification of licensure status shall be submitted directly to the Board by that state on the "Verification of Licensure or Certification from Another State" form.

(2) Notarized Statement of Prior Licensing Jurisdictions - The applicant shall submit a notarized statement listing all licensing jurisdictions in which he/she formerly practiced and a signed "Release of Information" granting the Board permission to contact said jurisdictions for verification of disciplinary history and current status.

(3) Determination of Equivalency - The applicant shall submit a copy of the statute and rules of licensure from the state issuing his/her license. The burden of proof is upon the applicant to demonstrate that the statute and rules of the licensing state require him/her to meet all educational, experience and supervision requirements set forth in Title 24, Delaware Code, Chapter 30. Based upon the information presented, the Board shall make a determination regarding equivalency of the requirements of Title 24, Delaware Code, Chapter 30, and those of the applicant's licensing state.

(4) Non-Equivalency LACMH Option - If the Board determines that the requirements of the applicant's licensing state are not equivalent with regard only to the required 1,600 hours of supervised experience, then the applicant shall be eligible for licensure as a LACMH, in which case he/she shall have four (4) years to obtain the balance of the supervised experience required. The

applicant shall be given full credit for such supervised experience as was required for licensure in his/her licensing state. In such situation, the Board shall allow for disruption in the requirements that the applicant's supervised experience be completed within a four (4) year period.

### IV. LICENSURE OF ASSOCIATE COUNSELORS OF MENTAL HEALTH

(1) Written Plan - The applicant shall submit a written plan for supervised professional experience, written according to the "Licensed Associate Counselor of Mental Health Guidelines for Written Plan for Supervision," and signed by the approved professional supervisor.

### V. APPLICATION AND FEE, AFFIDAVIT AND TIME LIMIT

When applying for licensure, the applicant shall complete the following:

(1) Application and Fee - The applicant shall submit a completed "Application for Licensure," accompanied by a non-refundable application fee.

(2) Affidavit - The applicant shall submit a signed, notarized "Affidavit," affirming that he/she has not violated any rule or regulation set forth by the Delaware Board of Professional Counselors of Mental Health; and that he/she has not been convicted of any felony or misdemeanor involving dishonesty or for any offense.

(3) Time Limit for Completion of Application - Any application not completed within one (1) year shall be considered null and void.

### VI. RENEWAL OF LICENSURE

(1) Renewal Date - The LPCMH license shall be renewable biennially on September 30 of even-numbered years, beginning with September 30, 1994.

(2) Requirements for Renewal - Requirements for licensure renewal are as follows:

(a) Certification - The candidate for renewal shall hold current certification in good standing as of the date of licensure renewal in NBCC, ACMHC or other certifying organization. This certification shall be verified by the appropriate "Verification of Certification Form," submitted directly to the Board by the certifying organization.

**(b) Continuing Education**

[1] Requirement - The candidate for renewal shall have completed no less than forty (40) clock hours of acceptable continuing education per two (2) year licensure renewal period. Continuing education requirements for initial licensure periods of less than two (2) years shall be prorated.

[2] Acceptable Continuing Education - Acceptable continuing education shall include the following:

[a] Continuing education hours approved by a national mental health organization, such as NBCC, ACMHC, APA, shall be acceptable. Other training programs may apply for continuing education oriented towards enhancement, knowledge and practice of counseling. Hours are to be documented by a certificate signed by the presenter, or by designated official of the sponsoring organization.

[b] Academic course work, and presentation of original papers providing training and clinical supervision may be applied for up to twenty (20) clock hours of the continuing education requirement. These hours are to be documented by an official transcript, syllabus, or a copy of the published paper presented.

Under no circumstances, may there be less than twenty (20) hours of face-to-face participation in continuing education as outlined in [a] above.

[3] Make-Up of Disallowed Hours - In the event that the Board disallows certain continuing education clock hours, the candidate for renewal shall have three (3) months after the licensure renewal date to complete the balance of acceptable continuing education hours required.

(c) Verification - Verification of continuing education hours shall be by the "Continuing Education Form for Licensed Professional Mental Health Counselors," with appropriate documentation for each item listed attached to the form.

(d) Fees - The candidate for renewal shall make payment of a renewal fee in an amount prescribed by the Division of Professional Regulation for that licensure renewal period. A fifty percent (50%) late charge shall be imposed upon any fee paid after the renewal date.

**VII. REACTIVATION OF LICENSURE**

(1) Reactivation - An expired license shall be reactivated as follows:

(a) Within Five (5) Years - An expired license shall be reactivated within five (5) years following the expiration date upon fulfillment of the following requirements:

[1] Written Request - Written request to the Board requesting reactivation of licensure.

[2] Certification - Current certification in good standing, as of the date of the request for licensure reactivation in NBCC, ACMHC or other certifying organization.

[3] Continuing Education - Completion of forty (40) hours of acceptable continuing education, obtained within the two (2) year period prior to the request for reactivating.

[4] Fees - Payment of renewal fees for any licensure renewal periods which have elapsed since expiration of licensure, plus a late charge of fifty percent (50%) of the most recent licensure renewal fee.

**VIII. RETURN TO ACTIVE STATUS**

(1) Return to Active Status - Return to active status from inactive status shall be granted upon fulfillment of the following requirements:

(a) Written Request - Written request to the Board requesting return to active status.

(b) Certification - Current certification in good standing, as of the date of the request for return to active status, in NBCC, ACMHC or other certifying organization.

(c) Continuing Education - Completion of forty (40) hours of acceptable continuing education, obtained within the two (2) year period prior to the request for return to active status.

(d) Fee - Payment of the current fee for licensure renewal. No late fee shall be assessed for return to active status.

**IX. TEMPORARY SUSPENSION PENDING HEARING**

No order temporarily suspending a practitioner's license shall be issued by the Board with less than twenty-four (24) hours prior written or oral notice to the



practitioner or the practitioner's attorney, so that the practitioner or the attorney may be heard in opposition to the proposed suspension and unless at least four (4) members of the Board vote in favor of such a temporary suspension.

An order of temporary suspension pending a hearing shall remain in effect for a period of time no longer than sixty (60) days from the date of the issuance of said order, unless the suspended practitioner requests a continuance of the date for the convening of the hearing panel. In such event, the order of temporary suspension pending a hearing shall remain in effect until the hearing panel has convened and a decision rendered.

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## **DEPARTMENT OF AGRICULTURE**

### **THOROUGHBRED RACING COMMISSION**

Statutory Authority: 3 Delaware Code,  
Sections 10103 & 10128(m)(1)  
(3 **Del.C.** 10103, 10128(m)(1))

The Commission proposed the enactment of Rule 13.18 pursuant to 3 Del.C. sections 10103 and 10128(m)(1), and 29 Del.C. section 10115. The proposed Rule 13.18 would prohibit a claimed horse from racing for fourteen days after the claim unless there is good cause for a shorter time period. The proposed rule will be considered by the Commission at its next regularly scheduled meeting on April 16, 1998 at 10:00 a.m. at Delaware Park, 777 Delaware Park Boulevard, Stanton, Delaware. Comments may be made at the Commission's meeting in person or by writing submissions. Written comments may be submitted in writing to the Commission Office on or before 4:00 p.m. on April 16, 1998.

The Commission Office is located at 2320 South DuPont Highway, Dover, Delaware 19901 and the phone number is (302) 739-4811.

#### PROPOSED RULE

#### 13.18 Prohibition on Racing Claimed Horse:

No horse claimed in a claiming race shall be raced for a minimum period of fourteen days after the day of the race unless the Racing Secretary and the Stewards determine that good cause exists to allow the horse to race within a shorter period, which is at least twelve days after the day of the claiming race.

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## **DEPARTMENT OF EDUCATION**

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

**THE FOLLOWING SIXTEEN (16) PROPOSED REGULATIONS  
WILL BE PRESENTED TO THE STATE BOARD OF EDUCATION  
AT ITS MEETING OF MARCH 19, 1998**

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

### **ACCIDENT REPORTING**

A. TYPE OF REGULATORY ACTION REQUESTED  
Amendment to Existing Regulation

B. SYNOPSIS OF SUBJECT MATTER OF THE  
AMENDMENT

The regulation Accident Reporting found on page 125 in The School Nurse, A Guide to Responsibilities identifies when the school nurse must file an accident report and how it should be done. The amendment is necessary in order to isolate the regulatory responsibilities of the school nurse from the technical assistance and to use the word "must" in the regulatory statements.

C. IMPACT CRITERIA

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

The amended regulation deals with health and safety issues and not curriculum issues.

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

The amended regulation addresses health and safety issues for all students.

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

The regulation addresses the responsibilities of the school nurse in reporting accidents and the amendment clarifies the responsibilities.

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

The amended regulation addresses health and safety issues and student legal rights are also respected.

5. Will the amendment preserve the necessary authority and flexibility of decision makers at the local

board and school level?

The amendment does not alter the necessary authority and flexibility of decision makers at the local board and school level.

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

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

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

The amendment will retain the decision making authority and accountability in the same entity.

8. Will the amendment 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 amendment will not be an impediment to the implementation of other educational policies.

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

The regulation is necessary to protect the health and safety of the students and the amendment clarifies the responsibilities of the school nurse when reporting accidents.

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

The amendment does not add any additional costs.

**FROM THE SCHOOL NURSE, A GUIDE TO RESPONSIBILITIES**

**Accident Reporting**

~~Records are important in emergency care programs. Many days after an emergency, particularly an accident, information about what happened, what was done to aid the injured, and who did it, may be necessary to assist in settlement of an insurance claim or to protect school personnel against charges of negligence.~~

~~A summary of accidents which result in one-half or more days absence from school or require a physician's attention or both should be reported immediately to the administration, followed by a monthly summary.~~

~~Information on the monthly report to the district should include:~~

- ~~Number of Accidents~~
- ~~Nature of Accident~~
- ~~Part of Body~~
- ~~Location where accident occurred~~
- ~~Activity person was engaged in~~

AS REVISED

Accident Reporting

The school nurse must make a written report of student accidents to the school district in addition to entries on the daily log in the following circumstances:

1. The school nurse has referred the student for medical evaluation, regardless of whether the parent/guardian followed through on that request.
2. OR, the student has missed more than one-half day due to the accident.

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

**DAILY LOG**

A. TYPE OF REGULATORY ACTION REQUESTED

Amendment to Existing Regulation

B. SYNOPSIS OF SUBJECT MATTER OF THE AMENDMENT

The regulation Daily Log found on page 93 in The School Nurse, A Guide to Responsibilities mandates the keeping of a daily log and identifies the types of information that must be included. The amendment is necessary in order to require that the school nurse keep a daily log and clearly state what information must be in the log.

C. IMPACT CRITERIA

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

The amended regulation deals with health and safety issues and not curriculum issues.

2. Will the amendment help ensure that all students

receive an equitable education?

The amended regulation addresses health and safety issues for all students.

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

The regulation addresses the responsibilities of the school nurse in maintaining the daily log and the amendment clarifies those responsibilities.

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

The amended regulation addresses health and safety issues and student legal rights are also respected.

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

The amendment does not alter the necessary authority and flexibility of decision makers at the local board and school level.

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

The amendment does not place any unnecessary reporting or administrative responsibility or mandates on the decision makers at the local board or school level.

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

The amendment will retain the decision making and accountability in the same entity.

8. Will the amendment 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 amendment will not be an impediment to the implementation of other educational policies.

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

The regulation is necessary to protect the health and safety of students and the amendment clarifies the responsibilities of the school nurse in maintaining the Daily Log.

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

The amendment does not add any additional costs.

FROM THE SCHOOL NURSE, A GUIDE TO  
RESPONSIBILITIES

Daily Log

~~A daily log, see sample on page 95, must be kept listing all students who enter the health room with complaints involving illness or injury because:~~

- ~~(a) this is a documented record if any questions arise;~~
- ~~(b) it can be used in assembling illness and accident incidence of the school population; and~~
- ~~(c) it is used to compile data for the end-of-the-year report (see page 97).~~

~~It is recommended that the daily logs be stored for a length of time determined by the school district.~~

AS REVISED

Daily Log

The school nurse must maintain a daily log which will include at a minimum:

1. School Name
2. Three point date
3. Student's first and last name
4. Time of arrival and departure
5. Presenting complaint
6. Nurse's assessment and plan
7. Disposition (return to class, sent home, etc.)
8. Parent contact, if appropriate
9. Complete nurse's signature

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

**POLICY FOR SCHOOL DISTRICTS ON THE  
POSSESSION, USE AND DISTRIBUTION OF DRUGS  
AND ALCOHOL**

A. TYPE OF REGULATORY ACTION REQUESTED

Amendment to Existing Regulation

B. SYNOPSIS OF SUBJECT MATTER OF THE  
AMENDMENT

The regulation Policy for School Districts on the Possession, Use and Distribution of Drugs and Alcohol found on pages 130 to 133 in The School Nurse, A Guide to Responsibilities, and pages A-55 - A-60 in the Handbook for K-12 Education defines key terms, identifies the minimum number of elements that each

local district must have in their local drug and alcohol policies and defines the position of the Department of Education. The amendment is necessary to change the wording of the first paragraph of section III to read as follows: "Each school district shall have a policy on file and update it periodically. The policy shall contain at a minimum the following". The other change is to substitute the Department of Education for the Department of Public Instruction in the last paragraph following section III.K.

### C. IMPACT CRITERIA

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

The amendment simply removes a first time due date for having the drug policy to the Department of Education and changes the name of the Department of Public Instruction to the Department of Education.

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

The amendment simply corrects two sections as indicated in response #1.

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

The regulation addresses the health and safety of students and the amendment simply corrects two sections as indicated in response #1.

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

The regulation addresses students' legal rights and the amendment simply corrects two sections as indicated in response #1.

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

The amendment does not alter the necessary authority and flexibility of decision making at the local board or school level.

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

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

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

same entity?

The amendment will retain the decision making authority and accountability in the same entity.

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

The amendment will not be an impediment to the implementation of other education policies.

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

The regulation is necessary to protect the health and safety of the students and the amendment simply corrects two sections as indicated in response #1.

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

The amendment does not add any additional costs.

### ~~Policy for School Districts on the Possession, Use or Distribution of Drugs and Alcohol~~

I. The following policy on the possession, use, or distribution of drugs and alcohol shall apply to all public school districts.

A. The possession, use and/or distribution of alcohol, a drug, a drug-like substance, a look-alike substance and/or drug paraphernalia are wrong and harmful to students and are prohibited within the school environment.

B. Communications devices, such as, but not limited to, mobile phones and electronic beepers, ordinarily have no place in the school environment. These devices may be allowed in school, according to individual school and/or district codes of conduct.

C. Student lockers are the property of the school and may be subjected to search at any time with or without reasonable suspicion.

D. Student motor vehicle use to and in the school environment is a privilege which may be extended by school districts to students in exchange for their cooperation in the maintenance of a safe school atmosphere. Reasonable suspicion of a student's use, possession or distribution of alcohol, a drug, a drug-like substance, a look-alike substance or drug paraphernalia, or of a student's possession of an unauthorized electronic beeper or other communication device in the school environment, may result in the student being asked to open an automobile in the school environment to permit school authorities to look for such items. Failure to open

any part of the motor vehicle on the request of school authorities may result in the police being called to conduct a search, and will result in loss of the privilege to bring the vehicle on campus.

E. Students of majority age, i.e. age 18 or older, are responsible for their own actions. All such students will be treated as adults for purposes of reporting violations of this policy and of the law to the police. Such students shall also be on notice that their parents and/or guardians will be notified (if their address and/or telephone number is known to the school) of the student's actions in accordance with this policy.

F. All alcohol, drugs, drug-like substances, look-alike substances and/or drug paraphernalia found in a student's possession shall be turned over to the principal or designee, and be made available, in the case of a medical emergency, for identification. All substances shall be sealed and documented, and, in the case of substances covered by 16 Del. C. ch 47, turned over to police as potential evidence.

II. The following definitions shall apply to this policy and will be used in all district policies.

A. "Alcohol" shall mean alcohol or any alcoholic liquor capable of being consumed by a human being, as defined in Section 101 of Title 4 of the Delaware Code, including alcohol, spirits, wine and beer.

B. "Drug" shall mean any controlled substance or counterfeit substance as defined in Section 4701 of Title 16 of the Delaware Code, including, for example, narcotic drugs such as heroin or cocaine, amphetamines, anabolic steroids, and marijuana, and shall include any prescription substance which has been given to or prescribed for a person other than the student in whose possession it is found.

C. "Drug paraphernalia" shall mean all equipment, products and materials as defined in Section 4701 of Title 16 of the Delaware Code, including, for example, roach clips, miniature cocaine spoons and containers for packaging drugs.

D. "Prescription drugs" shall mean any substance obtained directly from or pursuant to a valid prescription or order of a practitioner, as defined in 16 Del. C., sec. 4701 (24), while acting in the course of his or her professional practice, and which is specifically intended for the student in whose possession it is found.

E. "Drug-like substance" shall mean any noncontrolled and/or nonprescription substance capable of producing a change in behavior or altering a state of mind or feeling, including, for example, some over-the-counter cough medicines, certain types of glue, caffeine pills.

F. "Nonprescription medication" shall mean any over-the-counter medication; some of these medications

may be a "drug-like substance."

G. "Look-alike substance" shall mean any noncontrolled substance which is packaged so as to appear to be, or about which a student makes an express or implied representation that the substance is, a drug or a noncontrolled substance capable of producing a change in behavior or altering a state of mind or feeling. See Del. C., sec. 4752A.

H. "Possess," "possessing," or "possession" shall mean that a student has on the student's person, in the student's belongings, or under the student's reasonable control by placement of and knowledge of the whereabouts of, alcohol, a drug, a look-alike substance, a drug-like substance or drug paraphernalia.

I. "Use" shall mean that a student is reasonably known to have ingested, smoked or otherwise assimilated alcohol, a drug or a drug-like substance, or is reasonably found to be under the influence of such a substance.

J. "Distribute," "distributing" or "distribution" shall mean the transfer or attempted transfer of alcohol, a drug, a look-alike substance, a drug-like substance, or drug paraphernalia to any other person with or without the exchange of money or other valuable consideration.

K. "School environment" shall mean within or on school property, and/or at school sanctioned or supervised activities, including, for example, on school grounds, on school buses, at functions held on school grounds, at extra-curricular activities held on and off school grounds, on field trips and at functions held at the school in the evening.

L. "Expulsion" shall mean exclusion from school for a period determined by the local district not to exceed 180 school days. The process for readmission shall be determined by the local district. (State Board Approved January 1991, Revised August 1991)

III. ~~Each school district shall develop and submit to the Department of Public Instruction by September 1, 1991, for review and approval, policies and/or regulations which shall include, as a minimum, the following:~~

Each school district shall have a policy on file and update it periodically. The policy shall include, as a minimum the following:

A. A system of notification of each student and of his/her parent at the beginning of the school year, and whenever a student enters or re-enters the school during the school year, of the state and district policies and regulations.

B. A statement that it is anticipated that the state and district policies shall apply to all students, except that with respect to handicapped students, the federal law will be followed, and a determination of whether the violation of the alcohol and drug policy was due to the student's handicapping condition will be made prior to any

discipline or change or placement in connection with the policy.

C. A written policy which sets out procedures for reporting incidents, how authorities and/or parents are to be contacted, and how confidentiality is to be maintained.

D. A written policy on how evidence is to be kept, stored and documented, so that the chain of custody is clearly established prior to giving such evidence over to the police.

E. A written policy on search and seizure.

F. A program of intervention and assistance, which includes:

1. Having in each school building at least one person to whom staff can refer students to receive initial counseling and to obtain information on counseling/treatment services available to the student, on the student's rights, if any, to those services, and on the confidentiality which the student can expect.

2. A written statement, available to be given to students or their parents, on what resources are available in the school environment and in the community for counseling and for drug and/or alcohol treatment.

3. A system which ensures that all staff members are aware of resources in and referral procedures within the school environment, and encourage students to seek support and assistance.

4. A system which encourages or requires that a student with alcohol or drug problems be assessed to determine the extent of alcohol or drug involvement and that the student receive the appropriate level of counseling or treatment needed.

5. A policy of notification of the conditions under which the district will provide or pay for alcohol and/or drug counseling/treatment and/or testing, and the extent to which the cost of such services must be borne by the student.

G. A discipline policy which contains, at a minimum, the following penalties for infractions of state and district drug policies.

1. Use/Impairment: For a first offense, if a student is found to be only impaired and not in violation of any other policies, he/she will be suspended for up to 10 days, or placed in an alternative school setting for up to 10 days, depending upon the degree of impairment, the nature of the substance used, and other aggravating or mitigating factors. For a second or subsequent offense, a student may be expelled or placed in an alternative school setting for the rest of the school year.

2. Possession of alcohol, a drug, a drug-like substance, and/or a look-alike substance, in an amount typical for personal use, and/or drug paraphernalia: For a first offense, the student will be suspended for 5-10 days, or placed in an alternative school setting for 5-10 days. For a second or subsequent offense, a student may be

expelled for the rest of the school year.

3. Possession of a quantity of alcohol, a drug, a drug-like substance, a look-alike substance and/or drug paraphernalia in an amount which exceeds an amount typical for personal use, and/or distribution of the above named substances or paraphernalia: the student will be suspended for 10 days, or placed in an alternative school setting for 10 days. Depending on the nature of the substance, the quantity of the substance and/or other aggravating or mitigating factors, the student also may be expelled.

H. A policy in cases involving a drug-like substance or a look-alike substance for establishing that the student intended to use, possess or distribute the substance as a drug.

I. A policy which establishes how prescription and non-prescription drugs shall be handled in the school environment and when they will be considered unauthorized and subject to these state and local policies.

J. A policy which sets penalties for the unauthorized possession of communication devices.

K. A policy which sets out the conditions for return after expulsion for alcohol or drug infractions.

The plan shall include the designation of a district committee composed of teachers, parents, school nurses, and community leaders. Any revisions in the local school district policy will be submitted to the Department of ~~Public Instruction~~ Education for review and approval.

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

#### **DELAWARE EMERGENCY TREATMENT CARD**

##### A. TYPE OF REGULATORY ACTION REQUESTED

Amendment to Existing Regulation

##### B. SYNOPSIS OF SUBJECT MATTER OF THE AMENDMENT

The regulation the Delaware Emergency Treatment Card is found on page 99 of The School Nurse, A Guide to Responsibilities. The existing regulation is in the form of a card that parents or guardians must fill out and sign and a list of school emergency procedures attached to the card. The amendment puts into regulation language that states that the card must be used and what information must be on the card.

##### C. IMPACT CRITERIA

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

The amended regulation addresses health and safety issues not curriculum issues.

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

The amended regulation addresses health and safety issues for all students.

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

The regulation addresses health and safety issues and the amendment simply puts in regulatory language the requirement that the Emergency Card must be used and what information must be included.

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

The amended regulation addresses health and safety issues and student legal rights are also respected.

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

The amendment does not alter the necessary authority and flexibility of decision making at the local board or school level.

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

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

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

The amendment will retain the decision making authority and accountability in the same entity.

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

The amendment will not be an impediment to the implementation of other education policies.

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

The regulation is in the form of a card and the amendment puts the requirement into the form of a regulation.

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

The amendment does not add any additional costs.

#### FROM THE SCHOOL NURSE, A GUIDE TO RESPONSIBILITIES

#### DELAWARE EMERGENCY TREATMENT DATA CARD

Student's Name \_\_\_\_\_ Birth Date \_\_\_\_\_ School District \_\_\_\_\_ School \_\_\_\_\_ Grade \_\_\_\_\_ Homeroom or Teacher \_\_\_\_\_ Home Address \_\_\_\_\_ Development \_\_\_\_\_ Home Phone \_\_\_\_\_ Mother/Guardian's Name \_\_\_\_\_ Father/Guardian's Name \_\_\_\_\_ Mother's Place of Employment \_\_\_\_\_ Phone \_\_\_\_\_ Ext. \_\_\_\_\_ Father's Place of Employment \_\_\_\_\_ Phone \_\_\_\_\_ Ext. \_\_\_\_\_ If parent/guardians cannot be reached, call:

1.	_____	_____	_____
	Name	Address	Phone
2.	_____	_____	_____
	Name	Address	Phone

Family Physician \_\_\_\_\_ Phone \_\_\_\_\_  
Family Dentist \_\_\_\_\_

Indicate student's serious medical problems \_\_\_\_\_

Student is allergic to: ( ) Penicillin ( ) Aspirin ( ) Other \_\_\_\_\_

Medical Insurance: Medicaid No. \_\_\_\_\_

Other: \_\_\_\_\_  
Certificate No. Group No. Type

This information may be shared with school personnel on a "need to know" basis.

(Please turn card over for parent/guardian signature) (over)

#### SCHOOL EMERGENCY PROCEDURES

Your schools have adopted the following procedures in caring for child when he/she becomes sick or injured at school:

In case of emergency and/or need of medical or hospital care:

1. The school will call the home. If there is no answer,

2. The school will call the father's, mother's or guardian's place of employment. If there is no answer,

3. The school will call the other telephone number(s) listed and the physician.

4. If none of the above answer, the school will call an ambulance, if necessary, to transport the child to a local medical facility.

5. Based upon the medical judgment of the attending physician, the child may be admitted to a local medical facility.

6. The school will continue to call the parents, guardians, or physician until one is reached.

If I cannot be reached and the school authorities have followed the procedures described, I agree to assume all expenses for moving and medically treating this student. I also hereby consent to any treatment, surgery, diagnostic procedures or the administration of anesthesia which may be carried out based on the medical judgment of the attending physician.

Parent/Guardian Signature \_\_\_\_\_

Date \_\_\_\_\_

AS REVISED

THE DELAWARE EMERGENCY TREATMENT  
CARD

A Delaware Emergency Treatment Card must be on file for every child in school grades K-12 and the card must contain at a minimum, requests for the following information: student's name, birth date, school district, school, grade, homeroom or teacher, home address, home phone, mother/guardian's name and/or father/guardian's name, their place of employment and work phone, two other names, addresses and phone numbers for times when the parent or guardian can not be reached, family physician, name and phone, family dentist, name and phone, student's medical problems and allergies, the students' medical insurance and if possible the parent/guardian's signature. This information may be shared on a need to know basis.

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

**DELAWARE SCHOOL HEALTH RECORD CARD**

A. TYPE OF REGULATORY ACTION REQUESTED

Amendment to Existing Regulation

B. SYNOPSIS OF SUBJECT MATTER OF THE AMENDMENT

The regulation on the Delaware School Health Record Card found on page 22 in The School Nurse, A Guide to Responsibilities defines the school nurse's

responsibilities in keeping school health records. The amendment is necessary to eliminate the reference to a "card" since most record keeping will be done electronically and to separate the regulatory aspects of the policy from those that were included for technical assistance purposes.

C. IMPACT CRITERIA

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

The amendment addresses health and safety issues and does not address curriculum issues.

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

The amended regulation addresses health and safety issues for all students.

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

The amended regulation mandates that the school nurse keep the school health record and defines responsibilities as to the record keeping.

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

The amended regulation addresses health and safety issues and student legal rights are also respected.

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

The amendment does not alter the necessary authority and flexibility of decision making at the local board or school level.

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

The amendment does not place any unnecessary reporting or administrative requirements or mandates on decision makers at the local board or school levels.

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

The amendment will retain the decision making authority and accountability in the same entity.

8. Will the amendment be consistent with and not an impediment to the implementation of other state educational policies, in particular to state educational



policies addressing achievement in the core academic subjects of mathematics, science, language arts and social studies?

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

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

The regulation is necessary for the health and safety of students and the amendment clarifies the record keeping responsibilities of the school nurse.

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

The amendment does not add any additional costs.

## FROM THE SCHOOL NURSE, A GUIDE TO RESPONSIBILITIES

### Delaware School Health Record Card

#### General Directions

1. The "School Health Record" is confidential and must be stored so that only duly authorized persons have access to it. The provisions of PL 93-380 must be observed.

2. A "School Health Record" card must be prepared for each school child.

3. The card must be presented to physician when child is examined.

4. When a child is promoted to another school in the district or transfers to another school in or out of the state, this card should accompany the other school records.

5. The card will serve a child as a health record for the thirteen years of schooling. The school nurse should use the "Student Health History Update" to keep health record current.

6. The "School Health Record" card is to remain in the general school file or nurse's file during the pupil's attendance in school.

7. Destroy any duplicate or partial health record after entries have been transferred to the official card so that there is only one correct and up-to-date card.

8. Data submitted by psychologist, hearing specialist, or other health professionals should be entered on the card.

9. Record all tests, examinations, and conferences at the

time they occur.

10. Record any diseases, serious illnesses, major injuries, or operations which occur during each year.

11. Frequent illnesses, absences, or visits to the health room should be noted in the record with follow-up of such cases.

12. Each school district is responsible for having the "School Health Record" card printed. (Revised 1972, see pages 23 and 24.) Cards may be purchased from the Diamond Printing Company, 100 Rogers Road, Wilmington, Delaware 19801.

13. For the disposition of the "School Health Record" card, follow the procedures below:

a. No health or psychological data shall be filmed with school academic records.

b. All student health records will be retained at the school for two years after termination (graduation, drop-out, transfer).

c. All health records will then be transferred to the State Records Center which will retain the records for a total of 25 years.

This action follows the recommendations of the State School Health Advisory Committee and is being proposed to the Bureau of Archives and Records Management for establishing a final retention as required by 27 Delaware Code, Sec. 524. For further information on the legal procedure for disposing of these records, contact the Bureau of Archives and Records Management (Gail Ralph, Records Analyst) 739-5318.

### AS REVISED

#### Delaware School Health Record

1. The "School Health Record" is confidential and must be stored so that only duly authorized persons have access to it.

2. A "School Health Record" must be prepared for each school child. When a child is promoted to another school in the district or transfers to another school in or out of state this must accompany the other school records.

3. The health record will serve for the duration of the child's schooling. The school nurse must use the "Student Health History Update" to keep health records current.

4. The "School Health Record" must remain in the general school file or nurse's file during the pupil's

attendance in school. The school nurse must destroy any duplicate or partial health record after entries have been transferred to the official record so that there is only one correct and up-to-date record.

5. No health or psychological data shall be filmed with school academic records.

6. All student health records must be retained at the school for two years after termination (graduation, drop-out, transfer).

7. All health records must be transferred to the State Records Center which will retain the records for a total of 25 years.

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

**HEARING SCREENING PROCEDURES**

**A. TYPE OF REGULATORY ACTION REQUESTED**

Amendment to Existing Regulation

**B. SYNOPSIS OF SUBJECT MATTER OF THE AMENDMENT**

The regulation on Hearing Screening Procedures found on pages 28 to 35 in *The School Nurse, A Guide to Responsibilities* lists the grade levels where hearing screenings must occur, requires re-screenings and new student screenings. Notification of the parent or guardian of the screening results and recording the results in the school health record are also regulated. The amendment is necessary in order to isolate the regulatory responsibilities of the school nurse from the technical assistance information and to use the word "must" in the regulatory statements.

**C. IMPACT CRITERIA**

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

The amended regulation can have a positive effect on student achievement.

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

The amended regulation addresses health and safety issues for all students.

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

This regulation requires hearing screenings of students at certain grade levels and the amendment clarifies the responsibilities of the school nurse.

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

The amended regulation addresses health and safety issues and student legal rights are also respected.

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

The amendment does not alter the necessary authority or flexibility of decision making at the local board or school level.

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

The amendment does not place any unnecessary reporting or administrative requirements or mandates on decision makers at the local board or school levels.

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

The amendment will retain the decision making authority and accountability in the same entity.

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

This amended regulation will not be an impediment to the implementation of other state education policies.

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

The regulation is necessary to protect the health and safety of students and the amendment clarifies the regulatory responsibilities of the school nurse.

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

The amendment does not add any additional costs.

FROM THE SCHOOL NURSE, A GUIDE TO  
RESPONSIBILITIES

*Hearing Screening Procedures*

**Purpose**

To accomplish rapid and efficient identification of hearing impairment in school-aged children.

**Population to be Screened**

All children in kindergarten or grade 1, 3, 5, 8, 11, any child being considered for special education classes, and all students new to the school system shall receive a hearing screening each year. Any child considered for a special education placement must receive hearing screening.

**Equipment Needed**

1. Pure tone audiometer calibrated annually to ANSI 1969 standards.
2. Quiet testing area free from ambient noises such as fans, typewriters, blowers, flushing toilets, band rehearsals, gymnasiums, or playgrounds.
3. Test room should be of sufficient size to accommodate the person conducting the screening and the child. In some cases it is helpful to have space that permits the seating of 2 to 4 additional children so that they may observe the test procedure. Experience has shown that rooms treated with acoustical tile, heavy drapes covering windows, carpeting, and solid core doors help to eliminate extraneous noise. The room must be supplied with an electrical outlet (110V A.C.).
4. A table sufficient in size to accommodate the audiometer and provide the evaluator with ample writing space. Seating for the tester and the child should be of appropriate size.
5. Have appropriate forms ready: class roster, parent letter, clinic referral form.

**Recommended Procedure**

1. Screening will be performed only at the following frequencies: 1000, 2000, and 4000 Hz.
2. Intensity level of screenings will be 20 dB at each frequency. (NOTE: If there appears to be a fair amount of extraneous noise, screening intensity level can be raised to 25 dB for each frequency.)
3. Failure to respond at the recommended screening level at any frequency in either ear constitutes failure.
4. All failures should be re-screened within the same session. This should be accomplished by removing and re-positioning the earphones and carefully re-instructing the child.
5. Should any child again fail the screening, a repeat screen should be done within two (2) weeks of the initial screening.
6. Any child failing the hearing screening will be

referred for appropriate follow-up and re-screened the following year.

**Follow-up Procedures**

1. Record results on the school health card.
2. Notify parents that child has failed the hearing screening and may have a hearing loss. They should be advised that they may elect to receive a diagnostic audiological and otological (ear examination by an ENT physician) through the Division of Public Health, or may seek further examination and treatment, if necessary, through the family physician or community ENT physician. (See sample Referral Form, page 39.)
3. Should the parents elect services through the Division of Public Health:
  - a. Contact the family physician to obtain permission to refer child to the clinic. Treatment services are not involved in this referral.
  - b. New Castle County: Referrals for Audiologic and Otologic Services should be forwarded to the Medical Center of Delaware ENT Clinic at the following location: Wilmington Hospital, Speech and Hearing Department, 501 West 14th Street, Wilmington, DE 19801 (428-2286).
  - c. Kent County: Refer for audiology or A & O Clinic services to: Williams State Service Center, Hearing Services, Route 13 and River Road, Dover, DE 19901 (739-5376).
  - d. Sussex County: Refer for audiology or A & O Clinic services to: Sussex County Health Unit, Hearing Services, 544 South Bedford Street, Georgetown, DE 19947 (856-5213).
4. Discuss suspected or known deviations with the appropriate school personnel.

NOTE: Nurses are urged to recheck the hearing of children receiving private care within a reasonable period of time or to check with the child or family on what care was given so as to insure adequate follow-up of the suspected hearing loss.

Approved by the State Board of Education on September 15, 1988.

AS REVISED

**Hearing Screening**

1. All children in kindergarten or grade 1, 3, 5, 8 and 11 or any child being considered for special education classes, and all students new to the school system shall receive a hearing screening by December 15<sup>th</sup> of the current school year.

2. All failures must be re-screened within the same session. This should be accomplished by removing and re-positioning the earphones and carefully re-instructing the child.

3. Should any child again fail the screening, a repeat screen must be done within two (2) weeks of the initial screening.

4. Any child failing the hearing screening must be referred for appropriate follow-up and re-screened the following year.

5. The school nurse must record the test results on the School Health Record.

6. The school nurse must notify the parents/guardian that the child has failed the hearing screening and may have a hearing loss.

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

**POLICY FOR PROVIDING EDUCATION TO  
STUDENTS WITH HIV INFECTION**

**A. TYPE OF REGULATORY ACTION REQUESTED**

Amendment to Existing Regulation

**B. SYNOPSIS OF SUBJECT MATTER OF THE  
AMENDMENT**

The regulation Policy for Providing Education to Students with HIV Infection found on page 81 in The School Nurse, A Guide to Responsibilities and on pages A-52 - A-53 in the Handbook for K-12 Education affirms the rights of students in K-12 and adult education programs with HIV infection to attend the public schools of Delaware and affirms their right to privacy concerning the existence of the infection. The amendment is necessary to remove the procedural references and focus only on the regulatory sections. Sections 2, 3, 4, and 8 are removed and sections 5, 6, and 7 become 2, 3, and 4. In section 4, the words "established by the State Department of Public Instruction and Division of Public Health and approved by the Delaware State Board of Education on December 19, 1985" and the last sentence "These procedures will be found in the School Nurse Handbook, School Bus Drivers Handbook, Handbook for School Food Services, and K-12 Handbook" are removed.

**C. IMPACT CRITERIA**

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

This amended regulation addresses health and safety issues not curriculum issues.

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

The regulation was put in place to assure that students and adults with HIV infection have full access to the public education system and the amendment does not change that intent.

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

The regulation was put in place to ensure that student health and safety is protected and the amendment does not change that intent.

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

The regulation was put in place to protect student health and safety as well as their legal rights and the amendment does not change that intent.

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

The amendment does not alter the necessary authority or flexibility of decision making at the local board or school level.

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

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

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

The amendment will retain the decision making authority and accountability in the same entity.

8. Will the amendment 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 amendment will not be an impediment to the

implementation of other state education policies.

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

This regulation is necessary to protect the health and safety of students and the amendment simply removes procedural references from the regulation.

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

The amendment does not add any additional costs.

### Policy for Providing Education To Students with HIV Infection

1. A student enrolled or entering a Delaware public school/program, or in an adult or apprenticeship program, with HIV infection shall be permitted to attend school unless the student, in the opinion of his/her physician, is at risk from communicable diseases (e.g. measles, chicken pox) present in the school or has other medically related problems.

~~2. Any conflict regarding attendance of the HIV infected student by the school district will be reviewed on a case by case basis by the State Advisory Panel appointed by the State Department of Public Instruction and consisting of the State Health Officer, State Epidemiologist, a representative from the Medical Society of Delaware, a representative from the State Department of Public Instruction, a school nurse, and a school superintendent. The local district will submit to the panel: (a) evidence that the student exhibits or manifests symptoms which justify exclusion; (b) a current report from the student's personal physician. If recommended by the student's physician, the student will remain in the school until a determination is made by the panel.~~

~~3. The student shall be readmitted to the school or program when the student's physician verifies to the State Advisory Panel that the condition for which removal occurred has been corrected or has abated, and the Panel determines the student can return to school.~~

~~4. The school nurse, in cooperation with the building principal, shall function as: (a) the liaison with the student's physician and the State Advisory Panel; (b) the advocate for the HIV infected student in the school (i.e., assist in problem resolution, answer questions); (c) the coordinator of services provided by other staff.~~

5. ~~2.~~ A student entitled to a free public education pursuant to 14 Del. C. ch. 2 and/or ch. 31, with HIV infection who is removed for reasons stated in Paragraph

1, shall be provided with an appropriate alternative education according to already established procedures.

~~6. 3.~~ Dissemination of the knowledge that a student has HIV infection is subject to State and Federal privacy laws and regulations.

~~7. 4.~~ Routine and standard procedures (i.e. universal precautions) for handling all body fluids established by the State Department of Public Instruction and Division of Public Health and approved by the Delaware State Board of Education on December 19, 1985 shall be utilized in every school and program. These procedures will be found in the School Nurse Handbook, School Bus Drivers Handbook, Handbook for School Food Services, and K-12 Handbook.

~~8. Educational programs about HIV infection, mode of transmission, care of body fluids, and good hand washing techniques shall be offered to all school personnel. The Department of Public Instruction shall coordinate training programs for school nurses and other designated personnel who will be responsible for school district programs.~~

Passed by the State Board of Education on May 17, 1990.

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

### IMMUNIZATION RULES OF THE STATE BOARD OF EDUCATION

#### A. TYPE OF REGULATORY ACTION REQUESTED

Amendment to Existing Regulation

#### B. SYNOPSIS OF SUBJECT MATTER OF THE AMENDMENT

The regulation entitled Immunization Rules and Regulations of the State Board of Education is found on pages 71 and 72 in The School Nurse, A Guide to Responsibilities. This regulation defines a school "enterer" and lists all required immunizations students must have. The regulation defines "certification of immunization" and "conditional school admission". It also provides direction on how to deal with lost or destroyed medical records and how to seek exemptions from immunization. The amendment is necessary to add a new section B.1.d. which requires students to receive three doses of Hepatitis B beginning in the 1999-2000

school year with kindergarten and grade seven. The existing sections d. and e. become e. and f. The amendment also removes section H, Implementation, which is no longer necessary because the previously existing parts of the regulation have been implemented.

### C. IMPACT CRITERIA

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

This amended regulation addresses health and safety issues and not curriculum issues.

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

The amended regulation addresses health and safety issues for all students.

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

This regulation addresses the health and safety issue of student immunizations and the amendment adds the requirement of Hepatitis B immunizations to the current list of immunizations.

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

The amended regulation addresses health and safety issues and student legal rights are also respected.

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

The amendment does not alter the necessary authority or flexibility of decision making at the local board or school level.

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

The amendment does not place any unnecessary reporting or administrative requirements or mandates on decision makers at the local board or school level. The school nurse will have another immunization to record on the school health record.

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

The amendment will retain the decision making authority and accountability in the same entity.

8. Will the amendment 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 amendment will not be an impediment to the implementation of other state education policies.

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

The regulation is necessary to protect the health and safety of students and the amendment simply adds another type of immunization to the existing program.

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

The amendment does not add any additional costs.

### ~~Immunizations Rules and Regulations of the State Board of Education~~

#### A. Definition of School Enterer

A school enterer is any child between the ages of two months and 21 years entering or being admitted to a Delaware school district for the first time, including but not limited to, foreign exchange students, immigrants, students from other states and territories and children entering from non-public schools.

#### B. Immunization Requirements for School Admission

The following minimum immunizations will be required for all school enterers:

##### 1. Vaccine

a. Four or more doses of diphtheria, tetanus, pertussis (DTP) or diphtheria, tetanus (DT) vaccine or a combination of these vaccines with the following exceptions: (1) a child who received a fourth dose prior to the fourth birthday must have a fifth dose; (2) a child who received the first dose of Td (adult) at or after age seven may meet this requirement with only three doses of Td (adult).

b. Four doses of oral polio vaccine (OPV) or four doses of inactivated polio virus (IPV) or a combination of these vaccines with the following exception: If the third primary dose of OPV or IPV is administered on or after the fourth birth date, a fourth dose is not required.

c. Two doses of measles vaccine. The first dose should be administered on or after the age of 12 months. The second dose should be administered after the fourth birthday. The combination vaccines of measles, mumps, rubella (MMR) can be used to meet this requirement.

d. Three doses of Hepatitis B vaccine beginning in the 1999-2000 school year with kindergarten and grade

seven.

d. e. One dose of rubella vaccine administered after the age of 12 months.

e. f. One dose of mumps vaccine administered after the age of 12 months.

2. Disease histories for measles, rubella and mumps will not be accepted unless serologically confirmed.

3. A booster dose of Td (adult) is recommended at ten year intervals for all students after the last DTP or DT dose was administered.

#### C. Certification of Immunization

All parents or legal guardians of school enterers must present a certificate specifying the month, day, and year that the immunizations were administered by the physician or public health agency.

~~(Passed by the State Board of Education on December 19, 1990.)~~

#### D. Admission

##### 1. Notice

According to Delaware Code, Title 14, Section 131, Paragraph C, a principal or person in charge of a school shall not permit a child to enter into school without acceptable evidence of immunization. The parent or legal guardian shall be notified of this requirement in writing. Within 14 calendar days after notification, evidence must be presented to the school that the basic series of immunizations has been initiated or has been completed.

##### 2. Conditional

A school enterer may be conditionally admitted to a Delaware school district by presenting a statement from a physician or public health agency which specifies that the school enterer:

a. has received at least one dose of DTP or DT and

b. has received at least one dose of OPV or IPV and

c. has received at least one dose of measles, mumps and rubella (MMR) vaccine.

d. Children entering school without documentation for the first or second dose of measles should be admitted after the first dose. A second dose is required between 30 and 90 days after the first dose. (MMR can be used to meet this requirement.)

##### 3. Denial

If the school enterer fails to complete the series of required immunizations according to the Division of Public Health's recommended schedule, the parent or legal guardian will be notified the child will be excluded.

#### E. Lost or Destroyed Medical Records

When an immunization record has been lost or

destroyed by the medical provider who administered the vaccine, the parent must sign a written statement to this effect and must obtain at least one dose of DTP or DT, one dose of OPV or IPV and immunization against measles, mumps and rubella. Evidence that the vaccines were administered must be presented to the superintendent or designated person. An exemption to this requirement would be a statement from a physician demonstrating serological evidence of immunity to measles, mumps or rubella.

#### F. Exemption from Immunization

Exemption from this requirement may be granted in accordance with Delaware Code, Title 14, Section 131.

#### G. Verification of School Records

The Division of Public Health shall have the right to audit and verify school immunization records to determine compliance with the law.

#### H. Implementation

~~Effective September 1, 1991 and thereafter, these revised regulations will be enforced 12/19/90.~~

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

### GUIDELINES FOR THE ADMINISTRATION OF NONPRESCRIPTION DRUGS

#### A. TYPE OF REGULATORY ACTION REQUESTED

Amendment to Existing Regulation

#### B. SYNOPSIS OF SUBJECT MATTER OF THE AMENDMENT

The regulation Guidelines for Administration of Nonprescription Drugs found on page 104 in The School Nurse, A Guide to Responsibilities identifies the responsibilities of the school nurse in the administration of nonprescription drugs. The amendment is necessary in order to isolate the regulatory responsibilities of the school nurse from the technical assistance information and to use the word "must" in the regulatory statements.

#### C. IMPACT CRITERIA

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

The amendment deals with student health and safety

issues not curriculum issues.

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

The amendment addresses health and safety issues for all students.

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

The regulation addresses the health and safety issue of the administration of nonprescription drugs and the amendment clarifies the responsibilities of the school nurse in this area.

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

The amended regulation addresses health and safety issues and student legal rights are also respected.

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

The amendment does not alter the necessary authority and flexibility of decision making at the local board and school level.

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

The amendment does not place any unnecessary reporting or administrative requirements or mandates on decision makers at the local board and school level.

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

The amendment will retain the decision making authority and accountability in the same entity.

8. Will the amendment 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 amendment will not be an impediment to the implementation of other educational policies.

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

The regulation is necessary to protect the health and safety of the students and the amendment clarifies the responsibilities of the school nurse in administering nonprescription drugs.

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

The amendment does not add any additional costs.

#### FROM THE SCHOOL NURSE, A GUIDE TO RESPONSIBILITIES

##### Guidelines For Administration Of Nonprescription Drugs

~~The following guidelines for administration of nonprescription drugs were adopted by the State Board of Education on May 20, 1982, and will become effective September, 1982:~~

~~Whereas any medication prescribed by a physician can be administered by the nurse, nonprescription drugs can be administered by nurses in schools by following guidelines below:~~

~~a. No medication is to be administered without parental permission.~~

~~b. A careful history of any allergies, especially to medications, must be noted on student's school health record:~~

~~c. A record that includes the date, time, dosage, purpose must be kept.~~

~~d. Assess the particular complaint and symptoms to determine if other measures can be used before medication is administered. See The School Nurse - A Guide to Responsibilities, "Common First Aid Procedures for Illness", page 111.~~

~~e. Medical attention should be sought if symptoms or conditions persist.~~

~~f. Medications may be considered for the following: dysmenorrhea, orthodontics discomfort, follow-up of known medically treated injuries, general malaise, severe allergic reactions, skin lesions.~~

~~g. Proper labeling of containers and proper storage of medication is necessary.~~

~~h. Nurses must use restraint at all times in the administration of nonprescription medications.~~

AS REVISED

##### Administration of Nonprescription Drugs

Medications prescribed by a physician can be administered by the school nurse in the schools. The school nurse must do the following:

1. Assess the particular complaint and symptoms to determine if other measures can be used before medication is administered. Medications may be considered for the following: dysmenorrhea, orthodontics



discomfort, follow up of known medically treated injuries, general malaise, severe allergic reaction and skin lesions.

2. Look for a record of all allergies, especially to medications, on the student's school health record.

3. Have the permission of the parent or guardian to administer any medications.

4. Record the date, time and dosage of the medication.

5. Seek medical attention if the symptoms or conditions persist.

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

### ADMINISTRATION OF NON-TRADITIONAL REMEDIES

#### A. TYPE OF REGULATORY ACTION REQUESTED

New Regulation

#### B. SYNOPSIS OF SUBJECT MATTER OF REGULATION

The Secretary seeks the consent of the State Board of Education to adopt a regulation entitled, Administration of Nontraditional remedies. The regulation is necessary in order to help the school nurse deal with an increasing number of requests to administer nontraditional remedies as opposed to prescription and nonprescription medications. Regulations are currently in place for the administration of prescription and nonprescription medications.

#### C. IMPACT CRITERIA

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

The regulation deals with student health and safety issues not curriculum issues.

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

The regulation addresses health and safety issues for all students.

3. Will the regulation help to ensure that all students'

health and safety are adequately protected?

The regulation addresses health and safety issues by defining the responsibilities of the school nurse concerning the administration of nontraditional remedies in the school setting.

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

The regulation addresses health and safety issues and student legal rights are also respected.

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

The regulation will preserve the authority and flexibility of decision makers at the local board and school level.

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

The regulation will not place any unnecessary reporting or administrative responsibilities or mandates on decision makers at the local board or school level.

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

The regulation will maintain the decision making authority and accountability in the same entity.

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

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

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

The regulation is necessary to define the responsibilities of the school nurse when asked to administer nontraditional remedies. There are regulations concerning the administration of prescription and nonprescription medications but there is an increasing number of requests for the administration of nontraditional remedies.

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

The regulation does not add any additional costs.

## Administration of Non-Traditional Remedies

When a school nurse administers non-traditional remedies to students in school the following conditions must exist:

1. The remedy is an over-the-counter commercially prepared preparation that is age-appropriate for the student.
2. The use of the remedy was requested in writing by the parent/guardian.
3. The use of the remedy does not violate any standing orders or protocols of the district.
4. The parent is made aware of the current standard of practice.
5. The parent provides adequate information regarding the remedy, its purpose, any toxicity or interactions, proper dosage and storage, and any other instructions necessary for the safe provision of the remedy.
6. The remedy is properly labeled with contents, dosage, time and route of administration, the student's name, the date, and the name of the prescribing practitioner (if prescribed).
7. A record that includes the date, time, dosage, and purpose of the remedy is kept.
8. A careful history of allergies is maintained.

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

### ORTHOPEDIC SCREENING

#### A. TYPE OF REGULATORY ACTION REQUESTED

Amendment to Existing Regulation

#### B. SYNOPSIS OF SUBJECT MATTER OF THE AMENDMENT

The regulation on Orthopedic Screening found on pages 51 and 52 in The School Nurse, A Guide to Responsibilities lists the grades when students must receive orthopedic screenings both Phase I and Phase II and requires the school nurse to record the information in the school health record. The amendment is necessary in order to isolate the regulatory responsibilities from the

technical assistance information and to use the word "must" in the regulatory statements.

#### C. IMPACT CRITERIA

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

This amended regulation can have a positive impact on student achievement.

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

This amended regulation addresses health and safety issues for all students.

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

This regulation requires students to have an orthopedic screening at certain grade levels and under certain conditions and the amendment clarifies the role of the school nurse.

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

The amended regulation addresses health and safety issues and student legal rights are also respected.

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

The amendment does not alter the necessary authority or flexibility of decision making at the local board or school level.

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

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

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

The amendment will retain the decision making authority and accountability in the same entity.

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

This amended regulation will not be an impediment to the implementation of other education policies.

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

This regulation is necessary to protect the health and safety of students and the amendment clarifies the regulatory responsibilities of the school nurse.

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

The amendment does not add any additional costs.

## FROM THE SCHOOL NURSE, A GUIDE TO RESPONSIBILITIES

### Orthopedic Screening

#### Objective

To identify orthopedic or postural defects as early as possible in order to obtain such remediation as indicated.

#### Those To Be Screened

All pupils in grades 4 through 9 will be screened annually. Screening will be the responsibility of the physical education teacher and school nurse. The school nurse will be responsible for follow-up and general supervision of the program.

#### Time Frames For Screening

Two phases constitute the screening. Phase I is performed by the school nurses and physical education teachers by October 15; Phase II by physical therapists under contract to the Alfred I. DuPont Institute. Both phases should be completed by January 31 in order to permit adequate time for follow-up. DPI will coordinate the program through the office of the Supervisor of School Health Services.

#### Procedures

1. Obtain class roster to use as work sheet and to record results of screening.
2. Boys should be dressed only in shorts or underpants; girls should wear shorts and short-sleeved blouse that opens in the back. This allows for adequate examination of head, arms, back, legs, and feet.
3. Examination should be done in this sequence:
  - a. Child walks toward examiner, look for:
    - (1) Symmetry of the body.
    - (2) Abnormality of gait (limp, waddle, feet

~~turn in or out excessively).~~

~~b. With child standing in front of examiner, look for:~~

- (1) Limitation of neck motion
- (2) Limitation of arm motion
- (3) Shoulder level
- (4) Eye level
- (5) Pelvic tilt
- (6) Short leg
- (7) Leg and foot abnormalities

~~e. With child standing sideways to examiner, look for:~~

- (1) Abnormalities of AP posture

~~d. With child standing with back to the examiner, look for:~~

- (1) Curvature of the spine or other abnormalities

(a) Back straight

(b) Back bent in Adams position

~~e. Child walks away from examiner and gait is checked again:~~

~~f. In addition to the above, such things as allergies, suspicious moles, skin conditions, excessive scarring from burns, and lop ears are noted and referred for further treatment:~~

~~g. Pain is a cardinal sign for referral.~~

~~h. Check signs on special form provided. (See page 53)~~

#### Follow-Up - Phase I and Phase II

1. Record findings on "School Health Record". If a suspected deviation is detected, complete one copy of form on page 53 for Phase II. Notify the district coordinator of the number of students to be checked in Phase II.

2. The coordinator will arrange for Phase II through the Supervisor of Health Education Services, Department of Public Instruction.

3. After Phase II, notify parents that suspected deviation has been detected. They should be advised that they should seek further examination through the family physician, Alfred I. DuPont Institute, or the Shriners Hospital (1-800-281-4050).

4. Parents electing to seek private medical care:

a. Obtain name of physician and send one copy of the special form with a cover letter.

b. Nurses are urged to check with the child or family within a reasonable time on what care was given to insure adequate follow-up.

c. Have parent sign authorization to release information (page 55) for private physician, Alfred I. DuPont Institute, and Shriners Hospital referrals.

5. Discuss suspected or known deviations with

appropriate school personnel.

~~Note: Some families may have to check with their primary care physician before contacting the Alfred I. DuPont Institute.~~

## Reference Book

~~A good reference book for screening and therapeutic exercises is *Therapeutic Exercise*, Williams, Marian and Worthington, Catherine; W.B. Sanders Company, Philadelphia, Pennsylvania.~~

### AS REVISED Orthopedic Screening

1. All pupils in grades 4 through 9 must be screened annually. The school nurse is responsible for follow-up and general supervision of the program. Two phases constitute the screening. Phase I is performed by the school nurse and physical education teacher by October 15; Phase II by physical therapists. Both phases should be completed by January 31 in order to permit adequate time for follow-up. The Department of Education will coordinate the program through the office of the Supervisor of School Health Services.

2. The school nurse must record the test findings on the School Health Record and notify the parents/guardian that a suspected deviation has been detected.

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

### **PARENTAL REQUEST TO HAVE PRESCRIPTION MEDICATIONS ADMINISTERED IN SCHOOLS**

#### A. TYPE OF REGULATORY ACTION REQUESTED

Amendment to Existing Regulation

#### B. SYNOPSIS OF SUBJECT MATTER OF THE AMENDMENT

The regulation Parental Request to Have Prescription Medications Administered in School found on page 105 b in *The School Nurse, A Guide to Responsibilities* identifies the information that the school nurse must get from the parent or guardian and the records that must be kept. The amendment is necessary in order to isolate the regulatory responsibilities of the school nurse from the technical assistance information and to use the word "must" in the regulatory statements.

#### C. IMPACT CRITERIA

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

The amended regulation deals with health and safety issues not curriculum issues.

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

The amended regulation addresses health and safety issues for all students.

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

The regulation addresses the responsibilities of the school nurse in administering prescription medications and the amendment clarifies those responsibilities.

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

The amended regulation addresses health and safety issues and student rights are also respected.

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

The amendment does not alter the necessary authority and flexibility of decision makers at the local board and school level.

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

The amendment does not place any unnecessary reporting or administrative responsibilities or mandates on the decision makers at the local board or school level.

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

The amendment will retain the decision making and accountability in the same entity.

8. Will the amendment 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 amendment will not be an impediment to the implementation of other educational policies.

9. Is there a less burdensome method for addressing

the purpose of the amendment?

The regulation is necessary to protect the health and safety of students and the amendment clarifies the responsibilities of the school nurse in the administration of prescription medications.

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

The amendment does not add any additional costs.

FROM THE SCHOOL NURSE, A GUIDE TO  
RESPONSIBILITIES

Parental Request to Have Prescription Medications  
Administered in School

If it is necessary for your child to receive medication during the school day, please do the following:

- ~~Send the medication to school with a responsible individual if you are unable to take it to school.~~
- ~~Send the medication in the original container properly labeled with correct name, time, dose and date.~~
- ~~Count the tablets (unless the number of tablets is the exact number on the label) or approximate amount of liquid in the bottle.~~
- ~~Fill out the following information:~~

Date \_\_\_\_\_  
 Student's Name \_\_\_\_\_  
 Medication \_\_\_\_\_  
 Dose \_\_\_\_\_ Time \_\_\_\_\_  
 Reason for Medication \_\_\_\_\_  
 Allergies to any medications \_\_\_\_\_  
 Number of tablets sent \_\_\_\_\_  
 Amount of liquid \_\_\_\_\_  
 Parent/Guardian Signature \_\_\_\_\_  
 Nurse's Signature \_\_\_\_\_  
 Number of tablets/amount of liquid received \_\_\_\_\_

AS REVISED

Prescription Medications

Medications prescribed by a licensed healthcare provider must be administered in school by the school nurse under the following conditions:

1. Request received from the parent/guardian.
2. The medication is brought/sent to school in the original container that is properly labeled with the student's name; the name of the medication; time; dosage; how it is to be administered; the physician's name; name

of pharmacy and phone number; and a current date of the prescription.

3. Any allergies are noted.
4. All controlled substances are counted and reconciled at least once a month and kept under double lock.
5. The daily log or special medication record shows the student's name, time, and date of administration.

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

**PHYSICAL EXAMINATIONS**

A. TYPE OF REGULATORY ACTION REQUESTED  
Amendment to Existing Regulation

B. SYNOPSIS OF SUBJECT MATTER OF THE  
AMENDMENT

The regulation on Physical Examinations found on pages 15 and 16 in The School Nurse, A Guide to Responsibilities requires that all students have a physical examination before entering school, lists one exception and requires school nurses to record all findings on the school record. The amendment is necessary in order to isolate the regulatory responsibilities of the school nurse from the technical assistance information and to use the word "must" in the regulatory statements.

C. IMPACT CRITERIA

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

The amended regulation can have a positive impact on student achievement.

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

The amended regulation addresses health and safety issues for all students.

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

The regulation requires all students to have a physical examination and the amendment clarifies the responsibilities of the school nurse.

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

The amended regulation addresses health and safety issues and student legal rights are also respected.

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

The amendment does not alter the necessary authority or flexibility of decision making at the local board or school level.

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

The amendment does not place any unnecessary reporting or administrative requirements or mandates on decision makers at the local board or school levels.

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

The amendment will retain the decision making authority and accountability in the same entity.

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

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

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

The regulation is necessary to protect the health and safety of students and the amendment clarifies the regulatory responsibilities of the school nurse.

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

The amendment does not add any additional costs.

#### FROM THE SCHOOL NURSE, A GUIDE TO RESPONSIBILITIES

##### Physical Examinations

##### Objectives

- To determine the pupil's health status through a comprehensive appraisal.
- To secure medical supervision and correction

when necessary:

- To indicate the extent to which the school program should be modified if necessary to benefit the pupil.
- To determine the pupil's fitness to participate in the school program.

##### Those To Be Examined

- All pupils upon entrance to the Delaware school system in kindergarten or grade one must have had a physical examination. Examinations can be obtained at the private physician's office or at a Well Child Clinic. The Delaware Pupil Medical Record form should be given to the parent to take to the physician or clinic. (See page 19) All other new enterers should have a physical examination form on file in health records.

- All students who participate in sports. See official Handbook of the Delaware Secondary School Athletic Association.

- Those selected pupils whose health status suggests further follow-up as a result of observations and/or conferences by the teacher and school nurse.

- Children of Christian Scientist parents may request exemption from physical exams by having their parents obtain the proper form from the "Committee on Publication for Delaware" which is responsible for such matters. The school should not furnish these forms.

##### Recommended Procedures

For districts that employ a physician\*

- Screening tests such as vision and hearing should be done prior to health examinations.
- Six to eight children should be examined per hour--each should be seen singly.

\*Only a physician licensed to practice in Delaware is to be used for school health services. Any questions concerning the status of a physician should be directed to the Bureau of Professional Licensing, State Health Building, Dover, Delaware.

- Child should be disrobed to trunks for boys, and panties for girls. (Capes may be provided for girls.)
- The disrobing and examining areas must permit privacy, and be adequately heated, well lighted, and quiet.

For contractual services or for selected referrals to local physicians

- Compile and make available to the physician all information pertinent to the physical and emotional status of the individual child. This would include results of

# PROPOSED REGULATIONS

screening tests and observations of the teacher and school nurse:

- Arrange for examination with physician.
- Follow through on recommendations.

## Follow-Up

1. Record all findings on the School Health Record.
2. Notify parents of any disabilities or defects and, where necessary, direct proper resource.
3. Discuss deviations that may have an influence on the child's progress in school with appropriate school personnel.

Note: For further clarification regarding physical education examinations, please refer to the Attorney General's Opinion of July 17, 1979 on page 127

## AS REVISED

### Physical Examinations

1. All pupils upon entrance to the Delaware school system must have had a physical examination by a licensed medical physician, nurse practitioner or physician's assistant. The Physical Examination form can be given to the parent or guardian if requested. All other new enterers must have a physical examination form on file in their health records.
2. All students who participate in sports must have a physical examination.
3. Those selected pupils whose health status suggests further follow-up as a result of observations and/or conferences by the teacher and school nurse must have a physical examination.
4. Children of Christian Scientist parents may request exemption from physical exams by having their parents obtain the proper form from the "Committee on Publication for Delaware" which is responsible for such matters. The school should not furnish these forms.
5. The school nurse must record all findings on the School Health Record.
6. New enterers have ten school days to comply with the regulation before being excluded from school. A documented appointment with a licensed provider as stated above will defer exclusion.

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

## POLICY ON THE SCHOOL NURSE AND THE HANDICAPPED CHILD AND POLICY FOR PROVIDING CARE TO THE CHILD WITH SPECIAL HEALTH NEEDS

### A. TYPE OF REGULATORY ACTION REQUESTED

Amendment to Existing Regulation

### B. SYNOPSIS OF SUBJECT MATTER OF THE AMENDMENT

The policies entitled, Policy Statement on the School Nurse and the Handicapped Child and Policy for Providing Care to the Child with Special Needs are found on pages 175 and 181 respectively in The School Nurse, A Guide to Responsibilities. These regulations list the responsibilities of the school nurse as a member of the IEP team and the requirements for ministering to the special health needs of children. The amendment is necessary in order to combine the two policies into one policy entitled, The School Nurse and the Child with Special Health Needs. The amended policy removes the technical assistance language and includes only those areas that are regulated and uses the word "must" in the regulatory language.

### C. IMPACT CRITERIA

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

The regulation deals with the role the school nurse plays in helping the special needs child and the amendment clarifies these responsibilities, hence there can be a relationship to improved student achievement.

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

The regulation and the amendment do contribute to ensuring equal access to the academic curriculum for special education students.

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

The regulation deals with health and safety issues for special needs students and the amendment clarifies the responsibilities of the school nurse as they work with these students.

4. Will the amendment help to ensure that all

students' legal rights are respected?

The amended regulation addresses health and safety issues and student legal rights are also respected.

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

The amendment does not alter the necessary authority or flexibility of decision making at the local board or school level.

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

The amendment does not place any unnecessary reporting or administrative responsibilities or mandates on decision makers at the local board or school level.

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

The amendment will retain the decision making authority and accountability in the same entity.

8. Will the amendment 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 amendment will not be an impediment to the implementation of other education policies.

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

The regulation is necessary to protect the health and safety of the special education students and the amendment clarifies the responsibilities of the school nurse.

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

The amendment will not add any additional costs.

#### FROM THE SCHOOL NURSE, A GUIDE TO RESPONSIBILITIES

##### Policy Statement on The School Nurse and Children with Disabilities

The National Association of School Nurses, Inc. endorses the philosophy by guaranteeing the availability of free, appropriate public education for all children with disabilities in the least restrictive environment. Children

~~with disabilities may require additional educational services as well as related health services.~~

~~The school nurse plans and implements those health services which will contribute to the achievement of the children with disabilities.~~

~~The school nurse, as a member of the evaluation team,~~

~~(1) assists in identifying candidates for placement in a special program;~~

~~(2) conducts the initial health evaluation and parent conference;~~

~~(3) assists in obtaining an indepth health and developmental history and home environment assessment;~~

~~(4) provides and interprets all pertinent medical information including results of recent physical assessments;~~

~~(5) develops the individual health maintenance plan with student/parent;~~

~~(6) provides the evaluation team with the health component of the individual educational plan (IEP);~~

~~(7) periodically confers with the student, parent and faculty to revise health maintenance plan;~~

~~(8) assists parent/student to use appropriate community resources;~~

~~(9) follows up on medical recommendations and reports to teachers and appropriate personnel;~~

~~(10) provides teacher/staff inservice regarding health maintenance plan of student;~~

~~(11) provides and/or supervises nursing treatment and specialized health procedures to allow the student to remain in the least restrictive environment:~~

~~1. A written request shall be obtained from the parent for the procedure.~~

~~2. A written authorization for the procedure from the child's physician must be on file.~~

~~3. Each change in the procedure request from the parent or physician requires reauthorization. All procedures shall be reauthorized every six months.~~

~~4. A daily treatment log that includes child's name, date and time shall be kept on all medications and treatment administered with any reactions or comments noted.~~

~~(12) provides support to teachers and parents of students who have specialized health care needs.~~

##### Policy for Providing Care to the Child with Special Health Needs

In order for the school to provide care for the child with special health needs during the regular school day, the following general procedures shall be followed:

1. A written request shall be obtained from the



parent for the procedure.

2. ~~A written authorization for the procedure from the child's physician must be on file.~~

3. ~~Each change in the procedure request from the parent or physician requires reauthorization. All procedures shall be reauthorized every six months.~~

4. ~~A daily treatment log that includes child's name, date and time shall be kept on all medications and treatment administered with any reactions or comments noted.~~

5. ~~The procedures specified in the authorization shall be performed by the school nurse or trained personnel under the nurse's supervision. The procedures should be performed in accordance with the "General Guidelines and Procedures for Providing Care to the Child with Special Health Needs."~~

AS REVISED

### The School Nurse and the Child with Special Health Needs

The school nurse, as a member of the evaluation team must:

- Assist in identifying candidates for placement in a special program.
- Conduct the initial health evaluation and parent conference.
- Assist in obtaining an in-depth health and developmental history and home environment assessment.
- Provide and interpret all pertinent information including results of recent physical assessments.
- Develop the individual health maintenance plan with the student/parent if possible.
- Provide the evaluation team with the health component of the individual education plan, IEP.
- Periodically confer with the student, parent and faculty to revise the health maintenance plan.
- Follow up on medical recommendations and report to teachers and appropriate personnel.
- Provide and/or supervise nursing treatment and specialized health procedures with the following conditions:

1. A written request shall be obtained from the parent for the procedure.

2. A written authorization for the procedure from the child's physician must be on file.

3. Each change in the procedure request from the parent or physician requires reauthorization. All procedures shall be reauthorized every six months.

4. A daily treatment log that includes child's name,

date and time shall be kept on all medications and treatment administered with any reactions or comments noted.

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

#### THE SCHOOL HEALTH TUBERCULOSIS (TB) CONTROL PROGRAM

#### A. TYPE OF REGULATORY ACTION REQUESTED

Amendment to Existing Regulation

#### B. SYNOPSIS OF SUBJECT MATTER OF REGULATION

The regulation The School Health Tuberculosis (TB) Control Program found on page 82 in The School Nurse, A Guide to Responsibilities and on pages A-47 - A-50 of the Handbook for K-12 Education requires all school employees, substitutes, student teachers, contract employees and volunteers in frequent contact with students to receive the Mantoux tuberculin skin test or show proof of being tested in the past 12 months during the first fifteen days of employment. All new school enterers must also show proof of a Mantoux tuberculin skin test given within the last 12 months or follow the recommendations of the American Academy of Pediatrics (AAP) 1997. The school nurses must also record the results in the school health record. The amendment is necessary in order to change the time span between the administration of the Mantoux tuberculin skin test for adults from every third year to every fifth year. This change was recommended by both the School Health Advisory Committee and the Health Department. The other change is to remove the last sentence, which states, "The above program will replace policies established by the State Board of Education effective on September 1, 1995." and to add the sentence "School nurses must record the results of the Mantoux tuberculin skin test in the school health record".

#### C. IMPACT CRITERIA

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

The amended regulation deals with student health and safety issues not curriculum issues.

2. Will the amendment help ensure that all students

receive an equitable education?

The amended regulation addresses health and safety issues for all students.

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

The regulation addresses the health and safety issue of administering the Tuberculosis Mantoux test and the amendment changes the frequency for giving the test from every three years to every five years.

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

The amended regulation addresses health and safety issues and student legal rights are also respected.

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

The amendment does not alter the necessary authority or flexibility of decision making at the local board or school level.

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

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

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

The amendment will retain the decision making authority and accountability in the same entity.

8. Will the amendment 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 amendment will not be an impediment to the implementation of other education policies.

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

The regulation is necessary to protect the health and safety of the students and the amendment simply changes the time line between administrations of the test.

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

The amendment does not add any additional costs.

#### ~~School Health Tuberculosis Control Program~~

#### ~~Delaware State Board of Education Policy for The School Health Tuberculosis (TB) Control Program~~

1. All school employees, substitutes, student teachers, contract employees (including bus drivers) and volunteers who are in frequent contact with students will receive Mantoux tuberculin skin test or show proof of being tested in the past 12 months during the first 15 working days of employment. Known positive reactors need verification from private physician or Division of Public Health Clinics for:

- a. skin test reaction recorded in millimeters
- b. completion of preventive therapy for TB infection or chemotherapy for TB disease

If documentation is available, the known positive reactor need not have this tuberculin skin test. When documentation is unavailable, the employee should be tested. If documentation does not exist and the employee refuses to be skin tested again, the employee shall be asked to provide a statement in writing that he or she has had a positive skin test result in the past, and that he/she has been counseled about the signs and symptoms of tuberculosis.

2. Present employees will be required to show proof of Mantoux tuberculosis skin test to the district designee by October 15 every ~~third~~ fifth year of employment.

3. Newly infected positive reactors will be referred to the public health clinic or their private physicians for further evaluation. Known positive reactors who have appropriate documentation and are asymptomatic are not required to have another skin test or a chest x-ray.

4. All new school enterers must show proof of a Mantoux tuberculin skin test within the past 12 months or follow the recommendations of the American Academy of Pediatrics (AAP) 1997. Physicians must send documentation of the decisions. Multi-puncture skin tests will not be acceptable. A school enterer is any child between the ages of one year and 21 years entering or being admitted to a Delaware school district for the first time, including but not limited to, foreign exchange students, immigrants, students from other states and territories, and children entering from non-public schools. Known positive reactors need verification from their private physician or Division of Public Health clinics for:

- a. skin test reaction recorded in millimeters

b. completion of preventive therapy for TB infection or chemotherapy for TB disease

Tuberculin skin requirements may be waived for children whose parent(s) or guardian(s) present a notarized document (See attachment) that tuberculin skin testing is against their religious beliefs.

School nurses must record the results of the Mantoux tuberculin skin test in the health record.

~~The above program will replace previous policies established by the State Board of Education effective September 1, 1995.~~

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

**VISION SCREENING**

A. TYPE OF REGULATORY ACTION REQUESTED

Amendment to Existing Regulation

B. SYNOPSIS OF SUBJECT MATTER OF THE AMENDMENT

The regulation on Vision Screening found on pages 43 to 48 in *The School Nurse, A Guide to Responsibilities* lists the grades where vision screening must occur as well as requiring screenings for new students, special education students and driver education students. Requirements to notify parents or guardians and to enter the results in the school health record are also included. The amendment is necessary in order to isolate the regulatory responsibilities of the school nurse from the technical assistance information and to use the word "must" in the regulatory statements.

C. IMPACT CRITERIA

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

This amended regulation can have a positive impact on student achievement.

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

The amended regulation addresses health and safety issues for all students.

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

This regulation requires students to have vision screenings at certain grade levels and under certain conditions and the amendment defines the responsibilities of the school nurse.

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

The amended regulation addresses health and safety issues and student legal rights are also respected.

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

The amendment does not alter the necessary authority or flexibility of decision making at the local board or school level.

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

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

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

The amendment will retain the decision making authority and accountability in the same entity.

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

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

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

The regulation is necessary to protect the health and safety of students and the amendment clarifies the regulatory responsibilities of the school nurse.

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

The amendment does not add any additional costs.

**FROM THE SCHOOL NURSE, A GUIDE TO  
RESPONSIBILITIES****Vision Screening**

There has been much discussion in the last few years concerning the use of the Snellen Chart as the only screening device for testing visual acuity at twenty feet. Theoretically, school screening has been done in the hope that no child would be handicapped in his or her learning process because of a visual problem. Ironically, most children referred by Snellen screening are near-sighted (myopic) and statistically have higher grades than their classmates.

If students wear corrective lenses, the screening should be done with the lenses worn by the student. Students wearing corrective lenses in grades kindergarten through fourth may be given only distance visual screening if so desired by the vision screening administrator.

When students fail one or more tests on either instrument or non-instrument screening, they should be rescreened. If the screener still feels that the findings are questionable, a conference with the student's teacher should be called. Low achieving students should probably be referred when screening results are borderline.

**Objectives**

- To conserve vision by promoting eye health and ascertaining visual activity.
- To secure care of visual defects.
- To promote eye health, safety, and professional examinations for the education of the child.

**Those To Be Screened**

- Children in kindergarten or first grade and grades 3 or 4, 5, 8, 10, or 11.
- Any child being considered for a special education class.
- All new entrants and teacher referrals.
- Driver education students.

**Methods of Screening**

- Non Instrument (Recommended for K-3)  
This is an alternative screening technique which requires less cost outlay on the part of the school. If corrective lenses are usually worn by the student, all testing should be done with the glasses in place.

**1. Equipment Needed**

- a. Snellen or E Chart or set of plastic,

graduated, single E cards.

- b. Plastic occluder

- e. Plus 2.25 or 1.75 lens for hyperopia (small frames for preschool through second grade or 1.75 with larger frames for third grade and up)

- d. Titmus Fly-Test--Polaroid glasses for depth perception

- e. Cover targets for near and distance and Worth Dot flashlight and glasses (red-green) for muscle balance.

- f. Quiet room at least 20 feet in length with adequate lighting facilities

- (1) Illumination intensity chart of 10 to 30 foot candles evenly diffused over chart without glare

- (2) General illumination not less than 1/5 of chart illumination and nothing in the field of vision brighter than the chart

**2. Recommended Procedures****a. Visual Acuity**

- (1) Place the child at a mark exactly 20 feet or 10 feet from the chart with the eyes level with the 20/20 or 10/10 line. If the child stands, the feet should be on the 20 or 10 foot mark. If the child is seated, the back legs of the chair should be on the mark.

- (2) Teach child to use the occluder card to cover one eye while keeping both eyes open during test. Expose one symbol such as the graduated E card at a time. One person should hold the occluder in place for the kindergarten or first grade child.

- (3) If the child wears glasses, test first with glasses, then without.

- (4) Test the right eye first, then the left, then both eyes.

- (5) Begin with the 30 to 40 foot line and proceed with test to include the 20 foot line. With children suspected of low vision, begin with the 200 foot line.

- (6) Move promptly and rhythmically from one symbol to another that is comfortable to the child. Reading 3 to 4 symbols is usually considered evidence that the child sees the line satisfactorily.

- (7) Observe thrusting head forward, tilting head, eyes watering, frowning or scowling, closing one eye during the test of both eyes together, and excessive blinking.

- (8) Do not permit the child to go on, but record last line read correctly. Record visual acuity in order given for the right eye, left eye, for both eyes. Numerator equals distance from the chart; denominator represents the line read (20/60 means 20 feet distance over 60 foot line.)

- (9) A second screening is recommended on all children who fail the initial screening, i.e., vision of 20/30 or less in grade three and above.

- b. Plus Lens (Testing Hyperopia)

# PROPOSED REGULATIONS

(1) Use small framed (+2.25) glasses for preschool through second grade or larger framed (+1.75) glasses for third grade and up. Place the plus lens glasses on the child.

(2) Show the "20" size E at the 20 foot distance, varying the positions, or ask the child to read the 20 foot or 10 foot lines--depending on which you are using in the regular screening.

(3) If a child is able to read with either eye the 20/20 or 10/10 line through a 2.25 or 1.75 sphere, he/she fails.

## c. Muscle Tests

### (1) Cover Test At Near

(a) Hold the test object about 14 inches from the child and instruct him/her to look at the object. Talk to him/her and ask questions about the object so he/she won't stare but will actually look at it.

(b) Cover the right eye with the occluder. Observe the left eye.

(c) If it does not move, cover the left eye and observe the right eye.

(d) If either one does move out to see the object, or in towards the nose to see the object, or if it is unsteady, this is abnormal. Record - (minus) for failing, + (plus) for passing.

(e) Repeat as many times as it takes to be sure of the result.

### (2) Cover Test At Distance

(a) Place the test object 10 or 20 feet away.

(b) Instruct the child to look at the test object.

(c) Proceed to test each eye as above. Record the test results.

### (3) Worth Dot Test

(a) Place the glasses with red-green lenses on the child.

(b) Illuminate the Worth Dot flashlight and hold about 14 inches from the child.

(c) Ask the child to touch, with one finger, the lights he/she sees. (He/she may count them if he/she is able to count).

(d) If he/she points out 4 (four) lights, he/she passes the test. Record + (plus).

(e) If he/she points out more or less than 4 (four) he/she fails the test. Record - (minus).

## d. Stereoscopic or Depth Perception Test

### (1) Titmus Fly Test

(a) Place the special glasses on the child.

(b) Hold the picture of the fly sixteen inches away, avoiding reflection on the shiny surface.

(c) Have the child try to "pinch" the

fly's wing using the thumb and forefinger. (It may aid the preschool age child to show him how to "pinch" before he sees fly.)

(d) If the eyes are functioning properly, the child will see the fly as a solid, three dimensional object and the fingers will not touch the picture.

(e) The child fails the test if his fingers touch the picture, meaning that he sees it as an ordinary, flat photograph. Record the results, + (plus) for passing, - (minus) for failing.

## 3. Screening Failure Criteria

a. Children with vision 20/40 or less at kindergarten level, or repeated screening of 20/30 with problems, such as visual complaints, learning problems in grade 3 and above, or unequal screening results for two years.

b. If a child is able to read the 20/20 or the 10/10 line with either eye through the plus sphere, he/she should be referred.

4. Stereoscopic Instrument (Better results are obtained with children in grades 3 and up.)

a. Recommended Procedures (Visual acuity at distance and near, each eye)

(1) Follow instructions outlined by maker of instrument.

(2) Screening failure criteria shall be:

(a) Children with vision 20/40 or worse at kindergarten level, and 20/30 or worse thereafter at far or near, each eye separately.

(b) Any child whose screening results exceed instrument's criteria for muscle balance at distance or near.

## 5. Color Screening

### a. Equipment Needed

(1) Ishihara or Hardy-Rand-Rittler Pseudoisochromatic Plates are two tests which are satisfactory for schools.

### b. Recommended Procedures

(1) Color discrimination should be given each child at least once during his/her school experience.

(2) Follow instructions as outlined in the tests.

## Follow-Up

- Record test results on the School Health Card.
- Students under professional care need not be referred, but should be followed to encourage continuity of appropriate treatment.
- Notify parents that child has a suspected visual problem. (See "Sample", page 49.) They should be advised to seek further examination from an

ophthalmologist or optometrist, or if the family cannot afford to have the child seen privately, a referral may be made to the Optometric Clinic in the County Health Unit. Criteria for clinic eligibility (Medicaid and others) may change, so contact the clinic for directions:

- ~~Discuss suspected or known deviations with appropriate school personnel.~~
- ~~Color deficiency is not correctable, but parents and students should be made aware of such conditions.~~

#### Visually Impaired Students

- ~~Medical assistance and educational services may be received through the Division for the Visually Impaired, 305 West 8th Street, Wilmington, Delaware 19801 (577-3333).~~
- ~~Contact the office in your area. The state number is 571-3333.~~

AS REVISED

#### Vision Screening

1. All Children in kindergarten or grades 1, 3, 5, 8, and 11 must receive a vision screening by December 15<sup>th</sup> of the current school year.
2. Students new to the school system, teacher referrals, those students considered for special education placement and driver education students must have a vision screening.
3. The school nurse must record the results on the School Record.
4. The school nurse must notify parents/guardians that the child has a suspected visual problem.

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## DEPARTMENT OF FINANCE

### DIVISION OF REVENUE

#### OFFICE OF THE STATE LOTTERY

Statutory Authority: 29 Delaware Code,  
Section 4805(a) (29 Del.C. 4805(a))

The Lottery proposes these rules pursuant to 29 Del.C. sections 4805(a) and 29 Del.C. section 10115. The proposed regulations are to ensure that the Delaware Lottery is in compliance with the federal Americans with Disabilities Act ("ADA"). The proposed regulations will provide for a procedure for inspection of the sites of all

lottery retailers to ensure a minimum standard of accessibility required by federal law.

Comments may be submitted in writing to the Lottery Office on or before 4:00 p.m. on March 31, 1998. The Lottery Office is located at 1575 McKee Road, Suite 102, Dover, Delaware 19901 and the phone number is (302) 739-5291. Comments should be addressed to the attention of Vernon Kirk, Lottery Office.

#### BEFORE THE DELAWARE STATE LOTTERY OFFICE

#### IN RE: PROPOSED RULES AND REGULATIONS ORDER

Pursuant to 29 Del.C. section 4805(a), the Delaware State Lottery Office hereby issues this Order regarding proposed amendments to the existing Lottery Regulations. Following notice and a public hearing held on January 29, 1998, the Lottery Office makes the following findings and conclusions:

#### SUMMARY OF EVIDENCE AND INFORMATION SUBMITTED

1. The Lottery Office posted public notice of the proposed Amended Regulations in the Register of Regulations and in the News-Journal and Delaware State News. The Lottery Office received no written comments from the public concerning the proposed Regulations prior to the public hearing.

2. The Lottery Office conducted a public hearing on the proposed Amended Regulations on January 29, 1998. Prior to the hearing, the Lottery Director Wayne Lemons designated Vernon Kirk as the hearing officer.

3. At the public hearing, the Lottery received no public comments. Subsequent to the public hearing, the Lottery received three sets of written comments about the proposed regulations. On January 29, 1998, the Lottery received a letter from Laura Waterland, Esquire of the Disabilities Law Program, Wilmington, DE. On January 30, 1998, the Lottery received a fax letter from Gerard I. Landreth, Chief Administrator of the Architectural Accessibility Board. On the same day, the Lottery received a faxed letter from Ronald Sibert, Chairperson of the Governor's Advisory Council For Exceptional Citizens.

4. The written comments filed by the public members ("the respondents") address many of the same issues about the proposed regulations. This Order will

discuss the filed comments as a set.

5. The respondents stated that the purpose of the Regulations in section 2 was too narrow. The comments suggested that the Lottery expand the stated purpose to include reference to other applicable federal and state statutes.

6. The respondents requested that sections 3, 4, and 5 be reorganized to specify the duties of current retailers and new license applicants. The comments also recommended that extensions only be granted upon a showing of good cause.

7. A great deal of the written comments concerned the exemptions contained in paragraph 4. It was suggested that the historic properties exemption be revised to mirror the current language in the ADA, 28 CFR section 35.150(a)(2). The respondents also requested that the landlord refusal exemption be modified to clarify that it only applies during the current lease term of a licensee. Finally, the respondents objected to the current form of the exemption for undue hardship. The comments asserted that there must be a point where the Lottery as a state agency will revoke a license for noncompliance, regardless of the cost of needed modifications. There was also support for a financial burden exemption that factored in available tax benefits for barrier removal. One party asserted that a licensee should be required to obtain three written estimates before the Lottery can approve any exemption for financial hardship. The respondents also requested more explicit definition of alternative methods of service such as curb service.

8. Several comments addressed the scope of the complaint process contained in section 5 of the Regulations. The respondents requested that this section be clarified to provide that the Lottery complaint process was not an exclusive process for aggrieved parties.

#### FINDINGS OF FACT

9. The public was given notice and an opportunity to provide the Lottery Office with comments in writing and by oral testimony on the proposed Regulations. The written evidence received by the Lottery Office is summarized in paragraphs #3-8. The Lottery Office has considered the written comments submitted to the Lottery.

10. The Lottery received no comments regarding the definitions in Section 1 of the Regulations. The Lottery will maintain this section as proposed. The Lottery will revise Section 2 to expand the overall purpose of the

Regulations to reference compliance with other applicable federal, state, or local enactments.

11. The Lottery will accept the suggestion of the respondents and reorganize sections 3, 4, and 5 of the Regulations. The reorganization will clarify the procedures and requirements for current retailers and new license applicants. The Lottery will also accept the proposal to revise section 5 to only allow the Director to grant extensions upon the showing of good cause.

12. The Lottery will accept some of the comments addressing the exemption process. The Lottery will reorganize the Regulations to list the permitted exemptions in a new section 6. The historic properties exemption will be revised to add language that tracks the current applicable federal statute. The Lottery does not believe the landlord refusal exemption should be revised as requested by the respondents. The existing regulation already provides that the exemption is only valid for the retailer's current lease term. The Lottery also will keep the undue hardship exemption in its proposed form. The Lottery based this exemption on a similar regulation currently in use by the Oregon Lottery. The Lottery's regulation attempts to comply with the ADA's standard of removal of readily achievable barriers and also factor in the financial constraints of Lottery retailers. The Lottery also does not believe there is a need to require three written estimates from retailers seeking an exemption under this section. The Lottery's inspection report of the facility will contain an estimate of the cost of removal of any barriers. The Director also has the discretion to require sufficient written documentation from any retailer seeking an undue financial hardship exemption. The Lottery does not find that the definitions for alternative methods of service can be more detailed in the Regulations.

13. The Lottery will revise the complaint process in a new section 7 to clarify that the complaint process is not exclusive for an aggrieved party. The aggrieved party may pursue other remedies available under state and federal law. The revised regulations also delete the reference to "subchapter" and uses the term "regulation" which clarifies the scope of the regulations.

14. The Lottery's revisions to the proposed Regulations are in response to the comments received by the Agency. The Lottery finds it advisable to reissue the revised regulations as a set rather than attempt to adopt parts of the regulations at this time in a piecemeal fashion.

#### CONCLUSIONS

15. The proposed Regulations were promulgated by the Lottery Office in accord with its statutory duties and authority as set forth in 29 Del.C. section 4805(a).

16. The Lottery deems the proposed Regulations necessary for the effective enforcement of 29 Del.C. section 4805 and for the full and efficient performance of the Lottery's duties thereunder. The Lottery concludes that the revision and republication of the proposed Regulations would be in the best interests of the citizens of the State of Delaware and consonant with the dignity of the State and the general welfare of the people under section 4805(a).

17. The Lottery, therefore, will republish and accept written comments on the revised Regulations pursuant to 29 Del.C. section 4805 and 29 Del.C. section 10118. The Lottery has considered the comments and suggestions made by the witnesses at the public hearing. A copy of the revised Regulations is attached to this Order and incorporated herein.

18. The effective date of this Order shall be ten (10) days from the date of publication of this Order in the Register of Regulations on March 1, 1998.

Vernon Kirk, Hearing Officer  
Delaware State Lottery Office

It is So Ordered This 13th day of February, 1998.

Delaware Lottery Proposed Regulation

Non-Discrimination on the Basis of Disability in  
Delaware Lottery Programs

(1) Definitions

a) "Accessible" means complying with the technical requirements found in the ADA Accessibility Guidelines (ADAAG).

b) "Accessible Route" means a continuous unobstructed path connecting all accessible elements and spaces of a building or facility. Interior accessible routes may include corridors, floors, ramps, elevators, lifts, and clear floor space at fixtures. Exterior accessible routes may include parking access aisles, curb ramps, crosswalks at vehicular ways, walks, ramps, and lifts.

c) "ADA" means the Americans with Disabilities Act (42 United States Code. §§12101-12213 and 47 United States Code §225 and §611).

d) "Director" means the Director of the State

Lottery Office.

e) "Entrance" means any access point to a building or portion of a building or facility used for the purpose of entering. An entrance includes the approach walk the vertical access leading to the entrance platform, the entrance platform itself, vestibules if provided, the entry door(s) or gate(s), and the hardware of the entry door(s) or gate(s).

f) "Facility" means all or any portion of buildings, structures, site improvements, complexes, equipment, roads, walks, passageways, parking lots, or other real or personal property located on a site.

g) "Lottery Program" means on-line and instant games offered to the public through retailer licensees.

h) "Lottery" or "State Lottery Office" means the lottery established by the Delaware State Lottery Law, Chapter 348, Volume 59, of the Laws of Delaware.

i) "Lottery Retailer" or "Retailer" means a business entity housed in a specific retail facility that is under license with the Delaware Lottery to provide lottery related services.

j) "Inspection Report" means a completed survey of the retailer or applicant facility that identifies barriers to program accessibility, if any and suggest possible solutions.

k) "Service Site" means an area within a lottery retailer facility where a customer can purchase a lottery related product. This is usually the cashier's station.

(2) Purpose

a) The Americans with Disabilities Act (P.L. 101-336, U.S.C. §§ 12131-12134), known as the ADA, prohibits discrimination on the basis of disability in the delivery of programs offered by entities of state or local government. The purpose of this regulation is to ensure that the Delaware Lottery is in compliance with the ADA by ensuring that people with disabilities have access to Delaware Lottery programs.

b) In defining the scope or extent of any duty imposed by these regulations including compliance with the standard of accessibility defined in paragraph 3(b), higher or more comprehensive obligations established by otherwise applicable federal, state or local enactment may be considered.



**(3) General Requirements**

a) Prohibition of discrimination. No lottery retailer shall discriminate against any individual on the basis of a disability in the full and equal enjoyment of lottery related goods, services, facilities, privileges, advantages, or accommodations of any lottery licensed facility.

b) Standard of accessibility. Each Retailer is required to meet a standard of accessibility that enables people with disabilities, including those who use wheelchairs, to enter the lottery licensed facility and participate in the lottery program. An accessible route must be provided comprised of the following accessible elements:

1) Parking if parking is provided to the general public;

2) Exterior route connecting parking (or a public way if no parking is provided) to an accessible entrance;

3) Entrance;

4) Interior Route connecting the entrance to a service site.

c) Each element shall meet the design standards set forth in the ADA Accessibility Guidelines (ADAAG) published in the Federal Register on July 26, 1991.

**(4) New License Applicants**

a) License applicants. The State Lottery Office shall inspect the site of applicants for compliance with this regulation prior to granting a license. The State Lottery Office will not grant a license to an applicant who is not in compliance with this regulation.

b) Inspection reports. The State Lottery Office, prior to granting a license, shall provide lottery applicants with an Inspection Report that shall identify barrier removal actions, if any, necessary to provide program accessibility. The identified actions must be completed prior to the granting of a license.

**(5) Current Retailers**

a) The State Lottery Office shall inspect the site of each lottery retailer for compliance with this regulation.

b) Inspection reports. The State Lottery Office shall provide to all current retailers an Inspection Report that shall identify barrier removal actions necessary to provide

program accessibility. The identified actions must be completed within 90 days of receipt of the Inspection Report.

c) Extensions. The Director may grant an extension of up to 90 days to allow a current retailer to complete barrier removal actions identified in the Inspection Report.

(i) Any request for an extension must be in writing, and shall include specific reasons for an extension and supporting documentation.

(ii) The Director shall grant an extension only upon showing of good cause.

**(6) Permitted exemptions**

a) The following exemptions to the requirements of this rule may be granted by the Director. The Director shall review the circumstances and supporting documentation provided by the retailer to determine if the retailer's request for an exemption should be granted. The Director shall determine the type and scope of documentation to be required for each exemption classification. All decisions made by the Director shall be final; any retailer whose request for an exemption is denied by the Director shall be required to satisfy the requirements of this rule as a condition for maintaining its eligibility for a Lottery retailer contract.

b) Historic properties. To the extent a historic building is exempt under federal law, and if barrier removal would threaten or destroy the historic significance of the structure, this rule shall not apply to a qualified historic building or facility that is listed in or is eligible for listing in the National Register of Historic Places under the National Historic Preservation Act or is designated as historic under State or Local law.

c) Legal impediment to barrier removal. Any law, act, ordinance, state regulation, ruling or decision which prohibits the lottery retailer from removing a structural impediment or from making a required improvement to the facility may be the basis for an exemption to this rule. A lottery retailer requesting an exemption for a legal impediment will not be required to formally seek a zoning variance to establish such impediment, but will be required to document that they have applied for and have been refused whatever permit(s) are necessary to remove the identified barrier(s).

d) Landlord refusal. An exemption may be granted based on the refusal of a landlord to grant permission to a

Lottery retailer to make structural improvements required by the Lottery under this rule. The exemption shall only apply to the retailer's current lease term. To request such an exemption, the retailer must submit documentation to the Director that the retailer requested the Landlord's permission to make the required structural improvements, that such request was denied by the landlord, and the reasons for the denial. In making a decision on the exemption request the Director shall take into consideration, but not be limited to, the sufficiency of the reasons provided by the landlord for denying the retailer's request.

e) **Undue financial hardship.** A limited exemption may be granted if a retailer can demonstrate that the cost of removing a structural barrier or of making the required structural modification(s) to the retailer's facility is an undo financial hardship in that the cost of making such a change(s) exceeds 25% of the retailer's compensation from the Lottery for the prior calendar year (An annualized sales figure based upon the retailer's most current 13-week sales period shall be used for those retailer locations with less than a full year's history of sales.) Under the terms of this limited exemption, a retailer would be required to annually make those improvements and modifications that can be financed within an amount that is approximately equal to 25% of the total compensation earned from the Lottery in the prior calendar year. This requirement would continue on a year-to-year basis until all the improvements and modifications required by this rule have been completed. A retailer shall provide all supporting documentation requested by the Director to substantiate the, cost estimates of making the required improvements to the retailer's location.

f) **Alternative methods.** Where an exemption is granted in accordance with the provisions of this subchapter, the lottery retailer shall make the lottery related goods and services available through alternative methods. Examples of alternative methods include, but are not limited to:

- 1) Providing curb service;
- 2) Directing by signage to the nearest accessible lottery retailer.

(7) **Complaints Relating to Non-Accessibility**

a) An aggrieved party may file an accessibility complaint with the Lottery Director or designee for review. Complaints must be in writing and, where possible, submitted on an ADA complaint form. As soon

as practical, but not later than 30 days after the filing of a complaint, each complaint will be investigated. After the completion of the investigation, if the agency determines that the lottery retailer is not in compliance with this regulation, a letter of non-compliance will be issued to the lottery retailer with a copy to the complainant. If the lottery retailer is determined to be in compliance, a letter so stating will be mailed to the retailer and complainant. Regardless of whether a complaint has been filed, the agency will issue a letter of noncompliance within 30 days after the completion of an onsite inspection of the lottery retailer facility if the agency determines that the lottery retailer is not in compliance with this regulation.

b) If the letter of non-compliance shows deficiencies in the accessibility of the retailer facility, the lottery retailer shall submit a plan to the agency within 30 days of the issuance of the letter of non-compliance. The plan shall describe in detail how the lottery retailer will achieve compliance with this regulation. Compliance shall be accomplished within 90 days of the letter of non-compliance. The Lottery may, upon request, grant the lottery retailer additional time to submit the plan for good cause.

c) Within 20 days of the submission of the plan to the agency, the Lottery shall notify the lottery retailer of the agency's acceptance or rejection of the plan. If the plan is rejected, the notification shall contain the reasons for rejection of the plan and the corrections needed to make the plan acceptable to the Lottery. If the retailer agrees to make the required corrections, the Lottery shall accept the plan as modified.

d) If a retailer fails to submit a plan within 30 days of issuance of the letter of noncompliance and has not requested an extension of time to submit a plan, the Lottery may proceed to initiate termination proceedings.

e) If approved, the plan must be completely implemented within 60 days of the agency's notice of approval. The Lottery may, upon request, grant the lottery retailer additional time for good cause. Notice of any extension will also be sent to the complainant, if applicable. Any such extension will commence immediately upon expiration of the first 60 day period.

f) If the corrective action taken by the lottery retailer corrects the deficiencies specified in the letter of noncompliance as originally issued or as later revised or reissued or if the onsite inspection of the lottery retailer facility reveals compliance with this regulation, the Lottery will issue a notice of compliance. Until this notice is issued, a complaint will be considered pending.

g) Failure to make the identified modifications in compliance with the accessibility standards and within the required time period will result in the initiation of proceedings to suspend or revoke the lottery license by the agency.

h) A license will be suspended if the Lottery determines that the lottery retailer has made significant progress toward correcting deficiencies listed in the compliance report, but has not completed implementation of the approved compliance plan. If the Lottery determines that the lottery retailer has not made a good faith effort to correct the deficiencies listed in the compliance report, this inaction will result in the revocation of the lottery license for that lottery licensed facility.

i) While proceedings to suspend or revoke a lottery retailer's license are pending pursuant to this regulation, and until a notice of compliance is issued pursuant to subsection (c) of this section, the Lottery shall withhold incentive payments from the lottery retailer. In addition, if a license is revoked pursuant to this regulation, and incentive payments and other privileges have been withheld from the affected retailer pending review of the complaint, the lottery retailer forfeits any claim to such incentive payments or other privileges.

## (8) Request for Hearings

a) If the Lottery proposes the denial of an application for a license or the suspension or revocation of a lottery retailer's license pursuant to this regulation, the agency shall give the applicant or lottery retailer written notice of the time and place of the administrative hearing not later than 30 days before the date of the hearing.

b) All relevant rules of evidence and time limits established in these rules shall apply to hearings conducted under this regulation.

## (9) Non-Exclusivity of Remedies

a) Remedies established by these regulations are not intended to supplant, restrict or otherwise impair resort to remedies otherwise available under law, including those authorized by the ADA and Del. Code Ann., title 6, ch. 45 (1993).

## DEPARTMENT OF HEALTH & SOCIAL SERVICES

### DIVISION OF SOCIAL SERVICES

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

#### PUBLIC NOTICE

#### Medicaid / Medical Assistance Program

In compliance with the State's Administrative Procedures Act (APA - Title 29, Chapter 101 of the Delaware Code) and with 42CFR §447.205, and under the authority of Title 31 of the Delaware Code, Chapter 5, Section 505, the Delaware Department of Health and Social Services (DHSS) / Division of Social Services / Medicaid Program is amending its home health provider manual to include a federally mandated provision that home health agencies must obtain surety bonds to continue participating with Medicaid.

#### REVISION:

#### Surety Bonds

The Balanced Budget Act of 1997 (Public Law 105-33) Section 4724(b)(1) requires all home health agencies enrolled with Medicaid to obtain a surety bond. The bond must be for at least \$50,000 or 15% of Medicaid's payment to the home health agency for the previous calendar year, whichever is greater.

The home health agency must obtain the bond from surety companies approved by the United States Department of the Treasury. A bond must name the home health agency as "Principal", Delaware Medicaid as "Obligee", and the surety company as "Surety".

For Medicaid purposes, bonds must cover a full calendar year. Bonds must be renewed annually and a copy provided to Medicaid no later than December 1st (30 days prior to the beginning of each calendar year).

Comments, written suggestions, compilations of data, testimony, briefs or other written materials concerning this change must be received by mail no later than April 1, 1998, at the Medicaid Administrative Office, Lewis Bldg., Herman M. Holloway, Sr. Health & Social Services Campus, 1901 N. DuPont Hwy., New Castle, DE 19720, attention Thelma Mayer. Materials filed thereafter will not be considered except where good cause for lateness is demonstrated. Copies of all written submissions filed with the Medicaid office will

be available for public inspection in the Medicaid Administrative Office at the address given above. Please call (302) 577-4880, extension 131, for an appointment if you wish to review the materials. Individuals with disabilities who wish to participate in these proceedings, or review the materials submitted, should contact the Division to discuss auxiliary aids or services needed to facilitate such review or participation. Such contact may be in person, in writing or by telephone by using the Telecommunications Relay Service, or otherwise.

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## DEPARTMENT OF HEALTH & SOCIAL SERVICES

### DIVISION OF SOCIAL SERVICES

Statutory Authority: Public Law 104-193

#### PUBLIC NOTICE

#### DIVISION OF SOCIAL SERVICES / FOOD STAMP PROGRAM

The Delaware Health and Social Services / Division of Social Services / Food Stamp Program is proposing to implement a Simplified Food Stamp Program for households receiving *A Better Chance* (ABC) benefits. The regulations are contained in Public Law 104-193, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and Division of Social Services' Manual section 9910.

#### SUMMARY OF PROPOSED REVISIONS:

Under the Simplified Food Stamp Program, the Division will substitute certain TANF rules and procedures for food stamp rules. The proposed changes in the food stamp rules are as follows:

- Replaces food stamp work exemptions with ABC exemptions;
- Replaces current Employment and Training (E & T) and job quit requirements and penalties with ABC requirements and penalties; and
- Applies a food stamp sanction for parent who fail to cooperate with school officials to ensure attendance for children under 16.

#### PROPOSED REGULATIONS:

#### 9910 Simplified Food Stamp Program

DSS was approved by Food and Nutrition Service, under the United States Department of Agriculture, to operate a Simplified Food Stamp Program (SFSP). The SFSP permits a state to substitute certain TANF rules and procedures for food stamp rules. Delaware's SFSP has two components:

1. the alignment of ABC's Self-Sufficiency sanctions for Food Stamps; and
2. work for your welfare (workfare) program rules.

Households in which all members, or one or more members, receive ABC may participate in the SFSP. Non-Public Assistance (NPA) households will not participate in the SFSP.

The SFSP will follow all the regular food stamp rules for determining eligibility and certifying households. Under the SFSP, there are four basic changes in the food stamps rules that will affect certain ABC households who receive food stamps, as follows:

- Replaces food stamp work exemptions with ABC exemptions;
- Replaces current Employment and Training (E & T) and job quit requirements and penalties with ABC requirements and penalties; and
- Applies a food stamp sanction for parents who fail to cooperate with school officials to ensure attendance for children under 16; and
- Replaces food stamp workfare penalties with the ABC workfare program requirements and penalties.

#### ALIGNMENT OF SANCTIONS

#### REPLACE FOOD STAMP WORK EXEMPTIONS WITH ABC EXEMPTIONS

The ABC Self-Sufficiency Requirements include Employment and Training rules, work-related activities, and school attendance requirements. All adult caretakers and other adults in the assistance unit who are not exempt must participate in Employment and Training related activities. There are only two exemptions to this ABC requirement. The first exemption is a change from the regular food stamp E & T exemption rules. The two exemptions are:

- a) A parent caring for a child under 13 weeks of age; or
- b) An individual determined unemployable by a health care professional.

## PROPOSED REGULATIONS

### REPLACE CURRENT E & T AND JOB QUIT REQUIREMENTS AND PENALTIES WITH ABC REQUIREMENTS AND PENALTIES

DSS will apply *A Better Chance* (ABC) Self-Sufficiency Requirements and sanctions to food stamp households which are also receiving ABC benefits. The Self-Sufficiency Requirements have sanctions for non-compliance with E & T, Work Activity, and parent cooperation to ensure school attendance for children under age 16.

The ABC requirements are:

- All adults in the assistance unit who are not exempt must participate in E & T activities.
- Adult members of the assistance unit must keep a job unless they have good cause to quit.
- Adult members of the assistance unit must cooperate with school officials to ensure school attendance for children under the age of 16.

DSS will align the ABC and Food Stamp work-related sanctioning processes for individuals receiving both ABC and Food Stamps. Food Stamp recipients will be sanctioned when parents fail to cooperate with officials to ensure ABC's School Attendance Requirement for children under age 16.

The ABC sanctions for noncompliance with Self-Sufficiency requirements are:

- First offense - 1/3 reduction in benefits for 2 months or compliance\*, whichever is shorter;
- \*If there is no compliance after 2 months, the sanction goes to the 2<sup>nd</sup> level sanction.
- Second offense - 2/3 reduction in benefits for 2 months or compliance\*, whichever is shorter; and
- \*If there is no compliance after 2 months, the sanction goes to the 3<sup>rd</sup> level sanction.
- Third offense - ABC benefits are lost permanently; the household may reapply as a NPA household.

ABC job quit sanctions are:

- If a household member quits a job without good cause and subsequently fails to comply with ABC's job search requirements, the household loses all benefits for 2 months or until the member complies with the requirement by obtaining a job of equal or higher pay, whichever comes first.
- If a household member quits a job without good cause but complies with ABC's job search requirements, the household will have a:
  - » 1/3 reduction in benefits for 2 months or until the member complies with the requirement by obtaining a job

of equal or higher pay, whichever comes first;

» 2/3 reduction in benefits for 2 months or until the member complies with the requirement by obtaining a job of equal or higher pay, whichever comes first; and

» Third offense - ABC benefits are lost permanently; the household may reapply as a NPA household.

Food stamp recipients who are sanctioned under the remaining ABC requirements in DSSM 3000 will be subject to the Riverside rule.

Examples of the Aligned Sanction Process:

1. Parent fails to comply with an Employment and Training requirement. The family's ABC grant is reduced by 1/3. The food stamp allotment is determined by using the post-sanctioned grant amount and then reduced by 1/3. If the parent still has not complied at the end of the two months, the grant and food stamps have a 2/3 reduction in benefits. If the parent still has not complied at the end of the second two months, both the ABC and food stamp benefits are closed.

2. An ABC client who already has two E&T sanctions is assessed a third sanction for failure to cooperate with officials to ensure the school attendance of her 13-year-old, closing her ABC case permanently. The food stamp case will also close. If the household reapplies for food stamps, the household will be a non-public assistance case. The household may get food stamps under the regular Food Stamp Program. No E & T sanctions will carry over to the NPA case.

3. A family is only getting ABC benefits and has two E & T sanctions. The family starts receiving food stamps. A parent now has a third E & T sanction. The ABC and food stamp benefits are closed. If the household reapplies for food stamps, the household will be a NPA case. The household may get food stamp under the regular Food Stamp Program. No E & T sanctions will carry over to the NPA case.

4. A household receives only food stamps and has two food stamp E&T sanctions. The household starts to receive ABC. The two FSE&T sanctions are cured and the mandatory individual is placed in ABC E & T. Later, there is a first non-compliance with E & T. The ABC grant is reduced by 1/3. The food stamps will be calculated using the post-sanctioned grant and applying the 1/3 reduction sanction.

5. The father of a family of five voluntarily quits a job without good cause and refuses to comply with subsequent job search requirements. The ABC grant and food stamps receive a full benefit reduction for two months or until the father complies with job search or enters a job of equal or higher pay.

6. The father of a family of four voluntarily quits a job without good cause and refused to comply with subsequent job search requirements. The ABC grant and food stamps receive a full benefit reduction for two months or until the father complies with job search or enters a job of equal or higher pay. Father starts job search activities after one month. Benefits are restored with a 1/3 sanction for one month.

7. Parent fails to send 13 year old to school and keep scheduled school conferences. The ABC grant is reduced by 1/3. The food stamp allotment is determined by using the post-sanctioned grant amount and then reduced by 1/3. If the parent still has not complied at the end of the two months, the grant and food stamps have a 2/3 reduction in benefits. If the parent still has not complied at the end of the second two months, both the ABC and food stamp benefits are closed. If the household reapplies for food stamps, the household will be a NPA case. The household may get food stamp under the regular Food Stamp Program. No E & T sanctions will carry over to the NPA case.

SUMMARY:

- The simplified food stamp program lowers the age at which a child exempts a parent from work requirements to under 13 weeks.
- Current food stamp E & T and job quit requirements and penalties will follow the ABC E & T and job quit requirements and penalties.
- Adult members of the ABC unit must cooperate with school officials to ensure school attendance for children under the age of 16. The sanction for failure to cooperate with this requirement will apply to the entire food stamp household.
- ABC benefits closed for the third Self-Sufficiency sanction remain closed until the end of the ABC waiver.
- Food stamp benefits closed for the third ABC Self-Sufficiency sanction remain closed until the household reapplies and is eligible as a NPA household for food stamps.
- The ABC E & T sanctions will not carry over to NPA households certified under the regular food stamp program.

The Department finds that this change should be made in the best interest of the general public of the State of Delaware. The Department will receive, consider, and respond to petitions by any interested person for the reconsideration or revision thereof. Such petitions must be forwarded by March 31, 1998 to the Director, Division of Social Services, P. O. Box 906, New Castle, DE 19720.

## **DEPARTMENT OF HEALTH & SOCIAL SERVICES**

### **DIVISION OF PUBLIC HEALTH**

Statutory Authority: 16 Delaware Code,  
Section 122(3)(h) (16 Del.C. 122(3)(h))

#### **STATE OF DELAWARE RULES AND REGULATIONS PERTAINING TO THE PRACTICE OF CERTIFIED MIDWIFERY**

#### SUMMARY

These regulations replace regulations previously adopted April 17, 1978, and most recently amended May 15, 1985. They are to be adopted in accordance with Chapter 1, Section 122 (3) h, Title 16, Delaware Code. They will supersede all previous regulations concerning Midwifery adopted by the former Delaware State Board of Health.

The regulations establish and define conditions for the certification of midwives in the State of Delaware. Prior to its elimination, the State Board of Health, certified all midwives in Delaware. It has been determined more efficient and cost effective to certify midwives who are also advanced practice certified nurse midwives through the Delaware Board of Nursing. This will be done under the provisions of Title 24, Chapter 19 of the Delaware Code, and Article VIII of the rules and regulations of the Delaware Board of Nursing. All otherwise qualified midwives who are not advanced practice certified nurse midwives will retain certification under the Division of Public Health. These regulations also update certification requirements and standards of practice to conform to national standards as outlined by the American College of Nurse-Midwives.

#### NOTICE OF HEARING

The comment period for these regulations ends on March 31, 1998. All comments may be addressed to Steven L. Blessing, (302) 739-6638. The mailing address is: c/o State EMS Office, Blue Hen Corporate Center, Suite 4H, 655 Bay Rd., Dover, DE 19901.

A public hearing to discuss the proposed regulations will be held on March 20, 1998 in Room 309 of the Jesse Cooper Building, 417 Federal Street, Dover DE 19901. The hearing will start promptly at 1:30 PM.

DIVISION OF PUBLIC HEALTH  
STATE OF DELAWARE  
RULES AND REGULATIONS PERTAINING TO THE  
PRACTICE OF CERTIFIED MIDWIFERY

These regulations replace Regulations previously adopted on April 17, 1978; amended September 19, 1978, December 22, 1982, and May 15, 1985 by the Delaware State Board of Health. These regulations are effective ten (10) days after final publication in the State Register of Regulations, having been adopted by the Secretary, Delaware Health and Social Services, in conformance with Chapter 1, Section 122 (3)h, Title 16, Delaware Code, and supersede regulations on midwifery previously adopted by the Delaware State Board of Health.

#### Section I - Purpose

The purpose of these Regulations is to establish and define conditions under which individuals may be granted permits to practice certified midwifery in the State of Delaware. The Department of Health and Social Services, through the Division of Public Health, will recognize and treat for all purposes as a permit to practice certified midwifery, the licenses granted to advanced practice certified nurse midwives under Title 24, Delaware Code, Chapter 19 and Article VIII of the Rules and Regulations of the Delaware Board of Nursing.

#### Section II - Definitions

a. Certified midwifery practice is the management of women's health care, focusing particularly on pregnancy, childbirth, the postpartum period, care of the newborn, and the family planning and gynecological needs of women, including the prescription of appropriate medications and devices within the defined scope of practice. The certified midwife practices within a health care system that provides for consultation, collaborative management or referral as indicated by the health status of the client. Certified midwives practice at the level and scope defined by the agency which certified the midwife.

b. Consultation is the process whereby a certified midwife, who maintains primary management responsibility for the woman's care, seeks the advice or opinion of a physician or another member of the health care team.

c. Collaboration in the process whereby a certified midwife and physician jointly manage the care of a woman or newborn who has become medically, gynecologically or obstetrically complicated.

d. Referral is the process whereby the certified midwife

directs the client to a physician or another health care professional for management of a particular problem or aspect of the client's care.

#### Section III - Qualifications

To receive a permit to practice certified midwifery in the State of Delaware, applicants who are not licensed as advance practice certified nurse midwives must demonstrate that they have met the following qualifications:

1. Possesses a valid certification by the American College of Nurse-Midwives' Certification Council, Inc.; has completed a midwifery education program that has been accredited by the ACNM's Division of Accreditation; has earned a baccalaureate degree; or has completed an equivalent program of studies as determined by the certification agency.

2. Submits a sworn statement that he/she has not been convicted of a felony; been professionally penalized or convicted of substance addiction; had a professional midwifery license suspended or revoked in this or another state; been professionally penalized or convicted of fraud; is physically and mentally capable of engaging in the practice of midwifery; and

3. Has established mechanisms for practice within the health care system that provide for consultation, collaboration or referral as indicated by the health care status of the client.

#### Section IV - Application

Any person, other than an advanced practice certified nurse midwife licensed by the Board of Nursing, who wishes to obtain a permit to practice certified midwifery shall make a written application to the Division of Public Health. Such application shall be accompanied by the necessary documents demonstrating that the applicant possesses the qualifications in Section III. If, after investigation of the application by the Division of Public Health, it appears the applicant is qualified to practice certified midwifery, a permit to practice midwifery in the State of Delaware will be issued. Any person desiring to obtain a license to practice midwifery as an advanced practice certified nurse midwife shall make a written application to the Delaware Board of Nursing, Division of Professional Regulation.

#### Section V - Temporary Permits

Applicants who have completed the education requirements for a permit, and who are scheduled to take the ACNM Certification Council examination, may be granted a temporary permit to practice certified midwifery until they

take the exam. Temporary permit holders who do not pass the next two consecutively scheduled exams will have their permits revoked until such time as they pass the certification exam.

#### Section VI - Maintenance of Permit

No person granted a permit under these regulations shall engage in active practice of certified midwifery without having an established mechanism for consultation, collaboration and referral with a designated physician(s) licensed to practice medicine or osteopathy in the State of Delaware. A certified midwife who practices without establishing and maintaining such a mechanism will be subject to automatic and immediate revocation of his/her permit.

#### Section VII - Renewal of Permit

Any permit granted to practice certified midwifery in the State of Delaware shall terminate annually on December 31. The fee for such annual permit is \$25.00. Said permit shall be renewable annually with the filing of an application and documentation setting forth continued qualifications as specified in "1" through "3" of Section III. Should said permit not be renewed by January 31, the permit is considered lapsed and the certified midwife shall apply according to Section IV.

#### Section VIII - Exemptions

(a) Any person who, on September 19, 1978, held a valid permit issued by the State Board of Health to practice midwifery in the State of Delaware may be granted a permit to practice midwifery even though that person does not meet the qualification specified in item "1" of Section III of these Rules and Regulations, providing such midwife must continue to demonstrate to the Division of Public Health full compliance with all other provisions of these Regulations and any special conditions as set forth by the Division of Public Health to assure the safe and competent practice of certified midwifery.

#### Section IX - Complaints

Any person may make a complaint in writing to the Division of Public Health concerning incompetence, negligence, addiction to drugs and/or alcohol, physical or mental impairment, misrepresentation, willful breach of confidence, failure of a certified midwife to report a birth, or failure to otherwise comply with these regulations. Complaints about certified midwives shall be investigated by the Division of Public Health or its designee and a determination made as to the need for a hearing. In the event

a hearing is to be held, the midwife shall be notified by certified mail at least twenty (20) days prior to the hearing as to the time and place of the hearing and any allegations which the Division intends to investigate. If such complaint is found to be justified, the permit of the midwife against whom the complaint has been lodged may, at the discretion of the Division of Public Health, be revoked or suspended.

#### Section X - Illegal Practice

Any person who practices as a certified midwife as defined in item "a" of Section II in the State of Delaware without a permit issued by the Division of Public Health shall be subject to a fine pursuant to 16 Del.C. 107.

#### Section XI - Effective Date

These Regulations shall become effective ten (10) days after final publication in the State Register of Regulations and shall replace Rules and Regulations Pertaining to the Practice of Midwifery which were in effect until that date.

#### Section XII

Should any section, sentence, clause, or phase of these Rules and Regulations be legally declared unconstitutional or invalid for any reason, the remainder of said Rules and Regulations shall not be affected thereby.

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## **DEPARTMENT OF NATURAL RESOURCES & ENVIRONMENTAL CONTROL**

### **DIVISION OF FISH & WILDLIFE**

Statutory Authority: 7 Delaware Code,  
Section 903(e)(2)(a) (7 **Del.C.** 903(e)(2)(a))

#### REGISTER NOTICE

1. TITLE OF THE REGULATIONS:  
**TIDAL FINFISH REGULATION NO. 4 SUMMER  
FLOUNDER SIZE LIMITS; POSSESSION LIMITS;  
SEASONS**
2. BRIEF SYNOPSIS OF THE SUBJECT, SUBSTANCE  
AND ISSUES:  
The Summer Flounder Fishery Management Plan has been amended to require the recreational harvest be reduced to a fishing mortality rate of F=.24.

Options to decrease Delaware's recreational harvest



include:

1.) Increase the minimum size limit from 14.5" to 15" with a decrease in the creel limit from 10/day to 8/day; or

2.) Maintain the minimum size limit of 14.5" and reduce the creel limit from 10/day to 6/day with a seasonal closure to reduce landings by 8% from the 1997 landings using the average landing pattern in Delaware during 1992 through 1996.

3. **POSSIBLE TERMS OF THE AGENCY ACTION:**

The Department must adopt one of the proposed options. If not, Delaware may be found out of compliance with the Summer Flounder Fishery Management Plan and its summer flounder fishery closed by the Secretary, United States Department of Commerce.

4. **STATUTORY BASIS OR LEGAL AUTHORITY TO ACT:**

§903 (e)(2)(a), 7 Del. C.

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

None

6. **NOTICE OF PUBLIC COMMENT:**

Individuals may present their opinions and evidence and/or request information by writing or visiting the Division of Fish and Wildlife, Fisheries Section, 89 Kings Highway, Dover, DE 19901 prior to 4:30 p.m. on March 31, 1998. A public hearing on these proposed amendments will be held in the DNREC auditorium, 89 Kings Highway, Dover, DE at 7:30 p.m. on March 26, 1998.

7. **PREPARED BY:**

Charles A. Lesser, 302-739-3441, 1/20/98

**PROPOSED AMENDMENT TO TIDAL FINFISH  
REGULATION NO. 4 SUMMER FLOUNDER SIZE  
LIMITS; POSSESSION LIMITS; SEASONS**

Amend Tidal Finfish Regulation No. 4 in subsection's (b) and (j) by striking the words "Ten (10)" and substituting in lieu thereof the words "eight (8)";

Further amend Tidal Finfish Regulation No. 4 in subsection's (c) and (d) by striking the words "fourteen and one-half (14.5)" and substitute in lieu thereof the words "fifteen (15)."

OR

Amend Tidal Finfish Regulation No. 4 in subsection's

(b) and (j) by striking the words "ten (10)" and substituting in lieu thereof the words "six (6)";

Further amend Tidal Finfish Regulation No. 4 by amending subsection (a) by striking it in its entirety and substitute in lieu thereof the following:

"It shall be unlawful for any person to take and reduce to possession any summer flounder or to land any summer flounder during the period beginning at 12:01 a.m. on April 1, 1998 and ending at midnight on April 21, 1998.

**EXISTING TIDAL FINFISH REGULATION NO. 4**

**TIDAL FINFISH REGULATION NO. 4. SUMMER FLOUNDER SIZE LIMITS; POSSESSION LIMITS; SEASONS.**

a) It shall be lawful for any person to take and reduce to possession summer flounder from the tidal waters of this State at any time except as otherwise set forth in this regulation.

b) It shall be unlawful for any recreational fisherman to have in possession more than ten (10) summer flounder at or between the place where said summer flounder were caught and said recreational fisherman's personal abode or temporary or transient place of lodging.

c) It shall be unlawful for any person, other than qualified persons as set forth in paragraph (f) of this regulation, to possess any summer flounder that measure less than fourteen and one-half (14.5) inches between the tip of the snout and the furthest tip of the tail.

d) It shall be unlawful for any person, other than a licensed commercial finfisherman with a gill net permit, while on board a vessel, to have in possession any part of a summer flounder that measures less than fourteen and one-half (14.5) inches between said part's two most distant points unless said person also has in possession the head, backbone and tail intact from which said part was removed.

e) It shall be unlawful for any licensed commercial finfisherman with a gill net permit to have in possession any part of a summer flounder that measures less than fourteen (14) inches between said part's two most distant points unless said person also has in possession the head, backbone and tail intact from which said part was removed.

f) Notwithstanding the size limits and possession limits in this regulation, a person may possess a summer flounder that measures no less than fourteen (14) inches between the tip of the snout and the furthest tip of the tail and a quantity of summer flounder in excess of the possession limit set forth in this regulation, provided said person has one of the following:

1) A valid bill-of-sale or receipt indicating the date said summer flounder were received, the amount of said summer flounder received and the name, address and signature of the person who had landed said summer

flounder;

2) A receipt from a licensed or permitted fish dealer who obtained said summer flounder; or

3) A bill of lading while transporting fresh or frozen summer flounder.

g) Notwithstanding the size limits in this regulation, a person may possess a summer flounder that measures no less than fourteen (14) inches between the tip of the snout and the furthest tip of the tail, provided said person has one of the following:

1) A valid commercial finfishing license and gill net permit issued by the Department; or

2) A valid vessel permit issued by the Regional director, NMFS, to fish for and retain summer flounder in the EEZ or a dealer permit issued by the Regional Director or NMFS, as set forth in 50CFR, Part 625.

h) It shall be unlawful for any commercial finfisherman to sell, trade and or barter or attempt to sell, trade and or barter any summer flounder or part thereof that is landed in this State by said commercial fisherman after a date when the de minimis amount of commercial landings of summer flounder is determined to have been landed in this State by the Department. The de minimis amount of summer flounder shall be 0.1% of the coast wide commercial quota as set forth in the Summer Flounder Fishery Management Plan approved by the Atlantic States Marine Fisheries Commission.

i) It shall be unlawful for any vessel to land more than 200 pounds of summer flounder in any one day in this State.

j) It shall be unlawful for any person, who has been issued a commercial foodfishing license and fishes for summer flounder with any food fishing equipment other than a gill net, to have in possession more than ten (10) summer flounder at or between the place where said summer flounder were caught and said person's personal abode or temporary or transient place of lodging.

dates.

3. **POSSIBLE TERMS OF THE AGENCY ACTION:**

The Department must adopt this proposed amendment. If not, Delaware may be found out of compliance with the Weakfish Fishery Management Plan, as amended, and it's weakfish fishery closed by the Secretary, United States Department of Commerce.

4. **STATUTORY BASIS OR LEGAL AUTHORITY TO ACT:**

§903 (e)(2)(a), 7 Del. C.

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

None

6. **NOTICE OF PUBLIC COMMENT:**

Individuals may present their opinions and evidence and/or request information by writing or visiting the Division of Fish and Wildlife, Fisheries Section, 89 Kings Highway, Dover, DE 19901 prior to 4:30 p.m. on March 31, 1998. A public hearing on this proposed amendment will be held in the DNREC auditorium, 89 Kings Highway, Dover, DE at 7:30 p.m. on March 26, 1998.

7. **PREPARED BY:**

Charles A. Lesser, 302-739-3441, 1/20/98

**PROPOSED AMENDMENT TO TIDAL FINFISH REGULATION NO. 10 WEAKFISH SIZE LIMITS; POSSESSION LIMITS; SEASONS**

Amend Tidal Finfish Regulation No. 10 by striking subsection (e) in its entirety and substitute in lieu thereof the following:

"e) It shall be unlawful for any person to fish with any gill net in the Delaware Bay or Atlantic Ocean or to take and reduce to possession any weakfish from the Delaware Bay or the Atlantic Ocean with any fishing equipment other than a hook and line during the following periods of time:

Beginning at 12:01 AM on May 1, 1998 and ending at midnight on May 10, 1998;

beginning at 12:01 AM on May 15, 1998 and ending at midnight on May 17, 1998;

beginning at 12:01 AM on May 22, 1998 and ending at midnight on May 24, 1998;

beginning at 12:01 AM on May 29, 1998 and ending at midnight on May 31, 1998;

beginning at 12:01 AM on June 5, 1998 and ending at midnight on June 7, 1998;

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**REGISTER NOTICE**

1. **TITLE OF THE REGULATIONS:**

**TIDAL FINFISH REGULATION NO. 10 WEAKFISH SIZE LIMITS; POSSESSION LIMITS; SEASONS**

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

In order to remain in compliance with Amendment 3 to the Weakfish Fishery Management Plan as approved by the Atlantic States Marine Fisheries Commission, Delaware must maintain a reduction in commercial effort of 34 days when gill nets are not allowed in the water to catch weakfish during the core fishing season. The core fishing season is May 1-June 30. This amendment changes the 1997 dates to 1998

beginning at 12:01 AM on June 12, 1998 and ending at midnight on June 14, 1998;

beginning at 12:01 AM on June 19, 1998 and ending at midnight on June 21, 1998;

and beginning at 12:01 AM on June 25, 1998 and ending at midnight on June 30, 1998.”

## EXISTING TIDAL FINFISH REGULATION NO. 10

### TIDAL FINFISH REGULATION 10. WEAKFISH SIZE LIMITS; POSSESSION LIMITS; SEASONS.

a) It shall be unlawful for any person to possess weakfish *Cynoscion regalis* taken with a hook and line, that measure less than thirteen (13) inches, total length.

b) It shall be unlawful for any person to whom the Department has issued a commercial food fishing license and a food fishing equipment permit for hook and line to have more than six (6) weakfish in possession during the period beginning at 12:01 AM on May 1 and ending at midnight on October 31 except on four specific days of the week as indicated by the Department on said person's food fishing equipment permit for hook and line.

c) It shall be unlawful for any person, who has been issued a valid commercial food fishing license and a valid food fishing equipment permit for equipment other than a hook and line to possess weakfish, lawfully taken by use of such permitted food fishing equipment, that measure less than twelve (12) inches, total length.

d) It shall be unlawful for any person, except a person with a valid commercial food fishing license, to have in possession more than six (6) weakfish, not to include weakfish in one's personal abode or temporary or transient place of lodging. A person may have weakfish in possession that measure no less than twelve (12) inches, total length, and in excess of six (6) if said person has a valid bill-of-sale or receipt for said weakfish that indicates the date said weakfish were received, the number of said weakfish received and the name, address and signature of the commercial food fisherman who legally caught said weakfish or a bill-of-sale or receipt from a person who is a licensed retailer and legally obtained said weakfish for resale.

e) It shall be unlawful for any person to fish with any gill net in the Delaware Bay or Atlantic Ocean or to take and reduce to possession any weakfish from the Delaware Bay or the Atlantic Ocean with any fishing equipment other than a hook and line during the following periods of time:

~~Beginning at 12:01 AM on May 3, 1997 and ending at midnight on May 11, 1997;~~

~~beginning at 12:01 AM on May 16, 1997 and ending at midnight on May 18, 1997;~~

~~beginning at 12:01 AM on May 23, 1997 and ending at midnight on May 26, 1997;~~

~~beginning at 12:01 AM on May 30, 1997 and ending at~~

~~midnight on June 1, 1997;~~

~~beginning at 12:01 AM on June 6, 1997 and ending at midnight on June 8, 1997;~~

~~beginning at 12:01 AM on June 13, 1997 and ending at midnight on June 15, 1997;~~

~~and beginning at 12:01 AM on June 20, 1997 and ending at midnight on June 28, 1997.~~

~~Beginning at 12:01 AM on May 1, 1998 and ending at midnight on May 10, 1998;~~

~~beginning at 12:01 AM on May 15, 1998 and ending at midnight on May 17, 1998;~~

~~beginning at 12:01 AM on May 22, 1998 and ending at midnight on May 24, 1998;~~

~~beginning at 12:01 AM on May 29, 1998 and ending at midnight on May 31, 1998;~~

~~beginning at 12:01 AM on June 5, 1998 and ending at midnight on June 7, 1998;~~

~~beginning at 12:01 AM on June 12, 1998 and ending at midnight on June 14, 1998;~~

~~beginning at 12:01 AM on June 19, 1998 and ending at midnight on June 21, 1998;~~

~~and beginning at 12:01 AM on June 25, 1998 and ending at midnight on June 30, 1998.”~~

f) The Department shall indicate on a persons food fishing equipment permit for hook and line four (4) specific days of the week during the period May 1 through October 31, selected by said person when applying for said permit, as to when said permit is valid to take in excess of six (6) weakfish per day. These four days of the week shall not be changed at any time during the remainder of the calendar year.

g) It shall be unlawful for any person with a food fishing equipment permit for hook and line to possess more than six (6) weakfish while on the same vessel with another person who also has a food fishing equipment permit for hook and line unless each person's food fishing equipment permit for hook and line specifies the same day of the week in question for taking in excess of six (6) weakfish.

## REGISTER NOTICE

1. TITLE OF THE REGULATIONS:  
**TIDAL FINFISH REGULATION NO.22 TAUTOG;  
SIZE LIMITS**

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

Implement a Tautog catch reduction strategy to reduce fishing mortality to the interim target of F=0.24 as required in the Tautog Fishery Management Plan. The current F in Delaware is 0.3961. It must be reduced 40%.

Options to reduce fishing mortality to F=0.24 include:

- 1.) Reduce the creel limit from 10 per day to 6 per day during July - April and 3 per day during May and June; or
- 2.) Reduce the creel limit from 10 per day to 7 per day during July - February and 3 per day during March - June; or
- 3.) Maintain the existing creel limits and close fishing for approximately 40 days during July and August.

**3. POSSIBLE TERMS OF THE AGENCY ACTION:**

The Department must adopt one of the proposed options. If not, Delaware may be found out of compliance with the Tautog Fishery Management Plan and it's tautog fishery closed by the Secretary, United States Department of Commerce.

**4. STATUTORY BASIS OR LEGAL AUTHORITY TO ACT:**

§903 (e) (2) (a), 7 Delaware Code

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

None

**6. NOTICE OF PUBLIC COMMENT:**

Individuals may present their opinions and evidence and/or request information by writing or visiting the Division of Fish and Wildlife, Fisheries Section, 89 Kings Highway, Dover, DE 19901 prior to 4:30 p.m. on March 31, 1998. A public hearing on these proposed amendments will be held in the DNREC auditorium, 89 Kings Highway, Dover, DE at 7:30 p.m. on March 26, 1998.

**7. PREPARED BY:**

Charles A. Lesser , 302-739-3441 1/20/98

**PROPOSED AMENDMENTS TO TIDAL FINFISH REGULATION NO.22 TAUTOG; SIZE LIMITS**

Amend Tidal Finfish Regulation No.22 by striking it in its entirety and substitute in lieu thereof the following:

**“TIDAL FINFISH REGULATION NO.22 TAUTOG SIZE LIMITS; POSSESSION LIMITS.**

(a) It shall be unlawful for any person to possess any tautog that measures less than fourteen (14) inches in total length during the period beginning at 12:01 a.m. on July 1 and ending at 12:00 on March 31, next ensuing. (Note: The current minimum size limit of fifteen (15) inches would remain in effect during April, May and June.)

(b) It shall be unlawful for any person to possess more than six (6) tautog during the period beginning at 12:01 a.m. on July 1 and ending at 12:00 on April 30, next ensuing, at or between the place where said tautog were caught and said persons personal abode or temporary or transient place of

lodging.

OR

(b) It shall be unlawful for any person to possess more than seven (7) tautog during the period beginning at 12:01 a.m. on July 1 and ending at 12:00 midnight on the last day in February, next ensuing, at or between the place where said tautog were caught and said person's personal abode or temporary or transient place of lodging.

(c) It shall be unlawful for any person to possess more than three (3) tautog during the period beginning at 12:01 a.m. on May 1 and ending at 12:00 midnight on June 30, next ensuing, at or between the place where said tautog were caught and said persons personal abode or temporary transient place of lodging.

OR

(c) It shall be unlawful for any person to possess more than three (3) tautog during the period beginning at 12:01 a.m. on March 1 and ending at 12:00 midnight on June 30, next ensuing at or between the place where said tautog were caught and said persons personal abode or temporary transient place of lodging.

OR

Amend Tidal Finfish Regulation No.22 by adding the word; “SEASON” after the word “LIMITS” in the title.

Further amend Tidal Finfish Regulation No.22 by striking subsection (a) in its entirety and substitute in lieu thereof the following:

“(a) It shall be unlawful for any person to take and reduce to possession or to land any tautog during the period beginning at 12:01 a.m. on July 23 and ending at midnight on August 31.”

**EXISTING TIDAL FINFISH REGULATION NO.22**

**TIDAL FINFISH REGULATION NO.22 TAUTOG; SIZE LIMITS.**

(a) Notwithstanding 7 Delaware Code. §929 (b) (7) it shall be unlawful for any person to possess any tautog that measures less that thirteen (13) inches in total length during the period beginning at 12:01 a.m. on January 1, 1997 and ending at midnight on March 31, 1997 or during the period beginning at 12:01 a.m. on July 1, 1997 and ending at midnight on December 31, 1997.

(b) Notwithstanding 7 Delaware Code §929 (b) (7) it shall be unlawful for any person to possess any tautog that

measures less than fourteen (14) inches in total length during the period beginning at 12:01 a.m. on January 1, 1998 and ending at midnight on March 31, 1998 or during the period beginning at 12:01 a.m. on July 1, 1998 and ending at midnight on December 31, 1998 or during said periods in all years thereafter.

Also in effect are §938, 7 Delaware Code and §939, 7 Delaware Code.

§938. Creel limits on finfish; exceptions.

(a) Unless otherwise provided in this chapter, or by regulations promulgated by the Department, or permit issued by the Division, a fisher shall not have in possession at or between the place caught and the fisher's personal abode or temporary or transient place of lodging more finfish than exceed the following numbers for the species listed:

10 for tautog (*Tautoga onitis*) or blackfish.

§939. Fishing seasons; exception.

(a) Notwithstanding §938 of this title, it shall be unlawful for any person to possess or retain more than 3 tautog (*Tautoga onitis*) during the period beginning at 12:01 a.m. on April 1 through and including midnight on June 30 next ensuing except that an individual who free dives without the aid of an underwater mechanical breathing device may take by spear and possess not more than 10 tautog per day during this period.

Notwithstanding §929(b) (7) of this title, it shall be unlawful to possess any tautog during the period beginning at 12:01 a.m. on April 1 through and including midnight on June 30, next ensuing, which measures less than 15 inches long in total length.

(b) Each tautog taken and retained in violation of the provisions in subsection (a) of this section shall constitute a separate violation.

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#### REGISTER NOTICE

##### 1. TITLE OF THE REGULATIONS:

**TIDAL FINFISH REGULATION NO.23 BLACK SEA BASS SIZE LIMIT**

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

The Black Sea Bass Fisheries Management Plan has been amended to require the recreational and commercial harvests be reduced to a fishing mortality rate of  $F=0.32$ .

Options to reduce Delaware's recreational harvest include:

1.) Increase the minimum size limit from 9 inches to 10 inches with a seasonal closure of August 1-15; or

2.) Increase the minimum size limit from 9 inches to 10 inches with a creel limit of 20 per day.

To reduce the commercial harvest, quarterly trip limits will be required as follows:

First Quarter - 11,000 lbs.  
Second Quarter - 7,000 lbs.  
Third Quarter - 3,000 lbs.  
Fourth Quarter - 4,000 lbs.

The commercial fishing for or landing of any black sea bass in Delaware for commercial purposes will be prohibited during the remainder of any quarter after a date when the National Marine Fisheries Service determines that quarterly quota has been landed.

##### 3. POSSIBLE TERMS OF THE AGENCY ACTION:

The Department must adopt one of the proposed options for recreational fishing and the proposed option for commercial fishing. If not, Delaware may be found out of compliance with the Black Sea Bass Fishery Management Plan and it's black sea bass fishery closed by the Secretary, United States Department of Commerce.

##### 4. STATUTORY BASIS OR LEGAL AUTHORITY TO ACT:

§903 (e) (2) (a), 7 Delaware Code

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

None

##### 6. NOTICE OF PUBLIC COMMENT:

Individuals may present their opinions and evidence and/or request information by writing or visiting the Division of Fish and Wildlife, Fisheries Section, 89 Kings Highway, Dover, DE 19901 prior to 4:30 p.m. on March 31, 1998. A public hearing on these proposed amendments will be held in the DNREC auditorium, 89 Kings Highway, Dover, DE at 7:30 p.m. on March 26, 1998.

##### 7. PREPARED BY:

Charles A. Lesser , 302-739-3441 1/20/98

#### PROPOSED AMENDMENTS TO TIDAL FINFISH REGULATION NO.23 BLACK SEA BASS SIZE LIMIT

Amend Tidal Finfish Regulation No.23 by adding the words “;SEASONS AND TRIP LIMITS” after the word “LIMIT” in the title.

Further amend Tidal Finfish Regulation No.23 in subsection (a) by striking the words “nine (9)” as they appear

therein and substitute in lieu thereof the words "ten (10)".

Further amend Tidal Finfish Regulation No.23 in subsection (b) by striking subsection (b) in its entirety and substitute in lieu thereof the following:

"(b) It shall be unlawful for any recreational fisherman to take and reduce to possession any black sea bass or to land any black sea bass during the period beginning at 12:01 a.m. on August 1 and ending at midnight on August 15."

OR

"(b) It shall be unlawful for any recreational fisherman to have in possession more than twenty (20) black sea bass at or between the place where said black sea bass were caught and said recreational fisherman's personal abode or temporary or transient place of lodging."

Further amend Tidal Finfish Regulation No.23 by adding a new subsection (c) to read as follows:

"(c) It shall be unlawful for any person to possess on board a vessel at any time or to land after one trip more than the following quantities of black sea bass during the quarter listed:

First Quarter (January, February and March) - 11,000 lbs.

Second Quarter (April, May and June) - 7,000 lbs.

Third Quarter (July, August and September) - 3,000 lbs.

Fourth Quarter (October, November and December) - 4,000 lbs.

A trip shall mean the time between a vessel leaving its home port and the next time said vessel returns to any port in Delaware."

Further amend Tidal Finfish Regulation No.23 by adding a new subsection (d) to read as follows:

"(d) It shall be unlawful for any person to fish for black sea bass for commercial purposes or to land any black sea bass for commercial purposes during any quarter indicated in subsection (c) after the date in said quarter that the National Marine Fisheries Services determines that quarter's quota has been filled."

EXISTING TIDAL FINFISH REGULATION NO.23

TIDAL FINFISH REGULATION NO.23 BLACK SEA BASS SIZE LIMIT

a) It shall be unlawful for any person to have in possession any black sea bass (*Centropritis striata*) that measures less than nine (9) inches, total length.

b) It shall be unlawful for any person who has been issued a commercial food fishing license by the Department to have in possession any black sea bass, after January 1, 1998, that measures less than ten (10) inches, total measure.

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**DEPARTMENT OF NATURAL  
RESOURCES & ENVIRONMENTAL  
CONTROL**

**DIVISION OF FISH & WILDLIFE  
ENFORCEMENT SECTION**

Statutory Authority: 7 Delaware Code,  
Section 2114 (7 Del.C. 2114)

REGISTER NOTICE

1. Title of the Regulations: **BOATING REGULATIONS**

2. Brief Synopsis of the Subject and Issue: Pursuant to §2114(a), 7 Del. C., no person shall operate a vessel on the waters of this State unless such vessel is operated in accordance with the rules and regulations of the Coast Guard or the Department of Natural Resources and Environmental Control. With the Department's regulations having gone without revision since 1975, they have become almost obsolete and in need of significant updating. The proposed regulations will eliminate conflicts with Coast Guard safety and equipment requirements; reduce the likelihood of an injury or accident when, for example, waterskiing, anchoring, or sitting on the bow, gunwales, or stern; and improve the administration of the State-maintained boat ramps and parking lots.

3. Possible Terms of the Agency Action: The Department of Natural Resources and Environmental Control may reject or approve regulations governing vessels used on the waters of this State.

4. Statutory Basis or Legal Authority to Act: § 2114, 7 Del. C.

5. Other Regulations that may be Affected by the Proposal: None

6. Notice of Public Comment: Individuals may present their opinions and evidence and/or request information by writing or visiting the Division of Fish and Wildlife, Enforcement Section, 89 Kings Highway, Dover, DE 19901 prior to 4:30 PM on March 31, 1998. A public hearing on the proposed regulations will be held in the

DNREC Auditorium, 89 Kings Highway, Dover, Delaware at 7:30 PM on Tuesday, March 24, 1998.

7. Prepared by: James H. Graybeal (302-739-3440)

Date: 02/10/98

## BOATING REGULATIONS

### BR-1. GENERAL

#### Section 1. Code of Federal Regulations.

These regulations reference provisions from the Code of Federal Regulations (CFR), revised as of July 1, 1997, and October 1, 1996, for U.S.C. Titles 33 and 46, respectively.

#### Section 2. Application of Regulations.

Unless otherwise specified, these regulations shall apply to all vessels used on the waters of the State.

### BR-2. DEFINITIONS

For purposes of BR-3 through BR-12, the following words and phrases shall have the meaning ascribed to them unless the context clearly indicates otherwise:

(1) "All-round light" shall mean a light showing an unbroken light over an arc of the horizon of 360 degrees.

(2) "Boat" shall mean any vessel manufactured or used primarily for non-commercial use; leased, rented, or chartered to another for the latter's non-commercial use; or engaged in the carrying of 6 or fewer passengers.

(3) "Coast Guard approved" shall mean that the equipment has been determined to be in compliance with Coast Guard specifications and regulations relating to the materials, construction and performance.

(4) "Commercial hybrid PFD" shall mean a hybrid PFD approved for use on commercial vessels identified on the PFD label.

(5) "Division" shall mean the Division of Fish and Wildlife.

(6) "Enforcement officer" shall mean a sworn member of a police force or other law-enforcement agency of this State or of any county or municipality who is responsible for the prevention and the detection of crime and the enforcement of the laws of this State or other governmental units within the State.

(7) "Especially hazardous condition" shall mean a condition which endangers the life of a person on board a vessel.

(8) "First aid" shall mean emergency care and treatment of an injured person before definitive medical and surgical management can be secured.

(9) "Grossly negligent" shall mean the intentional

failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another; such a gross want of care and regard for the rights of others as to justify the presumption of willfulness and wantonness.

(10) "Issuing authority" shall mean a state where a numbering system for vessels has been approved by the Coast Guard or the Coast Guard where a numbering system has not been approved. Issuing authorities are listed in Appendix A.

(11) "Licensing agent" shall mean a qualified person authorized by the Division to register vessels pursuant to § 2113(d) of Title 23.

(12) "Masthead light" shall mean a white light placed over the fore and aft centerline of a vessel showing an unbroken light over an arc of the horizon of 225 degrees and so fixed as to show the light from right ahead to 22.5 degrees abaft the beam on either side of the vessel, except that on a vessel of less than 12 meters (39.4 ft.) in length the masthead light shall be placed as nearly as practicable to the fore and aft centerline of the vessel.

(13) "Motorboat" shall mean any vessel 65 feet in length or less equipped with propulsion machinery, including steam.

(14) "Motor vessel" shall mean any vessel more than 65 feet in length propelled by machinery other than steam.

(15) "Navigable channel" shall mean a channel plotted on a National Oceanic and Atmospheric Administration nautical chart or a channel marked with buoys, lights, beacons, ranges, or other markers by the Coast Guard or with Coast Guard approval.

(16) "Negligent" shall mean the omission to do something which a reasonable person, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent person would not do.

(17) "Open boat" shall mean a motorboat or motor vessel with all engine and fuel tank compartments, and other spaces to which explosive or flammable gases and vapors from these compartments may flow, open to the atmosphere and so arranged as to prevent the entrapment of such gases and vapors within the vessel.

(18) "Operator" shall mean that person in control or in charge of the vessel while the vessel is in use.

(19) "Owner" shall mean a person who claims lawful possession of a vessel by virtue of legal title or equitable interest therein which entitles him/her to such possession.

(20) "Passenger" shall mean every person carried on board a vessel other than:

(a) The owner or the owner's representative;

(b) The operator;

(c) Bona fide members of the crew engaged in the business of the vessel who have contributed no consideration for their carriage and who are paid for their services; or

(d) Any guest on board a vessel which is being

used exclusively for pleasure purposes who has not contributed any consideration, directly or indirectly, for his/her carriage.

(21) "Personal flotation device" shall mean a device that is approved by the Commandant of the Coast Guard pursuant to 46 CFR Part 160.

(22) "PFD" shall mean personal flotation device.

(23) "Racing shell", "rowing scull", "racing canoe" or "racing kayak" shall mean a manually propelled vessel that is recognized by national or international racing associations for use in competitive racing and one in which all occupants row, scull or paddle, with the exception of a coxswain, if one is provided, and is not designed to carry and does not carry any equipment not solely for competitive racing.

(24) "Recreational vessel" shall mean any vessel being manufactured or operated primarily for pleasure; or leased, rented, or chartered to another for the latter's pleasure. It does not include a vessel engaged in the carrying of six or fewer passengers.

(25) "Restricted visibility" shall mean any condition in which visibility is restricted by fog, mist, falling snow, heavy rainstorms, or any other similar causes.

(26) "Sidelights" shall mean a green light on the starboard side and a red light on the port side each showing an unbroken light over an arc of the horizon of 112.5 degrees and so fixed as to show the light from right ahead to 22.5 degrees abaft the beam on its respective side. On a vessel of less than 20 meters (65.6 ft.) in length, the sidelights may be combined in one lantern carried on the fore and aft centerline of the vessel, except that on a vessel of less than 12 meters (39.4 ft.) in length the sidelights when combined in one lantern shall be placed as nearly as practicable to the fore and aft centerline of the vessel.

(27) "Slow-No-Wake" shall mean as slow as possible without losing steerage way and so as to make the least possible wake. (This almost always means speeds of less than 5 miles per hour.)

(28) "Special flashing light" shall mean a yellow light flashing at regular intervals at a frequency of 50 to 70 flashes per minute, placed as far forward and as nearly as practicable on the fore and aft centerline of the tow and showing an unbroken light over an arc of the horizon of not less than 180 degrees nor more than 225 degrees and so fixed as to show the light from right ahead to abeam and no more than 22.5 degrees abaft the beam on either side of the vessel.

(29) "State of principal use" shall mean a state on whose waters a vessel is used or to be used most during a calendar year. It shall mean this State if the vessel is to be used, docked, or stowed on the waters of the State for over 60 consecutive days.

(30) "Sternlight" shall mean a white light placed as nearly as practicable at the stern showing an unbroken light over an arc of the horizon of 135 degrees and so fixed as to show the light 67.5 degrees from right aft on each side of

the vessel.

(31) "Towing light" shall mean a yellow light having the same characteristics as the sternlight.

(32) "Type I PFD" shall mean any Coast Guard approved wearable device designed to turn most unconscious wearers in the water from a face down position to a vertical and slightly backward position. The Type I PFD has the greatest required buoyancy: the adult size provides at least 22 pounds buoyancy and the child size provides at least 11 pounds buoyancy.

(33) "Type II PFD" shall mean any Coast Guard approved wearable device designed to turn some unconscious wearers from a face-down position to a vertical and slightly backward position. An adult size device provides at least 152 pounds buoyancy, the medium child size provides at least 11 pounds and the infant and small child sizes provide at least 7 pounds buoyancy.

(34) "Type III PFD" shall mean any Coast Guard approved wearable device designed to maintain conscious wearers in a vertical and slightly backward position. While the Type III PFD has the same minimum buoyancy as the Type II PFD, it has little or no turning ability.

(35) "Type IV PFD" shall mean any Coast Guard approved device designed to be thrown to a person in the water and grasped and held by such person until rescued. It is not designed to be worn. Type IV devices, which include buoyant cushions, ring buoys and horseshoe buoys, are designed to have at least 16.5 pounds buoyancy.

(36) "Type V PFD" is any Coast Guard approved wearable device designed for a specific and restricted use. The label on the PFD indicates the kinds of activities for which the PFD may be used and whether there are limitations on how it may be used.

(37) "Type V hybrid PFD" is any Coast Guard approved wearable device designed to give additional buoyancy by inflating an air chamber. When inflated it turns the wearer similar to the action provided by a Type I, II, or III PFD (the type of performance is indicated on the label). The exact specification and performance of the PFD will vary somewhat with each device.

(38) "Use" shall mean to operate, navigate or employ.

(39) "Water ski" or "water skiing" shall include all forms of water skiing, skiing on an aquaplane, knee board or other contrivances, parasailing or any activity where a person is towed behind or alongside a boat.

### **BR-3. REGISTRATION, NUMBERING AND MARKING OF VESSELS.**

#### **Section 1. Applicability.**

This regulation shall apply to all vessels propelled by any form of mechanical power, including electric trolling motors, used or placed on the waters of the State, except the following:



- (1) Foreign vessels temporarily using such waters;
- (2) Military or public vessels of the United States, except recreational-type public vessels;
- (3) A vessel whose owner is a state or subdivision thereof, other than this State, which is used principally for governmental purposes, and which is clearly identifiable as such;
- (4) A vessel used exclusively as a ship's lifeboat; and
- (5) Vessels which have been issued valid marine documents by the Coast Guard.

## **Section 2. Vessel Number Required.**

(a) Except as provided in Section 3 of this regulation, no person shall use or place on the waters of the State a vessel to which this regulation applies unless:

- (1) It has a number issued on a certificate of number by this State; and
- (2) The number is displayed as described in Section 8 of this regulation.

(b) This regulation shall not apply to a vessel for which a valid temporary certificate has been issued to its owner by the issuing authority in the state in which the vessel is principally used.

## **Section 3. Reciprocity.**

(a) When the state of principal use is a state other than this State and the vessel is properly numbered by that state, the vessel shall be deemed in compliance with the numbering system requirements of this State in which it is temporarily used.

(b) When this State becomes the state of principal use for a vessel numbered by another state, the vessel's current number shall be recognized as valid for a period of 60 consecutive days before numbering is required by this State.

## **Section 4. Other Numbers and Letters Prohibited.**

No person shall use a vessel to which this regulation applies that has any letters or numbers that are not issued by an issuing authority for that vessel on its forward half.

## **Section 5. Certificate of Number Required (Registration Card).**

(a) Except as provided in Section 3 of this regulation, no person shall use a vessel to which this regulation applies unless it has on board:

- (1) A valid certificate of number or temporary certificate for that vessel issued by this State; or
- (2) For rental vessels described in subsection (b) of this section, a copy of the lease or rental agreement, signed by the owner or the owner's authorized representative and by the person leasing or renting the vessel, that contains at least:

(a) The vessel number that appears on the certificate of number; and

(b) The period of time for which the vessel is leased or rented.

(b) The certificate of number for vessels less than 26 feet in length and leased or rented to another for the latter's non-commercial use for less than 24 hours may be retained on shore by the vessel's owner or representative at the place from which the vessel departs or returns to the possession of the owner or the owner's representative.

## **Section 6. Inspection of Certificate.**

Each person using a vessel to which this regulation applies shall present the certificate of number, lease, or rental agreement required by Section 5 of this regulation to any enforcement officer for inspection at the officer's request.

## **Section 7. Location of Certificate of Number.**

No person shall use a vessel to which this regulation applies unless the certificate of number, lease, or rental agreement required by Section 5 of this regulation is carried on board in such a manner that it can be handed to a person authorized under Section 6 of this regulation to inspect it.

## **Section 8. Numbers: Display; Size; Color.**

(a) Each number required by Section 2 of this regulation shall:

- (1) Be painted on or permanently attached to each side of the forward half of the vessel, except as allowed by subsection (b) or required by subsection (c) of this section;
- (2) Be in plain vertical block characters of not less than 3 inches in height;
- (3) Contrast with the color of the background and be distinctly visible and legible;
- (4) Have spaces or hyphens that are equal to the width of a letter other than "I" or a number other than "1" between the letter and number groupings (example: DL 5678 D or DL-5678-D); and
- (5) Read from left to right.

(b) When a vessel is used by a manufacturer or by a dealer for testing or demonstrating, the number may be painted on or attached to removable plates that are temporarily but firmly attached to each side of the forward half of the vessel.

(c) On vessels so configured that a number on the hull or superstructure would not be easily visible, the number shall be painted on or attached to a backing plate that is attached to the forward half of the vessel so that the number is visible from each side of the vessel.

(d) Expired validation decals shall be removed and only effective decals shall be displayed.

## **Section 9. Notification of Issuing Authority.**

The person whose name appears as the owner of a vessel on a certificate of number shall, within 15 days, notify the Division of:

- (1) Any change in said person's address;
- (2) The theft or recovery of the vessel;
- (3) The loss or destruction of a valid certificate of number;
- (4) The transfer of all or part of said person's interest in the vessel; and
- (5) The destruction or abandonment of the vessel.

**Section 10. Surrender of Certificate of Number.**

The person whose name appears as the owner of a vessel on a certificate of number shall surrender the certificate to the Division or a licensing agent within 15 days after it becomes invalid under subsections (b), (c), (d) or (e) of Section 14 of this regulation.

**Section 11. Removal of Number and Validation Decal.**

The person whose name appears on a certificate of number as the owner of a vessel shall remove the number and validation sticker from the vessel when:

- (1) The vessel is documented by the Coast Guard;
- (2) The certificate of number is invalid under Section 14(c) of this regulation; or
- (3) This State is no longer the state of principal use.

**Section 12. Application for Certificate of Number.**

Any person who is the owner of a vessel to which Section 1 of this regulation applies may apply for a certificate of number for that vessel by submitting the following to the Division or the nearest licensing agent:

- (1) The application prescribed by the Division;
- (2) The fee required by § 2113(a) of Title 23; and
- (3) Proof of ownership as required by Section 22 of this regulation.

**Section 13. Duplicate Certificate of Number.**

If a certificate of number is lost or destroyed, the person whose name appears on the certificate as the owner may apply for a duplicate certificate by submitting the following to the Division:

- (1) The application prescribed by the Division; and
- (2) The fee required by § 2113(b) of Title 23.

**Section 14. Validity of Certificate of Number.**

(a) Except as provided in subsections (b), (c), (d) and (e) of this section, a certificate of number is valid until the date of expiration prescribed by this State.

(b) A certificate of number issued by this State is invalid after the date upon which:

- (1) The vessel is documented or required to be documented;
- (2) The person whose name appears on the certificate of number as owner of the vessel transfers all of his/her ownership in the vessel; or

- (3) The vessel is destroyed or abandoned.
- (c) A certificate of number issued by this State is invalid if:

(1) The application for the certificate of number contains a false or fraudulent statement; or

(2) The fees for the issuance of the certificate of number are not paid.

(d) A certificate of number is invalid 60 days after the day on which another state becomes the state of principal use.

(e) A certificate of number is invalid when the person whose name appears on the certificate involuntarily loses his/her interest in the numbered vessel by legal process.

**Section 15. Validation Stickers.**

(a) No person shall use a vessel that has a number issued by this State unless a validation sticker was issued with the certificate of number and the sticker:

- (1) Is displayed within 6 inches of the number; and
- (2) Meets the requirements in subsections (b) and (c) of this section.

(b) Validation stickers shall be approximately 3 inches square.

(c) The year in which each validation sticker expires shall be indicated by the colors, blue, international orange, green, and red, in rotation beginning with green for stickers that expired in 1975 (see Appendix B).

**Section 16. Contents of Application for Certificate of Number.**

(a) Each application for a certificate of number shall contain the following information:

- (1) Name of each owner;
- (2) Address of at least one owner, or the address of the principle place of business of an owner that is not an individual, including zip code;
- (3) Mailing address, if different from the address required by paragraph (a)(2) of this section;
- (4) Date of birth of the owner;
- (5) Citizenship of the owner;
- (6) State in which vessel is or will be principally used;
- (7) The number previously issued by an issuing authority for the vessel, if any;
- (8) Expiration date of certificate of number issued by the issuing authority;
- (9) Official number assigned by the Coast Guard, if applicable;
- (10) Whether the application is for a new number, renewal of a number, or transfer of ownership;
- (11) Whether the vessel is used for pleasure, rent or lease, dealer or manufacturer demonstration, commercial passenger carrying, commercial fishing or other commercial use;

(12) Make of vessel or name of vessel builder, if known;

(13) Year vessel was manufactured or built, or model year, if known;

(14) Manufacturer's hull identification number, if any;

(15) Overall length of vessel;

(16) Whether the hull is wood, steel, aluminum, fiberglass, plastic, or other;

(17) Type of vessel (open, cabin, house, etc.);

(18) Whether the propulsion is inboard, outboard, inboard-outdrive, jet, or sail with auxiliary engine;

(19) Whether the fuel is gasoline, diesel, or other;

(20) Social security number, or, if that number is not available, the owner's driver's license number (if the owner is other than an individual, the owner's taxpayer identification number, social security number or driver's license number);

(21) The signature of the owner.

(b) An application made by a manufacturer or dealer for a number that is to be temporarily affixed to a vessel for demonstration or test purposes may omit items 13 through 20 of subsection (a) of this section.

### Section 17. Contents of a Certificate of Number.

(a) Except as allowed in subsection (b) of this section, each certificate of number shall contain the following information:

(1) Number issued to the vessel;

(2) Expiration date of the certificate;

(3) State of principal use;

(4) Name of the owner;

(5) Address of the owner, including zip code;

(6) Whether the vessel is used for pleasure, rent or lease, dealer or manufacturer demonstration, commercial passenger carrying, commercial fishing or other commercial use;

(7) Manufacturer's hull identification number (or the hull identification number issued by the Department), if any;

(8) Make of vessel;

(9) Year vessel was manufactured;

(10) Overall length of vessel;

(11) Whether the vessel is an open boat, cabin cruiser, houseboat, etc.;

(12) Whether the hull is wood, steel, aluminum, fiberglass, plastic, or other;

(13) Whether the propulsion is inboard, outboard, inboard-outdrive, jet, or sail with auxiliary engine;

(14) Whether the fuel is gasoline, diesel, or other;

(15) A quotation of the state regulations pertaining to change of ownership or address, documentation, loss, destruction, abandonment, theft or recovery of vessel, carriage of the certificate of number on board when the

vessel is in use, rendering aid in a boat accident and reporting of vessel casualties and accidents.

(b) A certificate of number issued to a manufacturer or dealer to be used on a vessel for test or demonstration purposes may omit items 7 through 14 of subsection (a) of this section if the word "manufacturer" or "dealer" is plainly marked on the certificate.

### Section 18. Contents of Temporary Certificate.

A temporary certificate issued pending the issuance of a certificate of number shall contain the following information:

(1) Make of vessel;

(2) Length of vessel;

(3) Type of propulsion;

(4) State in which vessel is principally used;

(5) Name of owner;

(6) Address of owner, including zip code;

(7) Signature of owner;

(8) Date of issuance; and

(9) Notice to the owner that the temporary certificate is invalid after 60 days from the date of issuance.

### Section 19. Form of Number.

(a) Each number shall consist of the two capital letters "DL" denoting this State as the issuing authority, followed by:

(1) Not more than four numerals followed by not more than two capital letters (example: DL 1234 BD); or

(2) Not more than three numerals followed by not more than three capital letters (example: DL 567 EFG).

(b) A number suffix shall not include the letters "I", "O" or "Q", which may be mistaken for numerals.

### Section 20. Size of Certificate of Number.

Each certificate of number shall be 2½ by 3½ inches.

### Section 21. Terms and Conditions for Vessel Numbering.

Except for a recreational-type public vessel of the United States, the State shall condition the issuance of a certificate of number on title to, the original manufacturer's or importer's statement or certificate of origin, copy of notarized bill of sale or other proof of ownership of a vessel.

### Section 22. Boat Registration Records.

(a) All valid records shall be filed alphabetically by the last names of owners and numerically by "DL" registration numbers;

(b) Invalid records shall be maintained for three years at which time they shall be destroyed.

## BR-4. CASUALTY REPORTING SYSTEM REQUIREMENTS.

**Section 1. Administration.**

The casualty reporting system of this State shall be administered by the Boating Law Administrator who shall:

- (1) Provide for the reporting of all casualties and accidents required by Section 2 of this regulation;
- (2) Receive reports of vessel casualties or accidents prescribed by Section 3 of this regulation;
- (3) Review accident and casualty reports to assure accuracy and completeness of reporting; and
- (4) Determine the cause of casualties and accidents reported.

**Section 2. Report of Casualty or Accident.**

(a) The operator of a vessel shall submit the casualty or accident report prescribed in 33 CFR § 173.57 to the reporting authority prescribed in Section 4 of this regulation when, as a result of an occurrence that involves the vessel or its equipment:

- (1) A person dies;
- (2) A person loses consciousness or receives medical treatment beyond first aid or is disabled for more than 24 hours;
- (3) Damage to the vessel and other property totals more than \$500.00; or
- (4) A person disappears from the vessel under circumstances that indicate death or injury.

(b) A report required by this section shall be made:

- (1) Immediately if a person dies within 24 hours of the occurrence;
- (2) Immediately if a person loses consciousness or receives medical treatment beyond first aid, or is disabled for more than 24 hours or disappears from a vessel; and
- (3) Within 5 days of the occurrence or death if an earlier report is not required by this subsection.

(c) When the operator of a vessel cannot submit the casualty or accident report required by subsection (a) of this section, the owner shall submit the casualty or accident report.

(d) The accident or casualty report completed by a Fish and Wildlife Agent may be substituted to meet the requirements of this section.

**Section 3. Casualty or Accident Report.**

Each report required by Section 2 of this regulation shall be in writing, dated upon completion, and signed by the person who prepared it and shall contain, if available, the information about the casualty or accident required by the Coast Guard pursuant to 33 CFR § 173.57.

**Section 4. Where to Report.**

The report required by Section 2 of this regulation shall be submitted to the Boating Law Administrator, Department of Natural Resources and Environmental Control, Division of Fish and Wildlife, 89 Kings Highway, Dover, Delaware 19901.

**Section 5. Immediate Notification of Death, Disappearance or Physical Injury.**

(a) When, as a result of an occurrence that involves a vessel or its equipment, a person dies or disappears from a vessel or sustains an injury requiring more than first aid, the operator shall, without delay, by the quickest means available, notify the Division of Fish and Wildlife Enforcement Section, Telephone: 302-739-4580 or 1-800-523-3336, of:

- (1) The date, time, and exact location of the occurrence;
- (2) The name of each person who died, disappeared, or sustained an injury;
- (3) The number and name of the vessel; and
- (4) The names and addresses of the owner and operator.

(b) When the operator of a vessel cannot give the notice required by subsection (a) of this section, at least one of the persons on board shall notify the Division of Fish and Wildlife Enforcement Section, Telephone: 302-739-4580 or 1-800-523-3336, or determine that the notice has been given.

**Section 6. Rendering of Assistance in Accidents.**

(a) The operator of a vessel involved in an accident shall:

(1) Render necessary assistance to each individual affected to save that affected individual from danger caused by the accident, so far as the operator can do so without serious danger to the operator's or individual's vessel or to individuals on board; and

(2) Give the operator's name and address and identification of the vessel to the operator or individual in charge of any other vessel involved in the accident, to any individual injured, and to the owner of any property damaged.

(b) An individual complying with subsection (a) of this section or gratuitously and in good faith rendering assistance at the scene of a casualty without objection by an individual assisted, is not liable for damages as a result of rendering assistance or for an act or omission in providing or arranging salvage, towage, medical treatment, or other assistance when the individual acts as an ordinary, reasonable, and prudent individual would have acted under the circumstances.

**BR-5. WATER SKIING.****Section 1. Water Skiing.**

(a) No person shall operate a vessel on any waters of this State for purposes of towing a person on water skis unless there is in such vessel a competent person, in addition to the operator, in a position to observe the progress of the person being towed. The observer shall be considered competent if he/she can, in fact, observe the person being

towed and relay any signals from the person being towed to the operator. This subsection shall not apply to Class A vessels operated by the person being towed and designed to be incapable of carrying the operator in or on the vessel.

(b) No person shall engage in water skiing unless such person is wearing a Type I, Type II, Type III or Type V PFD. This provision shall not apply to a performer engaged in a professional exhibition or a person preparing to participate or participating in an official regatta, boat race, marine parade, tournament, or exhibition.

(c) No person shall engage in water skiing and no person shall operate a vessel towing a person so engaged on any waters of the State with a tow line that exceeds 75 feet.

(d) No person shall engage in water skiing and no person shall operate a vessel towing a person so engaged on any waters of the State on which water skiing is prohibited.

(e) No person shall engage in water skiing and no person shall operate a vessel towing a person so engaged between sunset and sunrise.

(f) The operator of a vessel towing a water skier shall comply with all laws and regulations as they pertain to the individual's class of vessel and shall maneuver the vessel in a careful and prudent manner, so as not to interfere with other vessels or obstruct any channel or normal shipping lane, and maintain reasonable distance from persons and property, so as not to endanger the life or property of any person.

(g) No person shall engage in water skiing in such a manner as to strike or threaten to strike any person, vessel or property, and no person shall operate a vessel or manipulate a tow line or other towing device in such a manner as to cause a water skier to strike or threaten to strike another person, vessel or property.

(h) No person shall engage in water skiing and no person shall operate a vessel towing a person so engaged within one hundred (100) feet of any person in the water, a pier, dock, float, wharf, or vessel anchored or adrift, or in any direction of boat launching ramps, both public and private.

### **Section 2. Prohibited Water Skiing Areas.**

Water skiing shall be prohibited in the following areas:

- (1) The Rehoboth-Lewes Canal, in its entirety;
- (2) The channel through Masseys Landing from Buoy No. 12 off Bluff Point to Buoy No. 19A;
- (3) The Assawoman Canal, in its entirety;
- (4) The Indian River Inlet between Buoy No. 1 and the Coast Guard Station;
- (5) Roosevelt Inlet from 100 yards off jetty entrance to the Canal;
- (6) White Creek south of Marker No. 9A; and
- (7) Any designated public swimming areas unless authorized by a special permit issued by the Department.

### **Section 3. Obedience to Orders by Enforcement Officers.**

It shall be a violation of this regulation for a person to willfully fail or refuse to comply with any lawful order or direction of an enforcement officer invested by law with authority to enforce this regulation.

### **BR-6. VESSEL SPEED.**

#### **Section 1. Safe Boat Speed.**

(a) Every vessel shall at all times proceed at a safe speed so that she can take proper and effective action to avoid collision and be stopped within a distance appropriate to the prevailing circumstances and conditions.

(b) The speed of all vessels on the waters of the State shall be limited to a Slow-No-Wake speed when within 100 feet of:

- (1) Any shoreline where "Slow-No-Wake" signs have been erected by the Department;
- (2) Floats;
- (3) Docks;
- (4) Launching ramps;
- (5) Congested beaches;
- (6) Swimmers; or
- (7) Anchored, moored or drifting vessels.

(c) No person shall operate a vessel at a rate of speed greater than is reasonable having regard to conditions and circumstances such as the closeness of the shore and shore installations, anchored or moored vessels in the vicinity, width of the channel, and if applicable, vessel traffic and water use.

#### **Section 2. Responsibility of Operator.**

The operator of any vessel on the waters of this State shall be legally responsible for injuries, damages to life, limb or property caused by his/her vessel or vessel wake.

### **Section 3. Obedience to Orders by Enforcement Officers.**

It shall be a violation of this regulation for a person to willfully fail or refuse to comply with any lawful order or direction of an enforcement officer invested by law with authority to enforce this regulation.

### **BR-7. NEGLIGENT AND GROSSLY NEGLIGENT OPERATION OF A VESSEL.**

#### **Section 1. Negligent or Grossly Negligent Operation.**

(a) No person shall operate any vessel on the waters of the State in a negligent manner.

(b) No person shall operate any vessel on the waters of the State in a grossly negligent manner.

(c) Depending upon the degree of negligence, the following shall constitute a violation of subsection (a) or (b) of this section:

- (1) Failure to reduce speed in areas where boating

is concentrated, endangering life, limb and/or property;

(2) Operating at excessive speed under storm conditions, in fog or other low-visibility conditions;

(3) Operating at excessive speed when maneuvering room is restricted by narrow channels or when vision is obstructed by such things as jetties, land or other vessels;

(4) Impeding the right-of-way of a stand-on or privileged vessel so as to endanger risk of collision;

(5) Towing a water skier in a restricted area or where an obstruction exists;

(6) Operating a vessel within swimming areas when bathers are present;

(7) Operating a vessel in areas posted as closed to vessels due to hazardous conditions;

(8) Operating a vessel through an area where a regatta or marine parade is in progress in a way that could present a hazard to participants or spectators and interfere with the safe conduct of the event;

(9) Operating a vessel with any person sitting on the bow, gunwales or stern with legs hanging over the side;

(10) Operating a vessel or use any water skis while under the influence of alcohol, any narcotic drug, barbiturate, marijuana or hallucinogen;

(11) Loading a vessel with passengers or cargo beyond its safe carrying capacity;

(12) Operating a vessel with an engine of a higher horsepower rating than the rating noted on the vessel's capacity plate or in the manufacturer's specifications; and

(13) Other actions deemed by an enforcement officer to be in violation of subsection (a) or (b) of this regulation.

### **Section 2. Obedience to Orders by Enforcement Officers.**

It shall be a violation of this regulation for a person to willfully fail or refuse to comply with any lawful order or direction of an enforcement officer invested by law with authority to enforce this regulation.

### **BR-8. TERMINATION OF UNSAFE USE OF A VESSEL.**

#### **Section 1. Especially Hazardous Conditions.**

Especially hazardous conditions warranting termination of voyage shall include, but not be limited to,:

- (1) Insufficient life-saving devices;
- (2) Insufficient fire-fighting devices;
- (3) Overloaded;
- (4) Failure to display required navigation lights;
- (5) Fuel leakage (fuel system or engine);
- (6) Fuel accumulation (other than fuel tank);
- (7) Failure to meet ventilation requirements;
- (8) Failure to meet backfire flame control requirement;
- (9) Excessive leakage or accumulation of water

in bilges;

(10) Deteriorated condition of vessel; or

(11) Any other condition deemed hazardous by an enforcement officer.

### **Section 2. Enforcement.**

(a) Enforcement officers shall, if a violation of this regulation is observed, and in their judgment such a deficiency creates an especially hazardous condition to the occupants of the vessel, direct the operator to take specific steps to correct the unsafe condition.

(b) *Compliance by operator.* - Immediate compliance by the operator is required for safety purposes. Failure to comply with the directives of an enforcement officer shall result in a citation under Section 3 of this regulation as well as for the specific violation which created the unsafe condition.

### **Section 3. Obedience to Orders by Enforcement Officers.**

It shall be a violation of this regulation for a person to willfully fail or refuse to comply with any lawful order or direction of an enforcement officer invested by law with authority to enforce this regulation.

### **BR-9. MINIMUM REQUIRED EQUIPMENT FOR VESSELS USING STATE WATERS.**

#### **PART A - General.**

##### **Section 1. Applicability.**

(a) This regulation does not apply to:

(1) Military or public vessels of the United States, other than recreational-type public vessels; and

(2) A vessel used exclusively as a ship's lifeboat.

(b) Part B of this regulation prescribes general provisions applicable to all vessels covered by this regulation. Part C prescribes minimum required equipment for recreational vessels used on the waters of the State. Part D prescribes minimum required equipment for vessels other than recreational vessels that are not required to be documented.

##### **Section 2. Compliance with Coast Guard Regulations.**

Pursuant to § 2114 of Title 23, every vessel shall be provided with the equipment prescribed by Coast Guard regulations, and any amendments or changes thereto, even if such amendments or changes thereto have not been enacted into law by this State or promulgated as regulations by the Division.

#### **PART B - Provisions Applicable to All Vessels Covered by this Regulation.**

##### **Section 1. Fire-Extinguishing Equipment.**

(a) All hand portable fire extinguishers, semiportable fire extinguishing systems and fixed fire extinguishing systems shall be Coast Guard approved pursuant to 46 CFR

§ 25.30-5.

(b) All required hand portable fire extinguishers and semiportable fire extinguishing systems shall be of the "B" type; i.e., suitable for extinguishing fires involving flammable liquids such as gasoline, oil, etc., where a blanketing or smothering effect is essential. The number designations for size will start with "I" for the smallest to "V" for the largest. For the purpose of this regulation, only sizes I through III will be considered. Sizes I and II are considered hand portable fire extinguishers and sizes III, IV, and V are considered semiportable fire extinguishing systems which shall be fitted with suitable hose and nozzle or other practicable means so that all portions of the space concerned may be covered. Examples of size graduations for some of the typical hand portable fire extinguishers and semiportable fire extinguishing systems are set forth in the following table:

TYPE	SIZE	FOAM (GALLONS)	CO <sub>2</sub> (POUNDS)	DRY CHEMICAL (POUNDS)	HALON (POUNDS)
B	I	1¼	4	2	2½
B	II	2½	15	10	10
B	III	12	35	20	-

(d) All hand portable fire extinguishers and semiportable fire extinguishing systems shall have permanently attached thereto a metallic name plate giving the name of the item, the rated capacity in gallons, quarts, or pounds, the name and address of the person or firm for whom approved, and the identifying mark of the actual manufacturer.

(e) Vaporizing-liquid type fire extinguishers containing carbon tetrachloride or chlorobromomethane or other toxic vaporizing liquids are not acceptable as equipment required by this part.

(f) Hand portable or semiportable extinguishers which are required on their name plates to be protected from freezing shall not be located where freezing temperatures may be expected.

(g) The use of dry chemical, stored pressure, fire extinguishers not fitted with pressure gauges or indicating devices, manufactured prior to January 1, 1965, may be permitted on motorboats and other vessels so long as such extinguishers are maintained in good and serviceable condition. The following maintenance and inspections are required for such extinguishers:

(1) When the date on the inspection record tag on the extinguisher shows that 6 months have elapsed since last weight check ashore, then such extinguisher is no longer accepted as meeting required maintenance conditions until reweighed ashore and found to be in a serviceable condition and within required weight conditions;

(2) If the weight of the container is 3 ounce less than that stamped on the container, it shall be serviced;

(3) If the outer seal or seals (which indicate tampering or use when broken) are not intact, an enforcement officer may inspect such extinguisher to see that the frangible disc in neck of the container is intact; and if such disc is not intact, the container shall be serviced; and

(4) If there is evidence of damage, use, or leakage, such as dry chemical powder observed in the nozzle or elsewhere on the extinguisher, the container shall be replaced with a new one and the container properly serviced or the extinguisher replaced with another approved extinguisher.

(h) Fire extinguishers shall be at all times kept in a condition for immediate and effective use, and shall be so placed as to be readily accessible.

## Section 2. Backfire Flame Control.

(a) *Applicability.* - This section applies to every gasoline engine installed in a motorboat or motor vessel after April 25, 1940, except outboard motors.

(b) Installations made before November 19, 1952, need not meet the detailed requirements of this section and may be continued in use as long as they are serviceable and in good condition. Replacements shall meet the applicable requirements of this section.

(c) Installations consisting of backfire flame arrestors or engine air and fuel induction systems bearing basic Approval Nos. 162.015 or 162.041 or engine air and fuel induction systems bearing basic Approval Nos. 162.015 or 162.042, may be continued in use as long as they are serviceable and in good condition. New installations or replacements shall meet the applicable requirements of this section.

(d) No person may use a vessel to which this section applies unless each engine is provided with an acceptable means of backfire flame control. The following are acceptable means of backfire flame control:

(1) A backfire flame arrester complying with Society of Automotive Engineers (SAE) Standard J-1928 or Underwriters Laboratories (UL) Standard 1111 and marked accordingly. The flame arrester shall be suitably secured to the air intake with a flame tight connection;

(2) An engine air and fuel induction system which provides adequate protection from propagation of backfire flame to the atmosphere equivalent to that provided by an approved backfire flame arrester. A gasoline engine utilizing an air and fuel induction system, and operated without an approved backfire flame arrester, shall either include a reed valve assembly or be installed in accordance with SAE Standard J-1928; and

(3) An arrangement of the carburetor or engine air induction system that will disperse any flames caused by engine backfire. The flames must be dispersed to the atmosphere outside the vessel in such a manner that the

flames will not endanger the vessel, persons on board, or nearby vessels and structures. Flame dispersion may be achieved by attachments to the carburetor or location of the engine air induction system. All attachments shall be of metallic construction with flametight connections and firmly secured to withstand vibration, shock, and engine backfire.

(e) No person may use a vessel to which this section applies unless the backfire flame arrester is serviceable and in good condition.

### **Section 3. Ventilation.**

(a) *Applicability.* - This section applies to motorboats, motor vessels and boats used on the waters of the State and subject to this regulation.

(b) No person shall operate a motorboat or motor vessel, except an open boat, built after April 25, 1940, and before August 1, 1980, which uses fuel having a flashpoint of 110° F., or less, without every engine and fuel tank compartment being equipped with a natural ventilation system. A natural ventilation system consists of:

(1) At least two ventilator ducts, fitted with cowls or their equivalent, for the efficient removal of explosive or flammable gases from the bilges of every engine and fuel tank compartment;

(2) At least one exhaust duct installed so as to extend from the open atmosphere to the lower portion of the bilge and at least one intake duct that is installed to extend to a point at least midway to the bilge or at least below the level of the carburetor air intake; and

(3) The cowls shall be located and trimmed for maximum effectiveness and in such a manner so as to prevent displaced fumes from being recirculated.

(c) Boats built after July 31, 1978, shall be exempt from the requirements of subsection (a) of this section for fuel tank compartments that:

(1) Contain a permanently installed fuel tank if each electrical component is ignition protected in accordance with 33 CFR § 183.410(a); and

(2) Contain fuel tanks that vent to the outside of the motorboat or motor vessel.

(d) Boats built after July 31, 1980, or which are in compliance with the Coast Guard Ventilation Standard, a manufacturer requirement (33 CFR §§ 183.610 and 183.620), shall be exempt from the requirements of subsections (b) and (d) of this section.

(e) No person shall operate a boat after July 31, 1980, that has a gasoline engine for electrical generation, mechanical power or propulsion unless it is equipped with an operable ventilation system that meets the requirements of 33 CFR § 183.610(a), (b), (d), (e) and (f) and 183.6209(a).

(f) Boat owners shall maintain their boats' ventilation systems in good operating condition (regardless of the boat's date of manufacture).

### **Section 4. Whistles and Bells.**

(a) A vessel of 12 meters (39.4 ft.) or more in length shall be equipped with a whistle and a bell. The whistle and bell shall comply with the specifications in Annex III to the Inland Navigation Rules (33 CFR Part 86). The bell may be replaced by other equipment having the same respective sound characteristics, provided that manual sounding of the prescribed signals shall always be possible.

(b) A vessel of less than 12 meters (39.4 ft.) in length shall be equipped with a whistle or horn, or some other sounding device capable of making an efficient sound signal.

### **Section 5. Visual Distress Signals.**

(a) *Applicability.* - This section applies to all boats operated on the coastal waters of this State and those waters connected directly to them (i.e., bays, sounds, harbors, rivers, inlets, etc.) where any entrance exceeds 2 nautical miles between opposite shorelines to the first point where the largest distance between shorelines narrows to 2 miles.

(b) *Prohibition.* - Unless exempted by subsection (c) of this section, no person may use a boat to which this section applies unless visual distress signals, approved by the Commandant of the Coast Guard under 46 CFR Part 160 or certified by the manufacturer under 46 CFR Parts 160 and 161, in the number required, are on board. Devices suitable for day use and devices suitable for night use, or devices suitable for both day and night use, shall be carried.

(c) *Exemptions.* - The following boats shall be exempt from the carriage requirements of subsection (b) of this section between sunrise and sunset, but between sunset and sunrise, visual distress signals suitable for night use, in the number required, shall be on board:

(1) Boats less than 16 feet in length;

(2) Boats participating in organized events such as races, regattas, or marine parades;

(3) Open sailboats less than 26 feet in length not equipped with propulsion machinery; and

(4) Manually propelled boats.

(d) *Launchers.* - When a visual distress signal carried to meet the requirements of this section requires a launcher to activate, then a launcher approved by the Coast Guard under 46 CFR -160.028 shall also be carried. Launchers manufactured before January 1, 1981, which do not have approval numbers are acceptable for use with meteor or parachute signals as long as they remain in serviceable condition.

(e) *Visual distress signals accepted.* - Any of the following signals when carried in the number required, can be used to meet the requirements of this section:

(1) An electric distress light meeting the standards of 46 CFR § 161.013. One is required to meet the night only requirement;

(2) An orange flag meeting the standards of 46 CFR § 160.072. One is required to meet the day only



requirement;

(3) Pyrotechnics meeting the standards noted in the following table:

APPROVAL NO. UNDER 46 CFR	DEVICE DESCRIPTION	MEETS REQUIREMENTS FOR	NO. REQUIRED
§ 160.021	Hand-Held Red Flares <sup>1</sup>	Day and Night	3
§ 160.022	Floating Orange Smoke	Day Only	3
§ 160.024	Parachute Red Flare <sup>2</sup>	Day and Night	3
§ 160.036	Hand-Held Rocket-Propelled Parachute Red Flare	Day and Night	3
§ 160.037	Hand-Held Orange Smoke	Day Only	3
§ 160.057	Floating Orange Smoke	Day Only	3
§ 160.066	Red Aerial Pyrotechnic Flare <sup>3</sup>	Day and Night	3

<sup>1</sup> Must have manufacture date of October 1980 or later.

<sup>2</sup> These signals require use in combination with a suitable launching device.

<sup>3</sup> These devices may be either meteor or parachute assisted type. some of these signals may require use in combination with a suitable launching device.

(f) Any combination of signal devices selected from the types noted in paragraphs (e)(1), (2) and (3) of this section, when carried in the number required, may be used to meet both day and night requirements. (Examples: the combination of two hand-held red flares, and one parachute red flare meets both day and night requirements; and three hand-held orange smoke with one electric distress light meet both day and night requirements.)

(g) *Stowage, serviceability, approval and marking.* - No person may use a boat unless the visual distress signals required by this section are:

- (1) Readily accessible;
- (2) In serviceable condition and the service life of the signal, if indicated by a date marked on the signal, has not expired;
- (3) Legibly marked with the approval number or certification statement as specified in 46 CFR Parts 160 and 161; and
- (4) In sufficient quantity as required by the Coast Guard.

(h) *Prohibited use.* - No person in a boat shall display a visual distress signal on waters to which this section applies under any circumstance except a situation where assistance is needed because of immediate or potential danger to the persons on board.

## PART C - Minimum Required Equipment for Recreational-Type Vessels.

### Section 1. Personal Flotation Devices.

(a) Except as provided in Section 2 of this part, no person may use a recreational vessel unless at least one PFD of the following types is on board for each person:

- (1) Type I PFD;
- (2) Type II PFD; or

(3) Type III PFD.

(b) No person may use a recreational vessel 16 feet or more in length unless one Type IV PFD is on board in addition to the total number of PFD's required in subsection (a) of this section.

(c) A Type V PFD may be carried in lieu of any PFD required under subsections (a) and (b) of this section, provided:

(1) The approval label on the Type V PFD indicates that the device is approved:

(a) For the activity in which the vessel is being used; or

(b) As a substitute for a PFD of the Type required in the vessel in use;

(2) The PFD is used in accordance with any requirements on the approval label; and

(3) The PFD is used in accordance with requirements in its owner's manual, if the approval label makes reference to such a manual.

(d) A Type V hybrid PFD may satisfy the carriage requirements provided it is worn except when the boat is not underway or when the user is below deck.

### Section 2. Exceptions.

(a) Canoes and kayaks 16 feet in length and over are exempted from the requirements for carriage of the additional Type IV PFD required under Section 1(b) of this part.

(b) Racing shells, rowing sculls, racing canoes and racing kayaks are exempted from the requirements for carriage of any Type PFD required under Section 1 of this part.

(c) Sailboards are exempted from the requirements for carriage of any Type PFD required under Section 1 of this part.

### Section 3. Stowage, Condition, and Marking of PFDs.

(a) No person may use a recreational vessel unless each Type I, II, or III PFD required by Section 1(a) of this part, or equivalent Type allowed by Section 1(c) of this part, is readily accessible.

(b) No person may use a recreational vessel unless each Type IV PFD required by Section 1(c) of this part, or equivalent Type allowed by Section 1(c) of this part, is immediately available.

(c) No person may use a recreational vessel unless each PFD required by Section 2(c) of this part or allowed by Section 1(b) of this part is:

- (1) In serviceable condition, as defined by 33 CFR § 175.23;
- (2) Of an appropriate size and fit for the intended wearer, as marked on the approval label; and
- (3) Legibly marked with its Coast Guard approval number, as specified in 46 CFR Part 160.

**Section 4. Fire-Extinguishing Equipment Required.**

(a) Motorboats less than 26 feet in length with no fixed fire extinguishing system installed in machinery spaces shall carry at least one Type B-I approved hand portable fire extinguisher. When an approved fixed fire extinguishing system is installed in machinery spaces, a portable extinguisher is not required. If the construction of the motorboat does not permit the entrapment of explosive or flammable gases or vapors, no fire extinguisher is required.

(b) Motorboats 26 feet to less than 40 feet in length shall carry at least two Type B-I approved hand portable fire extinguishers or at least one Type B-II approved portable fire extinguisher. When an approved fixed fire extinguishing system is installed, one less Type B-I extinguisher is required.

(c) Motorboats 40 feet to not more than 65 feet in length shall carry at least three Type B-I approved hand portable fire extinguishers or at least one Type B-I and one Type B-II approved portable fire extinguisher. When an approved fixed fire extinguishing system is installed, one less Type B-I extinguisher is required.

(d) Motorboats 65 feet and over used for recreational purposes shall carry fire extinguishing equipment as prescribed under Section 3(b) of Part D of this regulation.

(e) Motorboats are required to carry fire extinguishers if any one of the following conditions exist:

- (1) Inboard engines;
- (2) Closed compartments and compartments under seats wherein portable fuel tanks may be stored;
- (3) Double bottoms not sealed to the hull or which are not completely filled with flotation material;
- (4) Closed living spaces;
- (5) Closed stowage compartments in which combustible or flammable materials are stowed; or
- (6) Permanently installed fuel tanks. (Fuel tanks secured so they cannot be moved in case of fire or other emergency are considered permanently installed.)

(f) Motorboats contracted for prior to November 19, 1952, shall meet the applicable provisions of this section insofar as the number and general type of equipment is concerned. Existing items of equipment and installations previously approved but not meeting the applicable requirements for type approval may be continued in service so long as they are in good condition. All new installations and replacements shall meet the requirements of this section.

**PART D - Life-Saving Equipment for Commercial Vessels not Documented.****Section 1. Applicability.**

This part applies to each vessel to which this regulation applies except:

- (1) Vessels used for non-commercial use;
- (2) Vessels leased, rented, or chartered to another

for the latter's non-commercial use; or

(3) Commercial vessels propelled by sail not carrying passengers for hire; or

(4) Commercial barges not carrying passengers for hire.

**Section 2. Life Preservers and Other Life-Saving Equipment Required.**

(a) No person may operate a vessel to which Section 1 of this part applies unless it meets the requirements of this section.

(b) Each vessel not carrying passengers for hire, less than 40 feet in length, shall have at least one life preserver (Type I PFD), buoyant vest (Type II PFD), or marine buoyant device intended to be worn (Type III PFD), of a suitable size for each person on board. Kapok and fibrous glass life preservers which do not have plastic-covered pad inserts as required by 46 CFR §§ 160.062 and 160.005 are not acceptable as equipment required by this subsection.

(c) Each vessel carrying passengers for hire and each vessel 40 feet in length or longer not carrying passengers for hire shall have at least one life preserver (Type I PFD) of a suitable size for each person on board. Kapok and fibrous glass life preservers which do not have plastic-covered pad inserts as required by 46 CFR §§ 160.062 and 160.005 are not acceptable as equipment required by this subsection.

(d) In addition to the equipment required by subsection (b) or (c) of this section, each vessel 26 feet in length or longer shall have at least one Coast Guard approved ring life buoy.

(e) Each vessel not carrying passengers for hire may substitute an exposure suit (or immersion suit) for a life preserver, buoyant vest, or marine buoyant device required under subsection (b) or (c) of this section. Each exposure suit carried in accordance with this paragraph shall be Coast Guard approved.

(f) On each vessel, regardless of length and regardless of whether carrying passengers for hire, a commercial hybrid PFD may be substituted for a life preserver, buoyant vest, or marine buoyant device required under subsection (b) or (c) of this section if it is:

(1) In the case of a Type V commercial hybrid PFD, worn when the vessel is underway and the intended wearer is not within an enclosed space;

(2) Used in accordance with the conditions marked on the PFD and in the owner's manual; and

(3) Labeled for use on uninspected commercial vessels.

(g) The life-saving equipment required by this section shall be legibly marked.

(h) The life-saving equipment designed to be worn required in subsections (b), (c) and (e) of this section shall be readily accessible.

(i) The life-saving equipment designed to be thrown required by subsection (d) of this section shall be immediately available.

(j) The life-saving equipment required by this section shall be in serviceable condition.

### Section 3. Fire-Extinguishing Equipment Required.

#### (a) Motorboats.

(1) Motorboats less than 26 feet in length shall abide by Section 4(a) of Part C of this regulation.

(2) Motorboats 26 feet in length to less than 40 feet in length shall abide by Section 4(b) of Part C of this regulation.

(3) Motorboats 40 feet in length to less than 65 feet in length shall abide by Section 4(c) of Part C of this regulation.

#### (b) Motor Vessels.

(1) Motor vessels less than 50 gross tonnage shall carry one Type B-II approved hand portable fire extinguisher.

(2) Motor vessels 50 and not over 100 gross tonnage shall carry two Type B-II approved hand portable fire extinguishers.

(3) Motor vessels 100 and not over 500 gross tonnage shall carry three Type B-II approved hand portable fire extinguishers.

(4) Motor vessels 500 but not over 1,000 gross tonnage shall carry six Type B-II approved hand portable fire extinguishers.

(5) Motor vessels over 1,000 gross tonnage shall carry eight Type B-II approved hand portable fire extinguishers.

(c) In addition to the hand portable fire extinguishers required by subsection (b) of this section, the following fire-extinguishing equipment shall be fitted in the machinery space:

(1) One Type B-II hand portable fire extinguisher shall be carried for each 1,000 B. H. P. of the main engines or fraction thereof. However, not more than six such extinguishers need be carried.

(2) On motor vessels over 300 gross tons, either one Type B-III semiportable fire-extinguishing system shall be fitted, or alternatively, a fixed fire-extinguishing system shall be fitted in the machinery space.

#### (d) Barges carrying passengers.

(1) Every barge 65 feet in length or less while carrying passengers when towed or pushed by a motorboat, motor vessel or steam vessel shall be fitted with hand portable fire extinguishers as required by this Section 4 of Part C of this regulation, depending upon the length of the barge.

(2) Every barge over 65 feet in length while carrying passengers when towed or pushed by a motorboat, motor vessel or steam vessel shall be fitted with hand

portable fire extinguishers as required by this section, depending upon the gross tonnage of the barge.

### Section 2. Obedience to orders by enforcement officers.

It shall be a violation of this regulation for a person to willfully fail or refuse to comply with any lawful order or direction of an enforcement officer invested by law with authority to enforce this regulation.

### BR-10. BOAT RAMPS AND PARKING LOTS ADMINISTERED BY DIVISION.

#### Section 1. Applicability.

This regulation applies to boat ramps, parking lots and seawalls or other mooring facilities administered by the Division.

#### Section 2. Boat Ramps and Mooring Facilities.

(a) Whoever uses a boat ramp, seawall or other mooring facility shall do so on a first-come, first-serve basis.

(b) No person shall leave a vessel unattended at any seawall or other mooring facility. Disabled vessels shall clear the area as soon as possible.

(c) No person shall use any seawall or other mooring facility except for vessels loading and unloading and as a holding area for vessels waiting to use boat ramps.

(d) No person shall moor or conduct repairs to a vessel in any area which interferes with vessel traffic at a boat ramp. Ramp space shall be kept clear at all times for usage of vessels being launched or recovered.

(e) Vessels left abandoned at any seawall or other mooring facility or found adrift shall be removed at the owner's expense. Vessels left unattended at any seawall or other mooring facility in excess of 48 hours without contacting the Division or a Fish and Wildlife Agent shall be deemed abandoned.

#### Section 3. Parking Lots.

(a) No person shall park a vehicle or boat trailer in an undesignated parking space.

(b) No person shall park, stop or stand a vehicle or boat trailer in front of a boat ramp except in designated areas.

(c) No person shall park a vehicle or boat trailer in such a manner as to impede traffic.

(d) No person shall camp overnight in a parking lot.

(e) No person shall abandon a vehicle or boat trailer in a parking lot. If a vehicle or boat trailer is abandoned, it will be removed at the owner's expense. Vehicles or boat trailers left unattended in a parking lot for in excess of 48 hours without contacting the Division or a Fish and Wildlife Agent shall be deemed abandoned.

(f) Operators of emergency vehicles shall have priority over all other vehicles. Vessel operators shall clear passage

for emergency vehicles on their approach or when directed by an enforcement officer.

**Section 4. Obedience to Orders by Enforcement Officers.**

It shall be a violation of this regulation for a person to willfully fail or refuse to comply with any lawful order or direction of an enforcement officer invested by law with authority to enforce this regulation.

**BR-11. NAVIGATION LIGHTS.****Section 1. Applicability.**

(a) Except for vessels used by enforcement officers for law enforcement purposes, this regulation applies to all vessels used on the waters of this State.

(b) Vessels over 20 meters (65.6 ft.) in length and vessels listed below shall display lights and exhibit shapes in accordance with the International or Inland Navigation Rules and Annexes (Commandant Instruction M16672.2C):

- (1) Vessels towing, pushing, or being towed or pushed;
- (2) Vessels engaged in fishing;
- (3) Vessels not under command;
- (4) Vessels restricted in their ability to maneuver;
- (5) Pilot vessels; or
- (6) Air-cushion vessels.

**Section 2. Visibility of lights.**

(a) The lights required by this section shall have an intensity so as to be visible at the following ranges:

(1) In a vessel of 12 meters (39.4 ft.) or more in length but less than 50 meters (164 ft.) in length:

(a) a masthead light, 5 miles; except that where the length of the vessel is less than 20 meters (65.6 ft.), 3 miles;

- (b) a sidelight, 2 miles;
- (c) a sternlight, 2 miles;
- (d) a towing light, 2 miles;
- (e) a white, red, green or yellow all-round light,

2 miles; and

(f) a special flashing light, 2 miles.

(2) In a vessel of less than 12 meters (39.4 ft.) in length:

- (a) a masthead light, 2 miles;
- (b) a sidelight, 1 mile;
- (c) a sternlight, 2 miles;
- (d) a towing light, 2 miles;
- (e) a white, red, green or yellow all-round light,

2 miles; and

(f) a special flashing light, 2 miles.

**Section 3. Prohibition.**

(a) No person may use a vessel to which this regulation applies without carrying and exhibiting the lights required in Section 4 of this regulation and of the intensity required

in Section 2 of this regulation:

- (1) When underway or at anchor;
- (2) In all weathers from sunset to sunrise; and
- (3) During times of restricted visibility.

(b) No person may use a vessel to which this regulation applies which exhibits other lights which may be mistaken for those required in Section 4 of this regulation during such time as navigation lights are required.

(c) No person may use a vessel to which this regulation applies unless it carries and exhibits the light or day shapes required in the International or Inland Navigational Rules and Annexes (Commandant Instruction M16672.2C) for vessels used under special circumstances defined therein.

**Section 4. Navigation Lights Required.**

(a) Power-driven vessels underway in international and inland waters shall exhibit:

- (1) A masthead light forward;
- (2) A second masthead light abaft of and higher than the forward one; except that in inland waters a vessel of less than 50 meters (164 ft.) in length shall not be obliged to exhibit such light but may do so;
- (3) Sidelights; and
- (4) A sternlight.

(b) Power-driven vessels underway in international waters:

(1) Power-driven vessels of less than 12 meters (39.4 ft.) in length may in lieu of the lights prescribed in subsection (a) of this section exhibit an all-round white light and sidelights;

(2) Power-driven vessels of less than 7 meters (23 ft.) in length whose maximum speed does not exceed 7 knots may in lieu of the lights prescribed in subsection (a) of this section exhibit an all-round white light and shall, if practicable, also exhibit sidelights; and

(3) The masthead light or all-round white light on a power-driven vessel of less than 12 meters (39.4 ft.) in length may be displaced from the fore and aft centerline of the vessel if centerline fitting is not practicable, provided that the sidelights are combined in one lantern which shall be carried on the fore and aft centerline of the vessel or located as nearly as practicable in the same fore and aft line as the masthead light or the all-round white light.

(c) Power-driven vessels underway in inland waters shall exhibit the same light for vessels in subsection (a) of this section except:

(1) A vessel of less than 12 meters (39.4 ft.) in length may, in lieu of the lights prescribed in subsection (a) of this section, exhibit an all-round white light and sidelights.

(2) A vessel of less than 20 meters (65.6 ft.) in length need not exhibit the masthead light forward of amidships but shall exhibit it as far forward as practicable.

(d) Sailing vessels underway and vessels under oars in

international and inland waters:

(1) A sailing vessel underway shall exhibit:

- (a) Sidelights; and
- (b) A sternlight;

(2) In a sailing vessel of less than 20 meters (65.6 ft.) in length, the lights prescribed in paragraph (d)(1) of this section may be combined in one lantern carried at or near the top of the mast where it can best be seen.

(3) A sailing vessel underway may, in addition to the lights prescribed in paragraph (d)(1) of this section, exhibit at or near the top of the mast, where they can best be seen, two all-round lights in a vertical line, the upper being red and the lower being green, but these lights shall not be exhibited in conjunction with the combined lantern permitted in paragraph (d)(2) of this section.

(4) A sailing vessel of less than 7 meters (23 ft.) in length shall, if practicable, exhibit the lights prescribed in paragraph (d)(1) or (2) of this section, but if she does not, she shall have ready at hand an electric torch or lighted lantern showing a white light which shall be exhibited in sufficient time to prevent collision.

(5) A vessel under oars may exhibit the lights prescribed in this section for sailing vessels, but if she does not, she shall have ready at hand an electric torch or lighted lantern showing a white light which shall be exhibited in sufficient time to prevent collision.

(6) A vessel proceeding under sail when also being propelled by machinery shall exhibit forward where it can best be seen a conical shape, apex downward. When upon inland waters, a vessel of less than 12 meters (39.4 ft.) in length is not required to exhibit this shape.

(e) Anchored vessels:

(1) *International and Inland.* - Vessels at permanent moorings are not required to display an anchor light.

(2) *International and Inland.* - A vessel of less than 50 meters (164 ft.) in length at anchor shall exhibit an all-round white light where it can best be seen or:

(a) In the fore part, an all-round white light or one ball; and

(b) At or near the stern and at a lower level than the light prescribed in subparagraph (2)(a) of this subsection, an all-round white light.

(3) *Inland.* - A vessel of less than 7 meters (23 ft.) in length, when at anchor, not in or near a narrow channel, fairway, anchorage, or where other vessels normally navigate, shall not be required to exhibit the lights or shapes prescribed in paragraph (d)(2) of this section.

### Section 5. Obedience to Orders by Enforcement Officers.

It shall be a violation of this regulation for a person to willfully fail or refuse to comply with any lawful order or direction of an enforcement officer invested by law with authority to enforce this regulation.

## BR-12. ANCHORING AND OBSTRUCTING NAVIGATION.

### Section 1. Applicability.

This regulation applies to all vessels or other objects used or placed on the waters of this State.

### Section 2. Anchoring.

(a) No person shall anchor a vessel or other object in a navigable channel or allow any equipment from an anchored vessel to extend into the channel and subsequently interfere with passage of any other vessel.

(b) No person shall anchor a vessel in such a manner as to obstruct or otherwise obscure navigation aids.

(c) No person shall anchor a vessel or allow any equipment from an anchored vessel to obstruct or otherwise interfere with passage or any other vessel near:

- (1) A boat launching facility;
- (2) A marina entrance;
- (3) The entrance to any canal or waterway;
- (4) A permanent mooring facility; or
- (5) A vessel docking facility.

(d) No person shall place any item or equipment in a navigable channel so as to obstruct or otherwise impede or interfere with the passage of a vessel.

### Section 3. Obedience to Orders by Enforcement Officers.

It shall be a violation of this regulation for a person to willfully fail or refuse to comply with any lawful order or direction of an enforcement officer invested by law with authority to enforce this regulation.

## APPENDIX A ISSUING AUTHORITIES

(a) The state is the issuing authority and reporting authority in:

Alabama	(AL)	Montana	(MT)
American Samoa	(AS)	Nebraska	(NB)
Arizona	(AZ)	Nevada	(NV)
Arkansas	(AR)	New Hampshire	(NH)
California	(CF)	New Jersey	(NJ)
Colorado	(CL)	New Mexico	(NM)
Connecticut	(CT)	New York	(NY)
Delaware	(DL)	North Carolina	(NC)
District of Columbia	(DC)	North Dakota	(ND)
Florida	(FL)	Ohio	(OH)
Georgia	(GA)	Oklahoma	(OK)
Guam	(GM)	Oregon	(OR)
Hawaii	(HA)	Pennsylvania	(PA)
Idaho	(ID)	Puerto Rico	(PR)
Illinois	(IL)	Rhode Island	(RI)

Indiana	(IN)	South Carolina	(SC)
Iowa	(IA)	South Dakota	(SD)
Kansas	(KA)	Tennessee	(TN)
Kentucky	(KY)	Texas	(TX)
Louisiana	(LA)	Utah	(UT)
Maine	(ME)	Vermont	(VT)
Maryland	(MD)	Virginia	(VA)
Massachusetts	(MS)	Virgin Islands	(VI)
Michigan	(MC)	Washington	(WN)
Minnesota	(MN)	West Virginia	(WV)
Mississippi	(MI)	Wisconsin	(WS)
Missouri	(MO)	Wyoming	(WY)

**DEPARTMENT OF NATURAL  
RESOURCES & ENVIRONMENTAL  
CONTROL**

**DIVISION OF AIR & WASTE MANAGEMENT**

Statutory Authority: 7 Delaware Code,  
Chapter 60

**REGISTER NOTICE**

(b) The Coast Guard is the issuing authority and reporting authority in:

Alaska (AK)

(c) The abbreviations following the names of the states listed in the paragraphs (a) and (b) are the two capital letters that must be used in the number format to denote the state of principal use.

**APPENDIX B  
ONE YEAR CYCLE**

COLOR	YEAR ISSUED	YEAR EXPIRES
Blue	1997	1997
Orange	1998	1998
Green	1999	1999
Red	2000	2000
Blue	2001	2001
Orange	2002	2002

**TWO YEAR CYCLE**

COLOR	YEAR ISSUED	YEAR EXPIRES
Red	1996	1997
Blue	1997	1998
Orange	1998	1999
Green	1999	2000
Red	2000	2001
Blue	2001	2002

**THREE YEAR CYCLE**

COLOR	YEAR ISSUED	YEAR EXPIRES
Green	1995	1997
Red	1996	1998
Blue	1997	1999
Orange	1998	2000
Green	1999	2001
Red	2000	2002

1. TITLE OF THE REGULATIONS:

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

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

The Department is proposing to, through Regulation 38, adopt the National Emission Standards for Hazardous Air Pollutants for Source Categories found at 40 CFR Part 63 Subparts A and Q by reference.

Subpart A establishes the general compliance, notification, testing, recordkeeping and reporting requirements common to all of the National Emission Standards for Hazardous Air Pollutants for Source Categories. Subpart A will apply to any owner or operator of a stationary source that is or will be subject to any standard, limitation, prohibition or other federal requirements established at 40 CFR Part 63 that is adopted by the State of Delaware.

Subpart Q establishes the specific requirements applicable to certain owners or operators of new or existing industrial process cooling towers that operated with chromium-based water treatment chemicals on or after September 8, 1994.

3. POSSIBLE TERMS OF THE AGENCY ACTION:  
None

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

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

6. NOTICE OF PUBLIC COMMENT:

The public hearing on proposed Regulation 38 will be held on Wednesday, April 8, 1998, beginning at 6:00 p.m. in the Richardson and Robbins Auditorium, 89 Kings Highway,

Dover, DE. For information concerning the hearing the public should call Mr. Jim Snead at (302) 323-4542

## 7. PREPARED BY:

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

### REGULATION NO. 38

#### EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES

2/3/98

#### OVERVIEW

Title III of the Clean Air Act Amendments of November 15, 1990 revised Section 112 of the 1970 Clean Air Act that addressed hazardous air pollutants (HAPs) and changed the way that these pollutants were to be regulated. Title III identified the specific HAPs and established the regulatory approach that the U.S. Environmental Protection Agency (EPA) would take to control their emissions from stationary sources.

The EPA is initially required to promulgate emission standards that are based on the maximum achievable control technology (MACT) for categories or subcategories of sources according to a Congress-mandated schedule. Within eight years of promulgating these MACT-based standards, the EPA is required to address the remaining or residual risk by promulgating, if needed, standards necessary to provide an ample margin of safety to protect public health or to prevent an adverse environmental effect. The initial MACT-based regulations are at 40 CFR Part 63.

The Department is adopting these regulations in response to 7 Del. C., Chapter 60.

2/3/98

#### Subpart A General Provisions

The provisions of Subpart A - General Provisions, of Title 40, Part 63 of the Code of Federal Regulations, as set forth in Vol. 59 of the Federal Register, page 12430 et seq, dated March 16, 1994, as amended in Vol. 59, page 19453 et seq, dated April 22, 1994; Vol. 59, page 62589 et seq, dated December 6, 1994; Vol. 60, page 4963 et seq, dated January 25, 1995; Vol. 60, page 33122, dated June 27, 1995; Vol. 60, page 45980 et seq, dated September 1, 1995; Vol. 61, page 25399 et seq, dated May 21, 1996; and Vol. 61, page 66227 et seq, dated December 17, 1996, are hereby adopted by reference with the following changes:

(a) The provisions of Subpart A of this regulation (Regulation 38) apply to owners or operators who are or may

be subject to a subsequent subpart(s) of this regulation, except when otherwise specified in that subsequent subpart(s).

(b) Except as shown in Table A-1 of this subpart, "Department" shall replace each of the following:

- (1) "Administrator";
- (2) "Administrator or by a State with an approved permit program";
- (3) "Administrator (or a State with an approved permit program)";
- (4) "Administrator (or the State with an approved permit program)";
- (5) "Administrator (or a State)"; and
- (6) "Administrator (or the State)".

(c) Paragraph 63.1(b)(2) shall be replaced with the following language: "In addition to complying with the provisions of this part, the owner or operator of any such source may be required to obtain, revise or amend permits issued to stationary sources by an authorized State air pollution control agency or an operating permit by the Administrator of the U.S. Environmental Protection Agency (EPA) pursuant to title V of the Act (42 U.S.C. 7661). For more information about obtaining permits, see Regulations 2, 25 and 30 of the State of Delaware "Regulations Governing the Control of Air Pollution" or part 70 of this chapter, whichever is applicable."

(d) The definition of *Administrator* found in Section 63.2 shall be replaced with the following language: "*Administrator* means the Administrator of the United States Environmental Protection Agency."

(e) The last sentence in the definition of Affected source found in Section 63.2 shall be deleted.

(f) The definition of Department is added to list of definitions found in Section 63.2 with the following language: "*Department* means the Department of Natural Resources and Environmental Control as defined in Title 29, Delaware Code, Chapter 80, as amended."

(g) The definition of Part 70 permit found in Section 63.2 shall be replaced with the following language: "*Part 70 permit* means any permit issued, renewed, or revised pursuant to Regulation 30 of the State of Delaware "Regulations Governing the Control of Air Pollution" ".

(h) The definition of Permit Modification found in Section 63.2 shall be replaced with the following language: "*Permit modification* means a change to a title V permit as defined in regulations codified in this chapter to implement title V of the Act (42 U.S.C. 7661) or Regulation 30 of the State of Delaware "Regulations Governing the Control of Air

Pollution", whichever is applicable."

(i) The definition of Permit Revision found in Section 63.2 shall be replaced with the following language: "*Permit revision* means any permit modification or administrative permit amendment to a title V permit as defined in regulations codified in this chapter to implement title V of the Act (42 U.S.C. 7661) or Regulation 30 of the State of Delaware "Regulations Governing the Control of Air Pollution", whichever is applicable."

(j) The Responsible Official definition (4) found in Section 63.2 shall be replaced with the following language: "For affected sources (as defined in this part) applying for or subject to a title V permit: "responsible official" shall have the same meaning as defined in Regulation 30 of the State of Delaware "Regulations Governing the Control of Air Pollution" or Federal title V regulations in this chapter (42 U.S.C. 7661), whichever is applicable."

(k) Paragraph 63.4(a)(1)(ii) shall be replaced with the following language: "An extension of compliance granted under this part by the Department; or".

(l) Paragraph 63.5(b)(3) shall be replaced with the following language: "After the effective date of any relevant standard promulgated by the Administrator under this part, whether or not an approved permit program is effective in the State in which an affected source is (or would be) located, no person may construct a new major affected source or reconstruct a major affected source subject to such standard, or reconstruct a source such that the source becomes a major affected source subject to the standard, without obtaining written approval, in advance, from the Department in accordance with the procedures specified in paragraphs (d) and (e) of this section."

(m) The last sentence in paragraphs 63.5(b)(4) and 63.9(b)(5) shall be replaced with the following language: "The application for approval of construction or reconstruction required in Sec. 63.5(b)(3) may be used to fulfill the notification requirements of this paragraph."

(n) The first sentence in paragraph 63.5(d)(1)(i) shall be replaced with the following language: "An owner or operator who is subject to the requirements of paragraph (b)(3) of this section shall submit to the Department an application for approval of the construction of a new major affected source, the reconstruction of a major affected source, or the reconstruction of a source such that the source becomes a major affected source subject to the standard."

(o) Paragraph 63.5(e)(5)(i) shall be replaced with the following language: "Relieve an owner or operator of legal

responsibility for compliance with any applicable provisions of this part or with any other applicable Federal, State, or local requirement, including, but not limited to the requirement to obtain construction permits under Regulation 2 or 25 of the State of Delaware "Regulations Governing the Control of Air Pollution", before commencing construction or reconstruction; or".

(p) Paragraphs 63.5(e)(5)(ii), 63.7(c)(3)(iii)(B) and 63.8(e)(3)(vi)(B) shall be replaced with the following language: "Prevent the Administrator from implementing or enforcing this part or taking any other action under the Act or Department from implementing or enforcing this regulation or taking any other action under 7 Del. C., Chapter 60."

(q) Paragraph 63.6(g)(2) shall be replaced with the following language: "An owner or operator requesting permission under this paragraph shall, unless otherwise specified in an applicable subpart, submit to the Administrator and Department a proposed test plan or the results of testing and monitoring in accordance with Sec. 63.7 and Sec. 63.8, a description of the procedures followed in testing or monitoring, and a description of pertinent conditions during testing or monitoring. Any testing or monitoring conducted to request permission to use an alternative nonopacity emission standard shall be appropriately quality assured and quality controlled, as specified in Sec. 63.7 and Sec. 63.8."

(r) Paragraph 63.6(h)(9)(i) shall be replaced with the following language: "If the Department finds under paragraph (h)(8) of this section that an affected source is in compliance with all relevant standards for which initial performance tests were conducted under Sec. 63.7, but during the time such performance tests were conducted fails to meet any relevant opacity emission standard, the owner or operator of such source may petition the Administrator (with copy to the Department) to make appropriate adjustment to the opacity emission standard for the affected source. Until the Administrator notifies the owner or operator of the appropriate adjustment, the relevant opacity emission standard remains applicable."

(s) Paragraph 63.6(i)(4)(i)(A) shall be replaced with the following language: "The owner or operator of an existing source who is unable to comply with a relevant standard established under this part pursuant to section 112(d) of the Act may request that the Department grant an extension allowing the source up to 1 additional year to comply with the standard, if such additional period is necessary for the installation of controls. An additional extension of up to 3 years may be added for mining waste operations, if the 1-year extension of compliance is insufficient to dry and cover mining waste in order to reduce emissions of any hazardous air pollutant."



The owner or operator of an affected source who has requested an extension of compliance under this paragraph and who is otherwise required to obtain a title V permit shall apply for such permit or apply to have the source's title V permit revised to incorporate the conditions of the extension of compliance. The conditions of an extension of compliance granted under this paragraph will be incorporated into the affected source's title V permit according to the provisions of Regulation 30 of the State of Delaware "Regulations Governing the Control of Air Pollution" or Federal title V regulations in this chapter (42 U.S.C. 7661), whichever are applicable."

(t) Paragraph 63.6(i)(16) shall be replaced with the following language: "The granting of an extension under this section shall not abrogate the Administrator's authority under section 114 of the Act or Department's authority under 7 Del. C., Chapter 60."

(u) Paragraph 63.7(a)(3) shall be replaced with the following language: "The Administrator or Department may require an owner or operator to conduct performance tests at the affected source at any other time when the action is authorized by section 114 of the Act or by Regulation 17 of the State of Delaware "Regulations Governing the Control of Air Pollutants", respectively."

(v) Paragraph 63.7(b)(2) shall be replaced with the following language: "In the event the owner or operator is unable to conduct the performance test on the date specified in the notification requirement specified in paragraph (b)(1) of this section, due to unforeseeable circumstances beyond his or her control, the owner or operator shall notify the Department within 5 days prior to the scheduled performance test date and specify the date when the performance test is rescheduled. This notification of delay in conducting the performance test shall not relieve the owner or operator of legal responsibility for compliance with any other applicable provisions of this part or with any other applicable Federal, State, or local requirement, nor will it prevent the Administrator from implementing or enforcing this part or taking any other action under the Act or Department from implementing or enforcing this regulation or taking any other action under 7 Del. C., Chapter 60."

(w) Paragraph 63.7(c)(3)(ii)(B) shall be replaced with the following language: "If the owner or operator intends to demonstrate compliance by using an alternative to any test method specified in the relevant standard, the owner or operator shall refrain from conducting the performance test until the Department approves the site-specific test plan (if review of the site-specific test plan is requested) following the Administrator's approval of the use of the alternative method. If the Department does not approve the site-specific test plan (if review is requested) within 30 days before the test is

scheduled to begin, the performance test dates specified in paragraph (a) of this section may be extended such that the owner or operator shall conduct the performance test within 60 calendar days after the Department approves the site-specific test plan. Notwithstanding the requirements in the preceding two sentences, the owner or operator may proceed to conduct the performance test as required in this section (without the Department's prior approval of the site-specific test plan) if he/she subsequently chooses to use the specified testing and monitoring methods instead of an alternative."

(x) Paragraph 63.7(e)(2) shall be replaced with the following language: "Performance tests shall be conducted and data shall be reduced in accordance with the test methods and procedures set forth in this section, in each relevant standard, and, if required, in applicable appendices of parts 51, 60, 61, and 63 of this chapter unless —

(i) The Department specifies or approves, in specific cases, the use of a test method with minor changes in methodology; or

(ii) The Administrator approves the use of an alternative test method, the results of which the Administrator has determined to be adequate for indicating whether a specific affected source is in compliance; or

(iii) The Department approves shorter sampling times and smaller sample volumes when necessitated by process variables or other factors; or

(iv) The Department waives the requirement for performance tests because the owner or operator of an affected source has demonstrated by other means to the Department's satisfaction that the affected source is in compliance with the relevant standard."

(y) Paragraph 63.7(e)(4) shall be replaced with the following language: "Nothing in paragraphs (e)(1) through (e)(3) of this section shall be construed to abrogate the Administrator's authority to require testing under section 114 of the Act or Department's authority under Regulation 17 of the State of Delaware "Regulations Governing the Control of Air Pollution"."

(z) Paragraph 63.7(f)(2)(iii) shall be replaced with the following language: "Submits the results of the Method 301 validation process to the Administrator (with copy to the Department) along with the notification of intention and the justification for not using the specified test method. The owner or operator may submit the information required in this paragraph well in advance of the deadline specified in paragraph (f)(2)(i) of this section to ensure a timely review by the Administrator in order to meet the performance test date specified in this section or the relevant standard."

(aa) Paragraph 63.7(f)(3) shall be replaced with the following language: "The Administrator will determine

whether the owner or operator's validation of the proposed alternative test method is adequate when the Administrator approves or disapproves the use of the alternative test method required under paragraph (c) of this section. If the Administrator finds reasonable grounds to dispute the results obtained by the Method 301 validation process, the Administrator may require the use of a test method specified in a relevant standard."

(bb) Paragraphs 63.8(b)(1) shall be replaced with the following language: "Monitoring shall be conducted as set forth in this section and the relevant standard(s) unless —

(i) The Department specifies or approves the use of minor changes in methodology for the specified monitoring requirements and procedures; or

(ii) The Administrator approves the use of alternatives to any monitoring requirements or procedures.

(iii) Owners or operators with flares subject to Sec. 63.11(b) are not subject to the requirements of this section unless otherwise specified in the relevant standard."

(cc) Paragraph 63.8(e)(1) shall be replaced with the following language: "When required by a relevant standard, and at any other time the Administrator may require under section 114 of the Act or Department may require under Regulation 17 of the State of Delaware "Regulations Governing the Control of Air Pollution", the owner or operator of an affected source being monitored shall conduct a performance evaluation of the CMS. Such performance evaluation shall be conducted according to the applicable specifications and procedures described in this section or in the relevant standard."

(dd) Paragraph 63.8(e)(3)(v)(B) shall be replaced with the following language: "If the owner or operator intends to demonstrate compliance by using an alternative to a monitoring method specified in the relevant standard, the owner or operator shall refrain from conducting the performance evaluation until the Department approves the site-specific performance evaluation test plan (if requested) once the Administrator approves the use of the alternative method. If the Administrator does not approve the use of the alternative method within 30 days before the performance evaluation is scheduled to begin, the performance evaluation deadlines specified in paragraph (e)(4) of this section may be extended such that the owner or operator shall conduct the performance evaluation within 60 calendar days after the Department approves the site-specific performance evaluation test plan. Notwithstanding the requirements in the preceding two sentences, the owner or operator may proceed to conduct the performance evaluation as required in this section (without the Department's prior approval of the site-specific performance evaluation test plan) if he/she subsequently chooses to use the specified monitoring method(s) instead of

an alternative."

(ee) Paragraph 63.8(f)(4)(i) shall be replaced with the following language: "An owner or operator who wishes to use an alternative monitoring method shall submit an application to the Administrator (with copy to the Department) as described in paragraph (f)(4)(ii) of this section, below. The application may be submitted at any time provided that the monitoring method is not used to demonstrate compliance with a relevant standard or other requirement. If the alternative monitoring method is to be used to demonstrate compliance with a relevant standard, the application shall be submitted not later than with the site-specific test plan required in Sec. 63.7(c) (if requested) or with the site-specific performance evaluation plan (if requested) or at least 60 days before the performance evaluation is scheduled to begin."

(ff) Paragraph 63.8(f)(6)(i) shall be replaced with the following language: "An alternative to the test method for determining relative accuracy is available for affected sources with emission rates demonstrated to be less than 50 percent of the relevant standard. The owner or operator of an affected source may petition the Administrator (with copy to the Department) under paragraph (f)(6)(ii) of this section to substitute the relative accuracy test in section 7 of Performance Specification 2 with the procedures in section 10 if the results of a performance test conducted according to the requirements in Sec. 63.7, or other tests performed following the criteria in Sec. 63.7, demonstrate that the emission rate of the pollutant of interest in the units of the relevant standard is less than 50 percent of the relevant standard. For affected sources subject to emission limitations expressed as control efficiency levels, the owner or operator may petition the Administrator (with copy to the Department) to substitute the relative accuracy test with the procedures in section 10 of Performance Specification 2 if the control device exhaust emission rate is less than 50 percent of the level needed to meet the control efficiency requirement. The alternative procedures do not apply if the CEMS is used continuously to determine compliance with the relevant standard."

(gg) Paragraph 63.9(b)(4) shall be replaced with the following language: "The owner or operator of a new or reconstructed major affected source, or of a source that has been reconstructed such that the source becomes a major affected source, that has an initial startup after the effective date of a relevant standard under this part and for which an application for approval of construction or reconstruction is required under Sec. 63.5(d) shall provide the following information in writing to the Department:"

(hh) Paragraph 63.9(b)(4)(i) shall be replaced with the following language: "A notification of intention to construct a

## PROPOSED REGULATIONS

new major affected source, reconstruct a major affected source, or reconstruct a source such that the source becomes a major affected source with the application for approval of construction or reconstruction as specified in Sec. 63.5(d)(1)(i);”

(ii) Paragraph 63.10(b)(3) shall be replaced with the following language: “If an owner or operator determines that his or her stationary source that emits (or has the potential to emit, without considering controls) one or more hazardous air pollutants is not subject to a relevant standard or other requirement established under this part, the owner or operator shall keep a record of the applicability determination on site at the source for the life of the source or until the source changes its operations to become an affected source, whichever comes first. The record of the applicability determination shall include an analysis (or other information) that demonstrates why the owner or operator believes the source is unaffected (e.g., because the source is an area source). The analysis (or other information) shall be sufficiently detailed to allow the Department to make a finding about the source’s applicability status with regard to the relevant standard or other requirement. If relevant, the analysis shall be performed in accordance with requirements established in subparts of this part for this purpose for particular categories of stationary sources. If relevant, the analysis should be performed in accordance with EPA guidance materials published to assist sources in making applicability determinations under section 112, if any.”

(jj) Paragraph 63.10(f)(6) shall be replaced with the following language: “Approval of any waiver granted under this section shall not abrogate the Administrator’s authority under the Act or Department’s authority under 7 Del. C., Chapter 60 or in any way prohibit the Department from later canceling the waiver. The cancellation will be made only after notice is given to the owner or operator of the affected source.”

(kk) Paragraph 63.15(b)(3) shall be added with the following language: “(3) Any information provided to or otherwise obtained by the Department shall be made available to the public unless it is determined to be confidential under 7 Del. C., Chapter 60, Section 6014 or 29 Del. C., Chapter 100, Section 10002(d).”

**\* PLEASE SEE TABLE A-1 OF SUBPART A AT THE END OF THE REGULATION.**

2/3/98

Subpart Q Emission Standards for Hazardous Air Pollutants for Industrial Process Cooling Towers

The provisions of Subpart Q - National Emission

Standards for Hazardous Air Pollutants for Industrial Process Cooling Towers, of Title 40, Part 63 of the Code of Federal Regulations, as set forth in Vol. 59, page 46350 et seq, dated September 8, 1994, are hereby adopted by reference with the following changes:

(a) Except as shown in Table Q-1 of this subpart, “Department” shall replace “Administrator”.

(b) The Responsible Official definition (4) found in Section 63.401 shall be replaced with the following language: “ For affected sources (as defined in this part) applying for or subject to a title V permit: “responsible official” shall have the same meaning as defined in Regulation 30 of the State of Delaware “Regulations Governing the Control of Air Pollution” or Federal title V regulations in this chapter (42 U.S.C. 7661), whichever is applicable.”

(c) The opening paragraph of Section 63.404 shall be replaced with the following language: “No routine monitoring, sampling, or analysis is required. In accordance with section 114 of the Act, the Administrator can require cooling water sample analysis of an IPCT if there is information to indicate that the IPCT is not in compliance with the requirements of Sec. 63.402 of this subpart. In accordance with Regulation 17 of the State of Delaware “Regulations Governing the Control of Air Pollution”, the Department can require cooling water sample analysis of an IPCT to indicate that the IPCT is not in compliance with the requirements of Sec. 63.402 of this subpart. If cooling water sample analysis is required:”

(d) Table 1 of Subpart Q, which is being adopted by reference, is modified by the following additions or deletions:

(1) Paragraph 63.9(i) is added in the listing of General Provisions that are applicable to Subpart Q;

(2) Subparagraph 63.9(b)(6) is deleted from the listing of General Provisions that are not applicable to Subpart Q; and

(3) Item 63.10(b)(2)(xiii) is added in the listing of General Provisions that are not applicable to Subpart Q.

Reference	“Administrator” means “Administrator”	Comment
63.401 “Responsible official”	Yes	In definition (3)
63.404	Yes	As replaced

**DEPARTMENT OF  
TRANSPORTATION****AERONAUTICS**

Statutory Authority: 2 Delaware Code,  
Section 601 - 603 (2 Del.C. 601 - 603)

**NOTICE OF PROPOSED REGULATIONS**

The Department of Transportation proposes to adopt new regulations to implement Amendments to Titles 2, 9, and 30 of the Delaware Code Relating to Aeronautics and County Building Codes. The regulations include the Delaware Airport Licensing Regulation and the Delaware Airport Obstruction Regulation.

**Delaware Airport Licensing Regulation Synopsis:**

The purpose of this regulation is to implement the State of Delaware Airport Licensing Program authorized by State law, pursuant to Chapter 1, Title 2, Sections 162 and 163, Delaware Code, as amended, in order to provide for a safe statewide aviation program and to provide for the safety of the states' citizens. This Regulation sets forth the policies, criteria, and procedures for the inspection, licensing, and the revocation of licenses for public use airports or heliports within the State of Delaware.

This Regulation lists the aviation facilities eligible for licensure and the associated terms of eligibility. It describes the licensing process, including the criteria of minimum insurance requirements and displaced threshold requirements; the annual inspection program; and the licensing requirements for new airports or private use airports desiring public use status. Conditions for granting temporary waivers are outlined, along with the license revocation process.

**Delaware Airport Obstruction Regulation Synopsis:**

The purpose of this regulation is to implement Part 1, Title 2 of the Delaware Code, Sections 601-603 and related sections of Title 9 of the Delaware Code, specifically Sections 3005, 4407 and 6302, as amended, for the identification, permitting or removal of objects or structures located within statutorily defined boundaries and which may be a hazard to aviation or which constitute an "obstruction to air navigation," as that term is defined in the Regulation. This Regulation is derived from the legislation and provides the means of enforcement and the penalties imposed for failure to comply with the legislative requirements.

It has long been recognized that airports have unique needs for operational safety that interact with surrounding

land uses. In particular, the need for runway approaches that are clear of obstructions has long been the target of the Federal Aviation Administration. Numerous federal projects are undertaken each year to remove dangerous obstructions from land either within an airport's control or adjacent to the airport. The primary concern in this process is the safety of aircraft flight operations and the welfare of persons and real property on the ground. The Delaware Code authorizes the Department through its Office of Aeronautics to require a review of building permit applications. This review shall result in either an approval or disapproval of building permits for any structure that constitutes an obstruction to air navigation.

The Delaware Code also authorizes the Department to remove potentially hazardous existing obstructions in the approach areas to airport runways after compensating the owners of the obstructions. The process for removing existing obstructions is described in this regulation and entails the identification and preliminary ranking and costing of each eligible obstruction to air navigation, as defined in this regulation. Input shall be solicited from airport owners and operators. An Advisory Committee, appointed by the Department for the review and final ranking of each eligible obstruction, shall meet and consider the preliminary rankings. Based upon the recommendation of the Committee and after a public hearing, funds allocated by the Legislature for obstruction removal shall be directed toward individual projects on a statewide basis.

Interested parties may present their views on either of these Regulations at a public hearing scheduled for March 26, 1998 from 6 p.m. to 9 p.m. to be held at:

Central and North Conference Room  
DelDOT Administration Building  
Route 113, Across from Blue Hen Mall  
Dover, Delaware 19903

The opportunity for public comment to these written regulations shall be held open through April 6th, 1998. Written comments may be sent to:

Tricia Faust, Senior Planner  
DelDOT Administration Building  
Route 113, Across from Blue Hen Mall  
Dover, Delaware 19903

**DELAWARE AIRPORT LICENSING REGULATION****SECTION 1. PURPOSE**

The purpose of this regulation is to implement the State of Delaware Airport Licensing Program authorized by State

law, pursuant to Chapter 1, Title 2, Sections 162 and 163, Delaware Code, as amended, in order to provide for a safe statewide aviation program and to provide for the safety of the states' citizens. This Regulation sets forth the purpose, policies, criteria, and procedures for the inspection, licensing, and the revocation of licenses for public use airports or heliports within the State of Delaware. The pertinent sections of the Delaware Code are:

1. Chapter I, Title 2, Section 162 which states that:

“The Department, through the Office of Aeronautics may approve and license airports and helicopter landing sites, or other air navigation facilities, in accordance with regulations it adopts pertaining to such approval and licensure. Licenses granted under this section shall be renewed annually in conjunction with the Federal Aviation Administration sponsored airport survey program.”

2. Chapter 1, Title 2, Section 163 which states that:

“The Department, through the Office of Aeronautics, may suspend or revoke any certificate of approval or license issued by it when it determines that an airport, restricted landing area, or other navigation facility is not being maintained or used in accordance with the provisions of this chapter and the rules and regulations lawfully promulgated by it pursuant thereto.”

Aviation safety is of paramount importance in Delaware and depends in great measure upon flight safety and the availability of airports in the State, both of which are regulated by the FAA with the assistance of the Delaware Office of Aeronautics.

Safety standards are an integral part of the licensing program for Delaware Airports. Annual airport inspections conducted in conjunction with the FAA Form 5010 Airport Master Record Review for licensing can identify existing and potential safety problems and recommend mitigation measures. Inspections are a necessary and integral part of the licensing process and shall be performed by or at the direction of the Office of Aeronautics.

## SECTION 2: DEFINITIONS

The following definitions shall apply for the Airport Licensing Regulation:

1. **“Airport”**: means any area of land or water which is designated by the FAA for the landing and takeoff of aircraft, and all appurtenant areas used or suitable for airport buildings, other airport facilities and all appurtenant rights-of-way. For purpose of these Regulations, “Airport” shall

include all navigational facilities as defined herein.

2. **“Airport Approach Area”**: the area in and around an airport or heliport, as defined by Federal Aviation Regulations (FAR) Part 77 - **Objects Affecting Navigable Airspace**. The approach surfaces associated with the airport approach area are longitudinally centered on the extended runway centerline and extend outward and upward. These surfaces can differ by type of airport and runway characteristic and therefore must be determined using specific FAR Part 77 criteria.

3. **“Annual License Renewal”**: means once in each calendar year.

4. **“Displaced Threshold”**: The threshold of a runway is the beginning of that portion of the runway available and suitable for the landing of airplanes. A displaced threshold is one that is located at a point on the runway other than at the runway end. It is an artificial threshold for a runway which shortens the landing length of the runway in the direction of the displacement. The portion of runway behind a displaced threshold may be available for takeoffs in either direction and landings from the opposite direction.

5. **“Hazard to Air Navigation”**: Hazards to Air Navigation are severe obstructions to air navigation, classified as such by an FAA study under FAR Part 77.

6. **“Heliport”**: means any helicopter landing area or any area of land or water which is designated by the FAA for the landing and takeoff of helicopters, and all appurtenant areas used or suitable for heliport buildings other heliport facilities and all appurtenant rights-of-way.

7. **“Licensing Criteria”**: the parameters defined in this regulation that are used to determine whether or not an airport is to be licensed.

8. **“Obstruction to Air Navigation”**: any penetration of approach or transitional surfaces by an object or structure at an airport or heliport, as defined by FAR Part 77. Other objects or structures can be obstructions to air navigation outside the immediate vicinity of an airport if they encroach on navigable airspace as defined by FAR Part 77.

9. **“Office of Aeronautics”**: Subdivision of the Department of Transportation that is responsible for aviation matters.

10. **“Temporary Waiver”**: an intentional relinquishing of a known right or claim for a specific period of time, after careful consideration of all relevant factors.

11. **“Transitional Surface”**: the area in and around an airport or heliport, as defined by FAR Part 77. The transitional surfaces extend outward and upward at right angles to the runway centerline and the runway centerline extended.

### **SECTION 3. LICENSING AND GRANDFATHER RIGHTS**

Each public use airport or heliport operated in Delaware shall be licensed, operated, and maintained in accordance with this Licensing Program, as described herein this Regulation. Under previous legislation, grandfather rights for airport licenses extended to airports and restricted landing areas which were being operated on or before April 24, 1945. Under the new legislation, no grandfather rights are given or implied. Thus, each public use airport or heliport is subject to the licensing regulation adopted by the Department.

### **SECTION 4: AVIATION FACILITIES**

Under the new law, all public-use airports and heliports shall be licensed to operate in Delaware. Existing public-use airports and heliports, as of the date of adoption of this Licensing Regulation are the following:

- Chandelle Estates
- Delaware Airpark
- Henderson Airport
- Jenkins Airport
- Laurel Airport
- New Castle County Airport
- Smyrna Airport
- Summit Airport
- Sussex County Airport
- Chorman Airport
- DeIDOT Helipad

### **SECTION 5: LICENSING PROCESS**

The licensing process, as envisioned in this Regulation, requires that the Department inspect each existing public-use airport in the State by a representative of the Office of Aeronautics. All existing public-use airports shall automatically be included in the process. The inspections shall be conducted using the methods described in this section. Successful completion of the licensing process shall result in the issuance of an operating license for an airport. New public-use airports shall request a license in writing from the Delaware Department of Transportation, Office of Aeronautics. To adequately describe these steps, this section consists of the following: licensing criteria, annual licensing program, and new airport licensing process. Each of these steps is described below:

1. **License Criteria:** The Department hereby incorporates by reference FAR Part 77; FAA Advisory Circular 150/5300-13, **Airport Design**; and such other federal or state regulations as may be referred to herein. Licensing criteria have been developed for two specific areas of airport or heliport facility operation. The first involves the requirement of each public use airport to obtain and carry minimum levels of liability and property insurance. The second involves the requirement for displaced thresholds at runways obstructed by existing roadways, railways, or navigable waterways. In order for a public use airport or heliport to be licensed in Delaware, it shall comply with all standards and regulations pertinent to these two areas.

1) Minimum Insurance Requirements: As a part of this new regulation, it is required that public use airports carry a minimum of one million dollars (\$1,000,000) in liability insurance covering bodily injury and property damage liability in any one accident, along with fifty-thousand dollars (\$50,000) coverage for property damage for each accident. Certificates of insurance, issued by an insurance company licensed to write such insurance in the State of Delaware, shall be filed annually with the Department of Transportation, Office of Aeronautics, as a part of the licensing procedure. The Department shall be notified of any insurance coverage lapses at public use airports in Delaware.

2) Displaced Threshold Requirements: Delaware public use airports and heliports should be physically suitable for aviation, in accordance with the aviation purpose intended and operated in a safe manner. Runways that are obstructed, as defined in FAR Part 77, either by highways, railways, or navigable waterways shall have the thresholds of the impacted runways displaced by the appropriate distance. A displaced threshold has been defined as an artificial threshold for a runway which shortens the landing length of the runway in the direction of the displacement. The portion of runway behind a displaced threshold may be available for takeoffs in either direction and landings from the opposite direction. The displacement is caused by the need to provide clearance over an obstruction to air navigation, based upon an imaginary approach slope, which is defined in FAR Part 77.

For a public roadway, a clearance of 15 vertical feet is needed; for an Interstate Highway a clearance of 17 vertical feet is needed; for a railway, a clearance of 23 vertical feet is required; and for a navigable waterway, a clearance equal to the highest mobile craft to transverse the waterway is needed. For example, if the imaginary surface has a 20:1 slope, a 15 vertical foot clearance at the end of a runway will require 300 linear feet of displacement.

Appropriate displacement markings shall be

painted on paved surfaces in accordance with FAA guidelines and shall be installed as in-ground flush markers on turf strips. The airport owner shall be responsible for marking displacements on affected runways.

2. **Annual Licensing Program:** Each of the airports listed in Section 4 of this Regulation are subject to annual licensure by DelDOT through the Office of Aeronautics. To carry out this program, the Office of Aeronautics shall implement the following steps:

1) **Inspections:** Beginning in 1998, the Office of Aeronautics shall conduct annual on-site inspections of each public-use airport in Delaware, in accordance with the criteria set forth in this Regulation. Existing public-use airports need not apply for a new license, but shall automatically be included in the licensing process. Inspections of each airport shall be conducted by personnel from the Office of Aeronautics. The Office of Aeronautics reserves the right to conduct inspections at its convenience and is not limited in the number of inspections that it may conduct at an airport during any one year period.

2) **Inspection Period:** While the inspections for licensure do not need to be conducted within an exact 12 month period, they do have to occur at least once in each calendar year.

3) **Validity Period:** Licenses issued during 1998 will be valid until December 31, 1999; in subsequent years, licenses issued will be valid until the end of the following calendar year.

3. **New Airports:** In the event that a new public use airport is developed, or a private use airport desires to become a public use facility, the airport owner shall submit a request for a license in writing to the Office of Aeronautics, along with a copy of the FAA airspace approval for the airport. Within 30 days of the receipt of the written request, the Office of Aeronautics shall inspect the facility using criteria specified in this Regulation. From that inspection, the Office shall either issue a license or cite the conditions requiring correction before a license can be issued.

## SECTION 6: TEMPORARY WAIVERS

The licensing process should be one that encourages safety while at the same time does not place an undo burden upon the existing public use airports or heliports in the State. If a violation of this regulation occurs, the airport or heliport in question may attempt to rectify the situation, but in doing so, may require additional time to comply.

In cases where the correction of a regulation violation

requires more than 10 days, a temporary waiver may be issued by the Office of Aeronautics permitting the delay. The temporary waiver shall specify a definite time period for correction of the condition. The process for issuing a temporary waiver is as follows:

1. **Violation Cited:** In the event that an airport cannot show proof of insurance, or has not displaced a threshold subject to the requirements of this regulation, the Delaware Department of Transportation, through its Office of Aeronautics shall cite the airport for the violation. In the citation, the airport owner shall have 10 days to correct the violation.

2. **Waiver Request:** If the cited airport owner believes that there are mitigating circumstances that prevent compliance with these regulations within the 10 day period, he or she may request a waiver in writing from the Department through its Office of Aeronautics. The waiver request should state the mitigating circumstances and the timeframe requested for compliance.

3. **Waiver Terms:** The Department may grant a waiver to the requesting airport owner/operator after consideration of the mitigating circumstances preventing compliance and the time needed to comply. The waiver issued by the Department through its Office of Aeronautics shall state the timeframe for compliance.

4. **Waiver Implementation:** The Office of Aeronautics shall approve or disapprove the request for waiver within the 10 day normal compliance period. The decision shall be delivered in writing to the airport owner requesting the waiver. If the waiver is granted, the temporary nature of the waiver shall require that the Office of Aeronautics revisit the airport at the end of the temporary extension of the compliance period to determine if the airport is in compliance. If the airport is in compliance, a license shall be issued. If the airport is not in compliance, Section 7 of this regulation shall be implemented.

## SECTION 7: LICENSE REVOCATION

Under certain circumstances, the license to operate a public use airport or heliport in Delaware can be revoked. Revocation of the license for a public use airport or heliport shall result in either: 1) the immediate closure of the airport or heliport, or 2) the change in designation from public use to private use airport or heliport. The circumstances leading to revocation are listed below.

1. **Refusal or Failure to Comply with this Regulation:** If a public use airport or heliport operator refuses or fails to comply with the terms and conditions of licensure contained

in this regulation, that airport or heliport is subject to license revocation. Conditions of licensure include:

- Displacement of a runway threshold when obstructed by highways, railways, or waterways.
- Valid insurance coverage in the amounts and types stated in this regulation.

2. **License Revocation:** Airport licenses are to be revoked upon reaching the following trigger points:

- Upon the 11th day after a citation was given to an airport owner, given that no temporary waiver was requested by that airport owner.
- Upon the expiration of temporary waivers.

3. **Airport Closure/Private Use Designation:** No public use airport shall operate in Delaware without a license issued by the Department. Therefore, after license revocation, an airport shall either close or be redesignated as private use on FAA airspace sectional maps.

## APPENDIX A License Inspection Form

1. Airport Name: \_\_\_\_\_  
2. Inspector: \_\_\_\_\_ Date: \_\_\_\_\_

Displaced Threshold Requirements

3. If yes, which runway(s) are impacted: \_\_\_\_\_  
Sketch below:

4. Discussed with Airport Manager? \_\_\_\_\_  
5. Timeframe for correction? \_\_\_\_\_

6. Waiver required/issued? (If yes, please attach) \_\_\_\_\_

Insurance Certificate:

- Requested  Supplied (attach copy of certificate)

Comments:

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## DELAWARE AIRPORT OBSTRUCTION

## REGULATION

### SECTION 1. PURPOSE

The purpose of this regulation is to implement Part 1, Title 2 of the Delaware Code, Sections 601-603 and related sections of Title 9 of the Delaware Code, specifically Sections 3005, 4407 and 6302, as amended, applicable to the three counties respectively; for the identification, permitting or removal of objects or structures located within statutorily defined boundaries and which may be a hazard to aviation or which constitute an "obstruction to air navigation," as that term is defined herein and is hereinafter generically referred to as "obstruction" (see Appendix A for Federal Aviation Regulations Part 77 Obstruction Standards). This regulation is derived from the legislation and provides the means of enforcement and the penalties imposed for failure to comply with the legislative requirements.

It has long been recognized that airports have unique needs for operational safety that interact with surrounding land uses. In particular, the need for runway approaches that are clear of obstructions has long been the target of the Federal Aviation Administration. Numerous federal projects are undertaken each year to remove dangerous obstructions from land either within an airport's control or adjacent to the airport.

The primary concern in this process is the safety of aircraft flight operations and the welfare of persons and real property on the ground. The Delaware Code authorizes the Department through its Office of Aeronautics to require a review of building permit applications. This review shall result in either an approval or disapproval of building permits for any structure that constitutes an obstruction to air navigation.

The Delaware Code also authorizes the Department to remove potentially hazardous existing obstructions in the approach areas to airport runways after compensating the owners of the obstructions. The process for removing existing obstructions is described in this regulation and entails the identification and preliminary ranking and costing of each eligible obstruction to air navigation, as defined in this regulation. Input shall be solicited from airport owners and operators. An Advisory Committee, appointed by the Department for the review and final ranking of each eligible obstruction, shall meet and consider the preliminary rankings. Based upon the recommendation of the Committee and after a public hearing, funds allocated by the Legislature for obstruction removal shall be directed toward individual projects on a statewide basis.

### SECTION 2: DEFINITIONS



The following definitions shall apply for the Airport Obstruction Regulation:

1. **“Airport”**: means any area of land or water which is designated for the landing and takeoff of aircraft, and all appurtenant areas used or suitable for airport buildings, other airport facilities and all appurtenant rights-of-way. For purpose of this regulation, “Airport” shall include all navigational facilities as defined herein.

2. **“Airport Approach Area”**: the area in and around an airport or heliport, as defined by Federal Aviation Regulations (FAR) Part 77 - **Objects Affecting Navigable Airspace**. The approach surfaces associated with the airport approach area are longitudinally centered on the extended runway centerline and extend outward and upward. These surfaces can differ by type of airport and runway characteristic and therefore must be determined using specific FAR Part 77 criteria.

3. **“Displaced Threshold”**: The threshold of a runway is the beginning of that portion of the runway available and suitable for the landing of airplanes. A displaced threshold is one that is located at a point on the runway other than at the runway end. It is an artificial threshold for a runway which shortens the landing length of the runway in the direction of the displacement. The portion of runway behind a displaced threshold may be available for takeoffs in either direction and landings from the opposite direction.

4. **“Hazard to Air Navigation”**: Hazards to Air Navigation are severe obstructions to air navigation, classified as such by an FAA study under FAR Part 77.

5. **“Heliport”**: means any helicopter landing area or any area of land or water which is designated by the FAA for the landing and takeoff of helicopters, and all appurtenant areas used or suitable for heliport buildings other heliport facilities and all appurtenant rights-of-way.

6. **“Imaginary Surface”**: is a two dimensional plane stretching upward and outward from an airport. These surfaces are defined by FAR Part 77 criteria for approach surfaces, transitional surfaces, and other applicable surfaces.

7. **“Licensing Criteria”**: the parameters defined in this regulation that are used to determine whether or not an airport is to be licensed.

8. **“Notice to Airmen (NOTAM)”**: a notice concerning the establishment, condition, or change in any component, facility, service, or procedure of, or hazard in the National Airspace System, the timely knowledge of which is essential

to personnel concerned with flight operations.

9. **“Obstruction to Air Navigation”**: any penetration of approach or transitional surfaces by an object or structure at an airport or heliport, as defined by FAR Part 77. Other objects or structures can be obstructions to air navigation outside the immediate vicinity of an airport if they encroach on navigable airspace as defined by FAR Part 77.

10. **“Office of Aeronautics”**: Subdivision of the Department of Transportation that is responsible for aviation matters.

11. **“Transitional Surface”**: the area in and around an airport or heliport, as defined by FAR Part 77. The transitional surfaces extend outward and upward at right angles to the runway centerline and the runway centerline extended.

12. **“Transport Airport”**: Airports that accommodate business jets as a regular part of their operational fleet mix. These airports have runways that are at least 5,000' long and 75' wide.

13. **“Turf Airport”**: Airports that have no paved runways.

14. **“Utility Airport”**: Airports with paved runways that are smaller than Transport Airports.

### SECTION 3. AIRPORTS IMPACTED

The Delaware Code indicates that all public use airports are covered by the obstruction removal program. By definition, a public use airport can be either publicly or privately owned, but it must be open to the public for use and be so designated on aeronautical charts. Existing public-use airports and heliports, subject to this Obstruction Regulation as of the date of adoption of this Regulation are the following:

	<u>Airport Role</u>
• Chandelle Estates	Utility
• Delaware Airpark	Utility
• Dover Air Force Base	Transport
• Henderson Airport	Turf
• Jenkins Airport	Turf
• Laurel Airport	Turf
• New Castle County Airport	Transport
• Smyrna Airport	Turf
• Summit Airport	Utility
• Sussex County Airport	Transport
• Chorman Airport	Utility
• DelDOT Helipad	Heliport

### SECTION 4. BUILDING PERMIT REQUIREMENTS

In accordance with 2 Del. C. 602, a Building Permit may be issued by the county or municipality having land use jurisdiction in which the construction or alteration of facilities defined below are located, only after review and approval by the Delaware Office of Aeronautics.

1. **Building Permit Requirement:** Such Building Permit is required for the construction, erection, placement or alteration of any smokestack, tree, silo, flagpole, elevated tank, power line, or radio or television tower antenna, building, structure or other improvement to real property which meets any of the following conditions described in Subsection 2.

2. **Notification:** The Delaware Office of Aeronautics shall be notified by each county or municipality, having land use jurisdiction of any proposed construction that may create an obstruction to air navigation as defined herein. The formal notification process is activated through the existing building permit processes in effect in each such county or municipality; specifically: 9 Del. C. 3005 for New Castle County, 9 Del. C. 4407 for Kent County, 9 Del.C. 6302 for Sussex County and the respective municipal codes. These notices shall provide a basis for evaluating the effects of the construction or alteration of any object that may pose a hazard to air navigation. As defined, these objects can be natural growth, terrain, or permanent or temporary construction or alteration of any structure (including appurtenances) by a change in its height or other dimensions.

1) Conditions for Notice: In addition to the foregoing listed obstructions, the Delaware Office of Aeronautics shall be notified and shall approve prior to issuance of a Building Permit any facility which meets the following description and/or conditions:

- Any construction or alteration of more than 200 feet in height above the ground level at its site;
- Any construction or alteration of greater height than an imaginary surface extending outward and upward at one of the following slopes:
  - 100 to 1 for a horizontal distance of 20,000 feet from the nearest point of the nearest runway of each public use airport with at least one runway more than 3,200 feet in length,
  - 50 to 1 for a horizontal distance of 10,000 feet from the nearest point of the nearest runway of each public use airport with its longest runway no more than 3,200 feet in length,
  - 100 to 1 within a trapezoidal shape beginning at the end of a runway of any public use airport, at an initial width of 50 feet, and extending outward for a distance of 20,000 feet to a width of 3,000 feet at its ending point.

2) Maps: To assist the Counties in determining when the notice requirement is activated, the Delaware Office of Aeronautics shall distribute maps to each County agency responsible for issuing Building Permits. These maps shall detail the notice areas, including all corresponding imaginary surfaces around public use airports, as defined above.

3) Notice Period: Required notices shall be submitted to the Office of Aeronautics with the Building Permit applications at least 30 days before the date the proposed construction or alteration is to begin.

4) Emergencies: In the case of an emergency involving essential public services, public health, or public safety, that requires immediate construction or alteration, the 30 day requirement may be waived by the Office of Aeronautics, and the notice may be sent by telephone, fax, or other expeditious means, with appropriate forms submitted within 5 days.

5) Information Requirements: Notices shall be filed with the Office of Aeronautics on forms provided by said Office to the Counties (see Appendix B). These forms shall require the following minimum information:

- Exact location and dimensions of the proposed structure or object to be constructed or altered.
- Planned height above ground level of the structure or object at its highest point, including elevations.
- Site plan of the construction or alteration.

## SECTION 5. TEMPORARY OBSTRUCTIONS

Should circumstances develop that cause the erection of temporary obstructions to air navigation which do not require a Building Permit, the Delaware Office of Aeronautics shall be informed through the normal notification process (as described in Section 4) of the temporary obstruction.

1. **Temporary Obstructions:** Temporary obstructions may occur in response to emergency conditions or life-threatening situations. For example, a crane may be brought in to remove wreckage in the approach areas of Delaware airports.

2. **Approvals:** Approvals for temporary obstructions (see Section 6) shall be obtained from the Delaware Office of Aeronautics.

3. **Notams:** The airport impacted by a temporary obstruction shall be responsible for filing the Notice to

Airmen (NOTAM) describing the obstruction and its likely duration. To file a NOTAM, the airport operator must report information essential to personnel concerned with flight operations to the nearest Federal Aviation Administration Flight Service Station. In this case, notice must be given concerning the location and duration of the temporary obstruction.

## SECTION 6. BUILDING PERMIT PROCESS

As stated in the law, a Building Permit, issued by the County or municipality having land use jurisdiction, shall first be reviewed by the Delaware Office of Aeronautics if it meets the description and/or conditions set forth in Section 4 of this regulation. Such Building Permit for the construction or alteration of each object or structure shall not be issued by the issuing authority until such time as the Office of Aeronautics has approved the application.

The process of review for a Building Permit application as it pertains to any obstruction or potential obstruction impacting aviation shall be as follows:

1. **Initial Review:** Appropriate County and local municipalities responsible for zoning shall conduct the initial review of the Building Permit application. Using the maps provided by the Office of Aeronautics, the agencies shall make a determination whether or not the proposed building or structure invokes the notice requirements listed above. If the proposed structure exceeds the height of the imaginary surfaces around a particular airport, the application, with the completed notice form, shall be referred to the Office of Aeronautics for review.

2. **Office of Aeronautics Evaluation:** Once the Building Permit and completed notice form reach the Office of Aeronautics, an evaluation of the impact on air safety shall be conducted. If, in the opinion of the Office of Aeronautics, the proposed building or structure poses an obstruction to air navigation, or if, in the opinion of the Office of Aeronautics, the proposed building or structure unduly limits the planned development of an airport in question, that permit shall be denied.

3. **Criteria:** Criteria used in the evaluation process shall include FAR, Part 77, and approved airport master plans and the current State Aviation System Plan. FAR Part 77 criteria should focus on the imaginary surfaces for approach areas and transitional or lateral boundaries. The master plans and system planning information should examine future airport plans for development, and incorporate those plans into potential future FAR Part 77 surfaces.

4. **Approval:** If the Office of Aeronautics, finds that no

obstruction to air navigation results from the proposed structure and that the development does not limit the operation or development of an airport in question, the Building Permit shall be approved. The Office of Aeronautics shall approve or reject the Building Permit application within 30 days of receipt. If the Building Permit is requested under emergency conditions involving essential public services, public health, or public safety, that require immediate construction or alteration, the Office of Aeronautics may expedite the review and approval or disapproval process as soon thereafter as practical.

## SECTION 7. REMOVAL OF EXISTING OBSTRUCTIONS

The Delaware Code at 2 Del.C. Chapter 6 provides the legal authority for removal of aviation obstructions. Obstructions to air navigation decrease operational safety margins at airports. For this reason, the Delaware Code provides DelDOT, through the Office of Aeronautics, the authority to identify and remove obstructions located in approach areas to public use airports.

The overview to the obstruction removal process was described briefly in Section 1. As stated, the process entails the identification and preliminary ranking and costing of each eligible obstruction to air navigation, as defined in this regulation. Input shall be solicited from airport owners and operators. An Advisory Committee, appointed by the Department for the review and final ranking of each eligible obstruction, shall meet and consider the preliminary rankings. Based upon the recommendation of the Committee, funds allocated by the Legislature for obstruction removal shall be directed toward individual projects on a statewide basis.

To carry out this program the following process shall be observed:

1. **Inventory:** The Office of Aeronautics shall be responsible for the development of a Statewide obstruction inventory at each public use airport. This inventory shall be conducted periodically, but not less than every 24 months, and shall be carried out in conjunction with the airport owner input. The inventory shall document the existence of obstructions to air navigation as defined in FAR Part 77 in the approach areas at each public use airport. This inventory shall be updated, as needed, to properly identify obstructions and shall be maintained at the Office of Aeronautics. As part of the process, the cost to remove each obstruction shall be estimated.

2. **Preliminary Priority Ranking:** A preliminary priority ranking system shall be used to rank the obstructions. This priority system shall consider the following items:

- Severity of the obstruction
- Accident history at the associated airport
- Role of the airport in the State system
- Cost to remove the obstruction
- Activity levels at the candidate airports

3. **Deed Restriction:** The next step in the process involves the protection of State resources and the elimination of projects that are not considered important by airport owners. In order to protect State resources, any cumulative State funding for obstruction removal, on or off of an airport, that totals more than \$10,000 will require a commitment by the airport owner (in the form of a deed restriction) to maintain the airport a public use facility for not less than 10 years from the date that cumulative State expenditures exceed \$10,000. Failure by the airport owner to agree to incorporate this deed restriction into the airport deed shall be grounds for DeIDOT to disqualify the airport from the obstruction removal program for that obstruction. If the airport owner agrees to the deed restriction and the airport is converted to another use during the 10 year time period, the grant funds shall be reimbursed to the State upon closure, sale, or reclassification (to private use) of the facility, on a graduated scale as follows:

<u>Years Used As Airport Prior to Conversion to Other Use</u>	<u>% Grant Reimbursed to State</u>
1-5	100%
6	80%
7	60%
8	40%
9	20%
10	0%

The State reserves the right to remove a hazard to air navigation, as determined by an FAA airspace study, even if the airport sponsor does not agree to the deed restriction.

4. **Advisory Committee:** An Advisory Committee shall be appointed by the Department to review the preliminary ranking of obstruction removal projects. Projects over \$10,000 that an airport owner will not include in a deed restriction shall be removed from consideration by the Advisory Committee. The Office of Aeronautics shall provide the following:

- The preliminary ranking from the priority ranking model; and,
- The comments and rankings of the airport owners and operators.

The Advisory Committee shall meet and rank each of the obstruction removal projects and present a final list of rankings to the Department. This final list shall be published and a public hearing shall be conducted.

5. **Implementation Process:** Once the ranking has been adopted by the Department, an implementation process will be initiated by DeIDOT using the following criteria:

- Available Funding
- Deed Restriction
- Existing Easements
- Airport Owner Cost Sharing

**SECTION 8. PENALTIES**

In accordance with Delaware law, 2 Del.C. 603, whoever constructs, erects, places or alters any obstruction, as that term is used in this Regulation, without first obtaining a Building Permit as required by 2 Del.C. Chapter 6, shall upon being found liable in a civil proceeding brought by the Department, be fined an amount not exceeding One Thousand (\$1,000) Dollars. Each day's continuation of a violation of this section shall be deemed a separate and distinct offense, all of which may be brought together in a single action.

**SECTION 9. JURISDICTION AND APPEALS**

The Department may enforce the provisions of this regulation by the filing of a complaint in a court of appropriate jurisdiction, including a complaint for injunctive relief.

**APPENDIX A:**

**FAR Part 77 Obstruction Standards  
Subpart C**

Obstructions shall be identified through assessments of each public use airport. Criteria to identify obstructions are outlined in FAR Part 77, Subpart C - Obstruction Standards, as follows:

**Subpart C - Obstruction Standards**

77.21 Scope.

(a) This subpart establishes standards for determining obstructions to air navigation. It applies to existing and proposed manmade objects, objects of natural growth, and terrain. The standards apply to the use of navigable airspace by aircraft and to existing air navigation facilities, such as an air navigation aid, airport, Federal airway, instrument

approach or departure procedure, or approved off-airway route. Additionally, they apply to a planned facility or use, or a change in an existing facility or use, if a proposal therefor is on file with the Federal Aviation Administration or an appropriate military service on the date the notice required by § 77.13 (a) is filed.

(b) At those airports having defined runways with specially prepared hard surfaces, the primary surface for each such runway extends 200 feet beyond each end of the runway. At those airports having defined strips or pathways that are used regularly for the taking off and landing of aircraft and have been designated by appropriate authority as runways, but do not have specially prepared hard surfaces, each end of the primary surface for each such runway shall coincide with the corresponding end of the runway. At those airports, excluding seaplane bases, having a defined landing and takeoff area with no defined pathways for the landing and taking off of aircraft, a determination shall be made as to which portions of the landing and takeoff area are regularly used as landing and takeoff pathways. Those pathways so determined shall be considered runways and an appropriate primary surface as defined in § 77.25(c) will be considered as being longitudinally centered on each runway so determined, and each end of that primary surface shall coincide with the corresponding end of that runway.

(c) The standards in this subpart apply to the effect of construction or alteration proposals upon an airport if, at the time of filing of the notice required by § 77.13 (a), that airport is -

(1) Available for public use and is listed in the Airport Directory of the current Airman Information Manual or in either the Alaska or Pacific Airman's Guide and Chart Supplement; or,

(2) A planned or proposed airport or an airport under construction, that is the subject of a notice or proposal on file with the Federal Aviation Administration, and, except for military airports, it is clearly indicated that that airport will be available for public use; or,

(3) An airport that is operated by an armed force of the United States.

(d) [Deleted]

#### 77.23 Standards for determining obstructions.

(a) An existing object, including a mobile object, is, and a future object would be, an obstruction to air navigation if it is of greater height than any of the following heights or surfaces:

(1) A height of 500 feet above ground level at the site of the object.

(2) A height that is 200 feet above ground level or above the established airport elevation, whichever is higher, within

3 nautical miles of the established reference point of an airport, excluding heliports, with its longest runway more than 3,200 feet in actual length, and that height increases in the proportion of 100 feet, for each additional nautical mile of distance from the airport up to a maximum of 500 feet.

(3) A height within a terminal obstacle clearance area, including in initial approach segment, a departure area, and a circling approach area, which would result in the vertical distance between any point on the object and an established minimum instrument flight altitude within that area or segment to be less than the required obstacle clearance.

(4) A height within an en route obstacle clearance area, including turn and termination areas, of a Federal airway or approved off-airway route, that would increase the minimum obstacle clearance altitude.

(5) The surface of a takeoff and landing area of an airport or any imaginary surface established under §§ 77.25, 77.28, or 77.29. However, no part of the takeoff or landing area itself will be considered an obstruction.

(b) Except for traverse ways on or near an airport with an operative ground traffic control service, furnished by an air traffic control tower or by the airport management and coordinated with the air traffic control service, the standards of paragraph (a) of this section apply to traverse ways used or to be used for the passage of mobile objects only after the heights of these traverse ways are increased by:

(1) Seventeen feet for an Interstate Highway that is part of the National System of Military and Interstate Highways where overcrossings are designed for a minimum of 17 feet vertical distance.

(2) Fifteen feet for any other public roadway.

(3) Ten feet or the height of the highest mobile object that would normally traverse the road, whichever is greater, for a private road.

(4) Twenty-three feet for railroad.

(5) For a waterway or any other traverse way not previously mentioned, an amount equal to the height of the highest mobile object that would normally traverse it.

#### 77.25 Civil airport imaginary surfaces.

The following civil airport imaginary surfaces are established with relation to the airport and to each runway. The size of each such imaginary surface is based on the category of each runway according to the type of approach available or planned for that runway. The slope and dimensions of the approach surface applied to each end of a runway are determined by the most precise approach existing or planned for that runway end.

(a) Horizontal surface - a horizontal plane 150 feet above the established airport elevation, the perimeter of which is constructed by swinging arcs of specified radii from the

center of each end of the primary surface of each runway of each airport and connecting the adjacent arcs by lines tangent to those arcs. The radius of each arc is:

- (1) 5,000 feet for all runways designated as utility or visual;
- (2) 10,000 feet for all other runways.

The radius of the arc specified for each end of a runway will have the same arithmetical value. That value will be the highest determined for either end of the runway. When a 5,000-foot arc is encompassed by tangents connecting two adjacent 10,000-foot arcs, the 5,000-foot arc shall be disregarded on the construction of the perimeter of the horizontal surface.

(b) Conical surface - a surface extending outward and upward from the periphery of the horizontal surface at a slope of 20 to 1 for a horizontal distance of 4,000 feet.

(c) Primary surface - a surface longitudinally centered on a runway. When the runway has a specially prepared hard surface, the primary surface extends 200 feet beyond each end of that runway; but when the runway has no specially prepared hard surface, or planned hard surface, the primary surface ends at each end of that runway. The elevation of any point on the primary surface is the same as the elevation of the nearest point on the runway centerline. The width of the primary surface is:

- (1) 250 feet for utility runways having only visual approaches.
- (2) 500 feet for utility runways having nonprecision instrument approaches.
- (3) For other than utility runways the width is:
  - (i) 500 feet for visual runways having only visual approaches.
  - (ii) 500 feet for nonprecision instrument runways having visibility minimums greater than three-fourths statute mile.
  - (iii) 1,000 feet for a nonprecision instrument runway having nonprecision instrument approach with visibility minimums as low as three-fourths of a statute mile, and for precision instrument runways.

The width of the primary surface of a runway will be that width prescribed in this section for the most precise approach existing or planned for either end of that runway.

(d) Approach surface - a surface longitudinally centered on the extended runway centerline and extending outward and upward from each end of the primary surface. An approach surface is applied to each end of each runway based upon the type of approach available or planned for that runway end.

- (1) The inner edge of the approach surface is the same width as the primary surface and it expands uniformly to a

width of:

- (i) 1,250 feet for that end of a utility runway with only visual approaches;
  - (ii) 1,500 feet for that end of a runway other than a utility runway with only visual approaches;
  - (iii) 2,000 feet for that end of a utility runway with a nonprecision instrument approach;
  - (iv) 3,500 feet for that end of it nonprecision instrument runway other than utility, having visibility minimums greater than three-fourths of a statute mile;
  - (v) 4,000 feet for that end of a nonprecision instrument runway, other than utility, having a nonprecision instrument approach with visibility minimums as low as three-fourths statute mile; and
  - (vi) 16,000 feet for precision instrument runways.
- (2) The approach surface extends for a horizontal distance of:
- (i) 5,000 feet at a slope of 20 to 1 for all utility and visual runways;
  - (ii) 10,000 feet at a slope of 34 to 1 for all nonprecision instrument runways other than utility; and,
  - (iii) 10,000 feet at a slope of 50 to 1 with an additional 40,000 feet at a slope of 40 to 1 for all precision instrument runways.

(3) The outer width of an approach surface to an end of a runway will be that width prescribed in this subsection for the most precise approach existing or planned for that runway end.

(e) Transitional surface - these surfaces extend outward and upward at right angles to the runway centerline and the runway center-line extended at a slope of 7 to 1 from the sides of the primary surface and from the sides of the approach surfaces. Transitional surfaces for those portions of the precision approach surface which project through and beyond the limits of the conical surface, extend a distance of 5,000 feet measured horizontally from the edge of the approach surface and at right angles to the runway centerline.

Imaginary surfaces in the airport approach areas are defined above and would be used to identify obstructions to air navigation at airports and heliports in Delaware that are eligible for removal under the law. By definition, penetrations of these imaginary surfaces by objects are obstructions to air navigation.

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**\* PLEASE SEE DIAGRAM ISOMETRIC VIEW OF SECTION A - A AT THE END OF THE REGULATION**

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**APPENDIX B:****PROPOSED CONSTRUCTION/ALTERATION  
IN AIRPORT ZONES  
NOTIFICATION FORM**

The Delaware Code, Part 1, Title 2, Sections 601-603 specifies where construction/alterations can be done in and around airports. The Office of Aeronautics has been tasked to insure new construction or changes to existing structures conform to the legislative mandate. As such, the Office of Aeronautics shall be notified of any proposed construction that may create an obstruction to air navigation. The primary concern in this process is the safety of aircraft flight operations and the welfare of persons and real property on the ground.

Notice requirements shall incorporate the following areas and/or conditions:

- Any construction or alteration of more than 200 feet in height above the ground level at its site;
- Any construction or alteration of greater height than an imaginary surface extending outward and upward at one of the following slopes:
  - 100 to 1 for a horizontal distance of 20,000 feet from the nearest point of the nearest runway of each public use airport with at least one runway more than 3,200 feet in length.
  - 50 to 1 for a horizontal distance of 10,000 feet from the nearest point of the nearest runway of each public use airport with its longest runway no more than 3,200 feet in length.
  - 100 to 1 within a trapezoidal shape beginning at the end of a runway of any public use airport, at an initial width of 50 feet, and extending outward for a distance of 20,000 feet to a width of 3,000 feet at its ending point.
  - Federal Aviation Regulations, Part 77, also apply.

The following information must be submitted to the Office of Aeronautics with the Building Permit application at least 30 days before the date the proposed construction or alteration is to begin if said construction/alteration falls within any of the above stated conditions. Each County has been provided maps showing the areas in question around each airport. The Office of Aeronautics shall approve or reject based on the above criteria.

**REQUIRED INFORMATION TO BE PROVIDED TO  
THE OFFICE OF AERONAUTICS:**

Exact Location \* \_\_\_\_\_

Distance from Runway: \* \_\_\_\_\_

Height above ground of highest point after construction  
(attach site plan): \* \_\_\_\_\_

Height above sea level: \* \_\_\_\_\_

**DATE RECEIVED:** \_\_\_\_\_**APPROVE** \_\_\_\_\_ **DISAPPROVE** \_\_\_\_\_**SIGNED:** \_\_\_\_\_

Office of Aeronautics

**DATE SIGNED:** \_\_\_\_\_

\* The Delaware Department of Transportation is not responsible for the accuracy of the provided information. It is the responsibility of the provider to supply accurate information for evaluation. In addition, site plans and other material given to DelDOT as a part of this application process will not be returned.

## Symbol Key

Roman type indicates the text existing prior to the regulation being promulgated. Underlined text indicates new text added at the time of the proposed action. Language which is ~~stricken~~ through indicates text being deleted. **[Bracketed Bold language]** indicates text added at the time the final order was issued. ~~**[Bracketed-stricken through]**~~ indicates language deleted at the time the final order was issued.

## Final Regulations

The opportunity for public comment shall be held open for a minimum of 30 days after the proposal is published in the Register of Regulations. At the conclusion of all hearings and after receipt within the time allowed of all written materials, upon all the testimonial and written evidence and information submitted, together with summaries of the evidence and information by subordinates, the agency shall determine whether a regulation should be adopted, amended or repealed and shall issue its conclusion in an order which shall include: (1) A brief summary of the evidence and information submitted; (2) A brief summary of its findings of fact with respect to the evidence and information, except where a rule of procedure is being adopted or amended; (3) A decision to adopt, amend or repeal a regulation or to take no action and the decision shall be supported by its findings on the evidence and information received; (4) The exact text and citation of such regulation adopted, amended or repealed; (5) The effective date of the order; (6) Any other findings or conclusions required by the law under which the agency has authority to act; and (7) The signature of at least a quorum of the agency members.

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

## DEPARTMENT OF EDUCATION

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

**BEFORE THE DEPARTMENT OF EDUCATION OF THE  
STATE OF DELAWARE  
REGULATORY IMPLEMENTING ORDER  
REPEAL OF REGULATIONS WHICH ARE DELAWARE  
CODE**

### I. SUMMARY OF THE EVIDENCE AND INFORMATION SUBMITTED

The following six regulations found in the Handbook for K-12 Education are recommended for repeal. These regulations are simply a restatement of the Delaware Code. Although they have provided helpful technical assistance to the user of the Handbook for K-12 Education, they are in the Code and do not have to be regulated by the Department of Education. These regulations include the following: I.B.2, page A-2, Lawful Authority of Teachers and Pupils, I.D.1.a., pages A-4 to A-6, School Admission Policies, I.D.5, pages A-8 to A-9, Reading of the First Amendment of the United States Constitution, I.D.6, page A-9, Period of Silence,

I.D.7, page A-9, Salute to the Flag and Pledge of Allegiance and I.G.1, pages A-18 to A-21, Pupil Units. Notice of the proposed repeal of these regulations was published in the News Journal and the Delaware State News on January 12, 1998, in the form attached as Exhibit A. No comments were received regarding the proposed repeal of these regulations.

### II. FINDINGS OF FACT

These regulations are already in Delaware Code and do not need to be further regulated as Department of Education regulations. This action will serve to clarify the differences between what is Code and what are Department of Education Regulations.

### III. DECISION TO REPEAL REGULATION(S)

For the foregoing reasons, the Secretary concludes that it is necessary to repeal these regulations.

### IV. DECISION TO REPEAL REGULATIONS

The text of the regulations repealed hereby shall be in the form attached hereto as Exhibit B, and said regulations shall be removed from the Handbook for K-12 Education, Section I.



**V. EFFECTIVE DATE OF ORDER**

The actions herein above referred to were taken by the Secretary pursuant to 14 Del. C., Sec. 122 in open session at the State Board's regularly scheduled meeting on February 19, 1998. The effective date of this Order shall be ten days from the date this order is published in the Delaware Register of Regulations.

IT IS SO ORDERED this 19th day of February, 1998.

Dr. Iris T. Metts  
Secretary of Education

Consented to this 19<sup>th</sup> day of February, 1998.

**STATE BOARD OF EDUCATION**

Dr. James L. Spartz, President  
Jean W. Allen, Vice President  
Nancy A. Doorey  
John W. Jardine, Jr.  
Dr. Joseph A. Pika  
Dennis J. Savage  
Dr. Claibourne D. Smith

**REPEAL OF SIX REGULATIONS THAT ARE IN THE  
DELAWARE CODE**

The following six regulations found in the Handbook for K-12 Education are recommended for repeal. These regulations are simply a restatement of the Delaware Code. Although they have provided helpful technical assistance to the user of the Handbook for K-12 Education, they are in the Code and do not have to be regulated by the Department of Education. These regulations include the following: I.B.2, page A-2, Lawful Authority of Teachers and Pupils, I.D.1,a,b, pages A-4 to A-6, School Admission Policies, I.D.5, Pages A-8 to A-9, Reading of the First Amendment of the United States Constitution, I.D.6, Page A-9, Period of Silence, I.D.7, page A-9, Salute to the Flag and Pledge of Allegiance and I.G 1, pages A-18 to A-21, Pupil Units.

1. Handbook for K-12 Education - Page A-2

**2. ~~LAWFUL AUTHORITY OF TEACHERS AND  
PUPILS~~**

~~Every teacher and administrator in the public schools of this state shall have the right to exercise the same authority as to control behavior and discipline over any pupil during any school activity, as the parents or guardians may exercise over such pupil. The above authority may include corporal punishment where deemed necessary. Where~~

~~corporal punishment is deemed necessary, it may be administered by any public school teacher or administrator in accordance with district board of education policy. 14 Del. C. §701.~~

2. Handbook for K-12 Education - Pages A-4 to A-6

**1. ~~SCHOOL ADMISSION POLICIES~~**

~~a. Compulsory Attendance Requirements;  
Evaluation of Readiness~~

~~(1) Except as otherwise set forth in this Section, every person in the State having control of a child between 5 years of age and 16 years of age shall send such child to a free public school, in the district of residence of the parents, except as determined in accordance with Chapter 6 of this Title, and shall send the child to such school each day of the minimum school term of 180 days. For purposes of this Section, a child shall be considered 5 years of age if he or she celebrates his or her fifth birthday according to the following schedule:~~

<del>1993-94 school year</del>	<del>fifth birthday on or before November 30, 1993</del>
<del>1994-95 school year</del>	<del>fifth birthday on or before October 31, 1994</del>
<del>1995-96 school year</del>	<del>fifth birthday on or before September 30, 1995</del>
<del>1996-97 school year</del>	<del>fifth birthday on or before August 31, 1996</del>
<del>Subsequent school years</del>	<del>fifth birthday on or before August 31 of the respective year</del>

~~Local school authorities may grant exceptions to the above schedule for entry into school if they determine that such exception is in the best interest of the child.~~

~~(2) The following provisions shall be applicable to the administration of subsection (1) of this section in regard to compulsory attendance in the kindergarten for a child age 5 years:~~

~~(a) If a child is a resident of the State at the time of his or her eligibility for admission to the kindergarten at age 5, the parents, guardian or legal custodian of that child may request that school authorities evaluate the child's readiness for attendance and may request a delay of 1 year in that attendance. However, admission to first grade will be authorized only after school authorities evaluate the child's readiness for attendance.~~

~~(b) If a child was not a resident of the State at the time of his or her eligibility for admission to the kindergarten at age 5, the parents, guardian or legal custodian of that child may request that school authorities evaluate the child's readiness for attendance and on the basis of that evaluation authorize admission to grade 1.~~

Reference: 24 Del. Laws, c. 121, §1; Code 1915, §2313; 32 Del. Laws, c. 160, §41; Code 1935, §2685; 14 Del. C. 1953, §2702; 49 Del. Laws, c. 403, §§1-3; 57 Del. Laws, c. 112; 60 Del. Laws, c. 449, §3; 63 Del. Laws, c. 290, §2; 64 Del. Laws, c. 315, §§6, 7; 69 Del. Laws, c. 28, §2.

b. In accordance with Subpart I.E., Eligibility and Subpart I.F., Programs and Placement as contained in the Administrative Manual: Programs for Exceptional Children, Adopted 3/87, and Title 14 and 31 of the Delaware Code, programs may be provided for exceptional children who are between the ages of 4 and 20, inclusive (14 Del. C. §3101); and for children who are visually impaired, hearing impaired, deaf/blind, and autistic from birth through age 20, inclusive (31 Del. C. §2501 and §2503, 14 Del. C. §1703).

(1) Three year olds with disabilities will continue to be eligible for services under Part b. as of their third birthday. (Subject to the flexibility agreed to under the Part H Interagency Agreement) Entry dates for four year olds with disabilities have always been tied to the entry date for kindergarten. Therefore, over the next three years entry into four year old programs will be realigned along with those for five year old kindergarten entry. This means:

- 1994-95 school year fourth birthday on or before September 30, 1994
- 1995-96 school year fourth birthday on or before August 31, 1995
- Subsequent school years fourth birthday on or before August 31 of the respective year

Districts should follow the same phase-in schedules as established for kindergarten (five year old) students. According to the law, local education agencies may grant exceptions to the schedule if such an exception is in the best interest of the child. The IEP process also allows considerable latitude to design programs to meet the individual needs of children. Districts should rely on the IEP process to make appropriate decisions for children who fall in the phase-in months.

Children with disabilities covered under the birth mandate programs (Autism, Deaf/Blind, Hearing Impairment) are not affected by this change except as it affects age appropriate placements and entry into kindergarten programs:

(2) Gifted or talented children who have become four years of age on or before September 1 may be admitted for educational placement at the beginning of the school year in September at the discretion of the local district. If applicable in a district,

(a) application must be made to the superintendent of the district in which the child resides.

Such application must be completed before April 1 whereupon arrangement will be made for testing of the child applicant.

(b) the child must be identified as gifted or talented according to the procedures contained in the Program Standards for Gifted and Talented Education in the State of Delaware, June 1986.

3. Handbook for K-12 Education - Pages A-8 to A-9

#### 5. READING OF FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION

At the commencement of the first period of study on the first day of school of each school year in all public schools of the State of Delaware, the First Amendment of the Constitution of the United States of America shall be read or recited by the teacher in charge of such period to the students therein assembled. 14 Del. C. §4101.

The First Amendment of the U. S. Constitution (adopted 1791) Freedom of Religion, Speech, Press, Assembly, and Petition reads as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise therefore; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

4. Handbook for K-12 Education - Page A-9

#### 6. PERIOD OF SILENCE

During the initial period of study on each school day all students in the public schools in Delaware may be granted a brief period of silence, not to exceed two minutes in duration, to be used according to the dictates of the individual conscience of each student. During that period of silence no other activities shall take place. 14 Del. C. §4101A(b). (State Board Approved August 1985)

5. Handbook for K-12 Education - Page A-9

#### 7. SALUTE TO THE FLAG AND PLEDGE OF ALLEGIANCE

a. In the opening exercises of every free public school each morning, the teachers and pupils assembled shall salute and pledge allegiance to the American flag as follows: "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all." 14 Del. C. §4105.

b. An Attorney General's opinion (9/26/74, #113) ruled that any attempt to require participation in flag salute by teachers or students violates their rights to free

speech and is therefore unconstitutional.

6. Handbook for K-12 Education - Pages A-18 to A-21

1. PUPIL UNITS

a. "Units" or "unit of pupils" is defined according to this schedule of number of pupils for elementary schools:

Beginning July 1, 1984

Grades 1 - 3	19 students per unit
Grades 4 - 6	20 students per unit

In grades 7 through 12, the unit, except for the vocational-technical unit, is defined as 20 pupils. A major fraction shall be considered a unit and shall be considered any fraction greater than one-half of the total number of pupils authorized per unit for a given year. (See Page E-7 for computing the Vocational-Technical unit):

In the case of kindergarten, "unit" or "unit of pupils" is defined as 40 pupils (as of July 1980):

Kindergarten pupils may be enrolled for one-half school days in groups approximating one-half the unit authorized, thus providing that each "unit" represents two instructional groups within the unit authorized. A major fraction shall be considered a unit and shall consist of any fraction greater than one-half of the unit authorized.

The State Board of Education shall make uniform rules relative to the administration of kindergarten in the public school districts of the State in accordance with this Title.

b. Number of Units in a School District

The number of units to be used in determining state financial support in each school district shall be calculated by the State Board of Education each year in accordance with the procedures specified in this section:

(1) The number of units shall be calculated based upon the total enrollment of pupils in each school district as of the last school day of September. The number of units so determined shall be known as the "actual unit count."

(2) The actual unit count as determined in subdivision (1) of this section shall be categorized: kindergarten, elementary (grades 1-6), secondary (grades 7-12), net vocational (vocational units less the vocational deduct), and special education, in accordance with the definitions contained in this Title. Each of these categories of units in each school district shall be multiplied by 93%.

The product of this multiplication for each category shall be known as the "guaranteed unit count."

(3) The Department of Education shall annually (after September 30) certify and report the number of units required by §1710 of this Title, by certifying for each category of unit specified in subdivision (2) of this section

whichever is the greater of the following:

- (a) the actual unit count for the current school year; or
- (b) the guaranteed unit count calculated for the preceding year.

The implementation of this subdivision shall be subject to a specific annual appropriation in the annual Appropriations Act. In the event that no appropriation is made, the State Board of Education shall certify and report the actual count.

(4) A school district which experiences an enrollment growth during the school year, but after the actual unit count has been certified and reported, may at its option participate in an "optional unit count" on the first school day of January. The "optional unit count" shall be the nearest whole number computed by multiplying the total actual unit count, as specified in subdivision (1) of this section, by one less than the ratio of the total district enrollment on the first school day in January to the total district enrollment on the last school day in September.

(5) The Department of Education shall annually (after January 1) certify and report the "optional unit count" to the State Budget Commission. School districts shall qualify only for the following state financial support for each unit generated by the optional unit count:

(a) A Division I allocation for a teacher paid in accordance with §1305 of this Title for a period of 92 days, or a Division I allocation for two class aides paid in accordance with §1324 of this Title for a period of 92 days.

(b) The state-paid other employment costs, for a teacher or two aides, specified in 29 Del. C. §6340.

(c) One-half the Division II appropriation per unit specified in the annual Appropriations Act.

The implementation of this subdivision shall be subject to a specific annual appropriation in the annual Appropriations Act.

e. Unit of Pupils For Exceptional Children

In the cases of exceptional children the following conditions for the calculations of the number of units shall prevail:

(1) Classes for the educable mentally handicapped, one unit for fifteen children;

(2) Classes for the trainable mentally handicapped and severely mentally handicapped, one unit for six children;

(3) Classes for students with serious emotional disturbances, one unit for ten children;

(4) Classes for the partially sighted, one unit for ten children, except that even though the pupil count may be less than otherwise required by this chapter, there

shall be a minimum of one class for the partially sighted in each county;

(5) ~~Classes for the physically impaired, one unit for six children;~~

(6) ~~Classes for autistic children, one unit for four children;~~

(7) ~~When classes for the blind are established as approved by the State Board of Education and the Delaware Commission for the Blind, the unit for classes for the blind shall be eight;~~

(8) ~~When classes for the deaf/blind are established as approved by the State Board of Education, the unit for these classes shall be four;~~

(9) ~~For those children in the classification designated as having "learning disabilities" the unit shall be eight;~~

(10) ~~For a person identified as an "intensive learning center pupil" and assigned to an intensive learning center approved by the State Board of Education, the unit shall be 8.6; and~~

(11) ~~A major fraction shall be considered a unit and shall consist of any fraction greater than one-half. The number of children mentioned in these paragraphs shall not be counted in any other calculation of units. 14 Del. C. §1703.~~

## DEPARTMENT OF EDUCATION

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

BEFORE THE DEPARTMENT OF EDUCATION  
OF THE STATE OF DELAWARE  
REGULATORY IMPLEMENTING ORDER

### GUIDELINES FOR THE APPROVAL OF SCHOOL IMPROVEMENT GRANTS

#### I. SUMMARY OF THE EVIDENCE AND INFORMATION SUBMITTED

The Guidelines for Approval of School Improvement Grants are being recommended for adoption as regulation. The Delaware Code directs the Department of Education to adopt guidelines for the approval of school improvement grants. The Del. C., Title 14, Chapter 8, Section 807, requires that when the principal of an eligible school submits a request for a school improvement grant the request should include the information identified in the Guidelines for Approval of School Improvement Grants as adopted by the Department of Education. Notice of the proposed regulations was published in the News Journal and the Delaware State

News on January 12, 1998, in the form hereto attached as Exhibit A. The notice invited written comments and none were received.

#### II. FINDINGS OF FACT

The Secretary finds that this regulation is necessary because the Delaware Code directed the Department to adopt such Guidelines.

#### III. DECISION TO ADOPT REGULATIONS

For the foregoing reason, the Secretary concludes that the proposed regulation is necessary to meet the requirements of the Delaware Code. Therefore, pursuant to 14 Del. C., Section 122, and Chapter 8, Section 806, the regulation attached hereto as Exhibit B is hereby adopted. Pursuant to the provisions of 14 Del. C., Section 122(e), the regulation hereby adopted 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 the regulation adopted hereby shall be in the form attached hereto as Exhibit B, and said regulation shall be cited in the Handbook for K-12 Education.

#### V. EFFECTIVE DATE OF THE ORDER

The actions herein above referred to were taken by the Secretary pursuant to 14 Del. C., Section 122, and Chapter 8, Section 806, in open session at the State Board's regularly scheduled meeting on February 19, 1998. The effective date of this Order shall be ten days from the date this order is published in the Delaware Register of Regulations.

**IT IS SO ORDERED** this 19th day of February, 1998.

Dr. Iris T. Metts  
Secretary of Education

Consented to this 19<sup>th</sup> day of February, 1998.

#### STATE BOARD OF EDUCATION

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**Guidelines for Approval of School Improvement Grants**

A school that has an approved shared decision-making transition plan as specified in Delaware Code, Title 14, Chapter 8, Section 806, may apply for a school improvement implementation grant. To apply for a grant, the principal of the eligible school should submit a letter of request to the Office of the Secretary of Education, Delaware Department of Education, P. O. Box 1402, Townsend Building, Dover, DE 19903. Requests should include the following information:

1. Evidence that the local board of education has adopted the school's transition plan; and
2. The school improvement plan containing the following components:
  - Comprehensive school improvement goals tied to state and local academic performance standards and strategies to achieve these and other goals identified by the school, including staff development and parental involvement;
    - A description of the rationale for the proposed governance structure, stating how and why the governance process should improve decision-making and support continuous improvement in teaching and student learning;
    - Evidence of review by the broader school community with agreement that the school improvement plan is consistent with the school district plan and evidence that the local board of education has formally adopted the school's improvement plan;
    - A proposed budget that explains the use of resources allocated to the school to support strategies for achieving the school improvement goals;
      - The structural changes or procedures for providing the necessary time and skill-building to support shared decision-making and continuous improvement in teaching and student learning;
      - The assessment and evaluation process that the school will use to measure its progress toward achieving its stated goals;
      - A proposed timeline for phasing-in the school improvement plan; and
      - A proposed budget for the use of the school improvement grant.

A school with an approved application shall be eligible for a school improvement grant for the following (3) years as provided in the annual appropriations act. Subsequent applications may be made only after the review and

evaluation of the school improvement plan required by Delaware Code, Title 14, Chapter 8, Section 808 is completed and the results of such are included in the school's application.

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**DEPARTMENT OF HEALTH & SOCIAL SERVICES**

Statutory Authority: 16 Delaware Code, Section 122(c)(3) (16 **Del.C.** 122(c)(3))

**IN THE MATTER OF:**

**REVISION OF FOOD STAMP REGULATIONS**

**NATURE OF THE PROCEEDINGS:**

Delaware Health and Social Services has advertised for public comment the proposed revision of certain Food Stamp regulations contained in Public Law 104-193, Section 403, 8 USC 1613, the Mickey Leland Childhood Hunger Relief Act, the Food, Agriculture, Conservation, and Trade Act Amendments of 1991, Public Law 104-204, Title 38, USC, and DSSM Sections 4006 and 4012.

**NATURE OF PROPOSED REVISIONS:**

4006 Excluded Income

The following kinds of income are disregarded in determining financial eligibility and grant amounts in AFDC and GA:

- The value of USDA donated foods.
- The value of food stamps.
- Foster care payments made on behalf of foster children residing in the home.
  - Payments made directly to a third party on behalf of a recipient.

**EXAMPLE:** A friend pays a recipient's electric bill. The payment is made directly to the electric company. This payment is not considered as income to the assistance unit.

- Earnings received by children under the Summer Youth Program of the Job Training Partnership Act of 1982 for a period not to exceed six (6) months.
  - A cash payment made to the AFDC unit responsible for household bills by a non-unit member for his or her share of the common household expenses.
  - Any bona fide loan including loans for current

living expenses. The following criteria must be met to ensure that the loan is bona fide:

1. Written agreement between the client and the individual or establishment engaged in the business of making loans to repay the money within a specified time.
2. If the loan is obtained from an individual or establishment not normally engaged in the business of making loans, obtain one of the following:
  - a. Borrower's acknowledgement of obligation to repay; or
  - b. Borrower's expressed intent to repay either by pledging real or personal property or anticipated income; or
  - c. A written statement detailing borrower's plans to repay the loan when future anticipated income is received.

Money received in the form of a non-recurring lump sum payment is excluded as a resource in the month received and counted as a resource in subsequent months, unless specifically excluded from consideration as a resource by other federal law or regulations.

#### 4012 Lump Sums

A period of ineligibility results when a member of an AFDC assistance unit receives non-recurring lump sum income that exceeds the State standard of need after deducting applicable disregards. To determine the number of months the period of ineligibility covers:

1. Add the lump sum plus other income budgeted in the month the lump sum was received; and
2. Divide the sum by the State standard of need for the family size. (The family size includes all persons whose needs are taken into account in determining eligibility and the amount of the grant.)

Income left from the calculation is income in the first month following the period of ineligibility. Ineligibility begins the month the lump sum is received. Assistance paid to the unit in the month the lump sum is received is an overpayment and must be recovered. Examples of lump sums include, but are not limited to, gifts, lottery winnings, inheritances, and personal injury claims. Income tax refunds are exempt from the lump sum provisions and are treated as available resources.

EXAMPLE: An AFDC family of four receives a \$2,000 lump sum on May 25th. The family has \$150 of budgetable income in the month that the lump sum is received.

\$2,000	— lump sum
+150	— other income
\$2,150	— total income

~~\$2,150 divided by \$407 (AFDC standard for four people) = five with \$28 remaining.~~

~~This family is ineligible for five months. May is the first month of ineligibility caused by receipt of a lump sum. A \$257 overpayment exists for May. The remaining \$28 will be budgeted as unearned income in the month following the period of ineligibility.~~

~~The family applies in October and the family has no income.~~

~~\$407 Standard of need for a family of four  
-28 Remaining income from the lump sum  
\$379 Maximum grant for October~~

#### 4012.1 Lump sums - shortening the period of ineligibility

The period of ineligibility that results from receipt of lump sum income can be shortened if:

1. The applicable standard of need is increased by agency policy. To determine the remaining period of ineligibility, subtract the amount that equals the original standard of need multiplied by the number of months completed in the period of ineligibility from the total lump sum.

Divide the remainder by the increased standard.

EXAMPLE: Total lump sum — \$1,500  
Original Standard — \$265  
Increased Standard — \$270

Number of months completed - 4

$\$265 \times 4 = \$1060$  —  $\$1,500 - \$1060 = \$440$   
 $\$440$  divided by  $\$270 = 1$  with  $\$170$  remainder

The remaining period of ineligibility is one (1) month; \$170 is counted as unearned income in the first month following the period of ineligibility.

- 2) The lump sum is paid to a child and held in an irrevocable trust established by a court of law until the child is 18. In this case no period of ineligibility is established.

NOTE: A trust established after the lump sum is received by the individual is treated as a lump sum.

- 3) The lump sum is used to pay for medical expenses of a member of the assistance unit. To qualify medical expenses must be:

- or
- a. ~~expenses that are covered by Medicaid,~~ 9806);
  - b. ~~expenses for psychiatric treatment~~

~~These expenses are used to offset the amount of the lump sum. Verification that the expenses were incurred and paid is required.~~

#### 4012.2 Lump sum ineligibility and new unit members

~~A person who is not a member of the unit when the lump sum is received, but later lives in the home with the ineligible family, is not affected by the period of ineligibility. This person may receive assistance if otherwise eligible.~~

EXAMPLE: ~~A woman and three of her children receive AFDC. In June they receive lump sum income and are found ineligible for 12 months. In August, the woman gives birth to a child. This child is determined eligible for AFDC and can receive payments. The mother is made payee for the grant.~~

~~To determine the grant amount for the new member, first determine the standard of need for the disqualified family. Deduct this standard from the household's gross income. The remainder applies as unearned income to the needs of the new member. In the above example if the family's income is \$500, the child will receive a monthly grant of \$108.~~

~~\$500 -- gross income  
-407 -- AFDC standard of need  
\$ 93 -- Income applied to the new member's needs~~

~~\$201 -- standard of need  
-93 -- income  
\$108 -- grant~~

#### 4012.3 Personal injury settlements and lump sums

~~When a client has been injured due to the negligence of a third party and has received medical assistance under Title XIX (Medicaid) as a result of that injury, Title XIX has a prior claim on any settlement that is made for medical care costs.~~

~~When a settlement has been made, any amount not subject to a prior claim by Title XIX will be treated as a lump sum. (See DSSM Section 4012.)~~

#### 9020.4 Exceptions from notice

Do not provide individual notices of adverse action when:

- 1) The State initiates a mass change (see DSSM

2) The Division determines, based on reliable information, that all members of a household have died or that the household has moved from the project area; or DSS mail has been returned by the post office indicating no known forwarding address;

#### 9030.1 Citizens and Qualified Aliens

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

4. Aliens residing in the U.S. before August 22, 1996, who are lawfully admitted for permanent residence and who have worked 40 qualifying quarters of coverage under Title II of the Social Security Act. Beginning January 1, 1997, any quarter in which the alien received any Federal means-tested benefits does not count as a qualifying quarter.

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

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

#### 9210.2 Obtaining SSN's for Food Stamp Household Members

If the household is unable to provide proof of application for a SSN for a newborn, the household must provide the SSN or proof of application at its next recertification or within 6 months following the month the baby is born, whichever is later. If the household is unable to provide a SSN or proof of application at its next recertification within 6 months following the baby's birth, DSS shall determine if the good cause provisions of DSSM 9210.4 apply.

#### 9314.5 Special procedures for expediting service

2) Social Security Numbers - Those household members unable to provide the required SSN's or who do not have one prior to the second full month of participation will be allowed to continue to participate only if they satisfy the good cause requirements with respect to SSN's specified in DSSM 9210, except that households with a newborn may have up to six months following the month the baby was born to provide an SSN or proof of application for the newborn.

#### **9404 Resources Excluded For Food Stamp**

**Purposes**

In determining the resources of a household, only the following will be excluded:

2. Household goods, personal effects, the cash value of life insurance policies, one burial plot per household member, and the value of one bona fide funeral agreement per household member, provided that the agreement does not exceed \$1,500 in equity value. If the equity value of the funeral agreement exceeds \$1,500, the value above \$1,500 is counted as a resource. The cash value of pension plans or funds will be excluded, except that Keogh plans which involve no contractual relationship with individuals who are not household members and individual retirement accounts (IRA's) will not be excluded.

19. Allowances paid to children of Vietnam veterans who are born with spina bifida are excluded from income and resources for food stamp purposes. (P.L. 104-204). These monthly allowances (\$200, \$700, or \$1,200) are based on the degree of disability suffered by the child.

**9503 Earned Income**

6. Educational assistance which has a work requirement (such as work study, assistantship or fellowship with a work requirement) in excess of the amount excluded under DSSM 9506).

**9504 Unearned Income**

Unearned income includes, but is not limited to:

4. Scholarships, education grants, deferred payment loans for educational benefits, veteran's educational benefits and the like, other than educational assistance with a work requirement, in excess of amount excluded.

**9506 Income Exclusions**

C. Educational assistance, including grants, scholarships, fellowships, work study, educational loans on which payment is deferred, veterans' educational benefits and the like.

To be excluded, the educational assistance listed above must be:

A. Awarded to a household member enrolled at a:

1. Recognized institution of post-secondary education,
2. School for the handicapped,
3. Vocational education program,

4. Vocational or technical school, or
5. Program that provides for obtaining a secondary school diploma or the equivalent;

Means any public or private educational institution which normally requires a high school diploma or equivalency certificate for enrollment or admits persons who are beyond the age of compulsory school attendance for that State. The institution must be authorized to provide an educational program beyond secondary education or provides a program of training to prepare students for gainful employment, including correspondence schools at that level.

B. Used for or identified (earmarked) by the institution, school, program, or other grantor for the following allowable expenses:

1. Tuition,
2. Mandatory school fees, including the rental or purchase of any equipment, material, and supplies related to the pursuit of the course of study involved,
3. Books,
4. Supplies,
5. Transportation,
6. Miscellaneous personal expenses, other than the normal living expenses of room and board, of the student incidental to attending a school, institution, or program,
7. Dependent care (amounts excluded cannot be excluded under the income dependent care deduction under DSSM 9507), and
8. Origination fees and insurance premiums on educational loans.

Exclusions based on use for the allowable expenses listed above must be incurred or anticipated for the period the educational income is intended to cover regardless of when the educational income is actually received. If a student uses other income sources to pay for allowable educational expenses in months before the educational income is received, the exclusions to cover the expenses shall be allowed when the educational income is received. When the amounts used for allowable expenses are more than amounts earmarked by the institution, school, program or other grantor, an exclusion shall be allowed for amounts used over the earmarked amounts. Exclusions based on use shall be subtracted from unearned educational income first when possible, and the remainder, if any, shall be excluded from earned educational income.

An individual's total educational income exclusions cannot exceed that individual's total educational income received.



D. All loans, including loans from private individuals as well as commercial institutions, other than educational loans on which repayment is deferred. Educational loans on which repayment is deferred shall be excluded according to DSSM 9506 C. A loan on which repayment must begin within 60 days after receipt of the loan shall not be considered a deferred repayment loan.

E. No portion of any educational assistance that is provided for normal living expenses (room and board) shall be considered a reimbursement excludable under this section.

24. Allowances paid to children of Vietnam veterans who are born with spina bifida are excluded from income and resources for food stamp purposes (P.L.104-204). These monthly allowances (\$200, \$700, or \$1,200) are based on the degree of disability suffered by the child.

### **9507 Income Deductions**

#### Standard Utility Allowances (SUA)

There are two standard utility allowances. The basic SUA is for households that pay for costs for a major utility, such as electricity or cooking fuels, which includes cooling costs but not heat costs. The heat SUA is for households with heating costs. Households eligible to use a SUA are required to use the appropriate standard utility allowance when they have costs for a major utility or heating.

The two annualized standard utility allowances are as follows:

- : Basic SUA is \$164 per month.
- : Heat SUA is \$239 per month.

### **9615 Certification Periods**

Households eligible for the child support deduction shall have the following certification periods:

Households with no record of regular child support payments or payments of arrearages shall be certified for no more than 3 months.

Households with a record of regular child support payments or payments of arrearages shall be certified for no more than six months.

### **9709 Failure to comply with another assistance program's requirements**

Do not increase food stamp benefits when a household's benefits received under another means-tested Federal, State, or local welfare or public assistance

program (such as but not limited to ABC, GA, or SSI) have been decreased (reduced, suspended, or terminated) due to ~~an intentional~~ failure to comply with a requirement of the program that imposed the benefit decrease. This does not apply to food stamp work sanctions under DSSM 9203.

### FINDING OF FACT

It was determined that no written materials or suggestions had been received from any individual or the public. The Department finds these changes should be made in the best interest of the general public of the State of Delaware.

THEREFORE, IT IS ORDERED, that the proposed revisions to the regulations are adopted and shall become effective 10 days after publication in the Register of Regulations.

1-21-98

GREGG C. SYLVESTER, MD  
SECRETARY

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**DEPARTMENT OF HEALTH  
AND SOCIAL SERVICES**  
**DIVISION OF SERVICES FOR AGING AND ADULTS**  
WITH **PHYSICAL DISABILITIES**  
Statutory Authority: 11 Delaware Code,  
Section 8564(e) (11Del.C. 8564(e))

Order of Rule Adoption

Statutory Authority: 11 Delaware Code, Section 8564  
(11 Del. C. 8564)

**Before Delaware Health and Social Services Regarding  
Rules for the Adult Abuse Registry**

Pursuant to 11 Delaware Code, Section 8564, Delaware Health and Social Services hereby issues this order promulgating rules for the Adult Abuse Registry. Following notice and public hearings held on January 21 and 22, 1998, on the proposed rules, the Department makes the following findings and conclusion:

### Summary of Evidence and Information

Proposed Regulations describing the use of the adult abuse registry and administrative hearing procedures were proposed by Delaware Health and Social Services. An

announcement of public hearing was made in the Delaware Register of Regulations, Volume 1, Issue 7, on Thursday January 1, 1998. Public Hearings were held on January 21, 1998 at Buena Vista, New Castle, DE and on January 22, 1998 at the Milford State Service Center, Milford, DE. The report of the hearing officer has been received by the Secretary. One oral comment and one written comment were received.

#### Findings of Fact

The proposed regulations were properly advertised as required by Delaware Code. The public was afforded an opportunity to ask questions and make oral written comment. The public is supportive of adopting this regulation. There was no opposition. The written comment received from the Governors Advisory Council for Exceptional Citizens to include a reasonable timeframe within which the criminal record check must be conducted has been addressed through agency policy.

#### Conclusions

The proposed rules were promulgated by the Department in accord with its statutory duties and authority as set forth in 11 Delaware Code, Section 8564.

The Department has received and considered public comment.

These rules are hereby adopted with an effective date of March 10, 1998.

Gregg C. Sylvester, MD  
Secretary  
Delaware Health and Social Services

February 15, 1998

### DELAWARE HEALTH AND SOCIAL SERVICES REGULATIONS GOVERNING THE ADULT ABUSE REGISTRY

#### Section 1: Definitions

(A) "Adult Abuse" means:

(1) Physical abuse including the intentional and unnecessary infliction of pain or injury to an infirm adult or the threat thereof. This includes, but is not limited to, hitting, kicking, pinching, slapping, pulling hair, or any sexual contact, or the threat of any of the above acts.

(2) Emotional abuse including, but not limited to:

- (a) Ridiculing or demeaning an infirm adult.  
(b) Making derogatory remarks to an infirm

adult.

- (c) Cursing directed towards an infirm adult.  
(d) Threatening retaliation, directly or

indirectly

(3) Mistreatment including the inappropriate use of medications, isolation or physical or chemical restraints on or of an infirm adult.

(4) Neglect including:

(a) Intentional lack of attention to physical needs of the infirm adult including, but not limited to, toileting, bathing, meals and safety.

(b) Intentional failure to report health problems or changes in health problems or changes in health condition of an infirm adult to an immediate supervisor, doctor or nurse.

(c) Intentional failure to carry out a prescribed treatment plan for an infirm adult.

(5) Misappropriation of property including the theft of money or property from the infirm adult, use of money or property without permission of the infirm adult or guardian, and mishandling of money or property belonging to the infirm adult.

(B) "Substantiated Abuse" means that, weighing the facts and circumstances, a reasonable person has concluded that more likely than not the identified individual has committed adult abuse.

(C) "Person Seeking Employment" means any person applying for employment in a health care facility or child care facility that affords direct access to persons receiving care at such a facility, or a person applying for licensure to operate a child care facility.

(D) "Health Care Facility" means any custodial or residential facility where health, nutritional or personal care is provided for infirm adults, including nursing homes, hospitals, home health care agencies, and adult day care facilities.

(E) "Child Care Facility" means any child care facility which is required to be licensed by the Department of Services for Children, Youth and Their Families.

(F) "direct access" means the opportunity to have personal contact with persons receiving care during the course of one's assigned duties.

(G) "Infirm adult" means any person 18 years of age or over who is physically or mentally impaired, either permanently or temporarily.

(H) "proposed concern" refers to a temporary classification used until the final determination is made.

(I) "Department" means the Department of Health and Social Services.

**Section 2: Use of Registry**

(A) No employer who operates a health care facility or child care facility shall hire any person seeking employment without requesting and receiving an Adult Abuse Registry check for such person.

(1) Any employer who is required to request an Adult Abuse Registry check shall obtain a statement signed by the person seeking employment wherein the person authorizes a full release for the employer to obtain the information provided pursuant to such a check.

(2) The employer shall call the Adult Abuse Registry, provide the name and social security number of the person seeking employment, and will be informed of any information contained in the registry.

(B) When exigent circumstances exist which require an employer to fill a position in order to maintain the required or desired level of service, the employer may hire a person seeking employment on a conditional basis after the employer has requested an Adult Abuse Registry check.

(1) The employment of the person shall be conditional and contingent upon receipt of the Adult Abuse Registry check by the employer.

(2) The person shall be informed in writing, and shall acknowledge in writing, that his or her employment is conditional, and contingent upon receipt of the Adult Abuse Registry check.

**Section 3: Investigation of Adult Abuse.**

(A) The Department shall investigate any individual against whom an allegation of adult abuse has been made.

(B) If the investigator determines preliminarily that the facts and circumstances conclude that more likely than not the individual has committed abuse or neglect, the individual's name shall be placed on the Adult Abuse Registry with a finding of "Proposed Concern".

**Section 4: Administrative Hearings**

(A) Individuals against whom an allegation is preliminarily substantiated shall be notified in writing of the intent to place their name on the Adult Abuse Registry with a finding of "Substantiated Abuse" and shall be offered a right to an administrative hearing. Information contained in the finding of substantiated abuse shall consist of:

- (1) The date of the incident
- (2) The type of facility where the incident occurred
- (3) A brief description of the incident
- (4) Length of time the finding remains on the Abuse

**Registry**

(B) Individuals must request in writing an administrative hearing within 30 days of the date of the notice that a finding of abuse has been preliminarily substantiated.

(C) Individuals who fail to request an administrative hearing within 30 days shall have their name and information regarding the incident changed from a finding of "Proposed Concern" to a finding of "Substantiated Abuse" on the Adult Abuse Registry 30 days after the date of the notice.

(D) Individuals who have entered a plea or who have been convicted by a court of law of adult abuse, shall not have the right to an administrative hearing. Their name and information regarding the incident shall be entered directly to the Adult Abuse Registry.

(E) The Department shall make a scheduling decision within 10 days of receipt of a request for an administrative hearing by an individual who has received notice of a preliminary finding of substantiated abuse.

(1) An individual requesting an administrative hearing shall be entitled to a statement describing the incident, the date and location of the incident, and the name of the victim.

(2) The individual shall be afforded an opportunity to appear with or without an attorney, submit documentary evidence, present witnesses, and question any witness the Department presents.

(3) If, at the conclusion of the hearing, the hearing officer concludes that, weighing the facts and circumstances, more likely than not, the identified individual has committed adult abuse, a notice of "substantiation" shall be placed on the registry.

(4) The hearing officer shall render a written decision and will notify the individual and the Office of the Ombudsman of the decision. The notice will specify the reasons for the decision and, if the finding is substantiated, the length of time the finding of substantiated abuse shall remain on the registry.

(5) The decision of the hearing officer is final.

**Section 5: Length of time on the Abuse Registry**

The length of time on the Abuse Registry shall be no less than five years and may be permanent. The length of time shall be based on the actual injury or risk of injury to the infirm adult and whether there exists a pattern of adult abuse. Notwithstanding the above, the length of time on the registry may be less than five years if there is evidence of mitigating circumstances indicating that adult abuse by the individual was a singular event and not likely to reoccur.

Section 6: Registry of Nurse Aides

The names of registrants with findings of abuse, neglect, or misappropriation entered on the Registry of Nurse Aides created pursuant to 42 CFR § 483 shall be entered into the Adult Abuse Registry with a finding of substantiated abuse. The finding shall remain on the Adult Abuse Registry for so long as the finding remains on the Registry of Nurse Aides. There shall be no right of appeal for findings entered on the Adult Abuse Registry under this section.

**DEPARTMENT OF INSURANCE**

Statutory Authority: 18 Delaware Code,  
Section 311 & Chapter 24  
(18 Del.C. 311 & Chapter 24)

BEFORE THE INSURANCE COMMISSIONER  
OF THE STATE OF DELAWARE

IN THE MATTER OF:

**THE ADOPTION OF PROPOSED | Docket No. 97-39**  
**DEPARTMENT OF INSURANCE |**  
**REGULATION NUMBER 75 |**

FINAL ORDER AND DECISION

WHEREAS, on November 1, 1997, the Department caused to have published in the *Register of Regulations* a proposal to adopt Regulation 75; and

WHEREAS, in accordance with 29 Del. C. Chapter 101 and 18 Del. C. § 5003, a hearing was held before a hearing officer, Fred A. Townsend, III, Deputy Insurance Commissioner, on December 1, 1997; and

WHEREAS, the hearing officer issued his Proposed Order and Recommendations on February 2, 1998; and

WHEREAS, the findings of fact and conclusions of law contained in the Proposed Order appear well reasoned and amply supported by the summary of evidence contained therein; and

WHEREAS, the hearing officer made only two non-substantive changes to the form of the proposed Regulation as noticed in the *Register*;

NOW THEREFORE IT IS ORDERED, the summary of evidence, findings of fact and conclusions of law contained in the hearing officer's Proposed Order and Recommendations (attached hereto as exhibit "A"), are incorporated by reference and adopted herein in their entirety.

IT IS FURTHER ORDERED, that Regulation 75 be adopted in the form affixed to the hearing officer's Proposed Order and Recommendation, and as attached hereto as exhibit "B".

For the reasons set forth above, Regulation 75 is herein *adopted*, effective March 15, 1998.

SO ORDERED this 9<sup>th</sup> day of February, 1998.

Donna Lee H. Williams  
Insurance Commissioner

BEFORE THE INSURANCE COMMISSIONER  
OF THE STATE OF DELAWARE

IN THE MATTER OF:

THE ADOPTION OF PROPOSED | Docket No. 97-39  
DEPARTMENT OF INSURANCE |  
REGULATION NUMBER 75 |

PROPOSED ORDER AND RECOMMENDATIONS

Regulation 75 (proposed) would require an insurance company, making a payment to a third party claimant, to send notification to that third party claimant when the payment is transmitted to the claimant's attorney or other representative. The purpose of this regulation is to help prevent mishandling of funds by the claimant's representative.

On November 1, 1997, the regulation was published in the Register of Regulations in accordance with 29 Del. C. chapters 11 and 101. Also in accordance with 29 Del. C. chapter 101, a hearing was held on December 1, 1997 before this hearing officer, and the record left open for an additional 10 days for the submission of additional exhibits by interested parties. The following is my Proposed Order and Recommendations regarding the adoption of Regulation 75 in the form attached hereto as Exhibit "A".

Present at the hearing on December 1<sup>st</sup> was W. Laird Stabler, Esquire, of Potter, Anderson & Corroon, representing the State Farm Insurance Companies and the American Alliance of Insurers. Also present was Beverly Sisson, on behalf of BHM Insurance Services.

## I. Summary of the Evidence

The evidence in this matter consists of the oral testimony of Mr. Stabler, as well as five written exhibits submitted by interested parties.

1. Mr. Stabler testified that both of his clients were unopposed to third party notification generally. He expressed their desire that the notice requirement be satisfied by sending a copy of the transmittal letter to the claimant that accompanies the payment forwarded to the claimants' legal representative. Mr. Stabler further testified that State Farm had concerns over the statutory authority underpinning the regulation. State Farm separately submitted a letter to the Department authored by its in-house counsel, John Ashenfelter (admitted into the record as Exhibit 1). This

letter mirrored the comments made by Mr. Stabler regarding the statutory authority of the regulation and the use of what is termed a "carbon copy" of the transmittal letter, and went on to suggest additional language that might allay concerns from the trial bar that the notification would constitute an impermissible communication with a lawyer's client.

2. The Professional Insurance Agents Association submitted a letter (admitted into the record as Exhibit 2) generally in support of the proposed regulation. However, the PIAA questioned whether the regulation would be interpreted to apply to insurance agents who distribute insurance funds to third parties.

3. Victor F. Battaglia, Esquire, as chairman of the Professional Guidance Committee of the Delaware Bar Association, submitted a number of letters in support of the regulation (admitted into the record as Exhibits 3, 4, and 5). In these exhibits, Mr. Battaglia expresses his concern over the continuing incidence of the mishandling of client funds by legal representatives, and cites this regulation as an effective deterrent to such abuse. Mr. Battaglia noted the existence of similar regulations in New York and New Jersey, as well as legislation in Connecticut in support of the need for such regulation in Delaware. Mr. Battaglia also proposed language intended to address concerns of the trial bar regarding third party communications with individuals represented by counsel.

II. Findings of Fact and Conclusions of Law

Based upon the evidence received in this matter, I find that the mishandling or diverting of funds disbursed by insurance companies is a legitimate concern. I further find for the following reasons that the proposed regulation, with two non-substantive revisions, will address these concerns, is properly supported by the Insurance Code, imposes very minimal burdens upon insurance carriers and violates no prohibition against communications with individuals represented by counsel.

The statutory basis underpinning this regulation is sufficient. A "fraudulent insurance act" is defined in 18 *Del. C.* § 2407(a)(2) as, *inter alia*:

for any person to knowingly, by act or omission, with intent to injure, defraud or deceive present any oral or written statement to an insurer in support of a claim for payment pursuant to an insurance policy, containing false or misleading information concerning any fact material to such claim.

An attorney acting on behalf of a third party claimant makes oral or written statements to the insurer as part of settlement negotiations that accompany virtually every such claim. Implicitly or explicitly, the attorney represents to the insurance carrier that he is acting on behalf of the claimant. If

the attorney makes these statements when in fact he intends to divert settlement payments for his own use, he has made a material misrepresentation and has done so with the intent to defraud. A hypothetical fact pattern will illustrate the point: An attorney retained by a third party claimant begins negotiating an insurance claim. He convinces his client that the claim is worth \$100,000.00, all the while knowing the claim is worth substantially more. The attorney convinces the insurer to settle the claim for \$500,000.00 and the payment is forwarded to him. The attorney then forwards \$100,000.00 to his client and keeps the remainder. This attorney has misrepresented his client's position regarding settlement to the insurer, and has further misrepresented his own status as acting in the best interest of his client. These facts are material to the claim and the misrepresentation was performed with the intent to defraud. I find that the attorney's knowledge of the insurer's duty to independently notify the claimant of the settlement amount would deter such misconduct. Concerns stemming from direct communication with the third party claimant appear to spring from Delaware Rule of Professional Conduct 4.2. These concerns are misplaced. Rule 4.2 provides as follows:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by a lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Regulation 75 does not direct lawyers to communicate with other lawyer's clients, rather it directs insurance companies to communicate with the lawyer's client. In recognition of this fact, the parenthetical "(including the insurer's attorney)" should be removed from Section 4, and has been removed from Exhibit "A". The notice required by Regulation 75 is not the kind of communication that would typically come from an insurance company's counsel and is in every case a communication beneficial to the lawyer's client. To the extent the notice did come from the insurer's attorney, the attorney's actions would be protected by the provision of the last phrase of Rule 4.2 stating that a communication is not violative of the rule where required by law, as it would be in the case of Regulation 75. No further change addressing this issue is needed in the text of the regulation.

Section 5 of the regulation prescribes the minimum information that the notice must include. In the interests of minimizing the burden imposed on insurers, the suggestion that a carbon copy of the transmittal letter serve as the notification is reasonable so long as the transmittal contains all of the required information. This change is reflected in additional language made part of Section 5.

III. Recommendation

For the above reasons, it is recommended the Insurance Commissioner adopt Regulation 75 in the form attached.

SO RECOMMENDED, this 2<sup>nd</sup> day of February, 1998.

Fred A. Townsend III  
Deputy Insurance Commissioner

REGULATION NUMBER 75 (PROPOSED)  
WRITTEN NOTICE BY INSURERS OF PAYMENT OF  
THIRD PARTY CLAIMS

Sections:

1. Authority
2. Purpose
3. Scope
4. Requirement of Notice
5. Contents of Notice
6. Causes of Action and Defenses
7. Effective Date

Section 1. Authority

This regulation is adopted by the Insurance Commissioner pursuant to 18 Del.C. § 311 and 18 Del.C. Chapter 24. It is promulgated in accordance with 29 Del.C. Chapter 101.

Section 2. Purpose

The purpose of this regulation is to protect the third party claimant from misuse or mishandling of funds payable under a liability or casualty insurance contract, when those funds are disbursed to the third party claimant's attorney, accountant, agent or other representative.

Section 3. Scope

This regulation will apply to all insurers who make payment in excess of \$5,000.00 to third party claimants under casualty or liability insurance contracts.

Section 4. Requirement of Notice

Upon payment in excess of \$5,000.00 in settlement of or upon judgment on any third party liability or casualty claim and where the claimant is a natural person, the insurer or its representative [~~(including the insurer's attorney)~~] shall mail to the third party claimant written notice of payment at the same time such payment is made to the third party's attorney, accountant, agent or other representative.

Section 5. Contents of Notice

The written notice referred to in Section 4 above shall be mailed to the claimant by regular mail at the claimant's last known address, and shall include at least the following information:

- 1) The amount of the payment;
- 2) The party or parties to whom the instrument is made payable;
- 3) The party to whom the instrument was forwarded; and
- 4) The address of the party to whom the instrument was forwarded.

**[A copy of the transmittal letter forwarded by the insurer to the party receiving the payment may be used as the form of notice to the third party claimant so long as the transmittal letter includes all of the information specified in paragraphs 1) through 4) above.]**

Section 6. Causes of Action and Defenses

Nothing in Sections 4 and 5 above shall create a cause of action for any person or entity, other than the Delaware Insurance Commissioner, against an insurer or its representative based upon a failure to serve such notice, or defective service of such notice. Nothing in Sections 4 and 5 above shall establish a defense for any party to any cause of action based upon a failure by the insurer or its representative to serve such notice, or by the defective service of such notice.

Section 7. Effective Date

This regulation shall become effective March 15, 1998.

Donna Lee H. Williams  
Insurance Commissioner

**DEPARTMENT OF NATURAL  
RESOURCES & ENVIRONMENTAL  
CONTROL****DIVISION OF FISH & WILDLIFE**

Statutory Authority: 7 Delaware Code, Sections  
2701, 1902 (7 Del.C. §1902, 2701)

**ORDER****SUMMARY OF THE EVIDENCE AND  
INFORMATION**

Pursuant to due notice, 1:7 Del. R. 807-811 (January 1, 1998), the Department of Natural Resources and Environmental Control proposed to enact shellfish regulations to define the criteria for eligibility for a horseshoe crab collecting permit; control the times and areas where horseshoe crabs may be harvested; limit the number of horseshoe crabs that may be dredged in one day; define the equipment that may be used to store and/or transport horseshoe crabs and require monthly reporting of the harvest of horseshoe crabs. The Department's goal is to allow a sufficient harvest of horseshoe crabs to sustain the local need for bait in the eel and conch pot fisheries without adversely affecting migratory shorebirds or the supply of horseshoe crabs available to the pharmaceutical industry.

A public hearing was held on January 26, 1998 in Dover, Delaware in front of Charles A. Lesser, Fisheries Administrator for the Department and the Department's designee to receive testimony and evidence. His report is attached and part of this order.

**FINDINGS OF FACT**

The harvest of horseshoe crabs in Delaware was documented as having increased significantly since 1991. Fishery independent trawl surveys document the catch of horseshoe crabs per unit of effort is a declining trend, indicating the horseshoe crab fishery may be fully exploited.

The demand for horseshoe crabs as bait in the eel fishery has not increased significantly. However, the demand for horseshoe crabs in the conch pot fishery has increased significantly and may continue to increase. To meet this increased demand and the resulting economic incentives of the horseshoe crab beach collecting fishery, the number of horseshoe crab collecting permits issued by the Department has increased significantly since 1991.

The migratory shorebirds that stage on the shores of the Delaware Bay are of national significance. Their numbers are alleged to be declining and there is a legitimate concern for their demise. However, many other migratory bird populations also are alleged to be declining due to a variety of known and unknown factors. No evidence was submitted for the record which correlates the numbers of shorebirds relative to the numbers of spawning horseshoe crabs.

No evidence was submitted for the record that documents the relative decline or reason for the decline of shorebirds staging on the shores of Delaware Bay. No evidence was submitted for the record that documents what quantity of horseshoe crabs or their eggs upon which shorebirds feed is required to sustain a given number of shorebirds.

No evidence was submitted for the record that documents the need for additional horseshoe crabs in the local eel and conch fisheries.

Much of the testimony urged a conservative approach to managing the horseshoe crab fishery in lieu of a fishery management plan for horseshoe crabs. Likewise, much of the testimony urged the Division to do nothing to change the horseshoe crab fishery.

**CONCLUSION**

The horseshoe crab fishery should not be expanded, it should be restricted to a more traditional level of participation and harvest that meet the needs of local conch and eel pot fishermen. Until a horseshoe crab fishery management plan is adopted by the Atlantic States Marine Fisheries Commission, additional regulations are required to control the harvest of horseshoe crabs.

Future consideration should be given to authorizing the collecting of horseshoe crabs by conch fishermen for use in their own pots in this State. Consideration also should be given to authorizing a limited number of horseshoe crabs to be harvested by dredge, by commercial eel and conch fishermen and the use of larger vehicles and trailers by traditional seafood dealers to efficiently transport horseshoe crabs.

**ORDER**

It is hereby ordered, this 11th day of February, 1998 that Shellfish Regulations and Amendments thereto for S-51, S-54, S-55, S-56, S-57, S- 58, S-59 and S-60, copies of which are attached hereto, are adopted pursuant to 7 Del. C., § 2701 and are supported by the Department's

findings on the evidence and testimony received. This Order shall become effective on April 1, 1998.

Christophe A.G. Tulou, Secretary  
Department of Natural Resources  
and Environmental Control

Be it adopted by the Department of Natural Resources and Environmental Control the following amendments to Shellfish Regulations No. S-51 and S-54 and new Shellfish Regulations No. S-55, S-56, S-57, S-58, S-59 and S-60.

~~S - 51 SEASONS AND AREA CLOSED TO COLLECTING AND DREDGING TAKING HORSESHOE CRABS~~

~~(a) It shall be unlawful for any person to collect or dredge horseshoe crabs from any state or federal land owned in fee simple or water within one thousand (1000) feet, measured perpendicularly from the mean low waterline, during the period beginning at 12:01 am on May 1 and continuing through midnight, June 7, except authorized persons may collect horseshoe crabs on Wednesdays, Thursdays and Fridays from State owned lands to the east of State Road 89. Provided, however, any person that has been issued a valid scientific collecting permit may collect horseshoe crabs at any time in any area as specified in the permit.~~

~~(b) It shall be unlawful for any person to dredge horseshoe crabs except from one's own leased shellfish grounds or with permission from the owner of leased shellfish grounds in an area of Delaware Bay within the boundaries that delineate leasable shellfish grounds and described as follows:~~

~~Starting at a point on the "East Line" in Delaware at Loran-C coordinates 27314.50/42894.25 and continuing due east to a point at Loran-C coordinates 27294.08/42895.60 and then 27270.80/42852.83 and then continuing southwest to a point at Loran-C coordinates 27279.67/42837.42 and then continuing west southwest to a point at Loran-C coordinates 27281.31/42803.48 and then continuing west to a point at Loran-C coordinates 27280.75/42795.50 and then in a northerly direction on a line 1000 feet offshore, coterminous with the existing shoreline to the point of beginning on the "East Line".~~

~~(a) It shall be unlawful for any person to collect or dredge or attempt to collect or dredge horseshoe crabs from any state or federal lands owned in fee simple or the tidal waters of this state **[channelward of the mean low water line]** during a period beginning at 12:01 a.m. on May 1 and continuing through midnight, June 30, **[next ensuing]** except that **[authorized]** persons **[with valid horseshoe crab collecting permits and eel licenses and their alternates]** may collect horseshoe crabs on~~

~~Tuesdays and Thursdays from state owned lands to the east of state road No. 89 (Port Mahon Road).~~

~~(b) It shall be unlawful for any person to collect or attempt to collect, any horseshoe crabs from any lands not owned by the state or federal government during the period beginning at 12:01 a.m. on May 1 and continuing through midnight, June 30, **[next ensuing]** except that **[authorized]** persons **[with valid horseshoe crab collecting permits and eel licenses and their alternates]** may collect horseshoe crabs on Mondays, Wednesdays and Fridays.~~

~~S-54 POSSESSION LIMIT OF HORSESHOE CRABS, EXCEPTIONS~~

~~(a) Unless otherwise authorized, it shall be unlawful for any person to possess more than six (6) horseshoe crabs, except a person with a validated receipt from a person with a valid horseshoe crab commercial collecting or dredge permit for the number of horseshoe crabs in said person's possession. A receipt shall contain the name, address and signature of the supplier, the date and the number of horseshoe crabs obtained.~~

~~(b) Any person who has been issued a valid commercial eel fishing license by the Department is exempt from the possession limit of six (6) horseshoe crabs, provided said commercial eel fishing licensee has submitted an annual report of his/her previous year's harvest of horseshoe crabs to the Department on forms provided by the Department. Said exemption also applies to a commercial eel fisherman's alternate while the alternate is in the presence of the commercial eel fisherman. Any person who has been issued a commercial eel fishing license (and such person's alternate while in the presence of the licensee) may collect or dredge horseshoe crabs without a horseshoe crab commercial collecting or dredge permit, provided all horseshoe crabs taken are for personal, non-commercial use, as bait for the licensee's eel pots fished in this State.~~

~~(b) Any person who has been issued a valid commercial eel fishing license by the Department or **[his said person's]** alternate while in the presence of the licensee, is exempt from the possession limit of six (6) horseshoe crabs, provided said commercial eel fishing licensee has **[submitted filed]** all required reports of his/**[her]** and his/**[her]** alternate's previous months harvest of horseshoe crabs **[to with]** the Department on forms provided by the Department **[in accordance with S-57]**. Any person who has been issued a commercial eel fishing license and said person's alternate while in the presence of the licensee, may collect horseshoe crabs by hand without a horseshoe crab commercial collecting **[permit]** provided all horseshoe crabs taken are for personal, non-commercial use, as bait for the licensee's eel pots fished in this state.~~



S-55 HORSESHOE CRAB DREDGING RESTRICTIONS

(a) It shall be unlawful for any person to dredge horseshoe crabs ~~[in the area in Delaware Bay designated as leased Shellfish grounds]~~ except ~~[from on]~~ one's own leased shellfish grounds or with permission from the owner of leased shellfish grounds. ~~[in an area of Delaware Bay The area in Delaware Bay designated as leased shellfish grounds is]~~ within the boundaries that delineate leasable shellfish grounds and is described as follows: Starting at a point on the "East Line" in Delaware at Loran-C coordinates 27314.50/42894.25 and continuing due east to a point at Loran-C coordinates 27294.08/42895.60 and then 27270.80/42852.83 and then continuing southwest to a point at Loran-C coordinates 27279.67/42837.42 and then continuing west southwest to a point at Loran-C coordinates 27281.31/42803.48 and then continuing west to a point at Loran-C coordinates 27280.75/42795.50 and then in a northerly direction on a line 1000' offshore, coterminous with the existing shoreline to the point of beginning on the "East Line."

(b) It shall be unlawful for any person, who ~~[uses dredges to take horseshoe crabs operates a vessel and has on board said vessel a dredge of any kind,]~~ to have on board ~~[or]~~ to land more than 1500 horseshoe crabs during any 24 hour period beginning at 12:01 a.m. and continuing through midnight ~~[next ensuing]~~.

(c) It shall be unlawful for any person, ~~[with a dredge of any kind on board a vessel who operates a vessel and has on board said vessel a dredge of any kind, to have or to ]~~ possess on board said vessel any horseshoe crabs at any time during the period beginning at 12:01 a.m. on May 1 and continuing through midnight, June 30 ~~[next ensuing]~~.

S-56 HORSESHOE CRAB SANCTUARIES

(a) All state and federal lands owned in fee simple are horseshoe crab sanctuaries during the period beginning at 12:01 a.m. on May 1 through midnight June 30.

(b) Any private land owner(s) may register ~~[his or ]~~ their land with the Department to be designated as a horseshoe crab sanctuary ~~[for a period to be specified by the land owner(s)].~~

(c) It shall be unlawful to collect any horseshoe crabs at any time from a horseshoe crab sanctuary ~~[except as provided in S-51(a)].~~

S - 57 HORSESHOE CRAB REPORTING REQUIREMENTS

(a) It shall be unlawful for any person who has been issued a ~~[a scientific permit, a beach clean up permit, a]~~ horseshoe crab dredge permit, a horseshoe crab commercial collecting permit or a ~~[person who has been issued a]~~ commercial eel pot license ~~[and collects~~

~~horseshoe crabs for his/her personal use as bait if used to collect horseshoe crabs for personal, non-commercial use]~~ to not file a monthly report ~~[of his/her harvest of horseshoe crabs]~~ with the Department ~~[on forms provided by the Department]~~ on or before the 10th day of the next month. Monthly reports on horseshoe crabs shall be filed for each month whether horseshoe crabs are dredged or collected or not dredged or collected, ~~[and include the harvest by any person or persons authorized by S-54 and S-52 to assist with the collection of horseshoe crabs.].~~ Said forms shall require the reporting of the date, location, sex and number of horseshoe crabs dredged or collected.

(b) Any person who fails to file a completed monthly report with the Department on horseshoe crabs ~~[collected or dredged on the form]~~, on or before the 10th day of the following month shall have his~~[her]~~ ~~horseshoe crab dredge permit, horseshoe crab commercial collecting]~~ permit or authority to collect horseshoe crabs as a commercial eel fisherman, suspended until such time that all delinquent reports are received by the Department.

S - 58 HORSESHOE CRAB CONTAINMENT AND TRANSPORTATION RESTRICTIONS

(a) It shall be unlawful for any person to put, place, contain or cause to be contained any horseshoe crabs in any enclosure, container or facility, other than cold storage or a freezer, that contains more than 300 cubic feet of storage space.

(b) It shall be unlawful for any person to transport or cause to be transported any horseshoe crab in any vehicle or trailer that contains more than 300 cubic feet of storage space.

"S-59 HORSESHOE CRAB COMMERCIAL COLLECTING PERMIT ELIGIBILITY AND RENEWAL REQUIREMENTS

(a) The Department may only issue a horseshoe crab commercial collecting permit to a person who makes application for such a permit in calendar year 1998, and who, prior to July 1, 1997, had applied for and secured from the Department at least 2 valid horseshoe crab commercial collecting permits. Any person holding a horseshoe crab commercial collecting permit ~~[in 1998]~~ may apply for renewal of their horseshoe crab commercial collecting permit by April 1. Failure of any person holding a horseshoe crab commercial collecting permit to apply for renewal of their horseshoe crab commercial collecting permit by April 1, will limit their eligibility to obtain a horseshoe crab commercial collecting permit to the lottery process of subsection (b).

(b) When the total number of horseshoe crab commercial collecting permits drops to 45 or below, as

of April 2 of any year, the Department may schedule a lottery to take place prior to April 30 of that year to allow the total number of horseshoe crab commercial collecting permits to increase to 50."

**[S-60 PROHIBITIONS; SALE OF HORSESHOE CRABS**

(a) **It shall be unlawful for any person who collects or dredges horseshoe crabs, except a person with a valid horseshoe crab commercial collecting permit or a person with a valid horseshoe crab dredge permit, to sell, trade and/or barter or to attempt to sell, trade and /or barter any horseshoe crab.]**

**DEPARTMENT OF STATE**  
**OFFICE OF THE STATE BANKING COMMISSIONER**

Statutory Authority: 5 Delaware Code,  
Section 121(b) (5 Del.C. 121(b))

ORDER ADOPTING NEW REGULATIONS  
5.2111(b).0005, 5.2210(e).0005, 5.2318.0001,  
5.2906(e).0003 AND 5.2111/2210/2906.0006

IT IS HEREBY ORDERED, this 5th day of February, 1998, that new regulations 5.2111(b).0005, 5.2210(e).0005, 5.2318.0001, 5.2906(e).0003 and 5.2111/2210/2906.0006 are adopted as regulations of the State Bank Commissioner. Copies of new regulations 5.2111(b).0005, 5.2210(e).0005, 5.2318.0001, 5.2906(e).0003 and 5.2111/2210/2906.0006 are attached hereto and incorporated herein by reference. The effective date of new regulations 5.2111(b).0005, 5.2210(e).0005, 5.2318.0001, 5.2906(e).0003 and 5.2111/2210/2906.0006 is March 12, 1998. New regulations 5.2111(b).0005, 5.2210(e).0005, 5.2318.0001, 5.2906(e).0003 and 5.2111/2210/2906.0006 are issued by the State Bank Commissioner in accordance with Title 5 of the Delaware Code.

New regulations 5.2111(b).0005, 5.2210(e).0005, 5.2318.0001, 5.2906(e).0003 and 5.2111/2210/2906.0006 are adopted pursuant to the requirements of Chapters 11 and 101 of Title 29 of the Delaware Code, as follows:

1. Notice and the text of proposed new regulations 5.2111(b).0005, 5.2210(e).0005, 5.2318.0001, 5.2906(e).0003 and 5.2111/2210/2906.0006 were published in the January 1, 1998 issue of the Delaware Register of Regulations. The Notice also was published in the News Journal and the Delaware State News on January 12, 1998, and mailed on or before that date to all

persons who had made timely written requests to the Office of the State Bank Commissioner for advance notice of its regulation-making proceedings. The Notice included, among other things, a summary of the proposed new regulations, invited interested persons to submit written comments to the Office of the State Bank Commissioner on or before February 4, 1998, and stated that the proposed new regulations were available for inspection at the Office of the State Bank Commissioner, that copies were available upon request, and that a public hearing would be held on February 4, 1998 at 10:00 a.m. in the Second Floor Cabinet Room in the Townsend Building, 401 Federal Street, Dover, Delaware 19901.

2. Three written comments were received on or before February 4, 1998. With regard to proposed regulation 5.2318.0001, a representative of Western Union Financial Services, Inc. and Integrated Payments Systems, Inc. wrote that it would be "unduly burdensome to require licensees to be responsible for hotel recommendations and travel directions on a prospective basis." With regard to proposed regulations 5.2111(b).0005 and 5.2210(e).0005, a representative of the Delaware State Mortgage Brokers Association wrote to suggest changing the loan volume reporting dates from July 15th to July 31st, and from January 15th to January 31st. The third written comment was withdrawn when its author learned that the proposed new regulations would not apply to banks.

3. A public hearing was held on February 4, 1998 at 10:00 a.m. regarding the proposed new regulations 5.2111(b).0005, 5.2210(e).0005, 5.2318.0001, 5.2906(e).0003 and 5.2111/2210/2906.0006. The State Bank Commissioner, the Deputy Bank Commissioner for Supervisory Affairs, the Administrator of Non-Depository Institutions and Compliance for the Office of the State Bank Commissioner, three representatives of the Delaware State Mortgage Brokers Association, a representative of the Delaware Mortgage Bankers Association and the Court Reporter attended the hearing. No other person attended the hearing. The State Bank Commissioner, the Deputy Bank Commissioner for Supervisory Affairs and the Administrator of Non-Depository Institutions and Compliance for the Office of the State Bank Commissioner summarized the proposed new regulations for the record. The three representatives of the Delaware State Mortgage Brokers Association presented their written comment described above, explaining that the loan volume reporting dates should be extended because more time was needed to compile the required information, and also asked questions about the relationship between licensing and the reporting of Delaware assets under proposed regulation 5.2111/2210/2906.0006, and the required amounts of licensee surety bonds and the reporting of

Delaware loan volume under proposed regulation 5.2111(b).0005 and 5.2210(e).0005. The State Bank Commissioner and the Administrator of Non-Depository Institutions and Compliance for the Office of the State Bank Commissioner responded to these comments. The Delaware Mortgage Bankers Association stated through its representative that it had no objection to the proposed regulations. No other comments were made or received at the hearing on the proposed new regulations.

4. After review and consideration, the State Bank Commissioner concluded that it would be appropriate to extend the reporting dates in proposed new regulations 5.2111(b).0005, 5.2210(e).0005, 5.2318.0001 and 5.2906(e).0003 to allow more time to compile the required information. In addition, the State Bank Commissioner concluded that it would be appropriate to delete from those proposed regulations the requirements relating to hotel recommendations and travel directions. Finally, the State Bank Commissioner concluded that the remaining questions asked at the hearing did not require any other changes to the proposed regulations.

5. Therefore, the State Bank Commissioner decided to modify proposed new regulations 5.2111(b).0005, 5.2210(e).0005, 5.2318.0001 and 5.2906(e).0003 by changing the reporting dates in each of those regulations from July 15 to July 31 and from January 15 to January 31, as suggested, and by deleting the provisions relating to hotel recommendations and travel directions. The State Bank Commissioner determined that those changes were "not substantive" within the meaning of Section 10118(c) of Title 29 of the Delaware Code. Accordingly, the State Bank Commissioner decided to adopt new regulations 5.2111(b).0005, 5.2210(e).0005, 5.2318.0001 and 5.2906(e).0003, as modified. The State Bank Commissioner decided to adopt new regulation 5.2111/2210/2906.0006 as proposed.

Timothy R. McTaggart  
State Bank Commissioner

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Regulation No. 5.2111(b).0005  
Effective Date: March 12, 1998

**Report of Delaware Loan Volume  
(Chapter 21, Title 5 of the Delaware Code)**

This report shall be completed by all institutions licensed under Chapter 21, Title 5 of the Delaware Code and submitted to the Office of the State Bank Commissioner twice each year. The first report is due on or before July **[15 31]** and must contain figures from January 1 through June 30 of the current year. The second report is due on or before January **[15 31]** and must contain figures from January 1 through December 31 of the previous year. **In the event that you fail to provide this information in the period**

**requested, you will be in violation of this regulation. Additionally, an examination will be scheduled, and staff allocated, without respect to the volume of your Delaware business. This may result in additional examination costs to you.**

Licensees with multiple licensed locations, whose loan files are serviced at a consolidated, centralized location, may file a consolidated report. Otherwise, a separate report must be submitted for each licensed location

1. Name of Licensee: \_\_\_\_\_
2. Is this a consolidated report? Yes \_\_\_\_\_ No \_\_\_\_\_
3. License No.: \_\_\_\_\_  
(If consolidated, list all license numbers): \_\_\_\_\_
4. List the address where the loan files are maintained:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**[You will be billed for examiner time (including travel). Therefore, you may reduce your costs by providing complete, reliable and convenient directions that minimize travel time. If your records are maintained out of state and you have not previously provided this office with directions to the location identified above where your loan files are maintained, please provide us with directions. Provide directions for the nearest airport (if air transportation is appropriate) and/or driving directions, and a map of the area to which your directions refer. Please provide a name, telephone number and address of the nearest hotel providing safe and convenient accommodations, and include directions to the hotel as well as to your office. In addition, please provide the name, title, and telephone number of the person responsible for these directions, if that person is different from the examination contact referenced in item 5, below:]**

5. Examination contact person's name, title, phone number and fax number:  
\_\_\_\_\_  
\_\_\_\_\_
6. Please report the Delaware business conducted (number of loans) in each of the following categories:  
Loans Placed, per agreement: \_\_\_\_\_  
Total Dollar Value: \_\_\_\_\_  
Loans Rescinded: \_\_\_\_\_  
Applications Denied: \_\_\_\_\_

I, the undersigned officer, hereby certify that this report is true and correct to the best of my knowledge and belief.

# FINAL REGULATIONS

Date	Signature	Title
	Printed Name	Phone Number

Regulation No.: 5.2210(e).0005  
 Effective Date: March 12, 1998

### Report of Delaware Loan Volume (Chapter 22, Title 5 of the Delaware Code)

This report shall be completed by all institutions licensed under Chapter 22, Title 5 of the Delaware Code and submitted to the Office of the State Bank Commissioner twice each year. The first report is due on or before July **[15 31]** and must contain figures from January 1 through June 30 of the current year. The second report is due on or before January **[15 31]** and must contain figures from January 1 through December 31 of the previous year. **In the event that you fail to provide this information in the period requested, you will be in violation of this regulation. Additionally, an examination will be scheduled, and staff allocated, without respect to the volume of your Delaware business. This may result in additional examination costs to you.**

Licenses with multiple licensed locations, whose loan files are maintained at a consolidated, centralized location, may file a consolidated report. Otherwise, a separate report must be submitted for each licensed location.

1. Name of Licensee: \_\_\_\_\_
2. Is this a consolidated report? Yes \_\_\_ No \_\_\_\_\_
3. License No.: \_\_\_\_\_ (If consolidated, list all license numbers): \_\_\_\_\_
4. List the address where the loan files are maintained:  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

~~[You will be billed for examiner time (including travel). Therefore, you may reduce your costs by providing complete, reliable and convenient directions that minimize travel time. If your records are maintained out of state and you have not previously provided this office with directions to the location identified above where your loan files are maintained, please provide us with directions. Provide directions for the nearest airport (if air transportation is appropriate) and/or driving directions, and a map of the area to which your directions refer. Please provide a name, telephone number and address of the nearest hotel providing safe and convenient accommodations, and include directions~~

~~to the hotel as well as to your office. In addition, please provide the name, title, and telephone number of the person responsible for these directions, if that person is different from the examination contact referenced in item 5, below:]~~

5. Examination contact person's name, title, phone number and fax number:  
 \_\_\_\_\_  
 \_\_\_\_\_

6. Please report the Delaware business conducted (number of loans) in each of the following categories:

Loans Executed:	_____
Total Dollar Value:	_____
Loans Paid-Off at Maturity:	_____
Loans Paid Off Prior to Maturity:	_____
Applications Denied:	_____
Loans in Litigation:	_____
Credit Life Insurance Claims:	_____
Credit A & H Insurance Claims:	_____

I, the undersigned officer, hereby certify that this report is true and correct to the best of my knowledge and belief.

Date	Signature	Title
	Printed Name	Phone Number

Regulation No.: 5.2318.0001  
 Effective Date: March 12, 1998

### Report of Delaware Sale of Checks, Drafts and Money Orders Volume (Chapter 23, Title 5 of the Delaware Code)

This report shall be completed by all institutions licensed under Chapter 23, Title 5 of the Delaware Code and submitted to the Office of the State Bank Commissioner twice each year. The first report is due on or before July **[15 31]** and must contain figures from January 1 through June 30 of the current year. The second report is due on or before January **[15 31]** and must contain figures from January 1 through December 31 of the previous year.

**In the event that you fail to provide this information in the period requested, you will be in violation of this regulation. Additionally, an examination will be scheduled, and staff allocated, without respect to the volume of your Delaware business. This may result in additional examination costs to you.**

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# FINAL REGULATIONS

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1. Name of Licensee: \_\_\_\_\_
2. License No.: \_\_\_\_\_
3. List the address where the books and records are maintained: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

~~[You will be billed for examiner time (including travel). Therefore, you may reduce your costs by providing complete, reliable and convenient directions that minimize travel time. If your records are maintained out of state and you have not previously provided this office with directions to the location identified above where your loan files are maintained, please provide us with directions. Provide directions for the nearest airport (if air transportation is appropriate) and/or driving directions, and a map of the area to which your directions refer. Please provide a name, telephone number and address of the nearest hotel providing safe and convenient accommodations, and include directions to the hotel as well as to your office. In addition, please provide the name, title, and telephone number of the person responsible for these directions, if that person is different from the examination contact referenced in item 4, below:]~~

4. Examination contact person's name, title, phone number and fax number: \_\_\_\_\_  
\_\_\_\_\_

5. Please report the Delaware business conducted in each of the following categories:

Number of travelers checks/cheques sales: \_\_\_\_\_  
Total dollar value: \_\_\_\_\_  
Number of money order sales: \_\_\_\_\_  
Total dollar value: \_\_\_\_\_  
Number of times funds were transmitted: \_\_\_\_\_  
Total dollar value of funds transmitted: \_\_\_\_\_

I, the undersigned officer, hereby certify that this report is true and correct to the best of my knowledge and belief.

_____	_____	_____
Date	Signature	Title
_____	_____	_____
	Printed Name	Phone Number

Regulation No.: 5.2906(e).0003  
Effective Date: March 12, 1998

**Report of Delaware Loan Volume  
Motor Vehicle Installment Contracts  
(Chapter 29, Title 5 of the Delaware Code)**

This report shall be completed by all institutions licensed under Chapter 29, Title 5 of the Delaware Code and submitted to the Office of the State Bank Commissioner twice each year. The first report is due on or before July 15 and must contain figures from January 1 through June 30 of the current year. The second report is due on or before January 15 and must contain figures from January 1 through December 31 of the previous year. **In the event that you fail to provide this information in the period requested, you will be in violation of this regulation. Additionally, an examination will be scheduled, and staff allocated, without respect to the volume of your Delaware business. This may result in additional examination costs to you.**

Licenses with multiple licensed locations, whose retail installment contract files are maintained at a consolidated, centralized location, may file a consolidated report. Otherwise, a separate report must be submitted for each licensed location

1. Name of Licensee: \_\_\_\_\_
2. Is this a consolidated report? Yes\_\_\_ No \_\_\_\_\_
3. License No.: \_\_\_\_\_ (If consolidated, list all license numbers): \_\_\_\_\_
4. List the address where the retail installment contract files are maintained: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

~~[You will be billed for examiner time (including travel). Therefore, you may reduce your costs by providing complete, reliable and convenient directions that minimize travel time. If your records are maintained out of state and you have not previously provided this office with directions to the location identified above where your loan files are maintained, please provide us with directions. Provide directions for the nearest airport (if air transportation is appropriate) and/or driving directions, and a map of the area to which your directions refer. Please provide a name, telephone number and address of the nearest hotel providing safe and convenient accommodations, and include directions to the hotel as well as to your office. In addition, please provide the name, title, and telephone number of the person responsible for these directions, if that person is different from the examination contact referenced in item 5, below:]~~

5. Examination contact person's name, title, phone number and fax number: \_\_\_\_\_  
\_\_\_\_\_

6. Please report the Delaware business conducted (number

of contracts) in each of the following categories:

Contracts Executed: \_\_\_\_\_  
 Total Dollar Value: \_\_\_\_\_  
 Contracts Paid-Off at Maturity: \_\_\_\_\_  
 Contracts Paid Off Prior to Maturity: \_\_\_\_\_  
 Applications Denied: \_\_\_\_\_  
 Contracts in Litigation: \_\_\_\_\_  
 Credit Life Insurance Claims: \_\_\_\_\_  
 Credit A & H Insurance Claims: \_\_\_\_\_

I, the undersigned officer, hereby certify that this report is true and correct to the best of my knowledge and belief.

_____	_____	_____
Date	Signature	Title
_____	_____	_____
	Printed Name	Phone Number

Regulation No.: 5.2111/2210/2906.0006  
 Effective Date: March 12, 1998

### **REPORT OF DELAWARE ASSETS**

This report shall be completed annually by all institutions licensed under Chapters 21, 22, and 29, Title 5 of the Delaware Code. This report must be received by the Office of the State Bank Commissioner no later than April 1st of each year. The figure reported should reflect **DELAWARE** assets only (including the value of any Delaware loans or contracts in your portfolio, any funds deposited in Delaware, and any fixed assets located in Delaware or any other assets allocated to the Delaware operations).

1. Name of Licensee: \_\_\_\_\_  
 2. Address of Principal License: \_\_\_\_\_

3. To whom should we mail the supervisory assessment invoice? Please provide name, title, complete mailing address, telephone number (include area code and extension numbers, if applicable) and fax numbers:  
 \_\_\_\_\_  
 \_\_\_\_\_

4. Total DELAWARE assets as of December 31st of the immediately previous year:  
 \$ \_\_\_\_\_

I, the undersigned officer, hereby certify that this report is true and correct to the best of my knowledge and belief.

_____	_____	_____
Date	Signature	Title
_____	_____	_____
	Printed Name	Phone Number

## **PUBLIC SERVICE COMMISSION**

**IN THE MATTER OF THE  
 DEVELOPMENT OF  
 RULES AND REGULATIONS  
 TO GOVERN THE PROVISION  
 OF TELEPHONE NUMBER  
 PORTABILITY BY  
 TELECOMMUNICATIONS  
 LOCAL EXCHANGE CARRIERS  
 OPENED SEPTEMBER 24, 1996)** | **PSC REGULATION  
 DOCKET NO. 46  
 TRACK ONE**

ORDER NO. 4715

AND NOW, this 3rd day of February, 1998, the Commission, finds, determines, and orders the following:

1. Number portability is the ability of a user of a telecommunications service to retain, at the same location, existing telephone numbers without impairment of service quality when the user switches from one telecommunications carrier to another. 47 U.S.C. §153(30). By PSC Order No. 4308 (Sept. 30, 1996), the Commission opened this two track docket. In the first track, the Commission sought to formulate and adopt rules and regulations to govern the provision of number portability on an interim, or transitional, basis until a long-term database method for number portability is deployed.<sup>1</sup> Under the directives of the Federal Communications Commission, such long term data-base method (operated on a region-wide basis) will be implemented for requested switches in the Wilmington metropolitan area by the end of 1998. In other areas of the State, the long-term method will be available, after January 1, 1999, six months after a specific request is made to the local exchange carrier. 47 C.F.R. §52.23; App. to Part 52, Phase V.

2. The Commission designated a Hearing Examiner to conduct proceedings to allow input from interested parties concerning the rules for interim number portability ("INP") to be proposed by the Commission Staff. Thereafter, Staff proposed a set of rules to govern INP, including a cost recovery mechanism, and the Hearing Examiner held a public hearing on such proposed rules on August 16, 1997. On November 14, 1997, the Hearing Examiner filed his report, recommending the adoption of Staff's proposed rules, as modified in Staff's post-hearing brief.

3. All but one of the parties that had participated in the hearing filed exceptions to the Report. AT&T Communications of Delaware, Inc. ("AT&T"), urged rejection of the portion of the rules which make Remote Call Forwarding ("RCF") the presumptive method of providing transitional portability and which relegate carriers to negotiating or petitioning the Commission to obtain portability by other methods. AT&T asserted that other methods, including two route indexing methods - Route

Indexing-Portability Hub and Directory Number-Route Indexing ("DN-RI") - are currently technically feasible methods and should be included as interim options under the INP rules. Bell Atlantic-Delaware, Inc. ("BA-Del") concurred with adopting RCF as the presumptive INP method but objected to the cost recovery mechanism set forth in the proposed rules. BA-Del argued that the proposed mechanism would result in BA-Del bearing almost all of the costs of providing INP through the RCF method and hence the mechanism was neither competitively neutral nor substantially fair. BA-Del urged that the carriers and customers enjoying the benefits of portability should bear the costs of paying for the interim method. Alternatively, BA-Del suggested that the costs of INP should be allocated in proportion to each carrier's retail communication services revenues in Delaware. Conectiv Communications, Inc. ("Conectiv") did not except to the Hearing Examiner's Report. Finally, MCImetro Access Transmission Services, Inc. ("MCI") also excepted to the use of RCF as the presumptive methodology, arguing that other technically feasible methods currently existed. In addition, MCI contended that the cost recovery mechanism in the proposed Rules should be altered to a scheme under which every carrier would absorb its own costs of deploying the various INP methods.

4. The Commission reviewed and considered the Report of the Hearing Examiner, together with exceptions of the parties thereto, at its regular public session held December 17, 1997. During the course of the Commission's deliberations, BA-Del indicated that it would make DN-RI available to requesting carriers as a technically feasible means of provisioning INP in Delaware.<sup>2</sup> After deliberation, the Commission has determined to adopt the findings and recommendations as set forth in the Report of the Hearing Examiner except that, based on BA-Del's revised position concerning DN-RI, the Commission departs from the Report with respect to the technical feasibility of this INP methodology.

5. The INP rules proposed by Staff and recommended by the Hearing Examiner do not specify a cost allocation methodology expressly intended to be applicable to recovery of costs incurred through provisioning INP through technically feasible means other than RCF, such as DN-RI. Consequently, the Commission will adopt the INP rules as drafted but will impose an additional requirement that in the event a requesting carrier petitions the Commission for an Order under Rule 2.5 of the INP Rules requiring the local exchange carrier ("LEC") to provide interim number portability by a technically feasible method other than RCF for the reason that the carrier and the LEC are unable to agree to a mutually agreeable and appropriate allocation of the cost of provisioning INP through such other technically feasible method, then Staff shall recommend to the Commission an appropriate cost allocation methodology for the INP method requested and shall further recommend whether, and to what

extent, the INP Rules should be modified to include such cost allocation methodology.<sup>3</sup>

6. The Commission chooses this course in light of the closing nature of the window when the INP rules will likely govern number portability. A long term data-base method is now scheduled to be deployed in the Wilmington area by the end of 1998 and might be available, upon request, in other portions of the State soon thereafter. The Commission could remand this matter for further revisions to include other technically feasible INP methods and cost recovery mechanisms for such other methods. However, given the procedural requirements for notice and hearing which would surround such amendments, the revised form of rules might not return to the Commission for review until the expected deployment of the long-term data-base method. In this hiatus, no rules to govern INP would be in place. Instead, by adopting the proposed rules now, but also outlining an expeditious, focused procedure if any carrier seeks to have INP implemented through DN-RI or other technically feasible methods, the Commission can have rules in place and still provide relief to any carrier who has a genuine demand for INP deployed through DN-RI or some other technically feasible method.<sup>4</sup> Finally, the Commission does not believe that the alteration made here, setting forth a prompt process for implementing INP under other methods, so changes the substantive content of the rules to require publication and comment under 29 Del. C. §10118(c). The alternative procedure for implementing other forms of INP simply sets forth a procedure consistent with the provisions of Proposed Rules 2.4 and 2.5.

**NOW, THEREFORE, IT IS ORDERED:**

1. That the Commission hereby adopts the Report of the Hearing Examiner, attached to the original hereof as Exhibit "A," including the summary of the evidence and information submitted and findings of fact contained in said Report, except, that in view of Bell Atlantic-Delaware, Inc.'s, statement to the Commission, the Commission finds that Directory Numbering - Route Indexing ("DN-RI") is a technically feasible means of provisioning interim number portability in Delaware.

2. That the Commission adopts the "Rules Governing the Deployment of Interim Number Portability Measures in the State of Delaware" ("INP Rules") attached to the original hereof as Exhibit "B."

3. That, in the event a requesting carrier petitions the Commission for an Order under Rule 2.5 of the INP Rules requiring the local exchange carrier ("LEC") to provide interim number portability by a technically feasible method other than Remote Call Forwarding ("RCF") for the reason that the carrier and the LEC are unable to agree to a mutually agreeable and appropriate allocation of the cost of provisioning INP through such technically feasible method, then the Commission Staff shall recommend to the Commission an appropriate cost allocation methodology for

the INP method requested and shall further recommend whether, and to what extent, the INP Rules should be modified to include such cost allocation methodology.

4. That the Secretary of the Commission shall cause a copy of this Order, the attached Report of the Hearing Examiner, and the adopted Rules to be delivered to the Registrar of Regulations for publication in the Delaware Register of Regulations at the earliest possible date.

5. That, pursuant to 29 Del. C. §10118(e), the INP Rules, adopted herein, shall be effective ten (10) days after publication of this Order in the Delaware Register of Regulations.

6. That 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:

/s/ Robert J. McMahon, Chairman  
 /s/ Joshua M. Twilley, Vice Chairman  
 /s/ Arnetta McRae, Commissioner  
 /s/ John R. McClelland, Commissioner

ATTEST:

/s/ Linda A. Mills, Secretary

EXHIBIT "A"

IN THE MATTER OF THE  
 DEVELOPMENT OF  
 RULES AND REGULATIONS  
 TO GOVERN THE PROVISION  
 OF TELEPHONE NUMBER  
 PORTABILITY BY  
 TELECOMMUNICATIONS  
 LOCAL EXCHANGE CARRIERS  
 OPENED SEPTEMBER 24, 1996)

REPORT OF THE HEARING EXAMINER

DATED: NOVEMBER 14, 1997

WILLIAM F. O'BRIEN  
 HEARING EXAMINER

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\* PLEASE NOTE, THE ABOVE PAGE NUMBERS REFER TO THE ACTUAL DOCUMENT, NOT PAGES IN THE REGISTER

BEFORE THE PUBLIC SERVICE COMMISSION  
 OF THE STATE OF DELAWARE

IN THE MATTER OF THE  
 DEVELOPMENT OF  
 RULES AND REGULATIONS  
 TO GOVERN THE PROVISION  
 OF TELEPHONE NUMBER  
 PORTABILITY BY  
 TELECOMMUNICATIONS  
 LOCAL EXCHANGE CARRIERS  
 OPENED SEPTEMBER 24, 1996)

PSC REGULATION  
 DOCKET NO. 46  
 TRACK ONE

REPORT OF THE HEARING EXAMINER

William F. O'Brien, duly appointed Hearing Examiner in this Docket pursuant to 26 Del. C. §502 and 29 Del. C. Ch. 101, by Commission Order No. 4308, dated September 24, 1996, reports to the Commission as follows:

I. APPEARANCES

On behalf of the Public Service Commission Staff :  
 MORRIS, JAMES, HITCHENS & WILLIAMS  
 BY: BARBARA MacDONALD, ESQUIRE

On behalf of the Participants:

Bell Atlantic-Delaware, Inc.:  
 DUANE, MORRIS & HECKSCHER  
 BY: WILLIAM E. MANNING, ESQUIRE

The Division of the Public Advocate:  
 PATRICIA A. STOWELL, The Public Advocate

AT&T Communications of Delaware, Inc.:  
 KARLYN D. STANLY, ESQUIRE and  
 SAUL, EWING, REMICK & SAUL  
 BY: WENDIE C. STABLER, ESQUIRE and SCOTT  
 JENSEN, ESQUIRE

Conectiv Communications, Inc.:  
 PAMELA DAVIS, ESQUIRE, Conectiv Communications,  
 Inc.



MCImetro Access Transmission Services, Inc.:  
CARVILLE COLLINS, ESQUIRE

## II. BACKGROUND

1. By PSC Order No. 4308, dated September 24, 1996, the Commission initiated this docket to consider the formulation and adoption of rules and regulations for the provision of number portability.<sup>5</sup> Number portability is the ability of a user of a telecommunications service to retain, at the same location, existing telephone numbers without impairment of service quality when switching from one telecommunications carrier to another. Order No. 4308 created a "two-track" process under which the Commission will consider rules for the provision of *interim* number portability in Track One and will consider *long-term* number portability rules in Track Two. This report comprises my recommendations with respect to the issues raised in Track One.

2. By a notice of proposed rulemaking published on September 30 and October 1, 1996, and by notifying the PSC Regulation Docket No. 45 participants, the Commission solicited comments concerning both Track One and Track Two rules. In accordance with the schedule for Track One set out in the notice, on October 30, 1996, Bell Atlantic-Delaware, Inc. ("BA-Del"), AT&T Communications of Delaware, Inc. ("AT&T"), Delmarva Power & Light Company ("DP&L"),<sup>6</sup> MCImetro Access Transmission Services, Inc. ("MCI"), MFS Intelenet of Delaware, Inc. ("MFS"), and the Division of the Public Advocate ("DPA"), each submitted comments.<sup>7</sup>

3. After obtaining two extensions, Staff filed its proposed rules on January 24, 1997. (Exh. 9.)<sup>8</sup> On March 5, 1997, Staff submitted a revised draft of its proposed rules. (Exh. 10.) On March 27, 1997, Conectiv Communications, Inc. ("CCI"), MCI, TelePort Communications Group ("TCG") together with its affiliate Eastern TeleLogic Corporation ("ETC")<sup>9</sup>, AT&T, and BA-Del submitted comments concerning Staff's proposed rules.<sup>10</sup> (Exhs. 7, 16, 20, 4, and 18, respectively.)

4. On May 8, 1997, Staff filed its Second Revised Proposed Rules ("Proposed Rules") together with comments supporting its acceptance of certain modifications recommended by the participants in their March 27 comments. (Exh. 11.) Staff's Proposed Rules are attached hereto as Exhibit "A".

5. At a telephone conference conducted on May 14, 1997, the Hearing Examiner scheduled a June 16, 1997 public evidentiary hearing in order to: (1) receive public comment; (2) allow participants to move their written comments into the record; and (3) allow participants to present testimony regarding the technical feasibility of certain INP methods proposed by AT&T in its comments. On

June 4, 1997, AT&T, Staff, the DPA, and BA-Del pre-filed written testimony. (Exhs. 2, 8, 12, and 14, respectively.)<sup>11</sup>

6. Due to a conflict with another PSC telecommunications docket, on June 13, 1997, Staff requested and was granted a postponement of the evidentiary portion of the hearing scheduled for June 16. The Hearing Examiner opened the hearing as scheduled to take public comment. No members of the public attended or otherwise participated in the proceeding. (Tr. at 60.)

7. The evidentiary hearing was continued on August 7, 1997. The participants moved their written comments into the record. The following witnesses testified: Penn Pfautz, AT&T Principal Technical Staff Member, John C. Citrolo, PSC Economist, Scott J. Rafferty, DPA consultant, and Donald D. Albert, BA-Del Network Operations and Engineering Director. At the conclusion of the August 7 evidentiary hearing, the record consisted of twenty (20) exhibits and a 251-page *verbatim* transcript.

8. Staff, BA-Del, AT&T, and the DPA submitted post-hearing briefs on September 10, 1997.<sup>12</sup> In its brief, AT&T referred to and attached an excerpt from a transcript from an August 5, 1997 Pennsylvania proceeding, which was not part of the record in this proceeding. BA-Del objected to the use of the transcript and was granted an opportunity to respond. On September 30, 1997, BA-Del submitted comments from Mr. Albert responding to the transcript. I have considered Staff's recommendations and all of the participants' comments, testimony, and briefs. Based thereon, I submit for the Commission's consideration the recommendations set forth in this Report.

## III. SUMMARY OF RECORD AND DISCUSSION

9. The Commission has jurisdiction over this matter under 26 Del. C. § 703(4), which authorizes the Commission to undertake proceedings that may be required by the Telecommunications Act of 1996<sup>13</sup> (the "Act"), and under 26 Del. C. § 209, which authorizes the Commission to fix "just and reasonable" regulations to be followed by any public utility.

10. Section 251(b)(2) of the Act imposes on all telecommunications carriers:

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the [Federal Communications] Commission [{"FCC"}].

On July 2, 1996, the FCC released its telephone number portability order<sup>14</sup> ("TNP Order") governing telecommunications carriers' obligations to provide number portability on both an interim and long-term basis. The TNP Order requires BA-Del to deploy long-term number portability ("LNP") in the Wilmington, Delaware

Metropolitan Statistical Area ("MSA") in the fourth quarter of 1998.<sup>15</sup> Beginning January 1, 1999, BA-Del must make LNP available in the rest of the state within six months after receiving a request for it from another telecommunications carrier.<sup>16</sup> (Staff at 1.)

11. The Commission opened this regulation docket to consider the adoption of rules for the provision of interim number portability ("INP") and long-term number portability ("LNP") and any attendant cost allocation and recovery mechanisms consistent with the Act and the TNP Order. With respect to LNP (Track Two), the Commission declined to adopt rules, elected to not "opt-out" of the FCC's regional database system, and left the docket open for the possibility of further proceedings upon the FCC's issuance of its cost recovery order. (PSC Order No. 4521, dated June 17, 1997.)

12. Regarding INP, Staff submitted its initial set of proposed rules in January and a revised draft in March of this year. (Exhs. 9 and 10.) The participants then submitted comments on the proposed rules. Staff submitted its final proposal in May, which incorporated several of the participants' recommendations. Staff also provided responsive comments that addressed, in detail, each of the recommendations of the participants and explained why Staff adopted some and rejected others.<sup>17</sup> (Exh. 11 at 3-11.)

13. The primary purpose of the August 7, 1997 evidentiary hearing was to receive evidence concerning the only significant factual matter at issue between the parties: whether two INP methods advocated by AT&T, Route Indexing - Portability Hub ("RI-PH") and Directory Number-Route Index ("DN-RI"), are "technically feasible" and, therefore, eligible for inclusion in Staff's Proposed Rules as mandatory INP methods. In addition to this factual issue, the participants briefed the policy and/or legal issues relating to Staff's proposed mechanism for allocating and recovering the costs of providing INP.

#### A. Technically Feasible Methods of Providing Interim Number Portability

14. The FCC's regulations provide that:

All [local exchange carriers] shall provide transitional [INP] measures which may consist of Remote Call Forwarding (RCF), Flexible Direct Inward Dialing (DID) or any other comparable and technically feasible method as soon as reasonably possible upon receipt of a specific request from another telecommunications carrier, until such time as the LEC implements a long-term database method for number portability.

47 CFR § 52.7. No participant has recommended Flexible Direct Inward Dialing ("DID")<sup>18</sup> because it is technologically obsolete or because Remote Call Forwarding ("RCF")<sup>19</sup>, in

practice, is the preferable method of the two. (AT&T-Initial at 4; BA-Del-Initial at 2.)

15. Staff's Proposed Rules direct local exchange carriers ("LECs") to use Remote Call Forwarding ("RCF") to provide number portability during the interim period unless: (1) another technically feasible method is mutually agreed upon; or (2) the Commission, upon petition or upon its own motion, requires the LEC to provide INP by another technically feasible method. (Proposed Rules 2.2, 2.4, 2.5.) Under a Commission proceeding to determine the technical feasibility of a requested INP method, the LEC bears the burden of proving that any requested method is technically infeasible.

16. AT&T recommends that for customers with a small number of lines INP should be provided through RCF. (AT&T-Initial at 5.) For larger customers, AT&T urges that other methods are more appropriate and proposes that the Commission mandate the provision of route indexing-portability hub ("RI-PH")<sup>20</sup> and directory number-route indexing ("DN-RI")<sup>21</sup> (collectively, "route indexing methods"). AT&T identified several RCF deficiencies including degradation of key features, premature exhaustion of switch capacity, and area code and number exhaustion. (AT&T at 10-12.) Further, according to AT&T, RCF precludes service to large customers who utilize extension numbers.

17. AT&T argues that without changes to incorporate route indexing methods, the Rules will contravene the Act and the TNP Order because route indexing is technically feasible and therefore must be available to new entrants. (Id. at 3.) AT&T asserts that the route indexing methods employ switch technology routinely used by BA-Del and that such methods have already been recognized as technically feasible in more than half of the jurisdictions in the country. (Id.) AT&T Witness Pfautz testified that DN-RI and RI-PH are software driven, do not require any significant investment, and are based on the route indexing capability already in use to provide DID service to customers operating through a PBX. (Id. at 6; Exh. 2 at 9; Tr. at 125.)

18. According to AT&T, the Proposed Rules create a disincentive for BA-Del to negotiate with competing LECs for the provision of more desirable INP methods. As a result, the Rules will "seriously and unnecessarily impede competition." (Id. at 4; Exh. 2 at 4.) AT&T concludes that the Proposed Rules relegate all Delaware customers to "what may be an inferior form of INP for their needs," and, thus, AT&T recommends that the Commission revise the Rules to reflect the technical feasibility and desirability of DN-RI and RI-PH.

19. BA-Del asserts that Bell Atlantic offers RCF, DID and Full NXX Code Migration (Local Exchange Routing Guide or "LERG") through over 4,300 INP arrangements with carriers throughout its region. (BA-Del at 2.) BA-Del Witness Albert testified that no carriers have experienced

any problems in providing service to their end users using these three methods. (Id., Exh. 14 at 3.) Concerning AT&T's criticisms of RCF, BA-Del asserts that there is no risk of number exhaustion until 2010, there is efficient use of the access tandem because direct office trunking is also used, and there is no loss of features. (BA-Del at 3.)

20. BA-Del asserts that RI-PH is not technically feasible and not currently available anywhere in the country because of its adverse impact on the integrity of the network and on certain services. (Id. at 4.) Mr. Albert testified that the effect of RI-PH in Delaware is heightened by the fact that Delaware (and portions of Pennsylvania) are served by one access tandem, which currently is operating at over 80% of capacity. (Id. at 5.) BA-Del also contends that RI-PH would compromise reliability because AT&T would be controlling the loads placed on the single access tandem. If RI-PH caused loads to materialize quickly, service degradation such as blocked calls and network outages could occur, affecting all customers served by the switch.<sup>22</sup> Finally, Mr. Albert testified that RI-PH would cost over \$100,000 in software development to support ordering, provisioning, maintenance and billing. (Id. at 6, Tr. at 196-203.)

21. As for DN-RI, Mr. Albert testified that Bell Atlantic-New Jersey ("BA-NJ") and AT&T are currently testing, pursuant to an agreement, the technical feasibility of DN-RI as an INP method. (BA-Del at 6, Tr. at 193-195.) Encouraged by the testing to date, Mr. Albert predicted that BA-Del eventually will make a DN-RI service offering. However, Mr. Albert also predicted that AT&T and BA-Del will not agree to the costs or cost recovery of DN-RI. Consequently, the cost allocation and recovery provisions of the Proposed Rules, which only contemplate RCF, would have to be amended to accommodate the DN-RI technology, according to BA-Del. (BA-Del at 6-7.)

22. The DPA supports Staff's proposal regarding RCF as the presumptive method of providing INP. (DPA at 1.) The DPA also suggests that when a new carrier obtains a majority of the lines in use within an exchange code, the entire code should transfer to the new carrier and the customers from that code remaining with BA-Del should be ported back to BA-Del. In addition, the DPA recommends that when BA-Del and a competing carrier agree to an alternative INP method, the competing carrier should bear all additional cost. (Id.)

23. Staff takes no position on the technical feasibility of DN-RI and RI-PH. (Staff at 5.) Staff argues that AT&T's proposed modifications are neither necessary nor advisable. According to Staff, § 52.7 (see & 14, *supra*) does not require state commissions to predetermine the technical feasibility of RCF alternatives and mandate their deployment before any carrier makes a request for them. Instead, it provides that the first step in the process will be a "specific request from another telecommunications carrier". (Id.; quoting § 52.7.) Staff asserts that its Proposed Rules are consistent with § 52.7 as they allow for a specific request for an alternative

INP method, followed by negotiations, followed by a Commission proceeding, if necessary.

24. Staff agrees with BA-Del that the cost allocation provisions of its Proposed Rules only apply to RCF. (Id. at 6; citing Proposed Rules 3, 4 and 5.) Staff notes that AT&T has not proposed necessary modifications to Staff's cost allocation rules and that further study would be required before Staff could propose a modification. Staff argues that further study would unnecessarily delay adoption of any INP Rules. (Id.)

25. Staff also notes that AT&T will not confirm whether it even intends to enter the Delaware local exchange market during the period that the interim rules will be in effect. (Id. at 6; Tr. at 111.) In light of AT&T's status as the only docket participant that contends that RCF is inadequate, Staff recommends that the Commission consider AT&T's lack of commitment to enter the Delaware market in evaluating the Proposed Rules.

26. I agree with Staff that its Proposed Rules 2.2 through 2.5 concerning INP methods are consistent with the Act and the TNP Order, and are otherwise reasonable. In addition, I share Staff's concern regarding the delay that would result from modifying the cost allocation rules to accommodate the route indexing methods, especially when considered in light of AT&T's reluctance to commit to entering the Delaware market during the interim time period. For these reasons, I recommend that the Commission not make a finding as to whether DN-RI and RI-PH are technically feasible at this time and decline AT&T's recommendation to modify the Proposed Rules.

27. If the Commission deems it appropriate to make a finding on the issue, then I recommend that it conclude that the record does not support a finding of technical feasibility. Neither BA-Del nor AT&T offered hard evidence (e.g., results from local testing) to support their positions. AT&T relied on disputed accounts of actions in other jurisdictions and on conclusory statements regarding the ease of implementing the route indexing methods. (Exh. 2 at 10-11; AT&T at 4; BA-Del at 4.) BA-Del presented its network engineer, Mr. Albert, who is responsible for the day-to-day operation of the local network as it relates to co-carrier arrangements.<sup>23</sup> (Exh. 14 at 1.) Mr. Albert offered credible, detailed testimony regarding the potential for system degradation and regarding the substantial amount of time that would be required to put the systems into place that are necessary to implement and administer RI-PH. (Id. at 8-11, Tr. at 215.) The time required for implementation is relevant in this case, since the effective period for the rules is limited by long-term number portability.

28. Mr. Albert testified that BA-Del will provide RI-DN in Delaware if the New Jersey testing is successful and the operational issues can be resolved. (Exh. 14 at 7.) Regarding the target date for completion of the tests, Mr. Albert testified that AT&T and BA-Del are "hoofing through in the

ASAP mode.” (Tr. at 218.) Before the Commission finds that RI-DN is technically feasible, it should consider the results of the New Jersey testing. If the testing is not completed before AT&T makes a specific request for RI-DN, the Commission may consider any allegations by AT&T that BA-Del has delayed the testing procedure in order to avoid a finding of feasibility.

29. For the above reasons, if the Commission deems it necessary to make a finding on technical feasibility, I recommend that it conclude that the record does not support a finding of technical feasibility.

### B. Cost Allocation and Recovery Mechanism

30. Staff’s Proposed Rules provide that each providing carrier absorb its own cost of providing INP through RCF until its total costs exceed the lesser of \$50,000 or 1/10th of 1% of its gross annual intrastate revenues. Thereafter, the providing carrier may begin recovering a portion of its costs from the requesting carrier in proportion to the requesting carrier’s market share, calculated on the basis of wireline access lines.<sup>24</sup> The providing carrier may also recover an assessment from resellers of local exchange service and purchasers of unbundled network elements in proportion to the competing carrier’s market share, but is limited to 25% of the providing carrier’s costs of providing INP through RCF. (Proposed Rules, Sections 3, 4.)

31. The Proposed Rules set forth “proxy” determinants which the carriers may use in calculating costs for purposes of the threshold level. In addition, after the threshold has been surpassed, such “proxies” may be used for calculating the rates to be charged to the other carriers, pending any final determination of the actual costs for providing RCF-based INP. The rules provide that once the providing carrier begins making assessments to other carriers, the providing carrier, or any of the carriers being charged, may make an appropriate filing to begin a proceeding to determine the providing carrier’s actual costs. At the end of such proceeding, a true-up procedure is available to reconcile the proxy-based threshold calculations and assessments with the actual costs determined. According to Staff, the proxy determinants were used to avoid protracted proceedings in this docket which might delay the availability of INP. (Exh. 10 at 2.)

32. Staff emphasizes that its Proposed Rules will be effective for a relatively brief period of time, approximately one year in the Wilmington MSA and sometime over 18 months in the rest of the state (depending on when another carrier requests LNP from BA-Del.) (Staff at 4.) Consequently, Staff argues that the Commission should adopt rules which may be implemented quickly and simply, rather than strive for the level of detail and precision which might be desirable if the rules were intended to apply permanently.

### The Threshold

33. BA-Del recommends that the Commission eliminate the threshold requirement.<sup>25</sup> (BA-Del at 7.) BA-Del asserts that most numbers will be ported by BA-Del to its new competitors and, thus, BA-Del will incur most of the costs of INP. BA-Del argues that requiring it to foot the bill while its competitors pay nothing until the costs reach \$50,000 is discriminatory and confiscatory. BA-Del argues that it may be prudent, from a cost/benefit standpoint, to condition a proceeding to test the accuracy of the cost proxies on the petitioner’s claim that it has incurred more than \$50,000 in costs. However, BA-Del urges that the providing carrier should be able to recover its first dollar of costs regardless of whether any such cost proceeding is ever held. In other words, any threshold should apply to cost determination rather than cost recovery. According to BA-Del, since the only expense of seeking repayment of costs is the expense of sending an invoice and is borne by the carrier, the decision to bill below the \$50,000 threshold should be left to the carrier. (Id. at 7-8.)

34. Staff defends its threshold by referring to the FCC’s discussion of competitive neutrality of INP cost recovery in its TNP Order: (Exh. 11 at 3-5.) For example, the FCC asserts that:

the incremental payment by the new entrant if it wins a customer would have to be close to zero, to approximate the incremental number portability cost borne by the incumbent LEC if it retains the customer.

(TNP Order at & 133.) Staff also notes that the FCC permits, as competitively neutral, “a mechanism that requires each carrier to pay for its own costs of currently available number portability measures.” (Exh. 11 at 4; citing TNP Order at & 136.) Staff interprets this provision to authorize commissions to require each LEC to bear all the costs it incurs in providing INP to competing carriers.<sup>26</sup> Thus, Staff reasons, since the Proposed Rules are more favorable to the incumbent LEC than one approach expressly authorized by the FCC, the threshold mechanism should not be considered unduly burdensome.

35. Based on the record, I believe that the threshold component of the Proposed Rules is reasonable. Staff selected the threshold, in part, because “the expense to both the carriers and the Commission attendant to determining actual costs *and supervising a ‘competitively neutral’ recovery mechanism* might well exceed the actual costs to be recovered.” (Exh. 10 at 2; emphasis added.) Thus, Staff was not only concerned about the LECs’ costs and the costs of the determination of actual INP costs but was also concerned about the costs to the Commission of supervising the mechanism while it operates below the threshold. The “supervisory” costs to the Commission may include the

expense of proceedings necessary to resolve INP billing disputes between carriers. With the threshold in place, such disputes should at least be postponed and, if no LECs meet the threshold prior to the implementation of long-term number portability, such disputes may be avoided altogether.

36. I also agree with Staff that the threshold is set at a level that will not place the providing carrier at a disadvantage in competing for local exchange customers. (Exh. 10 at 2.) I note that the elimination of the threshold would save the incumbent LEC an amount much less than \$50,000, since under the Proposed Rules, the providing LEC may only recover its costs in proportion to the competing carrier's market share, as measured by its access lines relative to all access lines. While the incumbent LEC is operating under its threshold, its competitors will garnish relatively few access lines and, thus, recovery would be substantially limited.

#### **Allocation Based on Market Share**

37. BA-Del asserts that costs should be allocated among all carriers in proportion to their retail telecommunications service revenues in Delaware, not access lines. (BA-Del at 8.) According to BA-Del, basing the allocation on access lines guarantees that BA-Del will shoulder essentially all of the costs. BA-Del asserts that competing carriers will target relatively few access lines -- those that belong to the most lucrative customers. Therefore, while a competing carrier may win a small number of access lines and thus pay little toward INP, it may realize substantial revenues. As such, BA-Del argues that revenues from services sold to end-users is a better measure of market share and should be used to allocate costs. (BA-Del at 9.)

38. The TNP Order identifies several cost allocation methods that satisfy its competitive neutrality requirement. (TNP Order at & 136.) Included in these methods are cost allocations based on: (1) a carrier's number of active lines relative to the total number of active lines in a service area; and (2) a carrier's gross telecommunications revenues net of charges to other carriers. Staff selected access lines as the measurement rather than revenues because access lines provide a better match for the cost of providing service. (Exh. 11 at 9.) BA-Del argues that market share bears no relationship to the cost of providing service and thus the selection of a particular measurement of market share should not consider cost of service. (BA-Del at 9.)

39. The FCC included a carrier's relative number of access lines as a market share measurement for cost allocation that meets its competitive neutrality standard. Further, Staff believes that such an allocation carries the additional benefit of bearing some relationship to the cost of porting numbers. Since Staff's proposed measurement of market share is supported in the record and is consistent with the TNP Order, I recommend that the Commission find it reasonable.

#### **Recovery From Long-Distance Providers**

40. BA-Del also recommends that the Proposed Rules be modified to include interexchange carriers, in their capacity of long-distance providers, as liable for INP costs. (Id. at 10.) BA-Del notes that § 251(e)(2) of the Act requires that the cost of INP be borne by "all telecommunications providers." The DPA supports the Proposed Rules on this point and agrees that no costs should be assessed against long-distance carriers. (DPA at 2.) Staff argues, and I agree, that INP is a service provided by one local exchange provider to another and the Proposed Rules appropriately allow LECs to recover costs from other carriers participating in the Delaware local exchange market.

#### **C. Other Issues**

41. The DPA asserts that the Commission should not permit BA-Del to recover INP costs from its ratepayers. (DPA at 2-3.) The DPA argues that INP costs are a foreseeable cost change and, thus, pursuant to the Telecommunications Technology and Investment Act ("TTIA"), may not be recovered from ratepayers. INP cost recovery from ratepayers will become an issue if BA-Del ever files a rate application under the TTIA and attempts to recover such costs. I recommend that the Commission defer the issue until then.

42. The DPA recommends a modification to the Proposed Rules to clarify the threshold provision, which refers to "\$50,000 or one tenth of one percent of the local exchange carrier's gross annual intrastate revenues." The DPA asserts that "intrastate revenues" should exclude sales of non-regulated services, of non-telephone utility services (e.g., electricity) and of intrastate toll service. (Id. at 3.) Staff generally accepts the DPA's suggestion and recommends that the Commission modify Rule 3.3(b) to add after the word "revenues" the phrase "arising from its telecommunications operations." I agree that this modification helps to clarify the Rule in question and I recommend its adoption.

#### **IV. RECOMMENDATIONS**

43. The Proposed Rules, while arguably not perfect, strike a balance between the various competing interests during the relatively short effective period for INP rules and enables the participants to implement INP quickly and simply. (Staff at 4.) In summary, and for the reasons stated above, I recommend that the Commission adopt the Proposed Rules, as modified in Staff's post-hearing brief, as "just and reasonable" and consistent with the Act and the TNP Order. Consistent with 29 Del. C. § 10118(b), the effective date for the INP Rules should be thirty (30) days after the date of the Order adopting the rules.

Respectfully submitted,

/s/ William F. O'Brien  
William F. O'Brien, Hearing Examiner

Dated: November 14, 1997

#### EXHIBIT "B"

### Rules Governing the Deployment of Interim Number Portability Measures in the State of Delaware

#### *Section 1: Definitions*

1.1 Interim Number Portability - the provisioning of number portability during the interim period by currently technically feasible methods.

1.2 Interim Period - the interim period shall begin on the date a local exchange carrier receives a request for deployment of interim number portability and ends on the date the local exchange carrier deploys number portability using a long-term database method under 47 C.F.R. § 52.3.

1.3 Local Exchange Carrier - a person that is engaged in the provision of telephone exchange service or exchange access service. For the purposes of this set of rules, such term does not include a person insofar as such person is engaged in the provision of a commercial mobile radio service under 47 U.S.C. § 332(c).

1.4 Number Portability - the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another.

1.5 Per Cent Market Share - represents a telecommunications carrier's share in the local exchange telecommunications market. For "wireline" telecommunications carriers, market share is calculated by dividing that telecommunications carrier's total number of active "wireline" access lines by the total number of active "wireline" access lines in the State of Delaware. For commercial mobile radio service telecommunications carriers, market share is calculated by dividing the sum of the telecommunications carrier's total number of active "wireline" access lines and active telephone numbers by the total number of active "wireline" access lines in the State of Delaware.

1.6 Remote Call Forwarding (RCF) - a method whereby a call to a telephone number in one exchange is automatically redirected by the telecommunications carrier's end office equipment to another telephone number in the same or

different exchange on the same or different carrier's network.

1.7 Telecommunications - the transmission, between or among points specified by the user, of information of the user's choosing without change in the form or content of the information as sent and received.

1.8 Telecommunications Carrier - a provider of telecommunications services, except that such term does not include aggregators of telecommunications services, as defined in 47 U.S.C. § 226(a)(2).

1.9 Telecommunications Service - the offering of telecommunications for a fee directly to the public, or such classes of users as to be effectively available directly to the public, regardless of the facilities used.

1.10 The Commission - the Delaware Public Service Commission.

#### *Section 2: Deployment of Interim Number Portability*

2.1 During the interim period, all local exchange carriers shall provide interim number portability as soon as reasonably possible upon receipt of a specific request from another telecommunications carrier.

2.2 Except as the carriers may agree or the Commission may otherwise order under Rules 2.4 and 2.5, all local exchange carriers shall provide interim number portability during the interim period using Remote Call Forwarding.

2.3 The Commission may waive the requirements of Rules 2.1 and 2.2 for a local exchange carrier which demonstrates that Remote Call Forwarding is not a technically feasible method for interim number portability for that local exchange carrier.

2.4 A local exchange carrier may agree to provide interim number portability to a telecommunications carrier utilizing technically feasible methods other than Remote Call Forwarding on mutually agreeable terms, conditions, and charges. A local exchange carrier providing interim number portability under such an agreement shall offer such non-RCF interim number portability methods to other telecommunications carriers upon the same terms, conditions, and charges.

2.5 Upon petition or upon its own motion, the Commission may require that a local exchange carrier provide interim number portability by a technically feasible method other than Remote Call Forwarding or by a combination of technically feasible methods. The providing carrier shall

bear the burden of proving that any requested method is technically infeasible.

2.6 Prices for interim number portability shall be set at a level that takes into account the relative inferior quality of the service provided, its interim nature, and the necessity for the development of a competitive market for local exchange services.

*COMMENTS: These rules adopt Remote Call Forwarding as the presumptive method for providing number portability during the interim period, now expected to end by late 1998. Staff believes that RCF is a presently technically feasible means. At the same time, Staff acknowledges that RCF, as a method for number portability, has limitations including: (1) its failure to support several custom local area signaling services and other vertical features; (2) the possible degradation of transmission quality; (3) the existence of limits on the number of calls to customers of the same competing service provider that can be handled at any one time; and (4) the need to allocate access charges derived from interexchange carriers between the provisioning local exchange carrier and the recipient end-user carrier. Staff also acknowledges the disagreement among the participants in Regulation Docket 46 as to the viability of RCF for large volume end-user customers. Because of these limitations, this section allows carriers to negotiate and agree to other methods for providing portability. The section also allows the Commission, acting upon request or on its own initiative, to explore ordering other methods of portability if circumstances warrant. If carriers do agree to provide interim portability by other non-RCF methods, the local exchange carrier must offer the same methods to other similarly-situated requesting carriers.*

*Section 3: Cost Recovery Mechanism for Interim Number Portability*

*Costs*

3.1 The mechanisms for the recovery of interim number portability costs set forth in these Rules take into account the relative inferior quality of the methods used for portability, the interim nature of the methods, and the need to develop a competitive market for local exchange services.

3.2 For purposes of the cost recovery mechanism in these Rules, the recoverable costs for providing RCF interim number portability shall be:

(i) the Total Element Run Incremental Cost through ("TELRIC") of providing interim number portability through RCF, as determined by the Commission under Rule

4.1 or in some other proceeding;

or

(ii) (in the absence of a determination of TELRIC costs), the following proxies:

Non-Recurring Proxy Costs	Recurring Proxy Costs
\$ 5.10 Service Order Charge Per Order \$2.33	Per Number Per Month for 0 to 10 Call Paths
\$18.76 Installation Charge, Per Number \$0.40 (Not applicable if RCF is installed with an unbundled loop)	Per Number Per Month for Each Additional Path.

*COMMENTS: The first portion of this section provides a calculation of the costs for providing RCF interim number portability, to be used both for calculating the threshold set out below and for the subsequent cost assessments against carriers, if implemented. The rules provide that if the Commission should, either under these Rules or in another proceeding (such as a generic docket or a Statement of Generally Available Terms and Conditions), determine the actual costs for providing RCF number portability, then those actual costs should be used to measure the breach of the threshold and the amounts of recoveries from the other chargeable carriers. However, until such a determination is made, the section provides proxy costs to be adopted for threshold and assessment purposes. The recurring cost proxies have been derived from cost materials submitted by Bell Atlantic-Delaware, Inc. in response to Staff data requests in Regulation Docket No. 46. The non-recurring proxy costs are based on the results of arbitration concerning service order costs in PSC Docket No. 96-204.*

*Threshold for Cost Assessment and Recovery*

3.3 During the interim period, a local exchange carrier may not recover the costs of providing RCF interim number portability under these Rules from other telecommunications carriers until the local exchange carrier's total costs of providing interim number portability (as defined in Rules 3.2 and 3.2.1) exceed the lesser of:

- (a) \$50,000; or
- (b) one tenth of one percent of the local exchange carrier's gross annual intrastate revenues.

*Post-Threshold Cost Recovery*

3.4 If a local exchange carrier's costs of providing RCF number portability during the interim period exceeds the amounts set forth in Rule 3.3, then the local exchange carrier

may thereafter recover a cost assessment from each telecommunications carrier that has, or will, request interim number portability.

3.5 The cost assessment that the local exchange carrier may recover under rule 3.4 from the requesting telecommunications carrier shall be:

The cost (as defined in Rule 3.2) of providing RCF interim number portability to the requesting carrier

times

The requesting telecommunications carrier's market share as defined in Rule 1.5.

3.6 At the time a local exchange carrier begins to recover the cost assessment from a requesting telecommunications carrier under Rules 3.4 and 3.5, the local exchange carrier may also recover a cost assessment for RCF interim number portability from: (1) those telecommunications carriers that provide end-user wireline access predominantly (over seventy-five percent) by means of the resale of services purchased from that local exchange carrier or (2) those telecommunications carriers that purchase unbundled network elements from the local exchange carrier.

3.7 The cost assessment that the local exchange carrier may recover from each telecommunications carrier described in Rule 3.6 shall be:

.25 (the local exchange carrier's aggregate costs (as defined in Rule 3.2) for providing RCF interim number portability to all telecommunications carriers during the period)

times

The market share, as defined by Rule 1.5, of the telecommunications carrier providing end-user wireline access by resale or by purchase of unbundled network elements less any direct payment made under Rule 3.5 except that the amount cannot be less than zero.

*COMMENTS: This portion of the section creates a cost threshold of the lesser of \$50,000 or one tenth of one percent of the local exchange carrier's intrastate revenues. That threshold must be breached before the local exchange carrier may choose to impose cost assessment on other carriers for RCF interim number portability. If, during the interim period, the costs of RCF number portability to a particular local exchange carrier never exceed the threshold, the costs may not be recovered.*

*Staff adopts the threshold formulation because the threshold amounts appear to be de minimis in relation to a exchange carrier's gross annual intrastate revenue and any attempt to collect portability costs below such level may result in administrative expenses greater than the amount of costs incurred.*

*If the cost threshold is breached by a local exchange carrier, that carrier may choose, but is not obligated, to recover its post-threshold RCF portability costs from other carriers, on a "going forward" basis. Staff anticipates that a carrier's decision to undertake, or forego, cost assessments may be guided by the anticipated post-threshold costs and the anticipated time remaining in the interim period. If a local exchange carrier decides to impose the cost assessments, it can do so against two categories of carriers. First, it can charge an amount of its on-going costs to the carrier requesting a ported number. That assessment is set at the proportion of the cost (actual or proxy) relative to the requesting carrier's market share. At the same time, the local exchange carrier may also assess costs against carriers reselling the local exchange carrier's retail services or purchasing unbundled network elements. The amount to be paid by carriers in this second category is based on one-quarter of the local exchange carrier's total RCF number portability costs with each such carrier paying a portion relative to its market share. Staff recognizes that resellers and purchasers of network elements do not, or may not, request number portability. However, the rules allow such carriers to be assessed for interim number portability costs in order to make the recovery mechanism "competitively neutral" between the requesting carriers, the local exchange carrier, and other carriers. In addition, in an attempt to maintain equity between requesting carriers (who may be assessed costs based upon their market share of the costs for the numbers they request) and the resellers and purchasers of elements (who may be assessed based on total portability costs), the rules provide that the assessment for the latter carriers is based only on one-quarter of the total costs.*

*Staff acknowledges that the recovery mechanism does not perfectly allocate the costs of RCF interim portability among all telecommunications carriers. Instead, the recovery mechanism is intended to provide a substantially fair, broader-based recovery mechanism which can be implemented without continued Commission oversight. The rules attempt to allow recovery from carriers who deal directly with the local exchange carrier.*

#### *Section 4: Opportunity for Determination of Actual Costs for Providing Interim Portability*

4.1 If at the time a local exchange carrier begins to recover cost assessments under Rules 3.4 through 3.7 the Commission has not determined the actual costs for



providing RCF interim number portability, the local exchange carrier or any telecommunications carrier from whom recovery is sought may petition the Commission to conduct a proceeding to determine the actual costs of providing RCF interim number portability.

4.2 Upon such a petition, the Commission shall determine the TELRIC costs of providing RCF interim number portability.

4.3 Until the time the Commission determines the TELRIC costs of providing RCF interim number portability, the local exchange carrier may impose cost assessments using the proxy cost set forth in Rule 3.2. Such assessments may be subject to later reconciliation as set forth in these Rules.

*COMMENTS: As noted earlier, the rules premise the threshold and any later assessments for RCF interim number portability on actual cost determinations made in a Commission proceeding or the use of proxies. If at the time the threshold is breached and the local exchange carrier begins to impose cost assessments the commission has not entered any order setting TELRIC RCF number portability costs, this section allows the local exchange carrier or any charged carrier to request that the Commission determine actual costs in a proceeding. Until such TELRIC costs are determined, the assessments may still be based upon the proxies, but subject to the later true-up procedure described in Section 5. Again, if all carriers are satisfied with continued use of the proxies during the remainder of the interim period, the Commission need not undertake a proceeding to determine TELRIC costs.*

*Section 5: True-up Upon Determination of Actual Costs*

5.1 After a Commission determination of actual costs for providing RCF interim number portability, the Commission, on its own motion or upon the petition of a telecommunications carrier, may order a reconciliation or true-up of the cost recovery mechanism set forth in these Rules.

5.2 In the reconciliation or true-up process, the determined TELRIC costs shall be used to calculate the costs for purposes of the threshold under Rule 3.3 and to make adjustments to all cost assessments previously recovered by the local exchange carrier under Rules 3.4 through 3.7. The reconciliation shall apply to the entire interim period.

5.3 Payments of adjusted amounts due under the reconciliation shall be recovered through a method agreed upon by the carriers. If no agreement can be reached, any carrier may petition the Commission to determine a reconciliation recovery method.

*COMMENTS: This section creates a true-up mechanism to adjust the amounts calculated by use of the proxies with the TELRIC costs, once determined. Under the process, once actual costs have been determined, the threshold can be recalculated and any costs incurred and assessed thereafter reconciled. When the assessments using TELRIC costs exceed the amounts collected by use of the proxy costs, the additional assessments may be collected from the previously assessed carriers. Conversely, if the TELRIC costs are below the amounts collected using the proxy costs, the assessed carriers may recover the excess payments. The over- and under-recoveries are both net of the threshold amount set forth in Rule 3.3.*

*Section 6: Distribution of Access Charges Paid by Interexchange Carriers*

6.1 During the interim period, the local exchange carrier providing RCF interim number portability shall collect the interexchange carrier ("IXC") access revenue in the process of forwarding an interexchange carrier's telecommunications call to an end-user of a second telecommunications carrier.

6.2 The local exchange carrier collecting the access revenue under Rule 6.1 shall distribute the collected relevant revenue to compensate the second carrier for revenue lost due to the use of RCF interim number portability. The relevant access revenue shall be distributed as follows:

- the approximation of "terminating IXC minutes of use ('MOUs') over ported numbers," to which the revenue distribution would apply, shall be determined by applying the ratio of terminating IXC access MOUs/ total (local and toll) terminating MOUs to the actual measured total terminating interim number portability MOUs
- the rate adjustment amount, over which the "terminating IXC minutes of use ('MOUs') over ported numbers" would apply, shall be calculated as follows:

rate adjustment = total IXC exchange access rate charged by the collecting carrier pursuant to its tariffs minus the meet point billing for the collecting carrier (if applicable) minus local reciprocal compensation rate of the second carrier (if applicable)

*COMMENTS: This section sets up method for dividing the interexchange access charges when the interexchange carrier's communication is ported by RCF to another carrier's network. The provisions of the section set up a formula to approximate the number of terminating access minutes of use that were routed by RCF interim number*

portability to end-users on the second carrier's network. The section also defines an adjusted access rate to reflect monies that might be due to the porting carrier from a meet point billing arrangement and reciprocal compensation from local traffic. The first carrier will subtract those per minute arrangements from its tariffed access rate, multiply by the number calculated under the "terminating IXC minutes of use ('MOU') over ported numbers" formula, and distribute that amount to the second carrier.

#### Section 7: Miscellaneous

7.1 These rules shall govern during the interim period.

7.2 All telecommunications carriers shall provide all information deemed necessary by the Commission and the Commission Staff to assist in the administration of these rules in any proceeding thereunder.

7.3 The Commission reserves the right to waive the application of these Rules or to make such amendments as may appear necessary or appropriate in accordance with the provisions of the Administrative Procedures Act, 29 Del. C. ch. 101.

<sup>1</sup> See 47 C.F.R. " 52.27, 52.29 (transitional number portability measures)

<sup>2</sup> The Hearing Examiner, based on the record existing before him, which included BA-Del's evidence and arguments against finding DN-RI to be technically feasible, had recommended that the Commission not find DN-RI to be a technically feasible method of providing INP in Delaware.

<sup>3</sup> By the affirmative vote of Chairman McMahon, Vice Chairman Twilley, and Commissioner McClelland, with Commissioners McRae and Puglisi absent.

<sup>4</sup> The Commission does note that Conectiv, which is now offering local exchange service in this State, did not file exceptions to the proposed rules nor the Hearing Examiner's Report.

<sup>5</sup> In so doing, the Commission removed the number portability issues from PSC Regulation Docket No. 45, which is the Commission's rulemaking docket relating to competitive entry into the telecommunications local exchange service market, and which has since been completed.

<sup>6</sup> By letter dated March 26, 1997, DP&L requested that its participation in this docket be replaced by that of Conectiv Communications, Inc., a wholly-owned subsidiary of DP&L.

<sup>7</sup> References to the October 30, 1996 initial comments will be cited as "([Participant]-Initial at \_\_.)"

<sup>8</sup> Unless otherwise noted, references to the exhibits introduced and entered into the record of the August 7, 1997 hearing will be cited as "(Exh. \_\_ at \_\_.)"

<sup>9</sup> By letter dated April 15, 1997, ETC informed the Commission that it had been acquired by Teleport Communications Group Inc. ("TCG") and requested certain changes to the service list.

<sup>10</sup> References to the March 27, 1997 comments will be cited as "([Participant]-2nd at \_\_.)"

<sup>11</sup> Staff also submitted a public, non-proprietary version of its pre-filed testimony identified as "Exh. 8A."

<sup>12</sup> References to the September 10, 1997 post-hearing briefs will be cited as "([Participant] at \_\_.)"

<sup>13</sup> Pub. L. No. 104-104, 110 Stat. 56; 47 U.S.C. 251 et seq.

<sup>14</sup> In the Matter of Telephone Number Portability, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket 95-116, FCC 96-286, July 2, 1996 (hereinafter "TNP Order").

<sup>15</sup> 47 CFR, Part 52, Appendix A.

<sup>16</sup> 47 CFR 52.3(c).

<sup>17</sup> Staff responded to the DPA's recommendations in its post-hearing brief because the DPA did not file its second round of comments until June, when pre-filed testimony was due. (Staff at 7-11.)

<sup>18</sup> DID is a non-database telephone number portability method whereby telephone calls to numbers that have been ported are transferred over a dedicated facility to the new service provider's switch. (TNP Order, App. E at 11.)

<sup>19</sup> RCF is a non-database telephone number portability method whereby calls are redirected to telephone numbers that have been transferred by placing what is, in essence, a second telephone call to the new network location. (TNP Order, App. E at 10.)

<sup>20</sup> RI-PH is a non-database method of number portability which requires the call to be routed to the LEC switch corresponding to the NXX code of the dialed number. The LEC switch inserts a 1XX prefix onto the front of the telephone number. This 1XX code identifies the competitive service provider to which the call will be routed. This ten to

thirteen digit number (telephone number with the 1XX prefix) is transmitted to the LEC tandem switch to which the competitive exchange provider is connected. The tandem switch strips the 1XX prefix from the dialed number, and routes the call to the competitive exchange provider's switch, from where the routing of the call is terminated. (TNP Order, App. E at n. 668.)

<sup>21</sup> DN-RI is a non-database method of number portability that first routes incoming calls to the switch to which the NPA-XXX code originally was assigned, then routes ported calls to the new service, either through a direct trunk or by attaching a temporary "pseudo NPA" to the number and using a tandem, depending on the availability. (TNP Order, App. E at 12.)

<sup>22</sup> While challenging BA-Del's claim that RI-PH compromises service reliability, AT&T has offered to switch to DN-RI "in those instances where the use of RI-PH will push outage risk levels too high." (AT&T at 9.)

<sup>23</sup> I understand that AT&T is at a disadvantage in producing supporting evidence for its position since it does not, at this time, own and operate the local network. However, if AT&T chooses to enter the Delaware local exchange market during the interim period and it requests the route indexing methods, it will hold the presumption of feasibility from the Proposed Rules, if adopted. Moreover, AT&T may be armed with the results from the BA-NJ DN-RI tests to support its position.

<sup>24</sup> For CMRS providers, the calculation is based on the number of active telephone numbers.

<sup>25</sup> The DPA apparently agrees with BA-Del that the threshold should be eliminated. The DPA asserts that "Staff has not provided any evidence that this provision will reduce administrative costs." (DPA at 3.) The DPA also expresses concern regarding the recovery of the initial set-up costs of INP. However, as explained by Staff, the RCF set-up costs are not included in the threshold and must be absorbed by all participating carriers. (Staff at 10.) The only INP costs that are counted against the threshold, and are eventually recoverable under the Proposed Rules, are the costs of providing INP via RCF.

<sup>26</sup> No participant challenged Staff's interpretation of this clause.

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# GOVERNOR'S EXECUTIVE ORDERS

STATE OF DELAWARE  
EXECUTIVE DEPARTMENT  
DOVER

**EXECUTIVE ORDER  
NUMBER FORTY-NINE**

**TO: HEADS OF ALL STATE DEPARTMENTS,  
AGENCIES AND AUTHORITIES, AND ALL  
POLITICAL SUBDIVISIONS AND  
GOVERNMENTAL UNITS OF THE STATE OF  
DELAWARE**

**RE: REALLOCATION OF STATE PRIVATE  
ACTIVITY BOND VOLUME CAP FOR  
CALENDAR YEAR 1997 AND INITIAL  
SUBALLOCATION OF STATE PRIVATE  
ACTIVITY BOND VOLUME CAP FOR  
CALENDAR YEAR 1998**

WHEREAS, pursuant to 29 Del.C. §5091, the State's private activity bond volume cap ('Volume Cap') for 1997 under §103 of the Internal Revenue Code of 1986 (the "Code") has been allocated among various state and local government issuers; and

WHEREAS, pursuant to Executive Order Number Forty-Four, \$75,000,000 of the Volume Cap for 1997 which had been allocated to the State of Delaware was further suballocated between the Delaware Economic Development Authority and the Delaware State Housing Authority; and

WHEREAS, the allocation of Volume Cap in Executive Order Number Forty-Four is subject to modification by further Executive Order; and

WHEREAS, the State's Volume Cap for 1997 and 1998 is allocated among the various State and local government issuers by 29 Del. C. §5091 (a); and

WHEREAS, New Castle County has reassigned \$26,250,000 of its unallocated Volume Cap for 1997 to the State of Delaware; and

WHEREAS, Kent County has reassigned \$15,000,000 of its unallocated Volume Cap for 1997 to the State of Delaware; and

WHEREAS, Sussex County has reassigned \$10,600,000 of its unallocated Volume Cap for 1997 to the State of Delaware; and

WHEREAS, the City of Wilmington has reassigned \$12,500,000 of its unallocated Volume Cap for 1997 to the State of Delaware; and

WHEREAS, pursuant to 29 Del. C. §5091 (b), the State's \$75,000,000 Volume Cap for 1998 is to be suballocated by the Governor among the Delaware State Housing Authority, the Delaware Economic Development Authority and other governmental issuers within the

State; and

WHEREAS, the Secretary of Finance recommends (i) that of the \$64,350,000 unallocated Volume Cap for 1997 reassigned to the State of Delaware by other issuers, \$16,235,000 be suballocated to the Delaware Economic Development Authority for projects financed during 1997 and \$48,115,000 be suballocated to the Delaware State Housing Authority for carry forward for use in future years and (ii) that the State's \$75,000,000 Volume Cap for 1998 be allocated equally between the Delaware State Housing Authority and the Delaware Economic Development Authority; and

WHEREAS, the Chairperson of the Delaware Economic Development Authority and the Chairperson of the Delaware State Housing Authority concur in the recommendations of the Secretary of Finance.

NOW, THEREFORE, I, Thomas R. Carper, by the authority vested in me as Governor of the State of Delaware, do hereby declare and order as follows:

1. The \$64,350,000 of unallocated Volume Cap for 1997 that has been reassigned by other issuers to the State of Delaware is hereby reassigned as follows: \$16,235,000 to the Delaware Economic Development Authority for projects financed during 1997 and \$48,115,000 to the Delaware State Housing Authority for carry forward use (in addition to the \$37,500,000 previously suballocated to the Delaware State Housing Authority for 1997 under Executive Order Forty-Four).

2. The \$75,000,000 allocation to the State of Delaware of the 1998 Volume Cap is hereby suballocated \$37,500,000 to the Delaware State Housing Authority and \$37,500,000 to the Delaware Economic Development Authority.

3. The aforesaid suballocations have been made with due regard to actions taken by other persons in reliance upon previous suballocations to bond issuers.

Approved this 23 day of December, 1997

Thomas R. Carper  
Governor

Attest:  
Edward J. Freel  
Secretary of State

STATE OF DELAWARE  
EXECUTIVE DEPARTMENT  
DOVER

**EXECUTIVE ORDER  
NUMBER FIFTY**

**TO: HEADS OF ALL STATE DEPARTMENTS,  
AGENCIES AND AUTHORITIES, AND ALL  
POLITICAL SUBDIVISIONS AND  
GOVERNMENTAL UNITS OF THE STATE OF  
DELAWARE**

**RE: ESTABLISHING THE EDUCATION SALARY  
SCHEDULE IMPROVEMENT COMMITTEE**

WHEREAS, the State of Delaware is fortunate to have thousands of dedicated Delaware teachers and principals who have devoted their careers to educating our children; and

WHEREAS, the State recognizes that the professional development of these educators is essential to education reform; and

WHEREAS, the State has greatly increased professional development funding during the last five years to help educators improve their skills, knowledge, and performance and to bring the State's academic standards to life in the classroom; and

WHEREAS, the State's salary schedule for educators is designed to provide financial rewards to educators who obtain genuinely relevant graduate-level degrees and credits; and

WHEREAS, the premise of this large investment is that teachers who obtain graduate degrees and credits will perform better in the classroom; and

WHEREAS, this premise is a good one if backed by requirements that the graduate degrees and graduate credits obtained be rigorous and be relevant to improving classroom performance. Unfortunately, the system has not been backed by such requirements. The salary schedule provides compensation for graduate degrees which are not relevant to the professional's school duties, and -- despite the clear language of the law to the contrary -- the schedule has been administered in such a manner as to permit salary credit for in-service credits which do not involve graduate level work; and

WHEREAS, the salary schedule should therefore be reformed so that it rewards only genuinely relevant graduate level training, and so that it rewards national teacher certification and the pursuit of graduate level career specialty certificates; and

WHEREAS, the salary schedule should also be reformed so as to provide for a longer work year for new teachers so as to address the shortage of time for staff and

curriculum development activities. Fair compensation for the extra days worked must be provided; and

WHEREAS, the state should develop a recertification process to ensure that teachers and other professionals continue to pursue high-quality continuing training; and

WHEREAS, such a recertification process should not be overly bureaucratic or burdensome; and

WHEREAS, ideally, professionals who obtain salary scale credit for continuing education under a reformed salary schedule should thereby satisfy any continuing education requirements of the State's certification system and they should not be subject to additional continuing education requirements; and

WHEREAS, any reform of the salary schedule should improve Delaware's ability to recruit the brightest new teachers; and

WHEREAS, any reform of the salary schedule should guarantee that current employees retain all their current rights under the existing schedule but also provide enhanced incentives for current employees to pursue high-quality, classroom-relevant training and to devote additional days to staff and curriculum development activities; and

WHEREAS, affected stakeholders -- particularly teachers -- should have an opportunity to participate in the consideration of improvements to the salary schedule; and

WHEREAS, a committee with strong teacher organization representation should be formed to consider improvements and seek input from affected stakeholders; and

WHEREAS, the committee's consideration of improvements in the salary schedule should be designed to produce an improved schedule for implementation for starting teachers in the 1999-2000 school year; and

WHEREAS, to that end, the committee shall consider as a focal point for reform the improved salary schedule outlined in Exhibit A to this Order.

NOW, THEREFORE, I, Thomas R. Carper, by the authority vested in me as Governor of the State of Delaware, do hereby declare and order as follows:

1. The Education Salary Schedule Improvement Committee shall be created and shall consist of the following members: five members appointed by the Governor, one of whom shall be Chairperson; the President of the Delaware State Education Association ("DSEA"), or her designee; the Executive Director of the DSEA, or his designee; the Chairpersons of the Joint Finance Committee, or their respective designees; the Chairperson of the Professional Standards Council, or her designee; and the President of the Delaware Chief School Officers Association, or her designee.

2. The Committee shall consider reforms to the State's salary schedule for education professionals so as

# GOVERNOR'S EXECUTIVE ORDERS

to : 1) ensure that the schedule provides positive salary incentives for relevant and rigorous graduate level continuing education and ensure that the schedule does not provide incentives for continuing education which is not of such relevance and quality; 2) address the need for more time for teachers to participate in staff and curriculum development activities by paying teachers more in exchange for more days worked; 3) provide Delaware teachers with competitive starting salaries and the opportunity to be rewarded for pursuing national certification, relevant graduate degrees, and career certificate specialties and for undertaking leadership roles which require additional hours of work; and 4) provide a sound basis for implementing an efficient recertification process to guarantee the continued professional development of all school professionals. The recommendations for improvement shall guarantee that current teachers and administrators may elect to continue to be compensated under the existing salary schedule or to opt-in voluntarily to any new salary schedule under procedures which are fiscally responsible. The Committee shall also make recommendations to improve the incentives for current teachers to pursue high-quality training, and the ability of school districts to direct staff to relevant training. The Committee shall also address whether teachers and administrators should be paid off of the same salary schedule.

3. The Committee shall seek input from affected stakeholders including local school boards, teachers, principals, other school administrators, and parent organizations.

4. The Committee shall present its recommendations, including a fiscal note and implementing legislation, to improve the State's education salary schedule to me on October 15, 1998 so that such recommendations for change can be considered for inclusion in the proposed budget for fiscal year 2000 to be presented to the General Assembly in January, 1999.

5. The Department of Education and the State Budget Office shall provide staff assistance to the Committee.

Approved this 20 day of January, 1998

Thomas R. Carper  
Governor

Attest:  
Edward J. Freel  
Secretary of State

STATE OF DELAWARE  
EXECUTIVE DEPARTMENT  
DOVER

**EXECUTIVE ORDER  
NUMBER FIFTY-ONE**

TO: HEADS OF ALL STATE DEPARTMENTS, AGENCIES AND AUTHORITIES, AND ALL POLITICAL SUBDIVISIONS AND GOVERNMENTAL UNITS OF THE STATE OF DELAWARE

RE: ESTABLISHMENT OF RECOMMENDATIONS ON THE COIN DESIGN FOR THE DELAWARE QUARTER DOLLAR COMMEMORATIVE COIN

WHEREAS, the United States Congress approved and the President signed Public Law 105-124, the "Fifty States Commemorative Coin Program Act" (the "Act") to "honor the unique Federal republic of 50 states that comprise the United States" and "to promote the diffusion of knowledge among the youth of the United States about the individual states, their history and geography, and the rich diversity of the national heritage"; and

WHEREAS, five state quarter dollars will be issued every year beginning in 1999 in the order in which the States ratified the Constitution or were admitted into the Union; and

WHEREAS, Delaware was the first state to ratify the Constitution of the United States; and

WHEREAS, Delaware will be among the first five states which coins will commemorate; and

WHEREAS, under the Act, the Governor of the State of Delaware is responsible for establishing a selection process and submitting coin concepts which are emblematic of the State of Delaware to the Citizens Commemorative Coin Advisory Committee and the Fine Arts Commission of the United States for consideration, with final approval by the Secretary of the Treasury.

NOW, THEREFORE, I, THOMAS R. CARPER, by the authority vested in me as Governor of the State of Delaware, do hereby declare and order that:

1. Delaware residents are hereby encouraged to submit design concepts for consideration.

2. The Delaware Arts Council is hereby assigned the responsibility for submitting coin concepts to the Governor.

3. The Council shall solicit and receive coin concepts from Delaware residents for consideration.

4. The Council shall review such coin design concepts and recommend five concepts for submission to the Governor. During this process, the Council shall:

(a) Give highest consideration to concepts which promote Delaware's rich heritage and recognize Delaware's historical significance as the "First State" of our nation; and

(b) Abide by the federal design concept standards provided for in the Act, which are outlined in Attachment A to this Order; and

(c) Abide by the state design concept standards provided for in the Act, which are outlined in Attachment B to this Order; and

(d) Meet no later than February 28, 1998 to review the coin design concepts submitted to it; and

(e) Consult with Delaware historians, Delaware art and design experts, members of the Delaware Heritage Commission, the Delaware Historical Society, Delaware coin experts, and Delaware residents in its review of the coin design concepts; and

(f) Recommend five coin design concepts to me no later than February 28, 1998.

Approved this 2nd day of February, 1998  
Thomas R. Carper  
Governor

Attest:  
Edward J. Freel  
Secretary of State

Attachment A

FIFTY STATES COMMEMORATIVE COIN  
PROGRAM

Design Concept Parameters

**Legislation**

Public Law 105-124 provides for designs to be submitted in accordance with the design selection and approval process developed by the Treasury Secretary in the sole discretion of the Secretary. The law further requires that, "because it is important that the Nation's coinage and currency bear dignified designs of which the citizens of the United States can be proud, the Secretary shall not select any frivolous or inappropriate design" and "no head and shoulders portrait or bust of any person, living or dead, and no portrait of a living person may be included in the design."

**Criteria**

Designs shall maintain a dignity befitting the Nation's coinage.

Designs shall have broad appeal to the citizens of the State and avoid controversial subjects or symbols that are likely to offend.

Suitable subject matter for design concepts include State landmarks (natural and manmade), landscapes, historically significant buildings, symbols of State resources or industries, official State flora and fauna, State icons (e.g., Texas Lone Star, Wyoming bronco, etc.), and outlines of the State.

State flags and State seals are not considered suitable for designs.

No inscriptions should be included in the State design concept.

Consistent with the authorizing legislation, the State are encouraged to submit concepts that promote the diffusion of knowledge among the youth of the United States about the State, its history and geography, and the rich diversity of our national heritage.

Priority consideration will be given to designs and concepts that are enduring representations of the State. Coins have a commercial lifespan of at least 30 years and are collected for generations.

Inappropriate design concepts include, but are not limited to the following: logos or depictions of specific commercial, private, educational, civic, religious, sports, or other organizations whose membership or ownership is not universal.

Concepts or background materials submitted to the Mint which are covered by copyright, trademark, or other rights (such as privacy and publicity rights) must include a release acceptable to the Mint from the rights owner that allows the concept or materials to be used on the coin, in marketing and promotional materials, and on the Mint's website for unlimited worldwide distribution without charge or restriction.

Attachment B

Delaware guidelines

Fifty States Commemorative Coin Program

**Eligibility:**

Delaware residents of all ages are encouraged to submit coin concepts.

**Criteria:**

Each coin concept must be accompanied by a written description, no longer than 100 words in length, which describes the reasons for consideration of the concept; and the name, address, and daytime telephone number of the individual who submitted the coin concept.

Individuals may submit only one coin concept.

Coin Concepts must be submitted on paper no larger than 12" X 24".

No slides, film, transparencies, or 3-dimensional designs or photography will be accepted.

Coin concepts must meet the federal design concept parameters.

**Deadline:**

Coin Concepts must actually be received by 4:30 p.m. on February 24, 1998. Concepts post-marked that date but not received will not be accepted.

No late entries will be accepted.

**Contact:**

Coin Concepts should be submitted to:

Eva Hays  
Secretary of State's Office  
State of Delaware  
401 Federal Street, Suite 3  
Dover, DE 19901

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**GOVERNOR'S APPOINTMENTS**

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1437

<b>BOARD/COMMISSION OFFICE</b>	<b>APPOINTEE</b>	<b>TERM OF OFFICE</b>
Board of Directors of the Riverfront Development Corporation	Mr. Marvin P. Thomas	Pleasure of the Governor
Council on Hispanic Affairs	Ms. Maria Madera Ms. Elba Quiles Mr. Antonio A. Valdes	01/15/01 01/15/01 01/15/01
Delaware Commission for Women	Ms. Kathryn Montgomery, Chairperson Ms. Geraldine Lewis-Loper	Pleasure of the Governor 03/29/98
Department of Health and Social Services	Dr. Gregg C. Sylvester, Secretary	Pleasure of the Governor
Governor's Task Force on School Libraries	Ms. Beth Anderson Dr. Kathleen Berhalter Ms. Jacqueline S. Harris Ms. Catherine W. Wojewodzki	01/15/01 01/15/01 01/15/01 01/15/01
Juvenile Justice Advisory Group	Mr. Justin Galloway Ms. Jennifer Hollis	Pleasure of the Governor Pleasure of the Governor

## THE FOLLOWING OPINIONS WERE ON FILE AS OF FEBRUARY 15, 1998

STATE OF DELAWARE  
DEPARTMENT OF JUSTICE  
**ATTORNEY GENERAL OPINION**  
**NO. 97-IB06**

March 17, 1997

Ms. Kathy Slaney  
Ms. Marie E. Page

403 Sharon Court  
Middletown, DE 19709

RE: Freedom of Information Act Complaint Against  
Appoquinimink School District

Dear Ms. Slaney and Ms. Paige:

Pursuant to 29 Del.C. Section 10005, we have consolidated the various complaints you made to this Office alleging that the Appoquiminink School District ("School District") violated the Freedom of Information Act, 29 Del.C Sections 10001-10005 ("FOIA"), by not allowing you reasonable access to public records. This letter is our written determination addressing those complaints.

Since you have made several FOIA requests to the School District in recent months, a complete procedural history is in order.

By letter dated September 30, 1996, you requested information from the School Board about parental involvement programs. You alleged that the School District received state and federal grant monies but "never instituted" those programs.

By letter dated October 7, 1996, the School District informed you that "we will respond in a timely manner," but due to other pressing school business, they could not respond within the seven days you had requested. The School District did reply to your request for information by letter dated October 17, 1996. Apparently, you had not yet received that response when you wrote your letter dated October 18, 1996 to the Department of Public Instruction, lodging a "formal complaint and request for investigation concerning the federal and state funding of the Appoquinimink School District."

By letter dated October 26, 1996 to the School District, you made a FOIA request for an accounting of various state and federal education grants. Specifically,

you asked for an accounting of "finding allocations received and expenditures encumbered on those funds" including: the names of persons who received those funds; the dates they received them; the funds allocated to them; dates, costs and names associated with services performed; dates, costs of materials purchased, and by whom; travel expenditures; capital outlays; and indirect costs. In your letter of complaint to this Office dated November 12, 1996, you alleged that the School District had not complied with your FOIA request.

On October 29, 1996, the School Board wrote to you stating: "Attached are the reports that you requested by your October 26, 1996 letter.... [T]he reports are quite detailed and could be hard to follow. I've included a list of object codes and of transaction codes that should be of some help to you. My offer inviting both of you for further explanation or to review any paper documentation still stands." By letter dated December 3, 1996, our Office determined that "the School District has already complied with your request for accounting information. To the extent it has not, there is an outstanding offer 'to review any paper documentation.' Accordingly we do not find any FOIA violation with respect to the production of public records requested by you from the School District."

As to your allegations of financial improprieties by the School Board, we stated in our December 3 letter that we "are referring those matters to the State Auditor's Office for possible investigation. We understand that you have asked the Department of Public Instruction to investigate your concerns as well."

By letter dated December 2, 1996, you made another FOIA request to the School District for documents relating to the Minker Construction arbitration award. By letter dated December 3, 1996, the School Board responded to that request, enclosing eleven documents. Superintendent Marchio also invited you, after reviewing the information, to contact him "if there is any other information that can be of benefit to you."

By separate letter dated December 2, 1996, you also asked the School District for copies of approved program budgets and final reports for eight state and federal education grants.<sup>1</sup> In response to your other FOIA request of that same day, the School Board had stated that the "request for information will take a few days longer to assemble."

Your second FOIA complaint letter, dated December 16, 1996, was received by this Office on December 20, 1996. In that letter you state that, "[r]egardless of Mr. Marchio's statements," you "are of the opinion that the information we requested has not been forthcoming. We have only received sporadic documentation, and none is detailed enough to address

any of our concerns regarding exact expenditures of the allocated grant money.” Specifically, you mentioned the “names of persons who received funding” as part of the information you had requested but not received.

By letter dated December 20, 1996, our Office asked the School Board to respond to that FOIA complaint. The School Board had already closed for the Christmas holidays, but our Office received a voice-mail from Superintendent Marchio, letting us know that he would respond to our letter as soon as possible after the schools re-opened on January 2, 1997.

By letter dated January 3, 1997, the School Board enclosed a copy of its letter dated December 3, 1996 (with attached documents) responding to your FOIA request of December 2 regarding the Minker Construction arbitration. The School Board also enclosed a copy of its letter dated December 17, 1996 (with attached documents) responding to your second FOIA request of December 2 regarding the grants. The School Board confirmed that you had met with school officials on two occasions (November 1 and December 2) to go over your requests for public records.

We received another letter from you dated January 9, 1997 enclosing a copy of a transcript of a meeting between you and school officials on November 1, 1996, and alleging that school officials have violated federal law by “supplanting” grant funds for education. Again, as we informed you in our letter of December 3, 1996, those allegations of financial improprieties are outside the jurisdiction of this Office.

By letter dated February 19, 1997, we asked the School District to clarify the existence of budgets and final reports for the eight education grants that were the subject of your December 2 FOIA request. By letter dated February 24, 1997, we received the School Board’s response, confirming that final reports are completed and available for inspection and copying for all of the federal grants (Title I, Title H, Title IV, Title VI, Perkins, Goals 2000, and the federal portion of the Carnegie Grant). Quarterly reports submitted to the Department of Public Instruction regarding the Curriculum Development Grant are also available for inspection and copying. According to the School District, it is not required to report on the state-funds portion of the Carnegie Grant. In its letter to you dated January 3, 1997 enclosing budgets for the eight grants, the School neglected to include a copy of the fiscal year 1996 budget for the Carnegie Grant. The School District has informed us that this budget is available for your inspection and copying.

Your December 3 request for public records relating to the Minker Construction arbitration was honored by the School District. Your most recent FOIA complaint does not specifically mention that request, and we assume that your remaining FOIA concerns are about

access to public records for the eight state and federal education grants that were the subject of your first FOIA complaint to this Office.

You have received at least some of the documents responsive to your FOIA requests under cover of letters dated October 29 and December 17, 1996 from the School District. The issue, therefore, is whether the School District has made available all public records relating to the state and federal education grants which are responsive to your FOIA requests and not exempt from disclosure.

According to a transcript of the October 22, 1996 School Board meeting (Appendix ‘F’ to your original letter of complaint), financial information regarding such grants is maintained in a computerized State accounting system. The State assigns an appropriation code to each separate grant, and each grant has its own separate account. The School District puts information such as monies received and monies spent in the computer system. It then receives periodic computer generated accounting reports from the State. The School Board keeps copies of all of the original paper documents (for example, purchase orders). The School Board also has computer terminals that can access the State main frame to obtain a print-out, for example, of all expenditures made pursuant to a particular grant and all appropriations.

FOIA defines “public record” as “information of any kind, owned, made, used, retrieved, received, produced, composed, drafted or otherwise compiled or collected, by any public body, relating in any way to public business, or in any way of public interest, or in any way related to public purposes, regardless of the physical form or characteristic by which such information is stored, recorded or reproduced.” 29 Del.C. Section 10002(d). Like the federal Freedom of Information Act, this expansive definition “makes no distinction between records maintained in manual and computer storage systems.... It is thus clear that computer-stored records, whether stored in the central processing unit, on magnetic tape or in some other form, are still ‘records’ for purposes of FOIA.” *Yaeger v. Drug Enforcement Administration*, 678 F.2d 315, 321 (D.C. Cir. 1982).

FOIA, however, “does not require a public body to create public records that do not exist,” nor does it require a public body to compile the requested data from “other public records that may exist.” Att’y Gen Op., 96-IB28 (Aug. 8, 1996). Accordingly, a public agency is not required to produce computerized data in a special format requested by a citizen. It is not “necessary for a computer operator to create new records through a ‘computer run,’ i.e., a search of the online database, accomplished by entering the [requesting party’s] search criteria.” *Gabriels v. Curiale*, App. Div., 628 N.Y.S.2d 882 (1995). Nor does

FOIA obligate an agency to “develop a program to accomplish this task for the purpose of complying with [the FOIA] request.” a FOIA requires public bodies, such as the School District, to provide “reasonable access” to public records for inspection and copying. 29 D-d. C. Section 10003(a). The act does not define “reasonable access,” but this Office has construed that term to require the requesting party to describe the documents sought with sufficient specificity to allow the public body to locate the records with reasonable diligence. See Att’y Gen. Op. No. 95-IB24 (Aug. 7, 1995).

Like the federal Freedom of Information Act and the public records laws in many other states, the Delaware FOIA does not contain an exception to disclosure for requests deemed by a public agency to be burdensome. The issue of whether a request sufficiently describes the public records sought, so that they can be located with reasonable effort, is distinct from whether there might be an administrative burden involved. Every public records act “contemplates there will be some burden in complying with a records request. . . .” State Board of Equalization v. Superior Court, 10 Cal.App 4th 1177, 1190 n. 14 (1993). If a request for public records sufficiently identifies the documents sought, “the burden imposed on the agency is irrelevant.” State of Hawaii Organization of Police Officers v. Society of Professional Journalists, Haw. Supr., 927 P.2d 386,403 (1996). A public agency may have a legitimate ground not to comply with a freedom of information act request if the request is so vague that the agency “does not know what plaintiff wishes to see or where to locate it.” Sean v. Gottschalk, 502 F.2d 122, 125-26 (4th Cir. 1974), cert. denied, 425 U.S. 904 (1976). But it is not grounds for withholding disclosure to cite “the sheer bulk of the material to which access is sought and the accompanying expense and inconvenience of making it available for inspection.....” Id.

With regard to your December 2, 1996 FOIA request, we find that the School Board substantially complied with your request by sending you copies of the budgets and reports (that exist) relating to the state and federal grants under cover of letter dated December 17, 1996. It came to light during our factfinding that some of the reports provided to you did not cover the full life of the particular grant, but the School Board has confirmed that final reports for all of the federal grants are available for inspection and copying, as well as the budget for the Carnegie grant.

We find that your requests for access to public records regarding the grants are reasonably specific. We further find that, with regard to your October 26, 1996 FOIA request, the School Board has not afforded you reasonable access to all public records relating to the grants. In particular, the record shows that there are hard-

copy documents (such as travel vouchers, purchase orders, expense accounts) evidencing how grant monies were spent, which have not been provided to you. That information forms, in part, the basis for weekly and monthly computer-generated reports for each grant, which has its own unique accounting code.

Those computer-generated reports (as distinct from the final reports for each grant) are “public records” for purposes of FOIA and are not exempt from disclosure. In addition, any hardcopy documents which form the basis of those reports are also disclosable public records. The School Board has suggested that the volume of these public records is quite large, and to produce them would be a great administrative burden.<sup>2</sup> But that is not a valid reason, under FOIA, for not producing all of the public records requested by you.

The School Board is entitled to a reasonable amount of time to make these public records available for inspection and copying. See Att’y Gen. Op. 91-I003 (Feb. 1, 1991) (time to respond to a FOIA request for public documents must be “reasonable,” which depends on such factors as the need to search for and collect the requested records, and the volume of the records). We think it appropriate that they be made available for inspection and copying within sixty days of the date of this letter. We emphasize again that the School Board is not required to compile any lists of information contained in public records, or to answer questions in a format requested by the complainants. Moreover, if any record “is in active use,” the School District can “so inform the citizen and make an appointment for said citizen to examine such records as expediently as they may be made available.” 29 Del. C. Section 10003(a). If the School District has already promulgated a rule or regulation, it can charge a reasonable fee “for copying of such records.” Id. Section 10003(b).

Very truly yours,  
W. Michael Tupman  
Deputy Attorney General

APPROVED:

Michael J. Rich, Esquire  
State Solicitor

STATE OF DELAWARE  
DEPARTMENT OF JUSTICE  
**ATTORNEY GENERAL OPINION**  
**NO. 97-IB07**

March 26, 1997

Ms. Sharon Beegle  
127 Brierley Lane  
Bear, DE 19701

RE: Freedom of Information Act Complaint Against  
Colonial School District

Dear Ms. Beegle:

This letter responds to your facsimile of February 26, 1997 to the Attorney General's Office alleging that the Colonial School District ("School District") violated the Freedom of Information Act, 29 Del.C. Sections 10001-10005 ("FOIA"), by not providing you with information you had requested.

By letter dated February 26, 1997, we asked the School District to respond to your complaint. By letter dated March 6, 1997, we received the School District's response.

In four letters dated January 21, 1997 to Mr. Monroe Gerhart, you asked for various information in accordance with Section 10003 of FOIA. Title 29 Del. C. Section 10003(a) provides that "[a]ll public records shall be open to inspection and copying by any citizen of the State during regular business hours by the custodian of the records for the appropriate public body." FOIA does not require a public body, such as the School District, to provide information in the form of answers to questions from a citizen. Nor does FOIA require a public body to compile information from public records in the form of a list or other format requested by a citizen. See Att'y Gen. Op. No. 96-IB28 (Aug. 8, 1996). The School District's responses to you and to this Office reflect this general statement of law.

Of the eleven separate requests for information you made in your four letters of January 21, 1997, only two asked to inspect or copy documents. The first was "the voter list for the recent December referendum." The School District's response was that no such list existed, "because the District did not formulate a list of those individuals. However, we do have records of individual participation that could be made available upon request and scheduling with our office for you to go through, . . ." Under FOIA, a public body is not required to create a public record that does not exist. See Att'y Gen. Op. No. 96-IB28 (Aug. 28, 1996). To the extent that the

information you seek is contained in public records other than in the list form you requested, the School District has offered to make those records available to you.

The second document you asked to see was "a copy of the state law and the BOE policy on how these funds [generated from "non-tax" sources] are to be accounted for and utilized." The School District states that it does not know what you mean by "BOE" policy. We are not sure either. In any event, the School District's response was that a copy of any state law "would be more appropriately sent to the Legislature," and also is available in "a public library." Official codifications, such as state laws and federal regulations, are not within the purview of the public records law, even if the School District might have copies of those laws or regulations in its files. "Not every document which comes into the possession or custody of a public official is a public record. It is the nature and purpose of the document, not the place where it is kept, which determines its status." Linder v. Eckard, Iowa Supr., 152 N.W.2d 833, 835 (1967).

Of your nine remaining requests for information, the School Board chose to provide you with all or part of the information you asked for regarding: percentage raise on salaries of administrators; employee benefits; legal expenditures; amount of money spent on a referendum; and income from facility rental and athletic events. In response to your question where you could find copies of state laws and federal regulations regarding accounting and utilization of "non-tax" sources of income, the School District referred you to the State legislature and the public library.

Of the four remaining requests for information, the School Board responded as follows:

List of all administrators supplied with a car, make model and year, monthly expense for leasing, source of payment (School District or State) - The School Board states that it cannot respond to this request for information because the Board does not lease any vehicles and "[a]ll vehicles have multiple users and none are exclusively used by a single individual."

Names and positions of employees issued a cellular phone and their monthly expenses; number of beepers issued to administrators -- The School District does not "issue" cellular phones or beepers. Some cellular phones are owned by the District and the District pays for all business related calls; some phones are owned by employees, and the District reimburses them for business related calls. "Similarly, some beepers are owned by the District, but some employees own and use beepers for District business."

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# ATTORNEY GENERAL OPINIONS

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List of income generated by vending machines and student pictures -- The School District does not have this information, because it "is not involved in the operation of [either]. These monies are handled through individual organizations such as clubs, faculty and staff organizations, and parent organizations."

You also asked whether "it is true that the [School District] recently purchased 2 new plumbing trucks at a cost of over \$32,000,00 each. Please explain any exaggerations." The School District denied that it had purchased two plumbing trucks at that price, and contends that any further response to your question is not required under FOIA.

Based on your complaint and its attached documents, and the School Board's response, we do not find that the School Board has committed a violation of the public records requirements of FOIA, 29 Del.C. Section 10003. Most of your questions and requests for information would call upon the School District to compile lists and extract information from other documents, which FOIA does not require the School District to do. To the extent the School District decided to provide you with some of the information you requested, it did so voluntarily, and FOIA is not a basis for compelling more complete or responsive answers.

Of course, if the information you have asked for is contained in public records of the School District, then you can direct a reasonably specific request to the School District to inspect and copy those records, provided that they are not privileged or otherwise exempt from disclosure under FOIA. We point this out because the information you seek regarding automobiles, cellular phones and beepers may very well be contained in documents which the School Board has. Under FOIA, the School Board may be required to produce those documents to you for inspection and copying, since they involve the expenditure of public funds.

Very truly yours,  
W. Michael Tupman  
Deputy Attorney General

APPROVED:

Michael J. Rich, Esquire  
State Solicitor

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STATE OF DELAWARE  
DEPARTMENT OF JUSTICE  
**ATTORNEY GENERAL OPINION**  
**NO. 97-IB08**

April 10, 1997

Mr. Clarence J. Barker  
P.O. Box 2  
Milton, DE 19968

RE: Freedom of Information Act Complaint Against  
Sussex County

Dear Mr. Barker:

This letter is our written determination in response to your complaint alleging that Sussex County (the "County") violated the Freedom of Information Act, 29 Del.C. Sections 10001- 10005 ("FOIA"), by not providing you with documents you requested.

On March 6, 1997, you faxed us a copy of a letter dated February 24, 1997 which you had sent to the County. By letter dated March 13, we asked the County to respond to your complaint. By letter dated March 21, 1997, we received the County's response.

You asked the County for "a copy of the official complete billing submitted by Delmarva Paving to whomever it was sent for the paving of our road." The County's response was "that no document exists in the files of Sussex County, Delaware, or within its control which would provide Mr. Barker with the information he requests concerning the billing of Delmarva Paving." The County further explained:

Delmarva Paving was the subcontractor of R.E. Pierson Construction Co., Inc. and Pierson's bid was based upon a unit price of per foot of pipe laid which included also the repair and restoration of all roads and surface areas disturbed by it under the terms of that subcontract.

Thus, repaving is integrated into the bid of Pierson, is only incidental to the whole project and there are no billings from Delmarva Paving that specifically address paving of the road at Pine Valley.

FOIA requires public bodies to make available for inspection and copying to any citizen of the State of Delaware "[a]ll public records." 29 Del.C. Section 10003(a). A "public record" includes any document "owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected" by a public body "relating in any way to public business, or in

any way of public interest, or in any way related to public purposes.....” Id. Section 10002(d).

The County’s attorney has attested that it did not receive any bills from Delmarva Paving; or the Pine Road paving project. The County had a contract with R.E., Pierson Construction Company (“Pierson”) for general contracting work. The bills submitted by Pierson to the County subsumed the costs of the subcontracting work done by Delmarva Paving, and therefore the public records of the County do not contain the information you seek.

Although Pierson might have documents showing the amounts billed by Delmarva Paving as a subcontractor, FOIA cannot be used to compel production of documents in the possession of a private contractor. “[T]he mere act of contracting with a public body to construct a public improvement does not mean that the private contractor” is subject to the public records law. L.E. Harold v. Orange County, Fla. App., 668 So.2d 1010, 1011 (1996). Thus, when a general contractor contracts out some of the work for a state agency, the general contractor’s “private negotiations with its subcontractors” are not “a proper subject of public scrutiny. Simply because a government agency contracts with a private corporation, the affairs of the corporation do not become the affairs of the government.” KMEG Television, Inc. v. Iowa State Board of Regents, Iowa Supr., 440 N.W.2d 382, 385 (1989).

In KMEG Television, the state university contracted with Rasmussen Communications to create a sports network. Rasmussen then subcontracted some of the work to local television stations. A television station which unsuccessfully bid then sued under the state freedom of information law seeking to compel the university and the general contractor to produce all bid documents submitted for subcontracting work. The Iowa Supreme Court found that the bid proposals “are not now, nor have they ever been, in the possession of the University. Rasmussen, a private corporation, solicited bids and oversaw the bidding procedure as part of its contractual obligation to create a sports network. The records, if any, kept in connection with that endeavor have not been shared with the University.” 440 N.W.2d at 385.

In Durham Herald Co. v. North Carolina Low-Level Radioactive Waste Management Authority, N.C. App., 430 So.2d 441, cert. denied, 435 S.E.2d 334 (1993), the state court of appeals held that records made and kept by contractors and subcontractors of a state agency, but not actually received by the state agency, were not public records requiring disclosure under North Carolina’s public records law. A private contractor is not “[a]n agency of North Carolina government or its subdivisions,” and the contractor’s records are not “made or received pursuant to law or ordinance in connection with the

transaction of public business.” 430 So.2d at 444.

Similarly, Pierson is not an agency of the State of Delaware or its subdivisions. The records of its billing with a subcontractor like Delmarva Paving therefore are not subject to disclosure under FOIA.

There may be instances where records of a private contractor are required to be provided to a state agency by the express terms of a public contract. See L.E. Harold, supra (private contractor required to breakout bids of minority and women subcontractors to ensure compliance with local procurement laws). Or the state agency may have an exclusive ownership right to documents produced by a contractor, in which case the agency can compel their production, even if they are not in the agency’s physical possession. See Pathmanathan v. State Cloud University, Minn. App. 461 N.W.2d 726 (1990). Neither of those exceptions appears to apply in this case.

Based on your complaint and the County’s response, we have determined that the County did not violate FOIA. The billing records you requested are not in the actual or constructive possession or control of the County but rather of a private contractor, which is not subject to the public records provisions of FOIA.

Very truly yours,  
W. Michael Tupman  
Deputy Attorney General

Approved:  
Michael J. Rich  
State Solicitor

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STATE OF DELAWARE  
DEPARTMENT OF JUSTICE  
**ATTORNEY GENERAL OPINION**  
**NO. 97-IB09**

April 21, 1997

Carol Ellis, Director  
Division of Professional Regulation  
861 Silver Lake Boulevard, Suite 203  
Dover, Delaware 19901

Dear Ms. Ellis:

You have requested the opinion of this office on the question of the status of a public member of the Board of Medical Practice to continue to hold office as a Board member.

You indicate that a presently serving public

Board member has a son who is completing his medical education in New Jersey. The son is presently a surgical resident in New Jersey and holds a permit from that state authorizing the holder of such permit to engage in the practice of medicine or podiatry in the second year of a graduate medical education program in medicine or podiatry.

Your question is prompted because of the provision of 24 Del. C §1710(b) which concerns the qualifications for public members of the Board of Medical Practice and which provides for five public members of the Board and then provides in pertinent part:

Said public members shall not be or ever have been licensed in any healthrelated field, shall not be a member of the immediate family of someone licensed in any health-related field, shall not be employed by a company engaged in a directly health-related business, and shall not have a material financial interest in the providing of goods and services to persons engaged in the practice of medicine. (Emphasis added).

A son or daughter would be viewed as a member of the “immediate family” for purposes of determining the qualifications for public members of the Board of Medical Practice. In Delaware, children, either natural or adopted, are viewed as a “close relative” for purposes of judging the conduct of state officers and employees. 29 Del.C § 5804(1).

As to the issue of whether a permit to practice in New Jersey equates with being “licensed in any health-related field,” the fact that New Jersey may distinguish between a “license” to practice medicine and a more limited “permit” to practice medicine which is given to medical students while in the second year or beyond of a graduate medical education program in medicine or podiatry in the State of New Jersey should not be viewed as controlling in any determination of eligibility for public Board member status in Delaware. Even if the New Jersey permit is viewed as only a restricted or limited authority to practice medicine, it is, nevertheless a “license” within the context of the Delaware Code. The equivalent authority in Delaware for the New Jersey “permit” to practice medicine would be the granting of a certificate to practice medicine under 24 Del.C. §1725(a)(2) in what is commonly referred to as an “institutional license.”

The term “licensed” in the statute is not expressly limited to licensure “within the State of Delaware,” and given the purpose of the restriction, which is obviously to insure that public members not be connected to or associated with the health care industry, any such limited

construction of the term “licensed” would be strained, overly restrictive, and inappropriate.

Assuming that the present situation is one which would disqualify an individual from initial appointment to the Board, the question becomes one of the status of an individual, presumably properly appointed, who subsequently comes under such a disqualification. Stated differently, does the occurrence of the disqualifying event necessarily or automatically result in the removal of the public member from the office or is further action required? The answer to this question for this Board is that the disqualifying event does not automatically effect the removal of the Board member nor, for that matter, does it mean that his acts done under the color of authority can be challenged. See Commonwealth of Kentucky cc rel. Breckinridge v. Winstead, et al., 430 S.W.2d 647 (1968).

The individual in such circumstances is viewed as at least a *de facto* officer. A *de facto* officer is one whose title to an office is not good in law but who is in fact in the unobstructed possession of his office and is discharging its duties in full view of the public in such manner and under such circumstances as not to present the appearance of being an intruder or usurper. State v. Pack, Del. Super., 188 A.2d 524 (1963).

The fact that the Board member may have been validly appointed and -that the disability has occurred subsequent to a valid appointment is not material in this situation since the statute specifies the prohibition in terms that a public member may not be nor ever have been . . . (emphasis added). Therefore, under the statute as it presently exists, when any of the prohibited conditions occur, the public member becomes ineligible to be a public member, and while such a Board member would serve as a *de facto* officer until ousted, once the right of such officer to serve is questioned, the probable result seems clear that service as a public board member must terminate unless the disability can be removed. State v. Pack, supra.

Members of the Board of Medical Practice are appointed by and subject to removal for cause from office by the Governor who may also fill vacancies on the Board. 24 Del.C. § 1710(g).

When a duly appointed Board member becomes disqualified from further service because of the occurrence of a limiting event and does not otherwise vacate the office, the appointing authority has cause to effect the removal of the individual who is no longer qualified and provide for his or her replacement by filling the resultant vacancy.

Should you have additional questions concerning this matter, please do not hesitate to let us know.



Very truly yours,  
Michael M. Tischer  
Deputy Attorney General

Malcolm S. Cobin  
Assistant State Solicitor

Approved:  
Michael J. Rich  
State Solicitor

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STATE OF DELAWARE  
DEPARTMENT OF JUSTICE  
**ATTORNEY GENERAL OPINION**  
**NO. 97-IB10**

April 28, 1997

The Honorable Thomas P. Eichler  
Department of Services for Children,  
Youth and Their Families  
1825 Faulkland Road  
Wilmington, DE 19805

RE: 31 Del.C. § 309 - Criminal History Information  
Relating to Child Care Personnel and Foster and Adoptive  
Parents

Dear Secretary Eichler:

You have asked whether those child care personnel exempted from the criminal history record check requirement under 31 Del. C. § 309 continue under that exemption when they transfer to another position, move laterally or are promoted. By way of this informal opinion we answer as follows:

The exemption of 31 Del. C. § 309(c) provides:

“[a]ll prospective child care personnel are covered by the provisions of this section as well as current child care personnel who have been providing said child care for a period of less than one (1) year...”

The effective date of this section was September 1, 1990, thereby exempting child care personnel employed on or before September 1, 1989 from the requirements of a criminal history record check. 67 Del. Laws c 409 § 2. The phrase “said child care” makes the exemption of §309(c) subject to more than one possible reading. The first is that child care personnel hired on or before September 1, 1989 remain exempt so long as they are continuously employed in any child care position. The second interpretation is that child care personnel remain

exempt so long as they continue to hold the exact position held as of September 1, 1989. Stated differently, child care personnel employed on or before September 1, 1989 would remain exempt from criminal history record checks until they transferred, moved laterally or were promoted to another child care position. As the statute is reasonably susceptible of different interpretations, it is ambiguous. Coastal Barge Corp. v. Coastal Zone Industrial Control Board, Del. Supr., 492 A.2d 1242 (1985). Where a statute is ambiguous, the intent of the legislature must be examined. Mosley v. Bank of Delaware, Del. Supr., 372 A.2d 178 (1977).

The synopsis of a piece of legislation is often helpful in determining legislative purpose together with reviewing the statute in its entirety. Synopsis language for this legislation states in part:

“[T]his Act requires certain individuals who currently provide child care to submit the necessary information in order for the Delaware State Police and the Department of Services for Children, Youth and Their Families to conduct a criminal history record investigation to determine a person’s suitability to provide child care services.” 67 Del. Laws C. 409

Suitability is to be determined using criteria and information “reasonably related to the prevention of child abuse.” 31 Del. C. § 309(h)(1). The Department of Services for Children, Youth and Their Families (hereinafter “Department”) which is to make the determination of “suitability,” is broadly mandated to “... protect and safeguard the well-being of children...” 29 Del. C. § 9001 (a). These provisions, the placement of the criminal history record requirements in the Delaware Code chapter entitled “Child Welfare” and the assignment of responsibility to the Department combine to support a clear legislative intent to protect the health, safety and welfare of Delaware children.

In view of the legislative intent of 31 Del. C. §309, it is our opinion that the General Assembly anticipated that movement from one child care personnel position to another, whether resulting from a transfer, lateral move or promotion, would require that an employee who was exempt at the time § 309 became effective should submit to the criminal history record check process. The statutory purpose of § 309 is to protect Delaware children who come within the purview, care and/or custody of the Department. To that end, it is only appropriate that any child care personnel changing positions within the child care field, just as any new employee, comply with the criminal history record check, review provisions and determination of suitability.

If we can be of further assistance, or if you have any questions, please do not hesitate to call us.

Very truly yours,  
Janice R. Tigani  
Deputy Attorney General

Marsha Kramarck  
Deputy Attorney General

APPROVED:  
Michael J. Rich  
State Solicitor

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STATE OF DELAWARE  
DEPARTMENT OF JUSTICE  
**ATTORNEY GENERAL OPINION**  
**NO. 97-IB11**

May 20, 1997

Senator Patricia M. Blevins,  
209 Linden Avenue  
Elsmere  
Wilmington, DE 19805

Representative Stephanie A. Ulbrich  
1018 Summit View Drive  
Newark, DE 19713

RE: Effect of Pending Criminal Charges On the Licensing of Veterinarians

Dear Senator Blevins, and Representative Ulbrich:

At the Sunset Committee hearing for the Board of Veterinary Practice ("Board") on March 10, 1997, the Board inquired whether legislation was necessary to authorize it to deny a license to a veterinarian from another state who has any pending criminal charge. At your request as Co-Chairs of the Sunset Committee, the Attorney General's Office submits this opinion.

### QUESTIONS PRESENTED

1. Can a person be denied a professional license on the ground that there is a pending criminal charge against that person at the time of application for licensure?
2. Does a licensing board have authority to withhold the issuance of a license while a criminal

charge is pending, and then grant or deny the license depending on the disposition of the criminal charge?

3. Can a licensing board suspend or revoke a license on the basis of a pending criminal charge that has not resulted in a conviction?

### Conclusion

Based on the foregoing legal authorities, we conclude that the Board can deny an application for a license if it determines that a criminal indictment against the applicant shows lack of good moral character necessary for the safe practice of veterinary medicine. If a license has already been issued, the Board can temporarily suspend the privilege of practicing veterinary medicine in order to protect the public safety, but the licensee has a right to a prompt post-suspension hearing. If the licensee is ultimately convicted of a felony or other public offense involving moral turpitude, then the Board has statutory authority to suspend or revoke a license for that reason.

### SUMMARY OF OPINION

The Board's enabling statute authorizes it to deny a license if the applicant does not demonstrate good moral character. A pending criminal charge can reflect on moral character. If the pending criminal charge does not have any bearing on the applicant's fitness to practice veterinary medicine, then denial could violate the applicant's substantive due process right to practice his or her profession.

The Board of Veterinary Medicine does not have authority to withhold issuance of a license pending the outcome of a criminal charge. If an applicant insists on a decision one way or the other, the Board must decide on the merits without delay. The applicant, however, may agree to voluntarily withdraw the application or ask the Board to withhold its decision until the criminal charge is resolved.

The Board has the inherent authority to temporarily suspend the license of a veterinarian who has been criminally charged for conduct that could threaten the public safety. Due process requires the Board to provide a prompt post-suspension hearing, but the Board does not have to stay its administrative proceeding pending the outcome of the criminal case. Granting a licensee's request for a stay may be appropriate, in the Board's discretion, to ensure fundamental fairness.

1. A State May Condition The Grant Or Denial Of A

Professional License On Any Ground Reasonably Related To The Practice Of That Profession.

Section 3308(a) of Title 24 of the Delaware Code provides: "Any person desiring a license to practice veterinary medicine in this State shall make written application to the Board. The application shall show that the applicant is a citizen of the United States or an applicant for citizenship, a graduate of a veterinary school, a person of good moral character, and such other information and proof as the Board may from time to time require by rule." Section 3309 further provides that "if a disciplinary proceeding or unresolved complaint is pending" before a licensing body in another state, "the applicant shall not be licensed until the proceeding or complaint has been resolved."

If the Board finds that an applicant is not qualified, it "shall immediately notify the applicant in writing of such finding and the grounds therefor. An applicant found unqualified may require a hearing on the question of his qualification. . ." 24 Del. C. Section 3308(b). Section 3314 provides that "in the case of a person whose application for a license is denied," such hearing shall be held within ten days "after receipt by the Board of a written request for a hearing."

The Board does not have authority to create substantive qualifications for license applicants in addition to those set forth in Section 3308(a). See Kramer v. State Board of Veterinary Medical Examiners, La. App., 55 So.2d 93, 94 (1951) ("nowhere in the act does the Legislature grant unto the Board the authority to prescribe" the "qualifications to be met by applicants prior to their application for the examination"). The statute authorizes the Board by rule to specify only the "information and proof" necessary to meet the statutory requirements for licensure.

Three of the statutory conditions for a license (citizenship, required school degree, disciplinary proceedings in another state) are objective. The third condition - "good moral character" - is subjective giving the Board discretionary authority to determine whether an applicant meets that condition.

"[A] person's right to engage in any lawful occupation is subservient to the legitimate right and duty of the state to protect the health, safety, and welfare of its citizens through the valid exercise of its police power. All occupational licensing emanates from this authority. For the greater good of the public at large, a state, under its police power, is free to place certain restrictions upon those who wish to enter or practice a particular occupation." Linkus v. Maryland State Board of Heating, Ventilation, Air-Conditioning & Refrigeration Contractors, Md. Spec. App., 1997 WL 96599, at p. 4

(Feb. 28, 1997) (citation omitted).

A statutory requirement of "good moral character" is common in state business, professional, and occupational license schemes. "Generally, the Legislature has authorized particular boards, after considering the factors enumerated in the relevant empowering statute, to exercise discretion and consider the general character of the applicant." Linkus, 1997 WL 96599, at p. II. For example, a licensing board can "consider prior criminal convictions as evidence of moral character....." Id. See Yirenkyi v. District of Columbia Hackers' License Appeal Board, D.C. App., 520 A-2d 328, 331 (1987) (whatever the term "good moral character" may mean in other contexts, "it surely excludes from consideration for a license any person, such as petitioner, who has been twice convicted of an offense [carrying a pistol without a license] against the public safety").

"The broad authority of the state to place restrictions upon those who wish to pursue an occupation is not without limitations however. In order to prevent arbitrary and capricious use of this power, due process and equal protection require that any regulation of a business must bear a reasonable and rational relationship to the state's objective." Linkus, 1997 WL 96599, at p. 4.

In Schwartz v. Board of Bar Examiners of the State of New Mexico, 353 U.S. 232 (1957), the United States Supreme Court held that a state cannot exclude a person from any "occupation in a manner or for reasons that contravene the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment." 353 U.S. at 238. In Schwartz, the applicant for the state bar was fully qualified to take the written examination, but was denied the opportunity because of several previous arrests for civil disobedience, none of which resulted in a conviction. The Supreme Court held that denial on that ground violated substantive due process because it was arbitrary. "The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense." 353 U.S. at 241 (footnote omitted). "Arrest, by itself, is not considered competent evidence either at a criminal or civil trial to prove that a person did certain prohibited acts." 353 U.S. at 241 n.6 (citing Wigmore on Evidence Section 980a).

In contrast, in Emery v. City of New Orleans, La. App., 473 So.2d 877 (1985), the state court upheld the city's denial of a liquor license to an applicant who had "several recent arrests and pending charges for possession of narcotics and stolen property." 473 So.2d at 878. The court found that the nature of those charges had "a real and substantial relationship to promotion of orderly and legal distribution of intoxicating beverages.... The requirement of good character and reputation for alcoholic beverage

outlet managers is reasonable and not arbitrary, and we defer to the municipality's broad discretion in setting the standard and in determining whether it is met by an applicant who has an arrest record." *Id.* at 880-81 (citation omitted).

In *Schware*, the applicant for the state bar examination was arrested but "released without formal charges being filed against him. He was never indicted nor convicted for any offense in connection with these arrests." 353 U.S. at 241. In *Emery*, the applicant for a liquor license had not only been arrested but also charged with possession of narcotics and stolen property. There is a qualitative difference between arrest and indictment for purposes of denying a license. Although an indictment does not have "evidentiary value," it is far "from being a mere allegation," and "constitutes a finding by a grand jury that a basis exists for subjecting the accused to a trial," with "intermediate restraints upon his freedom. . . ." *Trap Rock Industries, Inc. v. Kohl*, N.J. Supr., 284 A.2d 161, 169 (1971), cert. denied, 405 U.S. 1065 (1972).

The court of appeals in *Emory* rejected the constitutional challenge to the licensing statute's requirement of good moral character as void for vagueness. "The required qualification of good character and reputation provides an ascertainable standard. 'Good moral character' is a statutory prerequisite for countless occupations, professions, and positions of civic responsibility. The term is widely accepted and understood as a concise and meaningful description of an attribute of a desirable citizen." 473 So.2d at 881. To require the legislature to define all possible criteria for accepting or rejecting license applicants "...would undoubtedly have ended in a cumbersome, wordy enactment which could have added nothing to the inherent meaning of the words themselves and might well have detracted from their efficient and effective application." *Id.* (quoting *United States v. Mississippi*, 229 F. Supp. 925 (S.D. Miss. 1964)).<sup>3</sup>

Whether the Board can deny a license based on a criminal indictment depends upon the nature of the charge. If the charge has no bearing on the applicant's fitness to practice veterinary medicine, then a reviewing court could find that denial of the license application was arbitrary and capricious. Charges involving a controlled substance would most likely relate to the applicant's professional fitness (especially in a profession where prescription privileges attach to the license); a pending criminal charge for a traffic offense probably would not. See *Mules v. Maryland Racing Commission*, Md. Spec. App., 353 A-2d 664 (1976).

Legislation expressly authorizing the Board to deny a license based on a criminal indictment would diminish the chance of successful judicial challenge to the denial of a license application since the Board would not

be exercising unfettered discretion in determining that the indictment indicated bad moral character. But even a legislative provision would have to bear some rational relationship to the fitness to practice veterinary medicine in the State of Delaware. "Numerous decisions have held a statute can constitutionally bar a person from practicing a lawful profession only for reasons relating to his fitness or competence to practice that profession.... The authority to deny ... a professional license does not contemplate an identical standard of probity should apply to the different professionals with their different duties, responsibilities and degree of contact with the public." *Thorpe v. Board of Examiners in Veterinary Medicine*, Cal. App., 104 Cal.App.3d 111, 163 Cal.Rptr. 3 82, 3 84 (1980) (smuggling of controlled substance directly related to fitness to practice veterinary medicine). Thus, in *Yirenkyi* the municipal ordinance only barred licensure on the basis of indictment for certain crimes which might put the public safety of passengers at risk, given that cab drivers "pursue their employment without supervision and maintain direct and personal contact with the general public." 520 A-2d at 331.

In the context of an application for a professional license, the requirements of due process are at a minimum. "[A] protected right in a professional license comes into existence only after a license has been obtained. An applicant for a license has merely an expectation of obtaining a property interest. Such an expectation is not afforded the same protection under the Fourteenth Amendment as is the property right itself." *Walton v. Board of Examiners of Psychologists*, Del. Super., 1991 VVL 35716, at p. 4 (Feb. 21, 1991) (Barron, J.). Accordingly, there is no constitutional due process right to a hearing when a state board decides to deny an application for a license. By statute, however, "in the case of a person whose application for a license [to practice veterinary medicine] is denied," the applicant has a right to a hearing within "10 days after receipt by the Board of a written request for a hearing." 29 Del. C. Section 3314(a).

2. The Board Can Withhold The Issuance Of A License Only So Long As It Is Examining The Statutory Criteria For A License.

Section 3308(b) of Title 24 of the Delaware Code provides: "If the Board determines that the applicant possesses the proper qualifications, it shall admit the applicant to the next examination, or, if the applicant is eligible for a license without ammination under Section 3310 of this title, the Board may forthwith grant him a license." (Emphasis added.)

In *Kelley v. Delaware Alcoholic Beverage Control Commission*, Del. Supr., 423 A-2d 507 (1980)

(O'Hara, J.), the Alcoholic Beverage Control Commission imposed a moratorium on new liquor licenses because of a recent court decision calling into question the legality of Delaware's licensing scheme. The Superior Court granted a petition for writ of mandamus to compel the Commission to act on a pending application. The powers of the Commission were limited to those expressly given in Title 4 of the Delaware Code, and "cannot be extended beyond a strict construction thereof except with the approval of the General Assembly." 423 A.2d at 510 (quoting 59 Del. Laws c. 107, s. 68). The Commission conceded that it did not have express authority not to rule on a license application, but argued that such power was "implicit" in its "broad grant" of licensing authority. *Id.* The Superior Court rejected that argument. "[T]here is nothing in Title 4 expressly indicating that the Commission has discretion to consider some such applications but to refuse to consider or act on others."

In Stone and Edwards Insurance Agency v. Inc. v. Department of Insurance, Pa. Cmwlth., 636 A.2d 293, aff'd, Pa. Supr., 648 A.2d 304 (1994), the Pennsylvania Commonwealth Court also granted a writ of mandamus to compel action on a license application. Under the Pennsylvania statutory scheme, if the Insurance Department "is satisfied as to the applicant's worthiness and all other requirements are met, it must grant a license." Conversely, "if it is not satisfied that the applicant is worthy, the [Department] will deny the application." 636 A.2d at 302 n.27. But once the Department concluded its investigation of the applicants' alleged violations of the state insurance laws, "there is no adequate remedy for [the license applicants] other than mandamus because the Department's refusal to take final action of the applications precludes any appeal. The Insurance Department Act places a duty on the Department to either grant or deny applications consistent with its processing, and while the Department does have discretion in the outcome of the determination, it does not have the discretion to refuse to process Petitioners' applications." 636 A.2d at 304.

The Board's enabling statute (Title 24, Chapter 33) does not give the Board authority to withhold the issuance of a license during the pendency of a criminal charge, or for any other reason. Indeed, the statute provides that if the statutory criteria are met, the Board "shall" grant the application "forthwith." If there is a pending criminal charge, then the Board can exercise its discretion to deny the license application, but it must decide one way or the other, if the applicant insists on his or her right to a hearing. Of course, the applicant can ask the Board to defer its decision until the outcome of the criminal case, and thereby waive any right to seek a writ of mandamus. Alternatively, the applicant may voluntarily

elect, with the Board's consent, to withdraw the application without prejudice and with the ability to refile after the disposition of the criminal charge.

### 3. The Board Cannot Suspend Or Revoke A License Solely On The Basis Of A Criminal Charge Unrelated To The Practice Of Veterinary Medicine.

Title 24, Section 3313 of the Delaware Code sets forth fourteen statutory grounds for suspending or revoking a veterinary license, including: "(5) Conviction of a felony or other public offense involving moral turpitude;" and "(14) Unprofessional conduct as defined in regulations adopted by the Board." It is our understanding that the Board has not adopted any regulations defining "unprofessional conduct" for purposes of suspending or revoking a license.

In State Board of Medical Examiners v. Weiner, N.J. App., 172 A.2d 661 (1961), the State Board of Medical Examiners temporarily suspended a doctor's license to practice medicine pending the outcome of a criminal indictment for manslaughter. Citing the Supreme Court's decision in Schwartz, the New Jersey court observed that "the right to follow one's chosen profession is a fundamental element of citizenship and one cannot be prevented from practicing except for valid reasons arrived at in orderly and fair fashion." 172 A.2d at 675. "Implicit in the licensing philosophy, of course, and expressly provided in such regulatory legislation, is the power to revoke or suspend the license when the behavior of the licensee is found to be inconsistent with criteria which are stated with reasonable clarity and certainty and are arguably reflective of the State's interest in preservation of the public health and welfare." *Id.* The Board did not have express statutory authority to suspend a license pending criminal charges, but the Board had statutory authority to suspend or revoke a license for conviction of a crime involving morale turpitude. The Board argued, therefore, that it had "incidental authority, to do that which is 'fairly and reasonably necessary or appropriate' to implementation of the function expressly authorized by law." *Id.* at 676.

The court agreed in principle that "[s]uch a power may be implied from the Board's overall suspension and revocation authority. Among the considerations persuasive of such a view are the ever-present need for immediate and preventative action" to prevent the licensee from endangering "the public welfare prior to or during the pendency of charges and prior to actual hearing and disposition." *Id.* The court, however, held that this implied power could not be invoked on the basis of a criminal charge unrelated to the practice of medicine. Although the crime of manslaughter was "a serious

offense against the peace and dignity” of the state, it had “no direct connection with the physical capacity or professional methods of the practitioner in a way that would warrant summary measures in order to shield the public health.” 172 A-2d at 678, 679.

“[W]ith respect to licenses to engage in a business or activity, it is generally said to be implicit that a suspension may be ordered pending investigation when the public interest so requires.” Trap Rock Industries, Inc. v. Kohl, N.J. Supr., 284 A.2d 161, 169 (1971), cert. denied, 405 U.S. 1065 (1972) (citing K. Davis, Administrative Law Treatise Section 7.08, at pp. 438-444 (1958), 1970 Supp. Section 7.08, at pp. 331-33)). The courts in other states have also held that a regulatory agency can suspend a license to protect the public safety pending the outcome of criminal proceedings, so long as the alleged criminal conduct involved the fitness to hold a license. See, e.g., City of Indianapolis v. Tabak, Ind. App., 441 N.E.2d 494 (1982) (second-hand goods dealer’s license temporarily suspended pending criminal charges of receiving stolen property); Karanja v. Perales, Supr. Ct., 535 N.Y.S.2d 892 (1988) (health care provider may be suspended “when an accusatory instrument has been filed which charges a felony related to medical care”). The state, however, must offer the licensee “an opportunity to explain away the criminal charges to obviate the temporary suspension.” Trap Rock, 284 A.2d at 171.

The Board of Veterinary Medicine probably has the inherent authority to temporarily suspend a license if the licensee is the subject of a pending criminal charge that relates to his or her fitness to practice veterinary medicine. Due process requires that the licensee be given a prompt postsuspension hearing, and the statute requires a hearing within ten days if the licensee requests.

At that juncture, the Board must balance the need to protect the public safety by a continued suspension until the criminal charge is resolved, against the right of the accused to due process and the right to earn a living. See Barry v. Barchi, 443 U.S. 55, 66 (1979). (once a temporary suspension has been imposed, the licensee’s “interest in a speedy resolution of the controversy becomes paramount”). Continued suspension is not justified merely on the basis of an outstanding indictment. Nor does the Board sit to decide the merits of the criminal charge. Indeed, the Board most likely will “know nothing at all about the [criminal] case,” and “there stands between the licensee and conviction (and hence final determination of the revocability of his license) a presumption of innocence which must be overcome by evidence demonstrating his guilt beyond a reasonable doubt.” Weiner, 172 A-2d at 678. The purpose of a hearing is to allow the licensee an opportunity to explain the criminal charges and to demonstrate that continued

temporary suspension is not necessary to protect the public safety. Of course, if the licensee is ultimately convicted of a felony or public offense involving moral turpitude, then the Board will have statutory grounds to revoke or suspend a license for a fixed period of time.

Where there are criminal proceedings pending, licensees have argued that a parallel administrative proceeding will violate their Fifth Amendment right against self-incrimination. The United States Supreme Court has rejected that argument because the licensee can still invoke his Fifth Amendment right not to testify in the administrative proceeding. “It would stultify enforcement of federal law to require a governmental agency such as the [Food and Drug Administration] invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial.” United States v. Kordel, 397 U.S. 1, 11 (1970).

A licensee’s Fifth Amendment rights, however, might be violated if an agency’s rules would compel the licensee’s testimony or if his “failure to testify will be held a ground for disbarment or forfeiture of office.” DeVita v. Sills, 422 F.2d 1172, 1177 (3d Cir. 1979). But there is no constitutional infirmity if the licensee “can, if he wants, assert the privilege in the disciplinary proceeding. He has no constitutional right to be relieved of the burden of that choice.” 422 F.2d at 1180.

The courts in Delaware have followed Kordel and DeVita. The constitutional right against self-incrimination is not violated if a parallel civil proceeding goes forward at the same time as a criminal proceeding, even though the defendant in a criminal case may “be put to the difficult choice of having to assert the privilege in a related civil case.” Insurance Co. of North America v. Steigler, Del. Super., 300 A-2d 16, 18 (1972) (O’Hara, J.).

Although not a violation of the Fifth Amendment, an administrative proceeding to suspend or revoke a license may still violate due process and fundamental notions of fairness if criminal charges are also pending against the licensee. In Silver v. McCamey, 221 F.2d 873 (D.C. Cir. 1955), a licensed taxicab operator was arrested and charged with two counts of rape. While the criminal charges were still pending, the Board of Revocation and Review of Hackers’ Identification Licenses ordered him to show cause why his license should not be revoked because he was unfit to operate a public vehicle. The D.C. Circuit held that “due process is not observed if an accused person is subjected, without his consent, to an administrative hearing on a serious criminal charge that is pending against him. His necessary defense in the administrative hearing may disclose his evidence long in advance of his criminal trial and prejudice his defense in that trial.” 221 F.2d at 874-75. But “nothing prevents the

Board, while a criminal charge is pending, from holding a hearing and taking action on the question whether, because it is pending, a license should be temporarily suspended [to protect the public].” Since temporary suspension of a license does not involve “a finding of guilt or a permanent loss of employment, the hearing involved ... need not require disclosure of defenses to the criminal charge. Accordingly, temporary suspension of a license, unlike revocation, pending a serious criminal charge, need not be inconsistent with due process.” *Id.* at 875.

If the license hearing goes forward while the criminal charge is still unresolved, the Board runs the risk of having its action challenged on constitutional grounds. Although discretionary, the Board should consider staying its proceeding until the criminal case is over. “Undoubtedly there are cases in which a court in the exercise of its discretion should stay . . . a civil action pending the disposition of a criminal case.” *De Vita*, 422 F.2d at 1181 (citing *United States v. Kordel*, *supra*).

In *Moss v. State Personnel Commission*, 1987 WL 16715 (Del. Supr., July 30, 1987) (Stiftel, Pres. J.), the State fired an employee for conduct that also gave rise to criminal charges for rape. The State Personnel Commission denied a request for a continuance of an administrative hearing until after the criminal charges were resolved. On appeal, the Superior Court held that the Commission abused its discretion in denying the request for a continuance. “[T]he fact that a criminal trial was in the offing is not sufficient reason for a civil trial continuance even though there could be some possible prejudice to plaintiff.” 1987 WL 16715, at p. 2. But since the criminal charges were scheduled for trial in the near future, caution and fairness militated in favor of a stay of the administrative action. This was particularly true because the employee had already been terminated, and there was no threat to the safety of other employees at the workplace.

Very truly yours  
W. Michael Tupman  
Deputy Attorney General

APPROVED:  
Michael J. Rich  
State Solicitor  
May 20, 1997

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STATE OF DELAWARE  
DEPARTMENT OF JUSTICE  
**ATTORNEY GENERAL OPINION**  
**NO. 97-IB12**

May 20, 1997

Carol Ellis, Director  
Division of Professional Regulation  
Cannon Building, Suite 203  
P.O. Box 1401  
Dover, Delaware 19903

Re: Twenty-four Del. C. § 3519(e) - Exemption from Licensure

Dear Ms. Ellis:

You have asked whether unlicensed psychologists on the staff of the University of Delaware Center for Counseling and Student Development (“Counseling Center”) are exempt from licensure for the 6 year period under 24 Del.C. §3519(e). For the reasons stated below, we believe that they are.

The second paragraph of 24 Del. C. § 3519(e) was introduced as House Amendment No. I to Senate Bill No. 61 and was enacted as part of 70 Del. Laws Ch. 57 in 1995. The second paragraph provides:

“Notwithstanding any contrary provisions in this chapter, any person who is a full-time faculty member in a nationally accredited doctoral level clinical training program in the State, and who is actively pursuing licensure under this chapter for a period not to exceed 6 years, may participate in and may supervise matriculated graduate students in activities defined as the practice of psychology within the context of such programs; and may conduct any research and teaching activities related to the activities of such program.”

There are, therefore, three requirements for a person to be exempted pursuant to § 3519(e). First, the person must be a “full-time faculty member.” Second, said faculty member must be in a “nationally accredited doctoral level clinical training program in the State.” Third, the person must be “actively pursuing licensure under this chapter for a period not to exceed 6 years.” We understand from your letter that the two parts of this statute which are at issue when applying it to the Counseling Center are whether the staff at the Counseling Center are “full-time faculty members” and whether the Counseling Center conducts a “nationally accredited doctoral level clinical training program training program

in the State.”<sup>4</sup>

In letters to the Board of Examiners of Psychologists (“Board”) dated September 30, 1996 and January 23, 1997, John B. Bishop, Ph.D., Assistant Vice President for Student Life, states that the persons employed as psychologists in the Counseling Center are full-time faculty members according to the Constitution and By-laws of the University of Delaware. He attaches to those letters sections of the University Constitution. Section I of that Constitution provides that “full-time professional members ... in the Center for Counseling and Student Development” are part of the University faculty with full voting membership in the University Faculty. It appears that the Board’s concern is that these persons may not actually be engaging in instructional activity full-time. We do not read § 3519(e) as requiring that. It merely requires that the person be a “full-time faculty member”. The University defines the psychologists in the Counseling Center as full-time faculty members by its Constitution and there is nothing in § 3519(e) to suggest that the General Assembly meant anything other than one who is so designated by the institution of higher learning.

Second, Dr. Bishop has stated that the Counseling Center runs an internship program that is accredited by the American Psychological Association (“APA”). We understand that this internship program, or another similar APA accredited program, is a requirement for receiving a doctoral degree in psychology for most accredited programs and, therefore, part of the program matriculated graduate students must complete to receive their doctoral degree. Therefore, this internship program is a “nationally accredited doctoral level clinical training program in the State” in that it is both nationally accredited by the recognized accrediting association as well as being a clinical training program at the doctoral level since it is part of the course of study needed to be completed in order to achieve the doctorate degree in psychology.

We are aware that some of the Board’s concern is based on the fact that House Amendment No. 1, which contains the language at issue here, was negotiated late in the session and had in mind the faculty members in the Department of Psychology of University of Delaware and not the Counseling Center. However, as shown above, the clear language of the statute leads to only one result. A fundamental rule of statutory construction is “to ascertain and give affect to the intent of the legislature.” *Coastal Barge Corp v. Coastal Zone Industrial Control Board*, Del. Supr., 492 A.2d 1242 (1985) “[I]f the statute as a whole is unambiguous, there is no reasonable doubt as to the meaning of the words used and the Court’s role is then limited to an application of the literal meaning of the words.” *Id.* at 1246. We believe the language is clear and

there is no need to resort to other methods of statutory construction. Additionally, the Synopsis of House Amendment No. 1 to Senate Bill No. 61 supports our conclusion. The Synopsis states in part:

“This Amendment permits the continuation without interruption of well-qualified clinical programs which provide valuable training for doctoral psychology degree candidates, and a valuable public service. It allows post graduate program faculty members, who must spend time researching, teaching, and supervising students, additional time to comply with psychologist licensure requirements...”

In summary, we find that the language of the second paragraph of 24 Del. C. § 3519(e) is clear and unambiguous. Nothing in the language suggests that it was intended to apply only to the Department of Psychology and not to programs such as the Counseling Center.<sup>5</sup>

If you have any further questions, please do not hesitate to contact us.

Very truly yours,  
Malcolm S. Cobin  
Assistant State Solicitor

Approved  
Michael J. Rich, State Solicitor

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STATE OF DELAWARE  
DEPARTMENT OF JUSTICE  
**ATTORNEY GENERAL OPINION**  
**NO. 97-IB13**

June 2, 1997

Mr. Richard H. Anthony  
P.O. Box 653  
Lewes, DE 19958

RE: Freedom of Information Act Complaint Against  
City of Lewes

Dear Mr. Anthony:

This letter is our written determination in response to your complaint alleging that the City of Lewes (the “City”) violated the Freedom of Information Act, 29 Del.C. Sections 10001 - 10005 (“FOIA”) by not giving the required notice of meetings where public business was



discussed.

Your letter of complaint dated February 22, 1997 was received by this Office on February 28, 1997. By letter dated March 10, 1997, we asked for the City's response to your allegations that the City had violated the open meeting requirements of FOIA. Although your complaint also alleged a violation of the public notice provisions of the Code of Lewes, we did not ask the City to respond to those allegations since they involved matters outside the jurisdiction of the Attorney General's Office.

In your letter, you alleged that the City had violated FOIA in two ways: first, by holding meetings of the Personnel Policy Review Committee during the last two years without notice to the public; and second, by holding a meeting of the Mayor and three council members on January 27, 1997 to discuss matters of public business, again without notice to the public. By letter dated March 24, 1997 we received a response from the City's attorney, denying that the City had committed any FOIA violations.

By letter dated April 28, 1997, we asked the City for additional documents and information, which we received on May 2, 1997.

Concerning the first issue, the City Council, at a regularly scheduled meeting on April 10, 1995, appointed an "in house" committee to review personnel policy issues, and to advise and make recommendations to the whole City Council. That committee, which came to be known as the Personnel Policy Review Committee (the "Committee"), first met on May 23, 1995. Since then, the Committee has met sixteen more times, most recently on March 13, 1997. According to the City's attorney, "[e]ach meeting was noticed with an agenda at least seven days prior to the meeting." Enclosed with the City's letter response were copies of the three-line notices for each of the meetings of the Committee. The City's attorney also states that each of those meetings was tape-recorded, and the tapes "are available for review pursuant to an appropriate request under Section 10003 of Title 29 of the Delaware Code."

Concerning the second issue, the City acknowledges that in January 1997 "the Mayor and Councilpersons each received an invitation from the Historic Lewes Business Committee of the Lewes Chamber of Commerce inviting each "to attend a workshop with our group at St. Peter's Parish Hall on Monday, January 27, 1997, at 7:30 p.m." The invitation listed "areas we feel need to be addressed," including: police coverage, Park and recreation proposals, uneven pavement and sink holes, parking, transient boats, street cleaning, and Christmas lights."

The only notice of this meeting was in the January 1997 newsletter of the Chamber of Commerce,

which stated: "The committee has also requested a meeting with City of Lewes officials to discuss a number of issues that businesses in the historic district have with the City. The meeting is scheduled for Monday, January 27 at 7:30 p.m. at St. Peter's Hall." That notice was also listed in the Chamber of Commerce and Visitor Bureau's calendar of events.

The Mayor and three members of the City Council attended the meeting on January 2, 1997. The City, however, contends that "[t]here was no action taken at this public forum. The Mayor and members of Council did not discuss between themselves any matter of public business but rather heard discussion by the Chamber of Commerce and the Lewes Business Committee."

#### Summary of the Law

Section 10004 of Title 29 of the Delaware Code provides that "[e]very meeting of all public bodies shall be open to the public" except as authorized by statute for executive session. Section 10004(e)(2) further provides: "All public bodies shall give public notice of their regular meetings and of their intent to hold an executive session closed to the public, at least 7 days in advance thereof The notice shall include the agenda, if such has been determined at the time, and the dates, times and places of such meetings; . . . ." Section 10004(e)(4) requires that notice "shall include, but not be limited to, conspicuous posting of said notice at the principal place of the public body holding the meeting ....."

Section 10004(f) requires every public body to "maintain minutes of all meetings, including executive sessions, conducted pursuant to this section, and shall make such minutes available for public inspection and copying as a public record. Such minutes shall include a record of those members present and a record, by individual members (except where the public body is a town assembly where all citizens are entitled to vote), of each vote taken and action agreed upon."

The Committee is a "public body" for purposes of FOIA. FOIA defines a public body to include any "committee, ad hoc committee, special committee, advisory board and committee, [or] subcommittee, . . . appointed by any body or public official [which] ... is impliedly or specifically charged by any other public official, body, or agency to advise or to make reports, investigations or recommendations." 29 Del.C. Section 10002(a). The City does not dispute that the Committee was appointed by a public official (the Mayor) to give advice and to make recommendations to a public body (the City Council).

#### Discussion and Findings

For each of the seventeen meetings of the Committee, the City posted a notice stating the date, time, and place of the meeting. None of those notices, however, included an agenda, as required by Section 10004(e)(2). FOIA defines an agenda to include, at the very least, "a general statement of the major issues expected to be discussed at a public meeting, as well as a statement of intent to hold an executive session and the specific ground or grounds therefor . . ." 29 Del.C. Section 10003(f). See Ianni v. Department of Elections of New Castle County, Del. Ch., 1986 WL 9610 (Aug. 29, 1986) (Allen, C.) (agenda was insufficient "to alert the public" as to the matters the public body would consider).

Furthermore, the City admits in its response that "[n]o formal written minutes" were maintained of any of those meetings of the Committee. Rather, the meetings were tape-recorded. This Office has previously determined that, even where a public body has taped a meeting, FOIA still requires that minutes be prepared so that they are readily available for public inspection. See Att'y Gen. Op. 96-IB25 (July 22, 1996).

We find that the City committed two separate violations of FOIA: (1) failure to post agenda for meetings of the Committee, in violation of Section 10004(e)(2); and (2) failure to maintain minutes of those meetings, in violation of Section 10004 (f). We now turn to the issue of notice of the January 27, 1997 meeting between members of the City Council and the Chamber of Commerce.

The application of the open meeting law to joint meetings of different bodies does not lend itself to bright lines. On the one hand, there is no "reason why a joint discussion meeting of several public bodies with respect to matters of mutual public concern should not be as fully subject to [FOIA] as is a discussion of a single body with respect to matters of public concern." Allen-Deane Corp. v. Township of Bedminster, N.J. App., 379 A.2d 265, 268 (1977). On the other hand, the public policies behind the act may not be implicated where a joint meeting is "informational" only and "not for the purpose of official action." Woodbury Daily Times Co. v. Gloucester County Sewerage Authority, N.J. App., 386 A.2d 445 (1978) (meeting between local authority and state department of environmental protection).

The issue turns on whether members of a public body attending such a joint meeting are there simply to listen and learn, or whether they actively participate in the discussion or resolution of any issues of public concern. Even though the members may not vote on anything at the joint meeting, the same issues may be raised at a later meeting of the single public body. That creates at least the appearance that decisions affecting the public are being crystallized out of the public view, and the public vote is

only a "ceremonial acceptance." Levy v. Board of Education of Cape Henlopen School District, Del. Ch., 1990 WL 154147, at p.7 (Oct. 1, 1990) (Chandler, V.C.). "[R]arely could there be any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors, . . . [A] sunshine statute, being for the benefit of the public, should be construed so as to frustrate all such evasive devices." Id.

The City suggests that the meeting attended by the Mayor and three council members was not subject to FOIA because the meeting was called by the Chamber of Commerce. This Office has previously determined that it is irrelevant who sponsors such a meeting. "[A] meeting as defined in Section 10002(e) does not cease to be a meeting because the Council gathers as a result of an invitation of another public official or body. If the 'gathering' is 'for the purpose of discussing public business,' it would be within the scope of [FOIA], regardless of [who] initiated the breakfast." Att'y Gen. Op. 94-103 6 (Dec. 15, 1994).

The subjects of discussion at the January 27, 1997 meeting of the Chamber of Commerce were clearly "public business." FOIA defines "public business" to mean "any matter over which the public body has supervision, control, jurisdiction or advisory power." 29 Del.C. Section 10002(b). The purpose of the Chamber of Commerce meeting was "not merely for academic discussion" on matters "which would have no effect upon the City." The News-Journal Co. v. McLaughlin, Del. Ch., 377 A.2d 358, 361 (1977) (Brown, V.C.). Rather, the matters discussed at the meeting -- paving, parking, parks, and police -- are "matters over which City Council clearly had control, supervision and jurisdiction." Id. See Code of Lewes, City Charter, Section 19(i) (charge and supervision of streets, parks, and other administrative affairs of the city); Section 24 (police force).

The City also contends that the January 27, 1997 meeting was not subject to FOIA because the City representatives took "no action." In McLaughlin, the Chancery Court distinguished the Pennsylvania open meeting statute, which applied only "to meetings where 'formal action' was taken. Our law is not so limited. Rather, it applies to meetings called to discuss public business as well as to meetings called to take action on public business." 377 A.2d at 362.

In Levy, supra, the Chancery Court again rejected the notion that FOIA applied only to meetings where a public body intended to take "formal action", but did not apply where a school board held a "workshop" at a local restaurant. Under that interpretation, "there would be no remedy to deter Board members from privately meeting for discussion, investigation or deliberation about public business as long as the Board reached no

formal decision at that private meeting.” 1990 WL 154147, at p. 6. FOIA “recognizes that policy decisions by public entities cannot realistically be understood as isolated instances of collective choice, but are best understood as a decisional process based on inquiry, deliberation and consensus building. Because informal gatherings or workshops are part of the decision-making process they too must be conducted openly.” *Id.*

The City contends that the public had notice of the Chamber of Commerce meeting through the Chamber’s newsletter and calendar of events. FOIA, however, requires that notice of public meetings “shall” include “conspicuous posting of said notice at the principal office of the public body holding the meeting.” 29 D&J. Q. Section 10004(e)(4) (emphasis added). In *Att’y Gen. Op.* 96-IB26 (July 25, 1996), *Us* Office determined that the county did not satisfy the notice provisions of FOIA, when it gave notice of a meeting in the county administrator’s report. The purpose of requiring conspicuous posting of notice at the public body’s principal office “is to ensure that no member of the public will have to search out to discover public meetings.” *Id.*

We do not find, however, on the basis of this record, that the City violated the notice requirements of FOIA in connection with the January 27, 1997 meeting attended by the Mayor and three members of the City Council. The Chamber of Commerce is not a public body, and therefore is not required by FOIA to maintain minutes of its meetings. The City’s counsel has also represented that “the City is unaware of any minutes, notes or any other documents memorializing or relating to what was discussed at the January 27, 1997, meeting.” We have reviewed the minutes of the general and special meetings of the City Council through March 24, 1997, and it does not appear that any matters of public business that were discussed at the Chamber of Commerce meeting in January were also the subject of any formal action at a later Council meeting. On the basis of this record, we accept the City’s representations that the Council members attended the Chamber of Commerce meeting to obtain information only, and that they did not actively participate in discussions of public business that were later the subject of formal action by the City Council at one of its own meetings.

The City is cautioned, however, that attendance by members of the Council at meetings like the one with the Chamber of Commerce may trigger the requirements of FOIA. To make certain that their attendance is merely to listen and learn, it behooves Council members to take notes or otherwise memorialize the proceedings, in case there is a question raised in the future about the applicability of FOIA. When in doubt, all that the Council

need do is to give notice of the attendance by members at a meeting sponsored by another body, the date, place and time of that meeting, and the subjects to be discussed. Such notice requires only a modicum of time and effort, and will help save the City from any FOIA scrutiny.

As for remediation, since the meetings of the Committee were tape-recorded and have been preserved, the City is directed to prepare minutes of all of the meetings to date, and to prepare minutes for all meetings that might be held in the future.

The most serious violation resulting from the complaint is the failure to provide the public with agenda for the seventeen meetings of the Committee. Those meetings have been held over the course of the last two years. The City Council has charged the Committee with an important function: to review the City’s personnel policies and make recommendations to the Council, presumably for the Council to take action. Such action could have considerable impact, not only on City employees, but also on the citizens at large, who rely on the City for a variety of services. By failing to notify the public of the subject matter of its meetings, the Committee could very well have deprived the citizenry of an opportunity to monitor and influence issues of important public policy, before they became crystallized for approval by the City Council.

We find that the failure to post agenda involved “substantial public rights” and was not merely a “technical” violation. *Ianni*, 1986 WL 961 0, at p. 6. As a practical matter, the City cannot recreate two years of history by re-noticing and holding seventeen meetings of the Committee. To the extent that the City Council may have acted on advice or recommendations formulated by the Committee at one of those meetings, however, the action(s) by the Council may be subject to invalidation.

We note in particular that the minutes of the July 10, 1995 meeting of the Council state: “Due to his absence, Council person Sheehan read a memo from Deputy Mayor Pratt regarding the direction that the Personnel Policy Review Committee is taking. The memo states that a new organizational chart has been prepared, and requests Council’s approval of same. Council person Sheehan noted the changes that were made to the organizational chart. City Solicitor Tempe Steen stated that the committee is requesting direction from Council as to how they want the committee to go with revisions, or are they to just review the policy and procedures. After some discussion, Mayor Smith recommended, by common consensus, that the committee proceed with changes.”

In at least one instance, therefore, the Committee made a formal recommendation to the Council for its approval, a clear violation of FOIA since the Committee

had met to discuss the issue without the required public notice. The minutes also suggest that the Committee made other recommendations to the Council, as a result of discussions at meetings of the Committee.

To remedy these FOIA violations, we direct that the City notice a special meeting to discuss any formal report or recommendation that has been made by the Committee since its inception, and to give proper notice of that special meeting to the public so that interested citizens can attend and comment. At that time, after "full public discussion," Beebe Medical Center v. Certificate of Need Appeals Board, Del. Supr., 1995 V& 465318, at p. 6 (June 30, 1995) (Terry, J.), the Council can publicly vote to implement any recommendations of the Committee.

If the City will agree, in writing, to hold such a special meeting within thirty (30) days of the date of this letter, then our Office will be willing to forego filing suit in the Chancery Court to seek invalidation of any actions taken by the Council upon the advice and recommendation of the Committee.

Very truly yours  
W. Michael Tupman  
Deputy Attorney General

Approved:  
Michael J. Rich  
State Solicitor

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STATE OF DELAWARE  
DEPARTMENT OF JUSTICE  
**ATTORNEY GENERAL OPINION**  
**NO. 97-IB14**

July 29, 1997

VIA HAND-DELIVERY

Richard G. Elliott, Jr., Esquire  
Richards, Layton & Finger  
One Rodney Square  
P.O. Box 551  
Wilmington, DE 19899

Re: Freedom of Information Act Complaint Against  
Red Clay Consolidated School District Board of  
Education

Dear Mr. Elliott:

Pursuant to 29 Del.C. Section 10005(e), the Department of Justice makes the following written

determination whether a violation of the Freedom of Information Act ("FOIA") has occurred.

On June 18, 1997, we received your letter of complaint. By letter dated June 20, 1997, we asked the Red Clay Consolidated School District Board of Education ("Red Clay") to respond within ten days to your allegations that Red Clay violated the public records and open meeting requirements of FOIA. We granted Red Clay's request for an extension of time to respond to your complaint until July 11, 1997. We then provided you with a further opportunity to respond in writing, and received your supplemental response on July 14, 1997.

On July 15, 1997, we asked Red Clay's counsel to provide us with a copy of the minutes of the executive session on June 2, 1997 for our in camera review. We received the minutes on July 16, 1997. Based on the complaint (and documents attached), Red Clay's response, your reply, and our review of the minutes, we make the following written determination.

**A. Public Records**

Section 10003(a) of FOIA provides: "All public records shall be open to inspection and copying by any citizen of the State during regular business hours by the custodian of the records for the appropriate public body." 29 Del. C. Section 10003(a). Section 10003(a) further provides that "all citizens shall have" [r]easonable access to and facilities for copying of these records ... If the record is in active use or in storage and, therefore, not available at the time a citizen requests access, the custodian shall so inform the citizen and make an appointment for said citizen to examine such records as expeditiously as they may be made available."

The complaint alleges three violations of the public records law: (1) Red Clay did not provide a copy of an amended contract with the Montessori School at a public meeting on June 2, 1997; (2) Red Clay required The News Journal to make a written request to Red Clay's counsel before providing access to other public records requested on June 3, 1997; and (3) Red Clay withheld the minutes of the executive session held on June 2, 1997. Since the third issue may turn on the interpretation and application of the open meeting law, we will address it subsequent to our discussion of whether Red Clay went into executive session for a purpose authorized by statute.

**1. The Montessori School Contract**

The complaint states that at 4:30 p.m. at the June 2, 1997 meeting "a reporter for the News Journal requested access to an amended contract between the Red Clay Consolidated School District and the Montessori Community School, Inc. relative to a charter application that was being voted on by the Board at that meeting.....".

The complaint first states that “[s]uch access was denied,” but then states that “access was provided after a vote on the contract had been taken.” The News Journal contends that the document “should have been provided before the vote.”

In its response, Red Clay states that the contract “was promptly provided to its reporter at the very meeting at which access was sought.....” Red Clay also contends that the document requested “was in ‘active use’ until the voting on it was complete, within the meaning of Section 10003 (a).” We do not have to decide whether the document was in “active use” for purposes of FOIA since we find that Red Clay did not deny The News Journal access to this public record.

FOIA requires that citizens have “reasonable access” to inspect and copy public records, but does not define “reasonable access.” In construing that term, this Office has made previous reference to the federal Freedom of Information Act, 5 U.S.C. Sections 550-559, which generally requires a ten-day response to requests for public records. See 5 U.S.C. Section 552(a)(6)(A)(i). The federal law only requires the agency to “respond” to the request, that is, to make a decision whether it will or will not comply (as opposed to actually producing the documents requested). If there are “unusual circumstances,” the federal agency may have longer to respond. Section 552(a)(6)(B).

A public body in Delaware “should, within ten (10) days after the receipt of a definitive request, issue a written determination to the requester stating which of the requested records will, and which will not, be released and the reasons for any denial of a request.” Att’y Gen. 911003 (Feb. 1, 1991). This time may be extended for good reason, for example: “(1) When there is a need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request; (2) When there is a need to search for, collect, and examine a voluminous amount of separate and distinct records which are demanded in a single request; or (3) When there is a need for consultation, which shall be conducted with all practicable speed, with another agency or with agency counsel.” Id. The touchstone to the public access analysis is the modifier “reasonable,” which is tested under the circumstances of the particular case. See Att’y Gen. Op. 94-IO30 (Oct. 19, 1994) (unreasonable for the town not to comply with a request for public records for ten weeks).

The News Journal admits that it received a copy of the contract it requested at the very meeting during which it requested the document. We do not construe the “reasonable access” requirement of FOIA to mean that a public body must provide access, on short-notice demand, at any time or place. The FOIA Declaration of Policy

states that citizens should have “easy access” to public records. 29 Del.C. Section 10001. It does not say that they must have instantaneous access.

Of course, there may be circumstances where a public body should give priority to requests for public records. “Courts have been sensitive to the context of FOIA requests and to the plaintiff’s need for the information, and they have expected that the administrative procedures would take these needs into account.” Mayock v. M, 714 F. Supp. 1558, 1567 (N.D. Cal. 1989) (public records needed to defend against imminent deportation). The News Journal apparently wanted to see a copy of the amended contract to better observe the discussion at the meeting on June 2. But we do not find that the circumstances were so compelling as to require Red Clay to provide a copy of the contract upon first demand at an open public meeting, especially since Red Clay provided The News Journal with a copy of the contract before the meeting concluded.

## 2. Minutes of School Board Meetings

On June 3, 1997, a reporter for The News Journal made a telephone request for minutes of certain meetings of the Red Clay School Board. The attorney for the School Board asked that the request be put in writing “so that there would be no mistake as to the documents requested” and “to avoid any misunderstanding that could occur.” The News Journal takes the position that FOIA does not require requests for public records to be made in writing.

FOIA is silent as to whether a public body can require a citizen to make a written request to inspect and copy public records before honoring the request. It is within the discretion of the public body to honor a verbal request for public documents. See Att’y Gen. Op. 96-IB 13 (May 6, 1996) (“a public agency can certainly respond to a request by telephone”). But if a public body chooses to require that the request be made in writing, or that such writing be directed to its counsel, then that, in itself, does not amount to a violation of the public records law.

In Brent v. Paquette, N.H. Supr., 567 A.2d 976 (1989), a citizen sued alleging that he was denied access to public records by the school superintendent, who required that he make an appointment first. The citizen argued that the New Hampshire law guaranteed him the right to inspect public records during regular business hours at the premises of the public body, and therefore he had a right to see any public document upon demand. The New Hampshire Supreme Court did not agree. “[A]n appointment does not prevent a citizen from inspecting public records,” but only assures “the ‘smooth and efficient functioning of the bureaucracy in providing public information.’” 567 A.2d at 980. “While ... citizens

are entitled to inspect public records during business hours and at business offices, [the statute] does not indicate that citizens have the unfettered right to review the records in any quantity and wherever kept immediately upon demand.” 567 A.2d at 981. The court also rejected the citizen’s argument that any restriction on access to public records was contrary to the purpose of the statute and the public’s right to know.

[R]equiring citizens to arrange a mutually convenient time to examine public records perpetuates the underlying purpose of the statute ... ‘to ensure ... the greatest possible public access to the actions, discussions, and records of all public bodies . . . .’ [C]alling ahead to arrange a time to review particular documents assures citizens that they will be able to examine the records soon after they arrive at the office, and that they will not be told either to wait an indeterminate amount of time for someone to help them, or to come back later when the office is not so busy. Likewise, our public offices will be able to function more smoothly and efficiently if the keepers of the records can plan their days around pre-arranged appointments, and not be forced to interrupt their work whenever a citizen “drops by” to inspect a public record.

567 A.2d at 981-82.

Requiring a written request does not burden a citizen’s right of reasonable access to public records any more than the appointment requirement in Brent. Further, there is little, if any, additional burden in requiring that the request be addressed to the public body’s counsel, as opposed to the custodian of the records. The News Journal complains that this can result in unreasonable delay since Red Clay’s counsel is in Philadelphia. In this age of facsimile and computers and law firms with multiple branch offices, we think this concern is de minimis. In any event, referring the records request to counsel did not result in unreasonable access since the response from Red Clay’s counsel was made within 48 hours of The News Journal’s request.

## B. The Executive Session

### 1. Purpose

FOIA requires that “[e]very meeting of all public bodies shall be open to the public except those closed pursuant to subsections (b), (c), (d) and (g) of this section.” 29 Del.C. Section 10004(a). Subsection (b) authorizes a public body to go into executive session for nine purposes. One of those purposes is for: “Strategy sessions, including those involving legal advice or

opinion from an attorney-at-law, with respect to collective bargaining or pending or potential litigation, but only when an open meeting would have an adverse effect on the bargaining or litigation position of the public body;..... 29 Del.C. Section 10004(b)(4).

Red Clay states that it went into executive session to meet with its attorneys to discuss a possible lawsuit over the Montessori School charter. According to Red Clay, “the Board was threatened with litigation by opponents of the [sic] Phil Cloutier [sic], State Legislator, and others, who vowed to sue Red Clay if it approved a pending Montessori charter school application. The Board therefore called the executive session to evaluate the potential litigation and to determine Red Clay’s alternatives to avoid litigation on that issue. Legal counsel to the Board was present, and without revealing the advice rendered, which is attorney-client privileged, Red Clay was concerned what its alternatives would be in approving the application, disapproving the application, or offering a modification which potentially could avoid litigation. Alternatively, Red Clay was interested in the soundness of its litigation position.”

A public body bears the “burden of proving that its action was justified when the propriety of an executive session is challenged.” Common Cause of Delaware v. Red Clay Consolidated School District Board of Education, Del. Ch., 1995 WL 733401, at p. 4 (Dec. 5, 1995) (Balick, V.C.) (citing 29 Del.C. Section 10005). Unlike the Chancery Court in Common Cause, we do not have the benefit of depositions of School Board members as to what was discussed at the executive session on June 2, 1997. We have reviewed the one-page minutes of the executive session, which indicate that two attorneys for Red Clay were present at the executive session and that legal matters were discussed. Counsel for Red Clay has confirmed that the executive session on June 2, 1997 was not tape-recorded.

In Common Cause, Vice Chancellor Balick observed that “[t]here is a practical reason” to keep more detailed minutes of executive session in the event there is litigation and the purpose of the executive session is challenged. 1995 WL 733401, at p. 4. But FOIA “neither says that the subjects discussed must be summarized nor attempts to define how specific such a summary should be. Although plaintiffs are undoubtedly correct that a more detailed contemporaneous record of the subjects discussed would make it easier to confirm that a public body has kept within prescribed limits on executive sessions, I cannot conclude that there is a clearly implied statutory requirement to summarize the subjects discussed with any degree of specificity in the minutes of executive sessions.” 1995 WL 733401, at p. 4.

In Common Cause, there was no dispute that

litigation (the federal desegregation lawsuit) was pending. The issue was whether the subjects discussed in executive session would have an adverse effect on Red Clay's position in that litigation. FOIA, however, also authorizes a public body to go into executive session to receive legal advice from an attorney with respect to "potential" litigation, if "an open meeting would have an adverse effect on the bargaining or litigation position of the public body; . . ." 29 Del.C. Section 10004(b)(4).

In Common Cause, the Chancery Court found that an open meeting would have an adverse effect on the Board's litigation position in the desegregation case. "At the time of the April meeting, Red Clay was seeking the State Board's support of the open enrollment plan and was trying to meet the deadline for filing a motion to modify the federal court's decree... The public was intensely interested and deeply divided on open enrollment and unitary status. The issues in question required the Board to consider proposed changes and arguable problems in the plan. The Board could reasonably conclude that open discussion of those issues would have an adverse effect on the Board's pending motion seeking court approval of the plan." 1995 WL 733401, at p. 2.

The Montessori School charter was the subject of extensive coverage in the local media. See, e.g. The News Journal, May 19, 1997 ("Red Clay Eyes Montessori"); May 21, 1997 ("Montessori Approval Looks Likely"); May 22, 1997 ("Red Clay Debates Montessori School"); May 23, 1997 ("Montessori Approval Raises Money Issues"). The article that appeared on May 23 noted that critics "question whether tuition-based preschool programs are legal in a charter school," and that Representative Philip D. Cloutier (R-Heatherbrooke) was planning "to ask the state attorney general's office to rule on the issue." In a News Journal article on June 2, 1997, the headline reported that the Montessori charter "Plan May Break Delaware Law." Representative Cloutier was quoted: "Red Clay is trying to find some means to accomplish what the statute says they can't do ... They are desperately trying to find a way to salvage a good idea, but it just happens to be illegal."

At the public meeting on June 2, there was "overwhelming opposition from about 50 community residents and staffers who shouted and railed against the proposal." The News Journal, June 3, 1997. The public was obviously interested and divided on the issue of a charter school. Critics claimed that the proposal would violate state law by charging tuition. Under these circumstances, we find that Red Clay could reasonably conclude that open discussion with its attorneys of the legal issues surrounding the charter application would have an adverse effect on the Board's position in potential litigation challenging the legality of the charter school.

## 2. Minutes of Executive Session

FOIA exempts from disclosure "minutes or portions thereof, and any public records pertaining to executive sessions conducted pursuant to this section....." 29 Del.C. Section 10004(f). In Chemical Industry Council Inc. v. State Coastal Zone Industrial Control Board, Del. Ch., 1994 WL 274295 (May 19, 1994) (Jacobs, V.C.), the Board invoked this exemption to withhold tape recordings of an executive session in which the Board discussed (though not exclusively) potential litigation. Vice Chancellor Jacobs emphasized that this exemption applied only "so long as public disclosure would defeat the lawful purpose for the executive session" (quoting Section 10004(f)), and ordered the Board to produce the tapes after redacting "those portions that specifically concern the Board's litigation strategies." 1994 WL 274295, at p. 13.

In reviewing the minutes of the executive session on June 2, 1997, we do not find that disclosure "would defeat the lawful purpose for the executive session" by revealing any details about Red Clay's litigation strategy or the advice received from counsel. Accordingly, we direct Red Clay to produce to The News Journal the minutes of that executive session.

The News Journal also contends that on other occasions Red Clay has "made improper use of the litigation exception to hold executive sessions (particularly as to charter school applications), when no legitimate threat of litigation exists....." Attached to the complaint are copies of the notices for meetings on April 16, May 19, and May 21, 1997, which state that the Board will hold an executive session concerning "charter school applications" or "the Montessori charter application."

Again, we are limited in our ability to know what was actually discussed at those meetings because of the lack of specificity in the minutes. Controversy surrounding charter schools, however, has continued since the General Assembly enacted the Charter School Act of 1995. See 1995 Del. Laws ch. 179 (approved July 10, 1995). This controversy was particularly intense in the months leading up to the approval of the Montessori School charter application by Red Clay on May 22, 1997. Accordingly, we find that Red Clay reasonably invoked the potential litigation exception for executive session at the April and May meetings.

## C. Procedure For Going Into Executive Session

The public notice of the June 2, 1997 meeting of the Red Clay School Board stated that the Board "will meet on Monday, June 2, 1997 at 3:00 p.m. This meeting, the executive session, will be held at the administrative offices building, 1400 Washington Street, Wilmington.

The public meeting will take place at Warner Elementary School, 820 West 19th Street, at approximately 4:30 p.m.”

The News Journal contends that “[n]o public notice was given that the Board intended to convene a public meeting on June 2, 1997, for the purpose of conducting a vote on whether to hold an executive session, as is required under 29 Del.C. Sections 10004(c) and (e)(2). . . .” As such, the Notice was drafted in such a way as to discourage or thwart public attendance at the Board’s meeting at 3:00 p.m. on June 2, 1997. The Notice further reflects the fact that the Board had pre-determined its intention to hold an executive session at 3:00 p.m. on June 2, 1997, thereby obviating any utility or significance of holding a public meeting and vote on the subject.”

Red Clay responds that a quorum of the School Board “convened in public session at three p.m. and immediately moved to go into an executive session. Once the motion was made and seconded and a vote taken, the Board went into executive session, where it remained until the conclusion of that meeting.” As for the notice of executive session, Red Clay explains that “[t]he Board’s notices of meetings are worded so as to put the public on notice that the Board intends to hold an executive session immediately after the public meeting is convened, so that the public does not wait outside the doors for an hour, hour and one-half, or two hours, while the executive session is completed. The Board’s notice is required to, and did, notify the public of its intent to go into an executive session.”

Section 10004(e)(2) of FOIA requires all public bodies to give “public notice of their regular meetings and of their intent to hold an executive session closed to the public, at least 7 days in advance thereof. The notice shall include . . . the dates, times and places of such meetings; . . . .” Section 10004(c) provides that “[t]he vote on the question of holding an executive session shall take place at a meeting of the public body which shall be open to the public, and the results of the vote shall be made public and shall be recorded in the minutes.”

The News Journal questions whether Red Clay gave adequate notice of the executive session since the notice suggested that the public was only invited to a later meeting of the School Board at a different location. But there is no evidence that any member of the public was denied the right to attend the meeting at 3:00 p.m. to watch the Board vote in public to go into executive session.

In Att’y Gen. Op. 94-1008 (Feb. 25, 1994), a city council moved to “adjourn” a public meeting in order to go into executive session. This Office found no violation of the open meeting law because nothing in the complaint “indicates either explicitly or implicitly that members of the public were somehow misled by this order of business into leaving the regular meeting so that the Council could

somehow meet secretly to conduct its business.” Similarly, we find nothing in The News Journal’s complaint to show that citizens did not attend the start of the 3:00 p.m. meeting because they were misled by the public notice posted for the meeting.

Nevertheless, we see some potential for public confusion under the format currently used by Red Clay for giving notice of its meetings, particularly in holding the executive session at a different location from the portion of the meeting open to the public. In the future, Red Clay should make it clear that a single public meeting open to the public will be held, and that during the meeting the Board may vote to go into executive session for a reason permitted by statute. Likewise, the notice should be clear as to the location of the meeting (or parts thereof) so that citizens can then choose whether to watch the public vote on going into executive session, or to arrive later at a different location after the executive session is concluded.

The News Journal asks this Office “for an opinion that, as a result of the Board’s above detailed violations of FOIA, all actions taken by the Board (as set forth herein) are null and void.” At most, the notices for the June 2 meeting might have technically violated the act. Under these circumstances, we think it inappropriate to declare invalid any action taken by Red Clay at the June 2 meeting.

The remedy of invalidation “is a serious sanction and ought not to be employed unless substantial public rights have been affected and the circumstances permit the crafting of a specific remedy that protects other legitimate public interests.” Ianni v. Department of Elections of New Castle County, Del. Ch., 1986 WL 9610, at p.7 (Aug. 29, 1986) (Allen, C.). We do not believe that “substantial public rights” were impaired as a result of Red Clay’s form of notice of the executive session on June 2, 1997. Following the executive session, there was considerable discussion and debate in the portion of the meeting open to the public, and the Board members unanimously agreed to locate the Montessori School at Shortlidge Elementary School. We find the circumstances similar to those in Beebe Medical Center v. Certificate of Need Appeals Board, Del. Super., 1995 WL 465318 (June 30, 1995) (Terry, J.), *affd*, Del. Supr., 1996 WL 69799 (Jan. 29, 1996), where the court held: “[T]his is a case where there was ample input from the applicants and the public; where there was a full public discussion; and where any violation of the FOIA was de minimis when taken in context with the entire process.” 1995 WL 465318, at p. 6.

In any event, the issue of whether to void an action taken in violation of the open meeting law is now moot. As reported in The News Journal on July 17, 1997, the contract proposal between the Montessori School and



Red Clay “has fallen apart,” and ... [t]he proposal approved by the [school] board is now null” (quoting William E. Manning, President of the Red Clay School Board).

The remedial action we have directed is prospective only, to address the potential for violating the notice requirements of FOIA that exists in the form of notice used by Red Clay for its meetings. Other public bodies that use the same or similar form of notice are cautioned that they could be subject to heightened scrutiny under FOIA if they do not clarify their notices along the lines recommended by this Office.

#### Conclusion

For the foregoing reasons, we determine that Red Clay did not violate the public records requirements of FOIA by: (1) producing a copy of the amended contract with the Montessori School after the vote but at the public meeting on June 2, 1997; (2) requiring that a FOIA request made on June 3 by telephone be in writing and directed to Red Clay’s counsel. We find that the minutes of the executive session on June 2 are not exempted from disclosure, and must be produced.

We further find that Red Clay went into executive session for a purpose authorized by statute: to discuss potential litigation with its counsel when an open meeting would have an adverse effect on the Board’s litigation position. The notices used by Red Clay to give the public notice of its meetings, however, are potentially misleading. Red Clay is directed to revise its form of notice in time for its next regularly scheduled meeting to make it clear that there is a single public meeting at a single location, during which meeting the Board may vote to hold an executive session as the first item on the agenda. In that way, the public can choose whether to attend the beginning of the meeting to watch the vote on going into executive session, to make sure that it complies with the requirements of FOIA.

W. Michael Tupman  
Deputy Attorney General

APPROVED:

Michael J. Rich  
State Solicitor

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STATE OF DELAWARE  
DEPARTMENT OF JUSTICE  
**ATTORNEY GENERAL OPINION**  
**NO. 97-IB15**

August 22, 1997

Mr. David Burke  
66 West Fairfield Drive  
Dover, DE 19910

RE: Freedom of Information Act Complaint Against  
Caesar Rodney School District

Dear Mr. Burke:

By letter dated June 30, 1997 (received by this Office on July 8, 1997), you alleged that the Caesar Rodney School District (“the School District”) had violated the Delaware Freedom of Information Act, 29 Del. C. Sections 10001-10005 (“FOIA”), by not allowing you to inspect and copy public records.

By letter dated July 10, 1997, we asked the School District for their response to your complaint. By letter dated July 16, 1997, the School District responded claiming that FOIA does “not apply to the National Honor Society. Thus, the District does not believe that the rights of Mr. Burke have been violated.”

By letter dated July 23, 1997, our Office posed additional questions to the School District regarding funding for the local chapter of the National Honor Society, and the location of and access to records of the local chapter. At the School District’s request, we granted an extension of time until August 7, 1997 to respond to those questions.

By letter dated August 7, 1997, the School District confirmed the following information:

1. The local chapter of the National Honor Society does not receive any State funds. Like coaches and sponsors of other extra-curricular programs, faculty sponsors of the chapter receive stipends paid by local School District funds, estimated at \$588 for the 1996-97 school year. In addition, the School District used \$622 in local funds that year to purchase awards for members of the local chapter. All other monies used to support the local chapter were student-generated (\$4,035.45 in the 1996-97 school year).

2. The records of the local chapter are maintained in the private files of the faculty

sponsor either at school or at home. The records are not maintained in the School District Office, or in the files of individual students, and the School District does not have access to those records.

#### STATUTORY PROVISIONS

Section 10003(a) of FOIA provides: "All public records shall be open to inspection and copying by any citizen of the State during regular business hours by the custodian of the records for the appropriate public body." 29 Del. C. Section 10003(a). A "public body" is defined to include any "association, group, panel, council or other entity or body established by an act of the General Assembly of the State, or established by any body established by the General Assembly of the State, or appointed by any body or public official of the State or otherwise empowered by any state governmental entity, which: (1) Is supported in whole or part by any public funds; . . . ." Id. Section 10002(a) "Public funds" are defined as "those funds derived from the State or any political subdivision of the State." 29 Del. C. Section 10002(c).

#### OPINION

The School District "is unquestionably a public body." *New Castle County-Vocational Technical Education Association v. Board of Education of New Castle County Vocational Technical School District*, Del. Ch., 1978 WL 4637, at p. 2 (Sept. 25, 1978) (Brown, V.C.). The local chapter of the National Honor Society, however, is not a "body established by, appointed by," or "otherwise empowered by" the School District. 29 Del. C. Section 10002(a). Under the Constitution of the National Honor Society, local chapters are part of a larger national organization under the sponsorship and supervision of the National Association of Secondary School Principals (NASSP). Control is vested in the National Council, which consists of seven members appointed by the Board of Directors of NASSP.

The local chapter of the National Honor Society at Caesar Rodney is a purely voluntary organization. It is not accountable to the School District, and it does not implement any School District policy. Any records generated by the local chapter are privately maintained by the faculty sponsors, and are not placed in a student's file. According to recommended National Honor Society practice, working papers are discarded shortly after induction.

In *Becky v. Butte-Silver Bow School District*, Mont. Supr., 906 P.2d 193 (1995), the Montana Supreme Court held that the state public records act did not apply to

the local chapter of the National Honor Society. "The National Honor Society is an honorary organization sponsored by the National Association of Secondary School Principals to recognize outstanding high school students. It is a nonmandatory organization in which students are selected for membership by high school faculty who voluntarily evaluate the students based upon their academic achievements, leadership abilities, character, and service to their school." 4906 P.2d at 194. Participation by both students and faculty "is voluntary," and records of the local chapter "are not maintained by the school." Id. Documents relating to the selection process "are generated by an independent nongovernmental organization for the purpose of determining membership in that organization. The documents do not record an act or acts of the School District. They do not contain information regarding school matters or the duties of School District Employees." 906 P.2d at 197. Accordingly, the records of the local chapter of the National Honor Society "contain no information which would make them 'documents of public bodies,'" as defined by Montana law.

Although there are some differences between the public records acts in Montana and Delaware, we find the similarities more compelling, especially in light of the overall purpose of the Delaware FOIA. Access to public records is intended to give citizens the opportunity "to monitor the decisions that are made by [public] officials in formulating and executing public policy." 29 Del. C. Section 10001. Faculty members, acting voluntarily as sponsors for the local chapter of the National Honor Society, are not acting in their capacity as public officials, nor are they engaged in executing public policy.

While it is true that the School District provides some funding to the local chapter and allows it to use school facilities, we do not believe that those facts transform a self-directed and voluntary organization into a public body for purposes of FOIA. See *Irwin Memorial v. American National Red Cross*, 640 F.2d 1051 (D.C. Cir. 1981); (Red Cross was not a public agency for purposes of the federal FOIA, because it was not subject to substantial federal control and supervision and received minimal federal funding); *Connecticut Humane Society v. Freedom of Information Commission*, Conn. Super., 1990 WL 283966 (June 14, 1990) (state freedom of information law does not apply to the Humane Society).

#### Conclusion

For the foregoing reasons, we determine that the School District has not violated the public records requirements of FOIA.

Very truly yours,

W. Michael  
Deputy Attorney General  
APPROVED

Michael J. Rich  
State Solicitor

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STATE OF DELAWARE  
DEPARTMENT OF JUSTICE  
**ATTORNEY GENERAL OPINION**  
**NO. 97-IB16**

August 25, 1997

Carol Ellis, Director  
Division of Professional Regulation  
Cannon Building, Suite 203  
P.O. Box 1401  
Dover, Delaware 19903

Re: Twenty-four Del.C. § 3520

Dear Ms. Ellis:

You requested our opinion of whether 24 Del. C. § 3520 is a criminal statute enforceable only through criminal prosecution by this Office or whether it may be enforced by the Board of Examiners of Psychologists. You have further asked, if our answer is that it is a criminal statute which may only be enforced by criminal prosecution through this office, whether the Board contact acts merely in an advisory capacity or whether the Board must approve the decision of the Deputy Attorney General to proceed against the unlicensed person or not. For the reasons stated below, we conclude that 24 Del. C. § 3520 is a criminal statute, the prosecution of which is within the constitutional and statutory authority and responsibility of the Attorney General and, although the input of the professionals on the Board may be helpful in advising the Attorney General regarding professional issues, the decision of whether to prosecute the matter or not is to be determined solely by the Attorney General.

Twenty-four Del. C. § 3520 provides:

“A person not currently licensed as a psychologist, or registered as a psychological assistant, under this chapter, when guilty of engaging in the practice of psychology, or of acting as psychological assistant or using in connection with the

practitioner’s own name, or otherwise assuming or using any title or description conveying, or tending to convey the impression that the practitioner is qualified to practice psychology, or to act as a psychological assistant, such offender shall be guilty of a misdemeanor. Upon the first offense, the practitioner shall be fined not less than \$500 no more than \$1,000 for each offense; and in addition, may be imprisoned for not more than one year. For a second or subsequent conviction, the fine shall be not less than \$1,000 nor more than \$2,000 for each offense. Superior Court shall have jurisdiction over all violations of this chapter.”

This section clearly states that the offense shall constitute a “misdemeanor.” Misdemeanors are classifications of crimes and are defined in the Delaware Criminal Code at I I Del. C. § 4202 as either Class A misdemeanors, Class B misdemeanors, or unclassified misdemeanors. Subsection (b) of that section specifically states “Any offense defined by statute which is not specifically designated a felony, a Class A misdemeanor, Class B misdemeanor or a violation shall be an unclassified misdemeanor.” Therefore, 24 Del. C. § 3520 is an unclassified misdemeanor defining a criminal offense. Pursuant to 29 Del. C. § 2504(6) the Attorney General has charge of all criminal proceedings. The question of whether a criminal charge will be brought is solely within the authority and responsibility of the Attorney General. Having said this, it is often useful for the Attorney General to have the advice of the professional board that is charged with regulating the profession. However, the ultimate decision whether a charge should be brought, subject to the requirement for an indictment, rests with the Attorney General.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,  
Malcolm S. Cobin  
Assistant State Solicitor

Approved:  
Michael J. Rich  
State Solicitor

STATE OF DELAWARE  
DEPARTMENT OF JUSTICE  
**ATTORNEY GENERAL OPINION**  
**NO. 97-IB17**

August 28, 1997

Jeffrey M. Weiner, Esquire  
1332 King Street  
Wilmington, DE 19801

RE: Freedom of Information Act Complaint Against  
City of New Castle

Dear Mr. Weiner:

By letter dated July 21, 1997, you alleged, on behalf of Wilmington Fraternal Order of Police Lodge # 1, that the Council of the City of New Castle ("the City") had violated the open meeting requirements of the Delaware Freedom of Information Act, 29 Del. C. Sections 10001-10005 (-FOIA-), by holding meetings without giving notice to the public.

By letter dated July 31, 1997, we asked the City to respond to your complaint. By letter dated August 6, 1997 (received by this Office on August 1 1), the City responded, enclosing copies of the notices of seven meetings held in July and August, 1997. The City denies that these were meetings of the City Council, but rather were meetings of the City's Public Safety Review Committee, only one of whose three members is also a member of the Council.

By letter dated August 14, 1997, you clarified your allegations of FOIA violations by the City. You allege that the City failed to give notice of a meeting of the Public Safety Review Committee on July 17, 1997 (although you do not contend that the City failed to give notice of other meetings that same week) to interview police officers. You also allege that "the Notices posted by City Council did not set forth any agenda nor specific issues to be addressed."

### STATUTORY PROVISIONS

FOIA requires that "[a]ll public bodies shall give public notice of their regular meetings and of their intent to hold an executive session closed to the public, at least 7 days in advance thereof. The notice shall include the agenda, if such has been determined at the time, and the dates, times and place of such meetings; 29 Del. C. Section 10004(e)(2). FOIA, however, provides that "the agenda shall be subject to change to include additional items arising at executive sessions of the deletion of items including executive sessions which arise at the time of the

public body's meeting." Id.

FOIA defines "agenda" to "include but is not limited to a general statement of the major issues expected to be discussed at a public meeting, as well as a statement of intent to hold an executive session and the specific ground or grounds therefor under subsection (b) of Section 10004 if this title." 29 Del. C. Section 10002(f).

FOIA defines a "public body" to include, among other things, any "committee" established by "any body established by the General Assembly of the State" or "appointed by any body."

### OPINION

The City does not dispute that the Public Safety Review Committee is a "public body" for purposes of the open meeting requirements of FOIA.

On July 9, 1997, the City posted notices stating that the "New Castle City Public Safety Review Committee will meet at the following times, with members of the City Public Safety Department and will be followed by an Executive Session pursuant to Section 10004(b)(9) unless the respective Officer requests that (his/her) interview be open to the public as provided in Section 1004(b)(9)." The notice listed various times for these meetings on July 14, 15, 16, and 18, 1997.

With respect to the meetings on July 14 and 15, the City did not give notice at least seven days in advance as required by FOIA. Although FOIA permits notice of a special or rescheduled meeting to be posted 24 hours prior to the meeting, see 29 Del. C. Section 10004(e)(3), there is nothing in the City's response to the complaint indicating that the meetings scheduled for the week of July 14 were a special or rescheduled meeting, that is, "one to be held less than 7 days after the scheduling decision is made." Id.

Furthermore, the notices for all the meetings scheduled for the week of July 14 do not contain the required agenda. Although FOIA allows a public body to add or delete items from the posted agenda if they arise at the public meeting, the Public Safety Review Committee knew in advance the matters that would be discussed in its meetings scheduled for the week of July 14.

In *Ianni v. Department of Elections of New Castle County, Del. Ch.*, 1986 WL 9610 (Aug. 29, 1986) (Allen, C.), the county posted a one-page notice stating that the Department of Elections would meet to consider the "primary election." At the meeting, the Department voted to open fewer polling stations in New Castle County in the primary elections. Chancellor Allen held that the notice of the agenda was insufficient "to alert the public to the fact that the (Department) would consider and act upon a proposal to consolidate election districts for the purpose of the primary election. While the statute

requires only a 'general statement' of the subject to be addressed by the public body, when an agency knows that an important specific aspect of a general subject is to be dealt with, it satisfies neither the spirit nor the letter of the Freedom of Information Act to state the subject in such broad generalities as to fail to draw the public's attention to the fact that specific important subject will be treated. In this instance, all that would have been required to satisfy this element of the statute would have been a statement that 'election district consolidation' or 'location of polling places' was to be treated." 1986 WL 9610, at p. 5.

The City suggests that the agenda for the meetings noticed for the week of July 14, 1997 is implicit in the notice since Public Safety Review Committee oversees police matters and the notice stated that the Committee would go into executive session pursuant to Section 10004(b)(9) of FOIA (the exception to discuss personnel matters). This Office, however, has previously determined that merely giving notice that a specific committee of a public body will meet does not satisfy the agenda requirement of FOIA because that does not sufficiently alert the public as to the major issues expected to be discussed at a public meeting. See Att'y Gen. Op. 97-IB13 (June 2, 1997).

In your letter dated August 14, 1997, you also allege that the meeting noticed for July 16, 1997 was in fact held on July 17, so that the City failed to give any notice to the public of the meeting on July 17. From your letter, it appears that there was a last-minute scheduling conflict with one of the police interviews, which was re-scheduled for the convenience of the parties. Although a technical violation of FOIA, we do not find that it requires any remediation. Police interviews were ongoing all week, and any member of the public who was attending could have easily ascertained the schedule change. The affected police officers obviously were aware of the change.

We also find that the failure to post notice seven days in advance of the meetings on July 14 and July 15 was a technical violation of FOIA that does not warrant the remedy of re-noticing the meetings held on those dates. While we do not condone any deviation from the letter of the law, there is no evidence that the City acted in bad faith, or that any member of the public who wished to attend the meetings of those dates was deprived of the opportunity because he or she did not have timely notice.

The lack of any agenda in the notices is more troubling. We find that the City violated the notice requirements of FOIA by not including a general statement of the major issues to be discussed at the meetings the week of July 14 sufficient to alert the public as to matters of public concern. We do not believe,

however, that remediation is necessary, especially since the public would not have been able to observe most of the meetings held the week on July 14 while the Public Safety Review Committee was in executive session. Moreover, there is no evidence to suggest that the City Council took any action based on the interviews of police officers the week of July 14. To require the Public Safety Review Committee to re-notice its meetings and interview again the same police officers would not serve to further the purposes of FOIA.

We caution the City, however, that in the future it must comply with all requirements of the open meeting law. Specifically, the City must give notice at least seven days in advance of meetings of the City Council or any of its committees, unless FOIA authorizes a shorter time. In addition, the City must include in all notices of public meetings an agenda that will include a general statement of the major issues expected to be discussed at the meeting.

#### Conclusion

For the foregoing reasons, we determine that the City violated the open meeting requirements of FOIA by: (1) failing to give the public notice at least seven days in advance of the July 14 and July 15, 1997 meetings of the Public Safety Review Committee; and (2) failing to include an agenda in the notices of the meetings for July 14, 15, 16, and 18, 1997. The City is directed to strictly comply with the notice requirements of FOIA in the future.

Very truly yours,  
W. Michael Tupman

APPROVED:  
Michiel J. Rich  
State Solicitor

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STATE OF DELAWARE  
DEPARTMENT OF JUSTICE  
**ATTORNEY GENERAL OPINION**  
**NO. 97-IB18**

September 2, 1997

Mr. Handley J. Orr  
Chief of Police  
Bridgeville Police Department  
302 Market Street  
Bridgeville, DE 19933

RE: Freedom of Information Act Complaint Against Town of Bridgeville

Dear Mr. Orr:

By letter dated July 15, 1997 (received by this Office on July 17, 1997), you alleged that the Town of Bridgeville ("the Town") had violated the Delaware Freedom of Information Act, 29 Del. C. Sections 10001-10005 ("FOIA"), by not posting notice of a meeting on June 30, 1997 at least seven days prior to the meeting.

By letter dated July 28, 1997, we asked the Town for its response to your complaint. By letter dated August 7, 1997, the Town's attorney responded claiming that FOIA only required 24 hours' notice for the meeting on June 30.

#### STATUTORY PROVISIONS

Section 10004(e)(2) of FOIA provides that "[a]ll public bodies shall give public notice of their regular meetings and of their intent to hold an executive session closed to the public, at least 7 days in advance." 29 Del. C. Section 10004(e)(2).

For a "special or rescheduled meeting," however, FOIA only requires that the public body give notice "as soon as reasonably possible, but in any event no later than 24 hours before such meeting. A special or rescheduled meeting shall be defined as one to be held less than 7 days after the scheduling decision is made. The public notice of a special or rescheduled meeting shall include an explanation as to why the notice required by paragraph (1) of this subsection [seven days] could not be given." 29 Del. C. Section 10004(e)(3).

#### OPINION

By letter dated June 25, 1997, Chief Orr wrote to Charles R. Singman, Town Commissioner, in response to a letter dated June 18, 1997 from Mr. Singman. Chief Orr alleged in his letter that the Town had "violated the policeman's bill of rights," and stated that he was going to "contact Attorney General M. Jane Brady to conduct a proper investigation." Chief Orr copied his letter to, among others, Attorney General Brady.

According to the Town's attorney, Chief Orr's letter prompted the Town to hold a special meeting on June 30, 1997. Notice of the special meeting and the agenda were posted on June 27, 1997 at approximately 3:45 p.m. at the Town Hall and the Bridgeville Library. The agenda stated that the Town Commissioners would go into executive session to discuss a "personnel" matter. The minutes of the special meeting state that the Commissioners "held an executive session on police

department personnel and a letter [Commissioner Singman] received June 25, 1997." After the executive session, the Commissioners voted to direct the Town Attorney "to write a letter to the Attorney General of the State of Delaware requesting any investigation the Chief of Police may request of her."

The only FOIA issue raised in your complaint is the timeliness of the posting of the notice of the June 30, 1997 meeting. For purposes of the notice provisions of FOIA, this was a "special" meeting since it was held "less than 7 days after the scheduling decision was made." 29 Del. C. Section 10004(e)(3). The decision to schedule the meeting was made after Mr. Singman received Chief Orr's letter dated June 25, 1997, and the meeting was held five days later.

In its response to your complaint, the Town suggests that the meeting on June 30, 1997 was an "emergency" meeting for which notice is not required. See 29 Del. C. Section 10004(e)(1) ("This subsection concerning notice of meetings shall not apply to any emergency meeting which is necessary for the immediate preservation of the public peace, health or safety."). We do not believe that the circumstances surrounding the dispute between Mr. Singman and Chief Orr so threatened the public peace, health or safety as to obviate the notice requirements of FOIA. Compare *Markowski v. City of Marlin, Tex.* App., 940 S.W.2d 724 (1997) (emergency meeting to meet with the city's attorney to discuss lawsuit filed by the fire chief who had been suspended without pay the day before).

Section 10004(e)(3) requires that the notice of a special meeting "shall include an explanation as to why the notice required by paragraph (1) of this subsection [seven days' notice] could not be given." "The notice of the special meeting posted by the Town on June 27, 1997 did not provide such an explanation.

In Att'y Gen. Op., 94-1037 (July 26, 1994), a school district posted notice of a special meeting to discuss student assignments five days prior to the meeting. This Office found that the notice failed "to provide any explanation whatsoever concerning the reason why the normal seven day notice could not be given." We determined "that the District failed to comply with the provisions of the Act concerning the required contents of a public notice announcing a special meeting." As a remedy, this Office asked the school district to re-notice its special meeting and "explain to the public its intention to formally ratify its previous action."

Accordingly, we find that the Town violated FOIA by failing to explain in the notice of the June 30, 1997 special meeting why seven-days' notice could not be given. Under the circumstances, however, we do not believe that any remedial action is necessary in order to

accomplish the purposes of FOIA.

The principal purpose of the June 30, 1997 special meeting was to meet in executive session to discuss the dispute with the Police Chief. As a result of that meeting, the Town Attorney wrote a letter dated July 3, 1997 to the Attorney General stating: "I have been asked by the Commissioners of Bridgeville to inform you that they met on Monday morning in Executive Session, reviewed [Chief Orr's June 25] letter, and have directed me to write to you confirming that they likewise seek to have an investigation conducted by your office."

After an exchange of correspondence seeking further factual information, Eugene M. Hall, the Director of the Fraud and Consumer Protection Division of the Delaware Department of Justice, wrote a letter dated July 24, 1997 to the Town's attorney. Mr. Hall observed that although the Attorney General had been copied on Chief Orr's June 25 letter, "Chief Orr never sent a letter of complaint to the Attorney General. Based upon your letter, there is apparently nothing for the Department of Justice to investigate, and the Department of Justice is closing its interest in this matter. Hopefully, the underlying conflict has been or will be resolved."

Under these circumstances, it would serve not serve any purpose to require the Town to re-notice its special meeting to consider whether to ask for an investigation by the Attorney General's Office because this Office has already decided not to investigate. The FOIA issue, as it relates to the notice of the executive session, is now moot. The Town is cautioned that in the future there must be an appropriate explanation in the notice of any special or rescheduled meeting explaining why the normal seven-days' notice could not be given. See, eg., Att'y. Gen. Op. 97IB02 (Feb. 12, 1997) ("it is our opinion that it is a sufficient explanation to state that an earlier notice was not possible because legal opinions had not been obtained from the City Solicitor and the Attorney General prior to the posting of the notice").

More troubling is the fact that at the special meeting on June 30, 1997 the Town discussed several items of new business. Specifically, the Commissioners discussed: (1) the EDU's for Gateway Plaza; and (2) a clause in the Town Code pertaining to a tax exemption for new business. Although we can appreciate that the Town was trying to use the time already scheduled for the police personnel matter to take up other business, there does not appear to be any reason why these new items of business could not have been discussed at a regularly-scheduled meeting with the normal seven-days' notice. We believe that it is the better practice, consistent with the purposes of FOIA, to limit the discussion at an emergency or special meeting of a public body solely to those issues which justify deviating from the seven-day notice rule.

In order to remediate this violation of FOIA, we direct the Town to re-notice for a regularly scheduled meeting the non-personnel matters that were discussed on June 30, 1997 to allow the public the opportunity to have input on those matters and to ratify the previous discussion of those matters by the Town Commissioners.

#### Conclusion

For the foregoing reasons, we determine that the Town violated the notice requirements of FOIA in posting the notice of the special meeting on June 30, 1997 three days before the meeting without explaining in the notice the reason why it could not have been posted sooner. Since the action taken by the Town Commissioners during the executive session portion of that meeting is now moot, no remediation is necessary. We direct the Town, however, to re-notice and ratify the non-personnel matters discussed at the meeting on June 30, 1997.

Very truly yours,  
W. Michael Tupman

Deputy Attorney General

APPROVED:  
Michael J. Rich  
State Solicitor

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STATE OF DELAWARE  
DEPARTMENT OF JUSTICE  
**ATTORNEY GENERAL OPINION**  
**NO. 97-IB19**

October 20, 1997

Mr. Gregory S. Layton  
Milford Chronicle  
P.O. Box 297  
Milford, DE 19963

RE: Freedom of Information Act Complaint Against  
Milford City Council

Dear Mr. Layton:

In your letter dated September 5, 1997 (received by this Office on September 8) you alleged that the Milford City Council ("the Council") had violated the Delaware Freedom of Information Act, 29 Dd. C Sections 10001-10005 ("FOIA"), in connection with two meetings on August 11 and 21, 1997. Specifically, you allege that the agenda posted for those meetings did not indicate that the Council might go into executive session and the

reason(s) therefor, and that the Council did not vote in public to go into executive session. Your letter also suggests that the Council may have gone into executive session for a purpose other than authorized by law.

By letter dated September 9, 1997, we asked the Council to respond to your complaint. By letter dated September 26, 1997 (received by this Office on September 29), the Council responded through its attorney, admitting "that the executive sessions were not held in full compliance with the Act." He further stated: "No votes were taken at the executive sessions. The City regrets any inconvenience and concern caused to the public and the press and intends to proceed in full compliance with [FOIA] at all future meetings."

### STATUTORY PROVISIONS

FOIA requires that "[a]ll public bodies shall give public notice of their regular meetings and of their intent to hold an executive session closed to the public, at least 7 days in advance thereof." 29 Dd. C. Section 10004(e)(2). The agenda must include not only "a general statement of the major issues to be discussed at a public meeting," but also "a statement of intent to hold an executive session and the specific ground or grounds therefor under subsection (b) of Section 10004 of this title." 29 D&I. -C. Section 10002(f). Section 10004(b) sets forth nine authorized grounds for a public body to go into executive session.

In order to go into executive session, there must be an "affirmative vote of a majority of members present at a meeting of the public body. The vote on the question of holding an executive session shall take place at a meeting of the public body which shall be open to the public, and the results of the vote shall be made public and shall be recorded in the minutes." 29 D-d. C. Section 10004(c).

### OPINION

Under FOIA, "to convene in executive session, the public body must satisfy several requirements": (1) publicly announce the purpose of the closed meetings in advance; (2) approve holding such a session by a majority vote; (3) limit the agenda of the closed session to public business that falls within one of the purposes allowed for such meetings; and (4) prepare minutes of any closed session. *Ley v. Board of Education of Cape Henlopen School District, Del. Ch. 1990 WL 154147, at p.3 (Oct. 1, 1990) (Chandler, V.C.)*.

The Council does not dispute that it failed to comply with any of these requirements with respect to the meetings held on August 11 and 21, 1997. In particular,

the agenda stated only that there would be a "Special Meeting - Perdue/David Bates," but did not inform the public that the Council intended to go into executive session. The Council did not vote in public to go into executive session, nor were minutes of the executive session maintained. Because of these violations of FOIA, any action taken by the Council at those meetings is voidable. See 29 Del.C. Section 10005(a).

To remedy these violations of FOIA, we direct the Council to re-notice the matters that were the subject of discussion at those two meetings for another meeting open to the public. This should be done in strict compliance with the requirements of FOIA, both with respect to the specifics of public notice, and the mechanics of going into executive session. A majority of the Council must vote in public to go into executive session. Additionally, the purpose for which the Council goes into executive session must be one permitted under FOIA. After the Council votes to go into executive session, the public may be excused, but the public may return after the executive session is over to observe any further proceedings of the Council which are not within a statutory exception for executive session. The Council is reminded it must also prepare minutes of the executive session so that, if necessary, it can be ascertained at a later date whether the Council stayed within the confines of the subject(s) authorized by FOIA for executive session.

The Council is cautioned that it must strictly comply with the requirements of the open meeting laws in the future. A lack of knowledge of the requirements of the law will not suffice to defend against a complaint of failure to comply with FOIA. If the Council is unsure about any particular legal requirement, it "can have its attorney on hand to advise it." *Levy, 1990 WL 154147, at p. 9.*

### Conclusion

For the foregoing reasons, we determine that the Council violated the open requirements of FOIA in the notice and conduct of the meetings on August 11 and 21, 1997. The Council is directed to hold those meetings anew in full compliance with FOIA, and to strictly comply with the requirements of FOIA in the future.

Yours very truly,  
W. Michael Tupman  
Deputy Attorney General

APPROVED:  
Michael J. Rich  
State Solicitor



STATE OF DELAWARE  
DEPARTMENT OF JUSTICE  
**ATTORNEY GENERAL OPINION**  
**NO. 97-IB20**

October 20, 1997

Mr. N. Dean Dey  
59 Edgewater Drive  
Lewes, DE 19958

RE: Freedom of Information Act Complaint Against  
Cape Henlopen School District

Dear Mr. Dey:

On September 15, 1997, we received your letter alleging that the Cape Henlopen School District (the "School District") had violated the Delaware Freedom of Information Act, 29 D&I. C. Sections 10001-10005 ("FOIA"), by holding a meeting on September 11, 1997 without giving proper notice to the public. Specifically, you allege that the agenda posted did not disclose that the School District might vote at that meeting to spend public monies for new locally-funded teaching positions.

By letter dated September 16, 1997, we asked the School District to respond to your complaint. By letter dated September 23, 1997 (received by this Office on September 24), the School District responded, enclosing copies of the agenda for the meeting and the written minutes. The School District denies that it violated FOIA since the act provides that an agenda shall be subject to change, and a public body can add items to the agenda that arise during a meeting. According to the School District, "[T]he issue of whether the Board should hire additional teachers to reduce class size arose at the meeting" on September 11, 1997. The discussion started with concerns about class size. The issue then arose about adding teachers to reduce class sizes. "At that point, the public discussion continued ultimately resulting in the adoption of a motion to hire locally funded teachers."

#### STATUTORY PROVISIONS

FOIA requires that "[a]ll public bodies shall give public notice of their regular meetings and of their intent to hold an executive session closed to the public, at least 7 days in advance thereof. The notice shall include the agenda, if such has been determined at the time, and the dates, times and place of such meetings; 29 D&J. -C. Section 10004(e)(2). FOIA, however, provides that "the agenda shall be subject to change to include additional items including executive sessions or the deletion of items including executive sessions which arise at the time of the

public body's meeting." Id.

FOIA defines "agenda" to "include but is not limited to a general statement of the major issues expected to be discussed at a public meeting, as well as a statement of intent to hold an executive session and the specific ground or grounds therefor under subsection (b) of Section 10004 if this title." 29 D&J. -C. Section 10002(f).

#### OPINION

In Ianni v. Department of Elections of New Castle County, Del. Ch., C.A. No. 8590, 1986 VYL 9610 (Aug. 29, 1986) (Allen, C.), the county posted a one-page notice stating that the Department of Elections would meet to consider the "primary election." At the meeting, the Department voted to open fewer polling stations in New Castle County in the primary elections. Chancellor Allen held that the notice of-the agenda was insufficient "to alert the public to the fact that the [Department] would consider and act upon a proposal to consolidate election districts for the purpose of the primary election. While the statute requires only a 'general statement' of the subject to be addressed by the public body, when an agency knows that an important specific aspect of a general subject is to be dealt with, it satisfies neither the spirit nor the letter of the Freedom of Information Act to state the subject in such broad generalities as to fail to draw the public's attention to the fact that specific important subject will be treated. In this instance, all that would have been required to satisfy this element of the statute would have been a statement that 'election district consolidation' or 'location of polling places' was to be treated." Ianni, 1986 WL 9610, at p. 5.

The School District suggests that the issue of using local monies to fund new teaching positions was within the agenda item, "Class Sizes and Enrollment. "We do not think that this general item satisfies the Ianni test by alerting the public that a significant amount of public monies might be spent on new teachers. The issue, then, is whether the School Board could add this new item to the agenda after the start of the meeting on September 11, 1997.

As this Office has previously determined, "FOIA does not limit the ability to make changes to the agenda to cases where the agenda specifically states that it is subject to change." Att'y Gen. Op. 95-EB35 (Nov. 2, 1995). A public body has discretion to determine the agenda for any public meeting and to make additions, corrections or deletions, if necessary, at the next regularly scheduled meeting when the minutes are adopted. See Att'y Gen. Op- 94-1023 (June 21, 1994).

If a public body knows that an item of public interest will be addressed at a meeting, then it cannot

claim, in good faith, that the issue arose at the time of the public body's meeting in order to circumvent the notice requirements of FOIA. On the other hand, discussion of noticed items can often segue into related public issues, and FOIA provides flexibility to address that situation.

As the School District explains, the discussion at the September 11, 1997 meeting about class sizes and enrollment continued "so that numbers could be discussed in relation to this issue. At that point, the public discussion continued ultimately resulting in the adoption of a motion to hire locally funded teachers" in order to reduce class size.

An agenda serves the important function of notifying the public of the matters which will be discussed and possibly voted on at a meeting, so that members of the public can decide whether to attend the meeting and voice their ideas or concerns. It is not always possible, however, to anticipate every permutation of every issue contemplated for discussion, and FOIA permits a public body to add items to the agenda if they arise at the meeting and are reasonably related to items that were noticed in the agenda. At some point, the issues may so far depart from the issues noticed on the agenda that they are better reserved for the next meeting of the public body so that the public will have adequate notice.

The meeting on September 11, 1997 was attended by a number of parents and teachers, including the complainant, who voiced his objection to the decision to use local monies to fund new teaching positions. We do not find that the public was misled by the agenda for the September 11, 1997 meeting or that any interested person did not attend because he was not fully aware what might be discussed. Furthermore, we find that the discussion of class sizes and enrollment naturally evolved into a discussion of whether more teachers might be necessary and, if so, how to fund their salaries. The School Board added the funding issue to the agenda during the course of the meeting, consistent with Section 10004(e)(2) of FOIA.

#### Conclusion

For the foregoing reasons, we determine that the School District did not violate the public notice and agenda requirements of FOIA in connection with the September 11, 1997 meeting.

Very truly yours,  
W. Michael Tupman, Deputy Attorney General

APPROVED:  
Michael J. Rich, State Solicitor

STATE OF DELAWARE  
DEPARTMENT OF JUSTICE  
**ATTORNEY GENERAL OPINION**  
**NO. 97-IB21**

October 28, 1997

Mr. William G. Burke, Sr.  
Administrative Director  
W. Howard G. Sholl, Jr.  
Deputy Administrative Director  
Department of Elections for New Castle County  
820 N. French Street

Wilmington, DE 19801

Re: Mailing of Absentee Ballots

Dear Gentlemen:

Fifteen Del. C. § 5505 provides that the Department of Elections shall mail an absentee ballot to an elector and that such mailing shall be made "not more than 60 nor less than 3 days prior to a general or special election." The Department of Elections asks whether the election day is counted as the third day for purposes of this statute. By way of example, the Department asks whether, where election day is Saturday, the Department must mail absentee ballots through the previous Wednesday. We answer this inquiry in the affirmative. Using the example of the Department of Elections, we conclude that the Department must mail absentee ballots through the close of business on Wednesday for a Saturday election.

There are no cases directly on point on this issue in Delaware and case law from other jurisdictions is not strictly consistent. However, the majority view is that the general rule for the computation of time applies, unless there is evidence of contrary legislative intent. Under the general rule, the first day of the time period in question is excluded and the day on which an act is to be performed is included. The words "at least," "not less than," and "prior to" are most commonly found not to evidence a legislative intent to alter the general rule for the computation of time. Barron v. Green N. J. Super., 80 A.2d 586, 587 (1951) ("at least 40 days prior to any other municipal election"); State v. Appling, Or. Supr., 355 P.2d 760, 761 (1960) ("not less than 70 days before the \* \* \* general election!"); Harris v. Latta, N.C. Supr., 259 S. E. 2d 239, 240 (1975) ("at least sixty (60) days prior to March 5, 1976"). To the contrary is State v. Beermann, Neb. Supr., 523 N.W. 2d 518, 522 (1994), which held that the words "prior to" require the exclusion of the terminal date.

While we acknowledge the Nebraska case, we believe that the law in Delaware is the majority view, which would count the day of the election as the third day prior to the election.

The operative words of 15 DeL C § 5505 are “prior to.” No Delaware court has interpreted exactly those words. However, the Delaware Supreme Court has ruled that the words “at least” within a statute that reads “at least fifteen days notice” do not change the general rule that the first day should be excluded but the day on which the act to be done should be included. Santow v. Ullman, Del. Supr., 166 A.2d 135, 137-138 (1960). In reaching this decision, the Supreme Court of Delaware relied upon decisions from New Jersey that ruled that the words “at least forty days prior to” (emphasis added) do not change the ordinary rule for the computation of time. *Li*, at 138, citing *Barron v. Green*, N.J. Super., 80 A.2d 586 (1951). In reaching our conclusion that the date of the election is counted as the third day for the computation of time for purposes of 15 DeL C. § 5505, we rely upon other principles of law, as well.

In past elections, the Department of Elections for New Castle County has consistently.. counted election day as the third day for purposes of 15 DeL C. § 5505. The other county Departments of Elections have as well: Our conclusion that this is the correct interpretation of Section 5505 both continues the past administrative practice and promotes consistency among election procedures. Moreover, when the minor administrative burden of mailing absentee ballots for an additional day is weighed against the fiindamental right to vote, we believe that the scales tip heavily in favor of our conclusion that the election day itself is the third day for purposes of 15 DeL C § 5505.

We trust that this resolves all of the issues raised by the Departments opinion request. Please do not hesitate to contact us if we can be of further assistance.

Very truly yours,  
Malcolm S. Cobin  
Assistant State Solicitor

A. Ann Woolfolk  
Deputy Attorney General

Approved:  
Michael J. Rich  
State Solicitor

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STATE OF DELAWARE  
DEPARTMENT OF JUSTICE  
**ATTORNEY GENERAL OPINION**  
**NO. 97-IB22**

November 24, 1997

Jeffrey M. Weiner, Esquire  
1332 King Street  
Wilmington, DE 19801

RE: Freedom of Information Act Complaint Against  
City of Wilmington

Dear Mr. Weiner:

This letter is our written determination in response to your complaint alleging that the City of Wilmington (the “City”) violated the Freedom of Information Act, 29 Del.C. Sections 1000110005 (“FOIA”).

Your letter of complaint dated October 4, 1997 was received by this Office on October 8, 1997. By letter dated October 9, 1997, we asked for the City’s response within ten days to your allegations that the City had violated the open meeting requirements of FOIA. By letter dated October 17, 1997, the City asked for a five-day extension of time, which we granted.

In your letter, you alleged that the City had violated FOIA in two ways: first, by holding meetings of the Residency Review Board without notice to the public; and second, by failing to maintain minutess of those meetings.

By letter dated October 24, 1997, we received a response from the City Solicitor. By letter dated October 28, 1997, we asked the City for additional information and documents relating to the FOIA complaint. By letter dated October 30, 1997, the City provided us with that information. The City confirmed that the first meeting of the Residency Review Board was held on December 23, 1996. The City also stated “that public notice of the meetings and agenda were not posted for the five meetings of the Board.”

Summary of the Law

Section 10004 of Title 29 of the Delaware Code provides that “[e]very meeting of all public bodies shall be open to the public” except as authorized by statute for executive session. A “public body” is defined to include any “board, commission, department, agency, committee, ad hoc committee, special committee, temporary committee, advisory board and committee, [or] subcommittee” appointed by any body which is

“impliedly or specifically charged” by another public body “to advise or to make reports, investigations or recommendations.” 29 Del.C. Section 10002(a).

Section 10004(e)(2) provides: “All public bodies shall give public notice of their regular meetings and of their intent to hold an executive session closed to the public, at least 7 days in advance thereof. The notice shall include the agenda, if such has been determined at the time, and the dates, times and places of such meetings; . . . .” Section 10004(e)(4) requires that notice “shall include, but not be limited to, conspicuous posting of said notice at the principal place of the public body holding the meeting...”.

Section 10004(t) requires every public body to “maintain minutes of all meetings, including executive sessions, conducted pursuant to this section, and shall make such minutes available for public inspection and copying as a public record. Such minutes shall include a record of those members present and a record, by individual members (except where the public body is a town assembly where all citizens are entitled to vote), of each vote taken and action agreed upon.”

The City does not dispute that the Residency Review Board is a “public body” for purposes of FOIA. The Board was appointed by a public body (the City Council) to oversee the administration and enforcement of the law requiring City employees to be Wilmington residents.

#### Discussion and Findings

On March 2, 1995, the City Council enacted an ordinance to amend Chapter 2 of the City Code of 1993 to create a Residency Review Board “to review any matters of residency requirement administration and enforcement that may arise.” The Residency Review Board consists of the City Solicitor, the Director of Personnel, and Administrative Assistant to the Mayor, and two residents of the City “who shall not be City employees, who shall be qualified electors of the City and who shall be appointed by the Mayor” and “confirmed by resolution approved by a majority of all members of Council.”

The City Council did not approve the appointments of all of the members of the Residency Review Board until August 15, 1996. The Board held its first meeting on December 23, 1996. Subsequent meetings were held on January 14, March 6, May 13, and September 9, 1997.

In its response to your FOIA complaint, the City provided us with copies of the minutes for those five meetings of the Residency Review Board. Your concern that the City violated FOIA by failing “to maintain

minutes of all meetings” therefore is unfounded.

The City has confirmed “that public notice of the meetings and agenda were not posted for the five meetings and notified Board members.” The City contends, however, that “regarding the five meetings in question, no policies and procedures were adopted, and no individual case was discussed or decided. Therefore, while there may have been an unintentional failure to provide public notice in the past, to date no formal action has been taken by the Board.”

The Chancery Court has rejected the notion that the open meetings requirements of FOIA apply only “to meetings where ‘formal action’ was taken. Our law is not so limited. Rather it applies to meetings called to discuss public business as well as to meetings called to take action on public business.” *The News-Journal Co. v. McLaupMin*, Del. Ch., 377 A.2d 358, 362 (1977) (Brown, V.C.). This is because the purpose of the “sunshine laws is to prevent at nonpublic meetings the crystallization of secret decisions to a point just short of ceremonial acceptance, that rarely could there be any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors, and that a sunshine statute, being for the benefit of the public, should be construed so as to frustrate all such evasive devices.” *Id.*

Clearly, the Residency Review Board discussed matters of public business at its five meetings. Among other things, the Board discussed: the legal definition of “residency”; the need for more vigorous enforcement; current problem situations; the criteria for determining whether a City employee is a resident; procedures for determining the residency of current and new City employees; and actual steps to enforce the residency requirement. The City residency requirement is a matter of widespread public concern. In fact, a bill to abolish the residency requirement was introduced, but not passed, in the last session of the General Assembly. Despite a keen public interest in this issue, the City did not give the public any notice that the Board was meeting, and thus give the public an opportunity to attend the meetings and participate in the political process.

It is irrelevant whether the Board has yet to take any “formal” action concerning the application and enforcement of the residency law. In *Ley v. Board of Education of Cape Henlopen School District*, Del. Ch., 1990 WL 154147 (Oct. 1, 1990) (Chandler, V.C.), the Chancery Court held that FOIA applied to school board “workshops,” even where no formal action was taken. Under any other interpretation, “there would be no remedy to deter Board members from privately meeting for discussion, investigation or deliberation about public business as long as the Board reached no formal decision

at that private meeting.” 1990 WL 15417, at p. 6. FOIA “recognizes that policy decisions by public entities cannot realistically be understood as isolated instances of collective choice, but are best understood as a decisional process based on inquiry, deliberation and consensus building. Because informal gatherings or workshops are part of the decision-making process they too must be conducted openly.” *Id.*

We find that the City violated the open meeting requirements of FOIA by failing to post notices and agenda for the five meetings of the Residency Review Board. The City Council has charged the Board with an important function: to set the standards and create procedures for enforcement of the City’s residency law, and to make final decisions regarding the administration and enforcement of the requirements of that law. The Board’s activities therefore could have considerable impact on individual City employees.

Failure to post notices and agenda before the Board’s meetings involved “substantial public rights” and was not merely a “technical” violation.” *Ianni v. Department of Elections of New Castle County*, Del. Ch., 1986 WL 961 0, at p. 6 (Aug. 29, 1986) (Allen, C.). To remedy these violations of the open meeting law, we direct the Residency Review Board to notice a special meeting within thirty days of the date of this letter. At that special meeting, the Board should discuss, at least in summary form, the principal matters discussed at its previous five meetings, and to give proper notice of that special meeting to the public so that interested citizens can attend and comment. At that time, after “full public discussion,” *Beebe Medical Center v. Certificate of Need Appeals Board*, Del. Super., 1995 WL 465318, at p. 6 (June 30, 1995) (Terry, J.), the Board can publicly vote to adopt or ratify any actions previously taken.

The City is put on notice that the open meeting requirements of FOIA will be strictly construed and enforced by this Office. Any future failure by the Residency Review Board to comply with FOIA could be determined to be evidence of a wilful pattern of FOIA violations.

#### Conclusion

Based on the complaint, the City’s written responses, and the documents and other information provided to us, we determine that the City’s Residency Review Board violated the open meeting requirements of FOIA by failing to post notices and agenda for five of its meetings. We determine that the Board maintained minutes of each of those meetings, and therefore did not violate Section 10004(f) of FOIA. The City is directed to take the remedial steps outlined above.

Very truly yours,  
W. Michael Tupman  
Deputy Attorney General

Approved:  
Michael J. Rich  
State Solicitor

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STATE OF DELAWARE  
DEPARTMENT OF JUSTICE  
ATTORNEY GENERAL OPINION  
NO. 97-IB23

December 23, 1997

Mr. Milton F. Morozowich  
R.D. 2, Box 166  
Bridgeville, DE 19933

RE: Freedom of Information Act Complaint Against  
Woodbridge School District

Dear Mr. Morozowich:

This letter is our written determination in response to your complaints alleging that the Woodbridge School District (the “School District”) violated the Freedom of Information Act, 29 Del. C. Sections 1000 I-10005 C’FOIA”). All three letters of complaint were received by this Office on November 5, 1997.

Your first letter, dated October 25, 1997, alleged that the minutes of the executive session held by the School District on October 7, 1997 were “vague and non-specific” and the meeting should have been tape-recorded. Your second letter, dated October 29, 1997, alleged that the School District noticed an “emergency” meeting on June 4, 1997 to discuss the assistant superintendent’s employment contract, but in fact discussed other personnel issues such as salary increases for all administrative staff. Your third letter, dated October 30, 1997, alleges that the School District purportedly met in executive session on October 21, 1997 to discuss personnel matters, but in fact discussed matters not authorized by statute to be closed to the public.

By letter dated November 6, 1997, we asked the School District to respond to your three complaints within ten days. The School District asked for, and we granted, a ten-day extension of time to respond. By letter dated November 24, 1997, we received the School District’s response, denying any violations of FOIA.

This Office declines to make any written determination regarding the meeting on June 4, 1997.

There is a 60-day statute of limitations for any citizen to challenge in court a meeting allegedly held in violation of FOIA. See 29 Del.C. Section 10005(a). While this Office is not bound by that statute of limitations when it investigates FOIA complaints, this Office has declined in the past to investigate matters which were not brought to our attention in a timely fashion. See Att'y Gen. Op. 93-1006 (Mar. 5, 1993); Att'y Gen. Op. 93-1028 (Sept. 21, 1993). While we have discretion to determine when a complaint is timely, we conclude that the delay of almost six months in this case warrants the conclusion that your complaint was not timely filed.

FOIA does not require a public body to tape-record its meetings or executive sessions. The statute only requires that "[e]ach public body shall maintain minutes of all meetings, including executive sessions, conducted pursuant to this section, and shall make such minutes available for public inspection and copying as a public record." 29 Del. C. Section 10004(f). This Office has previously determined that the statutory duty to maintain written minutes of public meetings does not require a public body to tape-record the meeting. See Att'y Gen. Op. 94-1023 (June 21, 1994). Moreover, the minutes of executive sessions need only include "a record of those members present and a record by individual members (except where the public body is a town assembly where all citizens are entitled to vote) of each vote taken and action agreed upon." 29 Del. C. Section 10004(f). But FOIA "neither says that the subjects discussed must be summarized nor attempts to define how specific such summary should be.... I cannot conclude that there is a clear implied statutory requirement to summarize the subjects discussed with any degree of specificity in the minutes of executive sessions." *Common Cause of Delaware v. Red Clu Consolidated School District Board of Education*, Del. Ch., C.A. No. 13798, 1995 WL 733401, at p. 4 (Dec. 5, 1995) (Balick, V.C.).

We do not find that the School District violated FOIA in connection with its October 7, 1997 meeting. The School District prepared written minutes of the executive sessions convened during that meeting. The minutes contain all of the information required by statute.

With regard to the October 21, 1997 meeting, the agenda for that meeting had a line item for "Executive Session - Personnel." This Office has previously determined that "it is not necessary to identify the personnel in convening an executive session to constitute personnel matters." Att'y Gen. Op. 96-IB27 (Aug. 1, 1996) (citation omitted). At the meeting, you reiterated a concern you had previously raised with the Superintendent regarding the size of your son's classes and his request for transfer. The Superintendent decided that it would be best

to take that matter up in executive session along with other personnel matters. The legal question, then, is whether your son's request for transfer concerned the "names, competency and abilities of individual employees or students," the discussion of which FOIA authorizes in executive session. 29 Del. C. Section 10004(b)(9). We conclude that your son's transfer request falls within the personnel exception for executive session. A transfer request based on large class size necessarily requires the School District to consider the competency and abilities of the individual student involved, as well as the respective competency and abilities of the current teacher and the proposed teacher.

#### Conclusion

Based on your complaint, the School District's response, and the documents provided to us, we determine that the School District did not commit any violation of FOIA in connection with the October 7 and October 21, 1997 meetings. We decline to make any determination regarding the June 4, 1997 meeting because the complaint was untimely.

Very truly yours,  
W. Michael Tupman  
Deputy Attorney General

Approved:  
Malcolm S. Cobin  
Assistant State Solicitor

**DELAWARE RIVER BASIN  
COMMISSION**

Amendments to the Delaware River Basin Commission's Ground Water Protected Area Regulations for Southeastern Pennsylvania

**AGENCY:** Delaware River Basin Commission.

**ACTION:** Final rule.

**SUMMARY:** At its January 28, 1998 business meeting, the Delaware River Basin Commission amended its Ground Water Protected Area Regulations for Southeastern Pennsylvania by the establishment of numerical withdrawal limits for subbasins in the Protected Area.

**EFFECTIVE DATE:** January 28, 1998.

**ADDRESSES:** Copies of the Commission's Ground Water Protected Area Regulations for Southeastern Pennsylvania are available from the Delaware River Basin Commission, P.O. Box 7360, West Trenton, New Jersey 08628.

**FOR FURTHER INFORMATION CONTACT:** Susan M. Weisman, Commission Secretary, Delaware River Basin Commission, (609) 883-9500 ext. 203.

**SUPPLEMENTARY INFORMATION:** On June 24, 1997 the Commission held a public hearing on proposed amendments to its Ground Water Protected Area Regulations for Southeastern Pennsylvania as noticed in the Federal Register issues of May 9, 1997 and June 18, 1997; the Pennsylvania Bulletin issues of June 7, 1997 and June 21, 1997; the New Jersey Register of June 2, 1997; and the New York State Register of May 21, 1997. The Commission has considered the extensive testimony and comments from interested parties and has revised the proposed amendments in response to those comments. A "Response Document on Proposed Amendments to the Southeastern Pennsylvania Ground Water Protected Area Regulations" is available upon request to Ms. Weisman at the number provided above.

The Commission's Ground Water Protected Area Regulations for Southeastern Pennsylvania are hereby amended as follows:

1. Section 6 is hereby amended by the addition of new subsections h. through m., to read as follows:

h. Dockets and protected area permits may be issued for a duration of up to ten years and shall specify the maximum total withdrawals that must not be exceeded during

any consecutive 30-day period. Such maximum total withdrawals shall be based on demands projected to occur during the duration of the docket or protected area permit.

i. Ground water withdrawal limits shall be defined for subbasins in accordance with the provisions of (1) or (2). The limits for specific subbasins are set forth in (3).

(1) Baseflow frequency analyses shall be conducted for all subbasins in the Southeastern Pennsylvania Ground Water Protected Area. The analyses shall determine the 1-year-in-25 average annual baseflow rate. The 1-year-in-25 average annual baseflow rate shall serve as the maximum withdrawal limit for net annual ground water withdrawals for subbasins. If net annual ground water withdrawals exceed 75 percent of this rate for a subbasin, such a subbasin shall be deemed "potentially stressed." The Commission shall maintain a current list of net annual ground water withdrawals for all subbasins. "Net" annual ground water withdrawals includes total ground water withdrawals less total water returned to the ground water system of the same subbasin.

(2) Upon application by the appropriate governmental body or bodies, the withdrawal limits criteria set forth in (1) may be revised by the Commission to provide additional protection for any subbasin identified in (3) with streams or stream segments designated by the Commonwealth of Pennsylvania as either "high quality" or "exceptional value," or "wild," or "scenic," or "pastoral," or to correspond with more stringent requirements in integrated resource plans adopted and implemented by all municipalities within a subbasin identified in (3). Integrated resource plans shall be developed according to sound principles of hydrology. Such plans shall at a minimum assess water resources and existing uses of water; estimate future water demands and resource requirements; evaluate supply-side and demand-side alternatives to meet water withdrawal needs; assess options for wastewater discharge to subsurface formations and streams; consider stormwater and floodplain management; assess the capacity of the subbasin to meet present and future demands for withdrawal and nonwithdrawal uses such as instream flows; identify potential conflicts and problems; incorporate public participation; and outline plans and programs including land use ordinances to resolve conflicts and meet needs. Integrated resource plans shall be adopted and implemented by all municipalities within a subbasin and incorporated into each municipality's Comprehensive Plan.

(3) The potentially stressed levels and withdrawal limits for all delineated basins and subbasins are set forth below:

Neshaminy Creek Basin

Subbasin	Potentially Stressed (mgd)	Withdrawal Limit (mgd)
West Branch Neshaminy	1054	1405
Pine Run	596	795
North Branch Neshaminy	853	1131
Main Stem Doylestown	710	946
Main Stem Warwick	889	1185
Little Neshaminy Warrington	505	673
Park Creek	582	776
Little Neshaminy Warminster	1016	1355
Mill Creek	1174	1565
Main Stem Northampton	596	794
Newtown Creek	298	397
Core Creek	494	658
Ironworks Creek	326	434
Main Stem Lower Neshaminy	3026	4034

Subject to public notice and hearing, this section may be updated or revised based upon the following: the completion of baseflow frequency analyses for the remaining subbasins within the Protected area; new and evolving information on hydrology and streamflow and ground water monitoring; or in accordance with (2).

j. Upon its determination that a subbasin is potentially stressed, the Commission shall notify all ground water users in the subbasin withdrawing 10,000 gallons per day or more during any 30-day period of its determination. If any such users have not obtained a docket or protected area permit from the Commission, they shall be required to apply to the Commission within 60 days of notification.

k. In potentially stressed subbasins, dockets and protected area permit applications for new or expanded ground water withdrawals must include one or more programs to mitigate the adverse impacts of the new or expanded ground water withdrawal. The eligible programs are noted below. If the remainder of the application and the program(s) submitted are acceptable, the withdrawal may be approved by the Commission for an initial three-year period. The applicant shall implement the program(s) immediately upon Commission approval. If after the three-year period the program(s) is deemed successful by the Commission, the docket or permit duration may be extended for up to 10 years. The project sponsor shall be required to continue the program(s) for the duration of the docket or permit.

(1) A conjunctive use program that demonstrates the applicant's capability to obtain at least 15 percent of its average annual system usage from a reliable surface water

supply. An acceptable program shall include either reservoir storage or an interconnection with a surface water supplier and an agreement or contract to purchase water from the supplier for the duration of the docket or permit.

(2) A water conservation program that exceeds the requirements of Section 7. For existing water utilities, the program shall reduce average annual per capita water usage by at least five percent. All conservation programs shall include water conservation pricing, either inclining block rates, seasonal rates, or excess-use surcharges, and plumbing fixture rebate or retrofit components. For self-supplied users, the program shall include water efficient technologies such as recycling, reuse, xeriscaping, drip or micro irrigation, or other innovative technology approved by the Commission.

(3) A program to monitor and control ground water infiltration to the receiving sewer system. The program must quantify ground water infiltration to the system and document reductions in infiltration. The program should include such measures as leakage surveys of sewer mains, metering of sewer flows in mains and interceptors, analysis of sewer system flows to quantify infiltration, and remedial measures such as repair of leaks and joints, main lining, and main replacement.

(4) An artificial recharge or spray irrigation program that demonstrates a return of at least 60 percent of the total new or expanded annual withdrawal to the same ground water basin and aquifer system from which it is withdrawn. The program shall not impair ground water quality.

(5) An alternative program approved by the Commission to mitigate the adverse impacts of the new or expanded ground water withdrawal.

l. The durations of all existing dockets and protected area permits may be extended by the Commission for an additional five years if the docket or permit holder successfully implements either option k(1) or k(2). If the docket or permit holder successfully implements both options, the docket or permit may be extended for an additional ten years. The Executive Director shall notify all docket and permit holders potentially affected by this resolution of their right to file an application to determine their eligibility for extension.

m. It is the policy of the Commission to prevent, to the extent reasonably possible, net annual ground water withdrawals from exceeding the maximum withdrawal limit. An application for a proposed new or expanded ground water withdrawal that would result in net annual ground water withdrawals exceeding the maximum withdrawal limit established in paragraph i (3) shall set forth the applicant's proposal for complying with the Commission's policy, with



such supporting documentation as may be required by the Executive Director. Notification of the application shall be given to all affected existing water users who may also submit comments or recommendations for consideration by the Commission on the pending application. In taking action upon the application, the Commission shall give consideration to the submissions from the applicant and affected water users. If the Commission determines that it is in the public interest to do so, it may reduce the total of proposed and existing ground water withdrawals within a subbasin to a level at or below the withdrawal limit. Unless otherwise determined by the Commission, docket and permit holders shall share equitably in such reductions.

2. This resolution shall become effective immediately.

Delaware River Basin Compact, 75 Stat. 688.

Susan M. Weisman  
Secretary  
January 30, 1998

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**DEPARTMENT OF  
ADMINISTRATIVE SERVICES  
DIVISION OF PROFESSIONAL REGULATION  
DELAWARE BOARD OF PROFESSIONAL  
COUNSELORS OF MENTAL HEALTH**

PLEASE TAKE NOTICE, pursuant to 29 Del. C. Chapter 101 and 24 Del. C. Section 3007(a)(1), the Delaware Board of Professional Counselors of Mental Health proposes to adopt new Rules and Regulations to replace the existing Rules and Regulations. The regulations will define meetings and elections, licensure by certification, licensure by reciprocity, licensure of associate counselors of mental health, application and fee, affidavit and time limit, renewal of licensure, reactivation of licensure, return to active status, and temporary suspension pending hearing.

A public hearing will be held on the proposed Rules and Regulations on April 3, 1998 at 1:00 p.m. in the Second Floor Conference Room A of the Cannon Building, 861 Silver Lake Boulevard, Dover, Delaware. The Board will receive and consider input, in writing, from interested persons on the proposed rules and regulations. The final date for interested persons to submit comments shall be at the above-scheduled public hearing. Anyone wishing to obtain a copy of the proposed regulations, or to make comments at the public hearing should notify the Board's Administrative Assistant Gayle Franzolino by calling (302) 739-4522 Ext. 220, or writing to the Delaware Board of Professional Counselors of Mental Health, P. O. Box 1401, Cannon Building, Dover, Delaware 19903

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**DEPARTMENT OF AGRICULTURE  
THOROUGHBRED RACING COMMISSION**

The Commission proposed the enactment of Rule 13.18 pursuant to 3 Del.C. sections 10103 and 10128(m)(1), and 29 Del.C. section 10115. The proposed Rule 13.18 would prohibit a claimed horse from racing for fourteen days after the claim unless there is good cause for a shorter time period. The proposed rule will be considered by the Commission at its next regularly scheduled meeting on April 16, 1998 at 10:00 a.m. at Delaware Park, 777 Delaware Park Boulevard, Stanton, Delaware. Comments may be made at the Commission's meeting in person or by writing submissions. Written comments may be submitted in writing to the Commission Office on or before 4:00 p.m. on April 16, 1998.

The Commission Office is located at 2320 South DuPont Highway, Dover, Delaware 19901 and the phone number is (302) 739-4811.

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**DEPARTMENT OF EDUCATION**

The State Board of Education will hold a special meeting on Monday, March 9, at 2:00 p.m. The purpose of the meeting is to discuss the Accountability Plan.

The Board will hold its regular monthly meeting on Thursday, March 19, at 11:00 a.m. A portion of the meeting will deal with the Accountability Plan.

The April meeting of the State Board of Education will be held on Thursday, April 16, at 2:00 p.m.

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**DEPARTMENT OF FINANCE**

**DIVISION OF REVENUE  
OFFICE OF THE STATE LOTTERY**

The Lottery proposes these rules pursuant to 29 Del.C. sections 4805(a) and 29 Del.C. section 10115. The proposed regulations are to ensure that the Delaware Lottery is in compliance with the federal Americans with Disabilities Act ("ADA"). The proposed regulations will provide for a procedure for inspection of the sites of all lottery retailers to ensure a minimum standard of accessibility required by federal law.

Comments may be submitted in writing to the Lottery Office on or before 4:00 p.m. on March 31, 1998. The Lottery Office is located at 1575 McKee Road, Suite 102, Dover, Delaware 19901 and the phone number is (302) 739-5291. Comments should be addressed to the attention of Vernon Kirk, Lottery Office.

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

**PUBLIC NOTICE  
Medicaid / Medical Assistance Program**

In compliance with the State's Administrative Procedures Act (APA - Title 29, Chapter 101 of the Delaware Code) and with 42CFR §447.205, and under the authority of Title 31 of the Delaware Code, Chapter 5, Section 505, the Delaware Department of Health and Social Services (DHSS) / Division of Social Services / Medicaid Program is amending its home

health provider manual to include a federally mandated provision that home health agencies must obtain surety bonds to continue participating with Medicaid.

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

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**PUBLIC NOTICE**

**DIVISION OF SOCIAL SERVICES / FOOD STAMP PROGRAM**

The Delaware Health and Social Services / Division of Social Services / Food Stamp Program is proposing to implement a Simplified Food Stamp Program for households receiving *A Better Chance* (ABC) benefits. The regulations are contained in Public Law 104-193, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and Division of Social Services' Manual section 9910.

The Department finds that this changes should be made in the best interest of the general public of the State of Delaware. The Department will receive, consider, and respond to petitions by any interested person for the reconsideration or revision thereof. Such petitions must be forwarded by March 31, 1998 to the Director, Division of Social Services, P. O. Box 906, New Castle, DE 19720.

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**STATE OF DELAWARE RULES AND REGULATIONS  
PERTAINING TO THE PRACTICE OF CERTIFIED  
MIDWIFERY**

**SUMMARY**

These regulations replace regulations previously adopted April 17, 1978, and most recently amended May 15, 1985. They are to be adopted in accordance with Chapter 1, Section 122 (3) h, Title 16, Delaware Code. They will supersede all

previous regulations concerning Midwifery adopted by the former Delaware State Board of Health.

The regulations establish and define conditions for the certification of midwives in the State of Delaware. Prior to its elimination, the State Board of Health, certified all midwives in Delaware. It has been determined more efficient and cost effective to certify midwives who are also advanced practice certified nurse midwives through the Delaware Board of Nursing. This will be done under the provisions of Title 24, Chapter 19 of the Delaware Code, and Article VIII of the rules and regulations of the Delaware Board of Nursing. All otherwise qualified midwives who are not advanced practice certified nurse midwives will retain certification under the Division of Public Health. These regulations also update certification requirements and standards of practice to conform to national standards as outlined by the American College of Nurse-Midwives.

**NOTICE OF HEARING**

The comment period for these regulations ends on March 31, 1998. All comments may be addressed to Steven L. Blessing, (302) 739-6638. The mailing address is: c/o State EMS Office, Blue Hen Corporate Center, Suite 4H, 655 Bay Rd., Dover, DE 19901.

A public hearing to discuss the proposed regulations will be held on March 20, 1998 in Room 309 of the Jesse Cooper Building, 417 Federal Street, Dover DE 19901. The hearing will start promptly at 1:30 PM.

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**DEPARTMENT OF NATURAL  
RESOURCES & ENVIRONMENTAL  
CONTROL**

**DIVISION OF FISH & WILDLIFE**

**REGISTER NOTICE**

**TIDAL FINFISH REGULATION NO. 4 SUMMER  
FLOUNDER SIZE LIMITS; POSSESSION LIMITS;  
SEASONS**

Individuals may present their opinions and evidence and/or request information by writing or visiting the Division of Fish and Wildlife, Fisheries Section, 89 Kings Highway, Dover, DE 19901 prior to 4:30 p.m. on March 31, 1998. A public hearing on these proposed amendments will be held in the DNREC auditorium, 89 Kings Highway, Dover, DE at 7:30 p.m. on March 26, 1998.

**TIDAL FINFISH REGULATION NO. 10 WEAKFISH  
SIZE LIMITS; POSSESSION LIMITS; SEASONS**

Individuals may present their opinions and evidence and/or request information by writing or visiting the Division of Fish and Wildlife, Fisheries Section, 89 Kings Highway, Dover, DE 19901 prior to 4:30 p.m. on March 31, 1998. A public hearing on this proposed amendment will be held in the DNREC auditorium, 89 Kings Highway, Dover, DE at 7:30 p.m. on March 26, 1998.

**TIDAL FINFISH REGULATION NO.22 TAUTOG;  
SIZE LIMITS**

Individuals may present their opinions and evidence and/or request information by writing or visiting the Division of Fish and Wildlife, Fisheries Section, 89 Kings Highway, Dover, DE 19901 prior to 4:30 p.m. on March 31, 1998. A public hearing on these proposed amendments will be held in the DNREC auditorium, 89 Kings Highway, Dover, DE at 7:30 p.m. on March 26, 1998.

**TIDAL FINFISH REGULATION NO.23 BLACK SEA  
BASS SIZE LIMIT**

Individuals may present their opinions and evidence and/or request information by writing or visiting the Division of Fish and Wildlife, Fisheries Section, 89 Kings Highway, Dover, DE 19901 prior to 4:30 p.m. on March 31, 1998. A public hearing on these proposed amendments will be held in the DNREC auditorium, 89 Kings Highway, Dover, DE at 7:30 p.m. on March 26, 1998.

**DEPARTMENT OF NATURAL  
RESOURCES & ENVIRONMENTAL  
CONTROL****DIVISION OF FISH & WILDLIFE  
ENFORCEMENT SECTION****BOATING REGULATIONS**

Individuals may present their opinions and evidence and/or request information by writing or visiting the Division of Fish and Wildlife, Enforcement Section, 89 Kings Highway, Dover, DE 19901 prior to 4:30 PM on March 31, 1998. A public hearing on the proposed regulations will be held in the DNREC Auditorium, 89 Kings Highway, Dover, Delaware at 7:30 PM on Tuesday, March 24, 1998.

**DEPARTMENT OF NATURAL  
RESOURCES & ENVIRONMENTAL  
CONTROL****DIVISION OF AIR & WASTE MANAGEMENT****REGULATION 38 - EMISSION STANDARDS FOR  
HAZARDOUS AIR POLLUTANTS FOR SOURCE  
CATEGORIES**

The public hearing on proposed Regulation 38 will be held on Wednesday, April 8, 1998, beginning at 6:00 p.m. in the Richardson and Robbins Auditorium, 89 Kings Highway, Dover, DE. For information concerning the hearing the public should call Mr. Jim Snead at (302) 323-4542

**DEPARTMENT OF  
TRANSPORTATION****AERONAUTICS**

The Department of Transportation proposes to adopt new regulations to implement Amendments to Titles 2, 9, and 30 of the Delaware Code Relating to Aeronautics and County Building Codes. The regulations include the Delaware Airport Licensing Regulation and the Delaware Airport Obstruction Regulation.

Interested parties may present their views on either of these Regulations at a public hearing scheduled for March 26, 1998 from 6 p.m. to 9 p.m. to be held at:

Central and North Conference Room  
DelDOT Administration Building  
Route 113, Across from Blue Hen Mall  
Dover, Delaware 19903

The opportunity for public comment to these written regulations shall be held open through April 6th, 1998. Written comments may be sent to:

Tricia Faust, Senior Planner  
DelDOT Administration Building  
Route 113, Across from Blue Hen Mall  
Dover, Delaware 19903

**DELAWARE RIVER BASIN  
COMMISSION**

The Commission will meet on March 25, 1998 in West Trenton, contact Susan M. Weisman at (609)883-9500 ext. 203, for more information.